

**AMERICAN BAR ASSOCIATION**

**Forum on the Construction Industry**

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**Who's on the Client's Team:  
How Outside Counsel Get Picked  
And  
Why They Get Cut**

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Maintaining successful relationships with in-house counsel is fundamental to the well-being of any lawyer in private practice seeking to survive the Great Recession. Signs of an uptick in legal work are beginning to emerge: according to Altman Weil's 2011 Chief Legal Officer Survey (the "AW Survey"), 56% of the 176 Chief Legal Officers ("CLO's") surveyed indicated that they had increased their law department budgets from 2010 to 2011. The median amount of the increase also rose, from 6 to 7%. On the other hand, 10% of law departments offshored some of their legal work in 2011, and 91% of those who offshored work expected the amount offshored to stay the same or increase in 2012. The number one priority for 2012, according to the CLO's surveyed, will be controlling costs.

For outside counsel, however, the chief question remains how to get hired in the first place. To address this question, we offer the following comments from a variety of seasoned in-house practitioners, including without limitation the following<sup>1</sup>:

- Penny Cobey, counsel to McKenna Long & Aldridge LLP, former Acting General Counsel for the J. Paul Getty Trust and former Associate General Counsel for the Los Angeles Unified School District's multi-billion dollar building program;
- Joni Armstrong Coffey, County Attorney for Broward County, Florida, and manager of a 37-person legal department;
- Steve Fried, chief operating officer of Oxbow Carbon LLC, a large, diversified, multinational energy company;
- Thomas Hill, Associate General Counsel, Corporate Environmental Programs, General Electric Corp., whose group coordinates regulatory, litigation and legal policy for the Company.

***What are the three most important qualities you look for in hiring outside counsel?***

- "Reputation, preferably confirmed by another in-house lawyer I trust; responsiveness; and attention to budget. And lots of extra points for a lawyer willing to spend time, at no charge to me, to learn more about my organization."
- "We want to win. We hire whoever gives us the best chance at winning."
- "I want lawyers confident enough in their relationship with me to give me the opinions I want to hear, and more important, the opinions I don't want to hear. The existing relationship is so important that it is very difficult for a newcomer to get in."

- “In terms of content, we try and hire the best possible expert. In terms of process, we try and hire people who have been successful with us in the past. There are a lot of lawyers who have subject matter expertise. We want lawyers who will work effectively within the process required by our organization.”
- “Sometimes, the subject matter is so narrow, expertise counts for 100% of the decision.”
- “Expertise and complete professional loyalty. No client ever wants to hear that you’re busy with someone else’s work.”
- “We hire large firms with deep subject matter expertise, where the relationship partner is responsive and can manage their scope effectively within our process. We also hire firms/lawyers that have done well for us in the past.”

***“How do you judge the effectiveness of the following outside counsel marketing?”***

- Listing in directories

--“A useful tool. Not the sole basis for a decision, but useful for confirming the standing of lawyers who’ve been referred to me.”

--“Not important. I would use as a tool to jog my memory, not as a selection factor.”

--“Irrelevant. If I have to look you up in the phone book, you’re the wrong guy.”

--“To me that’s the Yellow Pages. Last place I would go.”

- Wining and dining

--“Not interested. My day is full enough already. Besides, even the best lawyers do not necessarily make interesting dinner companions.”

--“If I have an established relationship with an outside counsel, lunch once a year or so might be nice. Not dinner or evening events—I prefer to be with my family.”

--“Irrelevant. I know these folks are just trying to get in the door, and some social interaction may be nice, but the hiring decision will be based either on our own past experience or the strong recommendation of someone we know who has had personal experience.”

--“I hate it. I only have so many hours in a day, and I don’t need to spend time with people I don’t know telling me how smart they are or even worse how smart I am. I get invited to everything from the Masters to the US Open to the Olympics, and I say no to all because attending becomes work.”

- Word of mouth

--“Important. Before hiring a lawyer I like to call other in-house counsel I know. Their recommendations for (and against) a lawyer I’m considering are key.”

--“It’s the best way to find a lawyer, just as I would find a doctor for myself.”

--“It’s key. I rely so heavily on personal recommendations that I treat it almost like subcontracting—the lawyer making the recommendation should feel like he continues to have skin in the game, that I’ll come back to him if I’m not happy.”

--“Key. Clients talk, and what we hear about an outside lawyer means a lot.”

- Articles published and talks given

--“Definitely a factor, especially in transactional matters where you don’t have a win-loss record to judge by. Articles help in judging expertise.”

