W-12: IN SYNC: WHAT IN-HOUSE COUNSEL AND BUSINESS CLIENTS EXPECT FROM THEIR OUTSIDE COUNSEL

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IN SYNC: WHAT IN-HOUSE COUNSEL AND BUSINESS CLIENTS EXPECT FROM THEIR OUTSIDE COUNSEL

The marketplace for legal services has never been more competitive, with the changing expectations of in-house counsel and business clients serving as both a cause and a consequence of the current state of affairs. An examination of why and how (and how quickly) such expectations have changed invites scrutiny of corporate and law firm culture, broad economic forces, and relationship best practices – both old and new. The goal of the discussion below is to examine each of these areas and illustrate how they inform the authors’ recommendations of the practical steps in-house counsel and law firms alike should consider when confronted with the opportunity to improve their relationships.

In addition to examining recent writings on these topics, and as a part of our examination of the issues they raise, we also conducted two anonymous surveys of some members of the Forum on Franchising to get their thoughts on the issues discussed in this paper. There was a survey of twenty-nine inside counsel (the “Inside Counsel Survey”), and one of twenty outside counsel (the “Outside Counsel Survey”). Each survey had five questions, and a copy of these questions can be found at Appendix A to this paper. Recipients of the surveys were specifically selected to reflect a diverse mix of business and firm size. Outside Counsel Survey recipients included attorneys at firms that range in size from less than five lawyers to more than 1000 lawyers, as well as a mix of both transactional and litigation attorneys. Recipients of the Inside Counsel Survey included counsel at predominantly larger North American franchise systems (600 - 2000 units) spanning diverse industries, as well as at two companies that hold various franchise brands. Survey recipients were located in the U.S. and Canada. Given the anonymous nature of the surveys, neither specific respondents nor the mix of respondents can be identified.

I. THE CURRENT LEGAL ENVIRONMENT AND NEW CHALLENGES TO THE DELIVERY OF LEGAL SERVICES

There are a number of conditions and pressures that currently exist in the legal services industry which have put it in flux. These include, among other things, the “more for less” challenge, consolidation and globalization of businesses and law firms, technological advances, and the segmentation or disaggregation of legal projects and services.

A. The “More for Less” Challenge

There has been much written about how businesses and their internal legal decision-makers post-2008 have been forced to scrutinize and cut back outside legal spending, while at the same time address a rise in complexity in the legal landscape in which they operate. As Richard Susskind writes in “Tomorrow’s Lawyers”¹ this is the dilemma of “more for less,” described by general counsel as the combination of having to: 1) reduce their inside legal teams; 2) reduce the amount they spend on outside counsel; and 3) undertake more legal and compliance work (and riskier work at that) than ever before. In effect, they must work together “with their outside law firms, [to] deliver more legal services at less cost.”²

How businesses collaborate with their outside lawyers in adapting to this reality is key to their relevance and profitability. Outside counsel must proactively look for ways in which they can

² Id. at 4.
work differently to deliver greater value to their clients at less cost. Client businesses on the other hand, while continuing to push their outside counsel to provide more for less, must keep lines of communication open and be transparent with respect to their challenges and expectations.

B. **Globalization of Businesses**

Increasingly businesses have grown from regional, to domestic, to international. This is a trend that has certainly been reflected in the franchise industry where we have seen a proliferation of global brands and the expansion of local businesses across the country, and then across the world. For example, Domino’s now serves pizza in India, and Subway sells its sandwiches in Lebanon. This often means that those making key decisions about the operation of a business, including decisions with respect to legal directions, strategies, budgets, and choice of legal counsel are not in the same country, let alone region, as where those legal services are delivered. Those who retain lawyers may not have met, nor may ever meet, those with whom they work. Further, those retaining and instructing lawyers may have only a rudimentary understanding of the legal framework, local, and cultural practices of the countries in which their businesses are operating. These realities impose another layer of complication in outside attorney and client relations.

C. **Technological Advances**

Technological advances are having a keen impact on the current practice of law and the relationships between inside and outside attorneys. They are quickly transforming the legal service delivery experience. In only the last few years we have seen the introduction of innovations including client relationship management systems ("CRMs"), e.g. OnePlace or Salesforce, document management systems, project tracking software, DocuSign, Contract Express and author automated form programs, sophisticated document review software, and the evolving use of artificial intelligence ("AI") in delivering legal services. These technologies are not, however, inexpensive, and certain lawyers and firms are farther along the curve with respect to adopting them. Clients in many instances, especially where they are global corporations, may have far more experience with this type of technology than outside lawyers. It is helpful both for lawyers and firms, at the outset of an engagement, to take stock of what technology is available to support specific legal projects, whether housed with the external provider or with the company itself, and to explore whether it can be leveraged on a particular project. With the sensitivity of the vast amount of confidential and personal third-party data that businesses, inside counsel, and outside counsel store and use daily, outside and inside attorneys have also had to become increasingly vigilant of each other’s respective levels of data security.