--“Important. You can read the materials and see where the lawyer comes down on the issues. Also it shows initiative to take the time to do this kind of writing.”

--“Yes, they can make a difference. I do seminars on occasion and if I see a memorable presentation I may sit down with the lawyer afterward.”

- Free in-house seminars

--“I love the idea of these and appreciate the offer, but in practice, it’s hard to clear everybody’s calendar and generate good attendance.”

--“A great idea in the abstract, but I just don’t have the time.”

--“A variation of this works well when you have a relationship with us and want to expand your footprint. I might have a couple of our other outside counsel join us in a meeting, sort of a roundtable, and bounce ideas or strategy off them. If the conversations are fruitful that could lead to a hire on matters in the future. We had a case where a firm brought a senior lawyer and a more junior partner to such a meeting, at no charge to us of course. The younger lawyer had never met us before, but as a result of his performance in that meeting he has been retained to represent us in other matters.”

***“Give me a couple of examples of outside counsel marketing that you thought were especially effective or ineffective.”***

- “I’ll never forget the lawyer who, on his own initiative, sent me a recent case in an area he thought would interest me—then billed me time and Westlaw charges for doing so!”

- “The firms that are thoughtful will view part of their mandate as treating me like a smart consumer. We have had law firms that have shot themselves in the foot by referring us to an ineffective partner in their own organization.”
- “Firm newsletters or advisories don’t do much for me. They’re usually not apropos of what’s on my desk.”
- “I’ve seen instances where outside counsel have “seconded” one of their lawyers to us—sent the lawyer to work inside our organization for a period of time. If that lawyer does a good job, we may hire him or her, and then generally the outside firm will have a new in-house source of referrals.”

***“Are others beside yourself also involved in selecting outside counsel in your organization?”***

- “Yes. If I’m hiring a specialist in employment law that I hope will be routinely on call for us, I will certainly ask the director of human resources for an opinion.”
- “In general, the business principal gets a significant say in which outside lawyer we hire. If the business principal knows which firm and which lawyer he wants to use for a task, that is usually OK. The General Counsel’s office must approve and run the formal hiring process (conflicts, billing, etc.).”
- “Definitely. I rely on my senior lawyers’ impressions and their knowledge of the outside counsel community practicing in their subject areas.”
- “It’s pretty rare for us for business people to want to have input, unless the business person involved in the matter happens to be a lawyer too. Instead, they look to us as the experts in retaining counsel. On the other hand, in my group any lawyer working for me can hire a lawyer. That lawyer works for the managing attorney, not me. I expect the lawyer who hires to manage the relationship.”

***“What subject matters are most likely to be sent to outside counsel by your office?”***

- “Litigation, specialty areas like bond work, areas where in-house work could be affected by internal politics—for example, internal investigations.”
- “Areas of law that are so unique that it’s not practical to develop them in-house—federal railroad law, for example. Narrow specialties.”
- “Litigation is our biggest legal spend. It’s not possible for me or those who work for me to spend hours in court. On the other hand, we handle most of our own compliance work and a lot of document review and management. The bulk of our construction contracting work—about two-thirds—is done outside.”
- “If you want a contract supporting our core business, our in-house team is world class. Beyond that narrow scope, we almost always use outside subject matter experts.”

***“Do you ever use RFPs to select outside counsel? What are the pros and cons?”***

- “Not formal RFP’s, but certainly beauty contests where we would choose three or four firms to interview for a substantial subject area. The principals within our organization who would be working with those firms participate in the questioning. Helps with internal buy-in.”
- “Not formally, but where the universe of specialists is small, we will try to establish an open and fair competitive process and invite a number of firms to interview.”
- “No. RFP’s, when we participate in them on the business side, are about getting the lowest cost for a particular scope. In lawyering cost is far from the main issue. A cheap lawyer can be really expensive long-term.”
- “Yes. We may be thinking of two or three firms that could handle a matter. We’ll invite a proposal from each firm—here’s what it is, how would you staff it, what would your fee arrangement be? Depending on the answers we may even have a second round.”

***“Have you ever used off-shore resources for legal assistance? Would you expect to be consulted if your outside counsel did so?”***

- “Have never sent work off-shore, and would certainly expect outside counsel to consult with me before doing so.”
- “No and yes.”
- “No, but I’m not opposed to the idea. If I think results justify the cost, I don’t care how you get it done. If the result is bad, you’ll have to justify your decision.”
- “Absolutely yes, for about two years now. We’ve sent document production and review work all over the world, mostly to India because their lawyers are trained on the UK model. We have an internal group that manages the process. The foreign lawyers do a first cut, or gross review as we call it, then the internal group does a follow-up review, then lawyers in my department take a look at what’s left. This works well for privilege review, for example. Our off shore providers are in the role of more junior associates, the intermediate group like senior associates, and the department lawyers are like junior partners. Since we started this system two years ago we have reduced our out of pocket document production costs by ~40%.”

***“Are alternative fee arrangements something you look for in hiring outside counsel? If so, what arrangements work best for you?”***

- “I tend to stick with hourly rates and budget estimates. If the hourly rate is too high, I simply won’t use that lawyer.”

- “Typically we go with an hourly rate subject to a cap. There’s a gentlemen’s agreement that we’ll get plenty of notice if there’s going to be a need to go over the cap.”
- “Before the outcome of the matter is known, we are OK with paying fair rates—we just don’t want to get ripped off. Afterward, if we won, the money spent is cheap. If we lost, the money spent is expensive.”
- “We do a little bit of everything—caps, not to exceed, contingency. Every law firm, every case is different. Typically alternative fee arrangements are not material in the process of choosing outside counsel.”
- “We’re open to anything—flat fee, blended rate, hourly rate, contingency—as long as it makes economic sense for both of us. I’ve agreed in the past to make payment terms fit our outside counsel’s fiscal year, for example.”

***“Think of a long-term outside counsel relationship that has been particularly valuable to your firm. How would you describe it?”***

- “We had a long-running white collar crime issue involving the courts of Italy. Our outside lawyer had worked in Italy, knew Italian, knew Italy’s criminal justice system inside out. He was invaluable, even irreplaceable to us. He was also extremely responsive at all hours of day or night, tactful, and very sensitive to our internal politics.”
- “I work with an outside counsel who is just an incredible expert in his field, a real depth of knowledge and experience. He thinks of things I don’t think of. He is incredibly responsive, and has just so much common sense and good judgment. And he’s not greedy on fees. I work in the public sector and our fees have to be defensible to members of the public who don’t understand the workings of legal practice.”
- “Process is important and contributes to the chances of winning, thus sometimes the right lawyer is one who can work within and optimize results within the client’s process, even if he or she is not the world’s expert on a particular subject.”
- “The outside counsel who put honesty over salesmanship win big stars from me. If a partner at a large law firm assures me that a certain labor and employment partner of his is the best in town, and my inquiries reveal that said specialist is instead a junior service partner nobody has heard of, I lose confidence in the partner who gave me that name. I may continue to work with him, if he’s good, but I won’t ask him again for a referral to anybody else in his firm.”
- “The valuable relationship is one where we achieve the results we are looking for. If it’s litigation—we win. If transactional, the deal gets done under terms that after a couple of years are working out OK. It’s like hiring an engineer to manage the construction of a building—if the building comes in on time and on budget and you like it, you’ll use that engineer again.”

- “The best relationships are almost family-like. Certainly collegial—these lawyers *are* our company. They come into matters early, sit in on strategy meetings—they also take the time at the very beginning to *understand* the pulse of the company they’re working for. They consider that part of the relationship. As a result I don’t nickel and dime them on fees, they don’t nickel and dime me on time. . . All clients are different. My training is in litigation—therefore I expect a litigator to appreciate that I may actually know something about the process and have an opinion. On the flip side, if I call on you for a tax issue—I will rely on you not just for an opinion, but not to be afraid to teach me something about tax law during the process. Effective outside counsel relationships are truly the practice of law, not the billing of hours.”

***“Think of situations where you decided to terminate the services of outside counsel. What led you to those decisions? How did the counsel respond?”***

- “When I became construction counsel to a large urban school building project, I found that the in-house lawyers had been relying on a large, nationally known AmLaw 100 firm that knew almost nothing about the laws of the California Education Code and related state statutes as they apply to school building. This firm was running up huge bills for drafting and advising on construction contracts, into the six figures in one instance, and getting things wrong to boot. I made it my business to stop the flow of work into this firm. There was never an out and out confrontation. Their work for us just dried up.”
- “I haven’t terminated a firm yet, being fairly new to my current in-house position. However, the firm I would terminate would be one that failed to demonstrate creativity and initiative. We are using one firm that is very reactive, shows a lack of professional attention to our matters, and has submitted pleadings with major misspellings. I have not terminated this lawyer, but I have assigned one of my in-house lawyers specifically to look over his work. I would hope that that would send a certain message.”
- “Who gets fired? Firms that deliver results below expectations. Firms who make it difficult for us to join in the process of getting the legal work done. Firms where we have a perception of poor value for work performed. And sometimes a conflict of interest arises mid-case that requires the termination of a firm—we’ve fired lawyers we really liked because a new conflict has come up. Some terminated engagements and relationships are salvageable, others are not. Honest assessment is required on both sides.”
- “Mistakes per se do not necessarily get a lawyer fired. I’ve made my share. But how the mistake is handled is key. Denials—cover-ups—these won’t be tolerated. A sincere apology—a financial offer, if appropriate—these are the way to go. But sit in a meeting (as happened to me once) along with your managing partner, and argue to me that a certain statute doesn’t say what it clearly says, and you will lose my business for good.”
- “I don’t terminate for bad results, but for bad lawyering. Whether we prevail or not in a given matter is not the only criterion for evaluating the outcome. Our participation in the litigation may be driven by a wide variety of other tangential business issues that outside