D. **Disaggregation or Compartmentalization of Traditional Legal Services**

The disaggregation or compartmentalization of traditional legal services refers to the fact that services performed on any legal task or project may be increasingly broken down into various components, possibly with different staffing arrangements, costing, service providers, and technological support for each component. For example, where historically a franchisor might engage an outside firm to represent it on its acquisition of another franchise system and expect that law firm to provide services for all aspects of that transaction, today it would not be unusual on that same transaction to see an outside document services firm handling due diligence (potentially offshore), a communications firm dealing with public relations, and a human resources services firm identifying and dealing with all employment issues.
A client with strong internal resources, legal and non-legal, may also take on certain aspects of the work itself – using its own agreements, conducting due diligence or even leading parts of a negotiation. In a major dispute, you may see similar approaches where certain buckets of work are left to outside document review firms and discovery services. This “project” approach to work means that an outside attorney may no longer have control or full information over all parts of any matter, and this can create communication issues between outside attorneys and their clients. While designed for cost-efficiency, the disaggregation of legal services – where not done properly – may create breakdowns in efficiency as well. Disaggregation also introduces or increases the prominence of project-management in any given file, and project management is not necessarily something for which most attorneys, inside or outside, are trained. Ensuring that all components of a file come together necessitates increased communication between lawyers, clients, and others in supporting roles. It may also include the use of automated tools and support systems as well as the technical knowledge and training to use them. Again, the climate of disaggregation requires strong front end communication where inside and outside attorneys work together to map out a file project plan for maximum efficiency, cost-savings, and to minimize duplication.

II. CLIENT EXPECTATIONS IN THE NEW LEGAL ENVIRONMENT

Much ink has been spilled in recent years over the changing dynamics of the relationship between law firms and their corporate clients. The forces behind the change are many, but they have produced a universally-recognized effect: a much more competitive environment driven by clients’ increased focus on the value rather than simply the cost of the legal services provided by their outside counsel.3 The challenge for both clients and law firms in this new environment is to fashion an agreed-upon framework for defining, measuring, and enhancing “value.” Ideally, such a framework helps cultivate a strong relationship that need not be dominated by the increasingly outdated “cost-per-hour conversation.”4 Among inside counsel (and especially among their colleagues in the finance and accounting departments), the conventional wisdom is that the billable hour is the root cause of many of the problems afflicting the legal profession.5 Simply stated, as reviewed above, legal departments are under increasing pressure to find alternatives to the traditional relationship model whereby the longer one side works on a matter, the more the other has to pay.6

An examination of both the structure and operation of the modern corporate legal department and the market environment in which it operates is instructive, and illuminates why this traditional model became ripe for disruption. Regardless of size, inside legal teams now face the same pressure for improved efficiency, accountability, and productivity from senior management (and shareholders) as any other operational unit. The traditional view of the legal department as strictly a cost center, along with the general sense that corporations have little influence over what they spend and what they receive in return from their outside counsel (with less accountability than what other business services provided), is now increasingly disfavored.7

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4 Id. at 6.
7 Id. at 1.
As a result, budget constraints, together with the availability of new technology tools to track and measure inside productivity alongside outside legal spend, have produced an increasingly sophisticated approach to inside legal operations in the quest for greater efficiency.

Indeed, many large corporate legal departments now include a full-time legal operations professional fluent in the technology and methodology of traditional corporate procurement systems.\(^8\) While the role may vary from one organization to the next, it typically reflects the duties and responsibilities of a legal department’s COO and/or CFO, reporting directly to the General Counsel/CLO. Most legal operations professionals have a juris doctorate and often are former litigators and transactional attorneys, although it is not unusual for the role to be filled by non-lawyers from the ranks of finance, technology, and human resources. A key qualification for the role is the ability to drive more effective and efficient relationships with outside counsel and vendors – reducing costs, enhancing transparency and implementing greater controls in the process. Project management experience and a solid familiarity with the latest technological tools related to billing, budgets and records, and knowledge management also are essential skills for most legal operations professionals.

The billable hour is an easy target in this environment, but it is just one of many data points that now factor into how inside counsel typically develop and manage their expectations of outside counsel. Undoubtedly to the dismay of outside counsel, many inside legal departments increasingly view outside legal services as a commodity. While still important, traditional “intangibles” such as brand, personal relationships, and word-of-mouth recommendations no longer play the same role they once did in the selection and hiring of outside counsel. As with their colleagues in other operational units, inside counsel typically find themselves designating outside counsel only after a comprehensive, data-driven business case has been made in support of the selection.\(^9\) Using their own historical data as a guide, inside legal departments can now use analytics to benchmark how long it should take to prepare for a deposition or trial or turn around a standard contract. Indeed, future “beauty contests” may feature law firms being requested to hand over such data to be analyzed and compared against that of their competitors in advance in order to produce a studied, data-driven engagement decision.\(^10\)

Corporate legal departments’ initial responses to such technology-driven trends took hold in the marketplace more than a decade ago. The sheer explosion of data over the past two decades sparked creative technological solutions in areas such as electronic discovery and transactional due diligence, allowing legal departments to “unbundle” certain legal services to reduce cost.\(^11\) Specifically, and as noted above, more companies began disaggregating legal work (often increasing inside headcount and in-sourcing more functions) and looking to managed legal services providers for high-volume processes such as e-discovery and contract management.\(^12\) The introduction of sophisticated electronic billing systems allowed legal departments to enforce billing policies (set forth in increasingly comprehensive outside counsel guidelines), track invoices and accruals, and streamline review and expedite payment. The


\(^10\) Id.

\(^11\) Ertel & Gordon, supra note 6 at 11.

\(^12\) THOMSON REUTERS, 2017 ALTERNATIVE LEGAL SERVICE STUDY, Alternative Service Providers: Understanding the Growth and Benefits of These New Legal Providers.
cumulative effect of these developments was to empower corporate legal departments with
greater bargaining leverage as their options for legal services expanded. Moreover, corporate
clients began to evaluate their firms using non-traditional criteria: use of technology, project
management skills, and commitment to diversity.13

How law firms respond to this new reality, of course, will have a significant impact on their
opportunities for growth. At first (and still prevalent), many law firms simply offered to renegotiate
their rates with their clients to be more competitive. As any law firm partner would attest, however,
such concessions are limited, may be unsustainable, and also have the potential to damage client
relationships.14 Alternative fee arrangements (“AFAs”) (e.g., flat fees for certain types of work,
success-based fees, risk sharing, or a hybrid of these arrangements, as discussed more fully
below) have also become relatively standard practice, with some large corporate departments
assigning up to 75% of their outside legal work to firms on a flat-fee basis.15 Flexibility in a law
firm’s billing practices is also increasingly welcome, with some higher-priced firms maintaining
their rates but no longer passing along items such as travel expenses16 or printing
disbursements.17 In order to better communicate with their more data-driven clients, some savvy
firms have developed their own client-friendly metrics, either web-accessible or by way of regular
report, that demonstrate their ability to deliver value beyond simple cost reduction.18 It is through
this new, data-driven prism that many inside legal departments now view the outside counsel
value proposition. Law firms willing and able to work with legal departments in the collection,
sharing, and analysis of such data to drive improved efficiency and innovation are likely to have
a clear advantage in this regard.

This is not to suggest that the “new normal” is simply about numbers, however. As
discussed above, corporate clients increasingly focus on the overall value, rather than simply the
cost of the legal services provided by outside counsel. Of course, there is no single, universally-
recognized definition of “value” in the context of a corporate client’s relationship with its outside
counsel. As discussed further below, the criteria for determining value will often be case or matter
specific, and may be subjective and influenced by long-standing personal relationships and other
factors.