counsel knows nothing about or cannot control. . . Every single lawyer I've terminated has tried to convince me to change my mind. None have succeeded. But termination doesn't necessarily mean that I won't hire that lawyer again. If I explain the reasons for termination, and I think they've listened to me and learned, I might hire them again."

***"Do you have any particular requirements regarding the use of associates by outside counsel?"***

- "Yes. I will not pay for the training of associates. Most of the matters I send out are complex and I start with the assumption that they will not be suitable for first and second year associates. Also, if I set up a meeting with outside counsel and he or she brings an associate along, that's an unwelcome surprise unless it's been cleared with me beforehand."
- "I did not retain one firm because the principal I reached out to wanted to include a first-year associate in the blended rate. Please. I've got one-year associates in my own legal department—I don't need them from outside counsel."
- "I concern myself with ultimate results, and cost. Lawyers I work with know that if I see a lot of associates at a meeting, I won't pay for it. If I think the hours billed are excessive, or if I'm not happy with the result, I'll ask for a billing reduction."
- "We give outside counsel a choice. We will not pay the posted rates for associates 4<sup>th</sup> year and under. They're simply not worth it. On the other hand, if we can construct a junior associate pay schedule with outside counsel that makes sense for both of us economically, we will certainly agree that they can be used."

***"Communication between in-house counsel and outside counsel is key. Give some examples from your experience of good communication, and poor communication."***

- "Answering calls or emails within 24 hours—no exception. And knowing enough to deliver bad news in person or over the phone. Once, in a case we lost in the appeals court, outside counsel mailed the decision to me without even a cover letter. Unbelievable!"
- "Continuing to check your emails during a client meeting is not just irritating, it's rude."
- "Usually good communication comes with a light touch—you don't want to bother people unnecessarily. As a GC, I like to see the legal work product in as final a form as you can get it. I don't have time to look at a lot of drafts. I've seen poor communication arise when a firm has been outside counsel for a long time and takes its situation for granted. Outside counsel need to remember they are never in the driver's seat."
- "In larger projects involving numerous outside lawyers, the job of managing the lawyers and managing the interaction between the lawyers and the company becomes almost as

important as the specific subject matter knowledge. ...Be very honest and realistic about expectations on success, process and cost. The track record becomes the relationship.”

- “Outside counsel may think they work for the company, and maybe they do as a matter of lawyer ethics, but frankly, they work for me. In communicating with me, don’t tell me what I already know: that a jury can go either way, and so forth. Tell me what you believe will happen, what you believe are the implications of our strategy. I do not expect a guarantee but I want no surprises. Understanding who your audience is, is the most important thing. And making sure that time is not wasted.”

### **Lessons Learned**

- In the words of the AW Survey, “Chief Legal Officers are too busy and too pressured to consider anything less than substantive, serious approaches from law firms.” Plan marketing accordingly.
- Many general counsel avoid direct confrontation but nevertheless may have concerns about the quality of outside counsel’s work or the way in which the relationship is being handled. According to the AW Survey, only 35% of law departments regularly and formally evaluate outside counsel, and only 17% communicate the results of these evaluations to their law firms. Devote some careful thought to the art of discerning what your in-house clients think about the quality of the work you’re doing and how their needs can best be met. Maintaining quality control over existing matters is as important to a firm as bringing in new ones.
- Clients who are business executives are accountable at all times for their own performance, and they expect accountability from their outside counsel as well. In the words of one executive, “If people feel they own the result, they’ll work harder.”
- A terminated relationship may be salvageable, depending on the grounds for termination. A detailed understanding of the client’s business, knowing the way the general counsel prefers to do business, and an absolute commitment to responsiveness and

communication can win work back and build a relationship even stronger than before.

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<sup>1</sup> All views expressed in this paper are those of the individuals concerned and do not necessarily depict the opinions or positions of their employers.