There are any number of creative ways for law firms to add value to the relationships with
their clients. Many leading firms, in true partnership with their clients, have developed innovative
approaches that have taken hold as “best practices” that no law firm striving to keep pace in the
current environment is likely to ignore. For example, the legal department of Shell Oil Company
sees added value in the services provided by its law firms that the company does not pay for
directly, but are bundled as part of the overall relationship.19 These may include access to the law
firm’s resources such as knowledge management, project management, training and support
staff, as well as alternative means for sharing advice such as an advice hotline, continuing legal

13 Lauer & Vermilion, supra note 3 at 5.
14 Ertel & Gordon, supra note 6 at 6.
15 Id. at 9.
16 Robin Hensley, Here’s What Law Firms Need to Know to Work With In-House Counsel, LAW.COM DAILY REPORT
ONLINE (June 15, 2018, 11:18 a.m.) https://www.law.com/dailyreportonline/2018/06/15/heres-what-law-firms-need-
to-know-to-work-with-in-house-counsel/ (hereinafter, “Hensley”).
17 Outside Counsel Survey.
18 Lauer & Vermilion, supra note 3 at 7.
education programs, and updates on relevant legal developments in legislative and regulatory areas. These additional touchpoints between client and law firm strengthen the relationship beyond the management level:

"Value services are an opportunity to better integrate firms into the company’s legal value chain and achieve alignment on multiple dimensions of legal service delivery. When company lawyers are working alongside firm lawyers (secondment), learning from their firm counterparts (CLE), utilizing the firm’s infrastructure (knowledge management), or relying on the firm’s support apparatus (project management), the company is not only receiving direct, measurable value but also insight into how the firm operates and how well the firm meshes with the company’s pursuit of superior business outcomes."21

Corporate clients also prize the value of business insight that many of their outside counsel are uniquely positioned to provide. Savvy outside counsel will make the effort to know their clients’ businesses as well as their clients do, positioning them as trusted strategic advisors on business as well as legal issues.22

Similarly, law firms should also canvass their own sophisticated data and performance metrics (whether derived from analysis of attorney time, billings, matter metrics or litigation results) for business insights that can be shared with their clients. Many leading firms have taken this to the next level, deploying their own inside “managed services” operations to help clients capture efficiencies and reduce costs for repetitive, less-critical tasks.23 Such operations are generally geared toward in-house teams in need of a “management dashboard” and may include technology tools to efficiently process high-volume matters such as non-disclosure agreements, contract renewals, and low-risk supplier contracts, and may often be branded as a separate consulting product wholly distinct from a law firm’s traditional legal services.24 Another example of next-level management services used by some firms are web-based client portals where the firm’s attorneys and inside counsel and business people at the client can log on to track live metrics on the progress of a particular legal matter through its various phases and against budget.

III. FOUNDATION OF A STRONG ATTORNEY-CLIENT RELATIONSHIP

A. Establishing Trust, a Sense of Shared Values, and Learning a Client’s Culture

Developing strong relationships between outside attorneys and clients is a process that requires constant attention. One of the first things primary outside lawyers can do with their clients is to identify shared values and experiences in order to establish trust. To do this, outside

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20 Id.
21 Id.
22 Hensley, supra note 16, at 3.
23 Association of Corp. Counsel, Turning Law Firms Into Managed Service Providers at Microsoft, ACC DOCKET (Feb. 2018).
attorneys need to learn all that they can about their client, its people, its values, its business, and the industries and the markets in which it operates.

The learning process begins with a thorough review of the client’s website augmented by a review of news media materials and social media information as well as asking questions of a new client. The law firm needs to gather as much information as possible to enable the firm to meet the client’s needs and objectives. This research will also enable the law firm to assign the appropriate lawyers and other personnel to the engagement. Inside counsel who enjoy their work are eager to provide information about the company to its new service providers, and may view the failure of a new law firm to diligently work with them to learn about the company as an early sign of a lack of interest in the engagement. By working hard to learn about a new client the firm may more readily identify those shared values that will help nurture a new client relationship. Clients expect their outside attorneys to have a “substantive understanding of the business the company is in.”

Outside of specific file work, what can outside counsel do to learn a client’s business?

- Read the client’s FDD
- Read the client’s SEC Filings
- Conduct basic internet research on the client
- Keep on top of industry trends
- Ask clients questions about their businesses and check in with them regularly
- Set client-specific and industry-specific news or social media alerts
- Attend industry events
- Visit a client’s office in person

None of this education should be on the clock!

Every client has a unique business culture. Understanding that culture and how to adapt to it will go a long way in developing and strengthening relationships. A company’s culture can be rigid or flexible, hierarchical or collaborative, formal or informal, one that encourages a free flow of ideas versus one that does not. Adapting to that culture can facilitate a firm’s interaction with inside counsel and the client’s business people and the effective delivery of services to the client. To that end, outside lawyers and the client’s inside counsel will want to share information on the people involved in the engagement to identify people from the firm and the client company who know each other or who have worked together before. Law firms should determine as soon as possible what their inside counterparts and the client’s business people like and dislike in working with outside counsel. The lead person from the law firm should learn the identity of the business people who will work most closely with the firm and inside counsel – while always being mindful.

25 Inside Counsel Survey, comments from three respondents.
that inside counsel typically frown upon outside counsel accepting assignments directly from business people.

Knowing the expectations of a client’s business people can help outside attorneys make inside counsel look good with their business peers. This is paramount. In the words of a General Counsel in a franchise business, outside counsel should provide “support that makes inside counsel look good to his business partners. Outside counsel’s focus should be to help the in-house counsel excel at all things.” Taking these steps will help outside attorneys establish trust with their client and develop a sense of shared values. It is important for outside lawyers to keep in mind that inside counsel also have clients to whom they are accountable, all of whom work for the same company and share many of the same goals and objectives.

B. A Client/Outside Attorney Disconnect? Understanding a Client’s Needs and Creating Value in the Relationship

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**Exchange from a Hot Air Balloon**

A man is flying in a hot air balloon when he realizes he is lost. He reduces his altitude and spots a man in a field below. He lowers the balloon toward the man and shouts to him, “Excuse me, can you help me? I am late to meet a friend, but I don’t know where I am.” The man below says, “I’m happy to help. You are in a hot air balloon, hovering approximately 30 feet above this field. You are between 40 and 42 degrees N. latitude, and between 58 and 60 degrees W. longitude.” After a brief pause, the balloonist declares: “You must be a lawyer.”

“I am” replies the man. “How did you know?” “Well,” says the balloonist, “everything you have told me I am sure is technically correct, but I have no idea what to make of your information, and the fact is I am still lost.” The man below responds, “Indeed. And you … You must be a client.” “Why, yes, I am,” replies the balloonist, “how in the world did you know?”

“Well,” says the man, “you don’t know where you are, or where you are going. You have made a promise which you have no idea how to keep, and you expect me to solve your problem. The fact is you are in the exact same position you were in before we met, but now it is somehow my fault.”

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While this is a well-loved lawyer joke, it does bring to the fore an all too frequent disconnect between clients and their attorneys. It is crucial that outside lawyers fully understand a client’s needs and objectives and that clients communicate their needs and objectives from the outset in order to create value and provide solutions in this relationship. Researchers at the University of Cambridge recently studied what they identified as the disconnect between outside lawyers and their clients. This study examined the points of disconnection between law firms and their clients,

26 Inside Counsel Survey, one respondent.


why the disconnect occurs, and what firms and clients can do to reduce it. The study found evidence of a significant disconnect, and found that outside lawyers and clients differed as to the magnitude and reasons for this disconnect. The study found three persistent causes: the service offerings by law firms, the service quality, and issues concerning the certainty and predictability of the delivery of services.

The concern regarding service offerings focused on the difference between providing advice and providing solutions. The study found that firms see themselves as offering advice which clients then apply to the problem. Clients on the other hand look to firms for solutions to their business problems, delivered in a timely manner and in a format they can use in resolving an issue. Outside lawyers often see themselves as lacking in the in-depth understanding of the client’s business needed to help find solutions. However, clients expect their outside lawyers to know enough about the client’s business to take into account business considerations in crafting advice designed to provide practical solutions to business problems. This sentiment was echoed repeatedly in the results of the Inside Counsel Survey. Outside counsel need to appreciate that clients “are looking for an endgame – not just a legal solution.” Inside counsel are looking for support in reaching resolutions “that make business and legal sense,” and to have “productive give-and-take” conversations with their outside counsel “about legal strategy and business concerns.”

The second cause for the outside lawyer-client disconnect identified by the Cambridge Study relates to service quality – what the study refers to as a “good enough” versus a “gold” standard. This dilemma squarely puts the focus on how clients perceive value. Faced with budgetary pressures, time constraints, and a multitude of other matters requiring resolution, clients become concerned when they believe the value received from a law firm is not commensurate with the time and effort expended by the law firm. These issues can lead to strains in the client relationship as outside lawyers and their firms struggle to determine what constitutes “good enough” service to the client. Outside attorneys may also resent what they see as the client’s attempt to obtain gold standard service at bargain prices. Again, these findings were closely echoed in survey results. Inside counsel commented that outside counsel should avoid “writing page long emails. Keep it short and sweet,” don’t write “long, expensive formal memos rather than less formal communications that could do the trick” and take a “pragmatic approach. . .get to the point quickly – don’t bore me with ‘if this, then that’ or writing a novel.” Conversely, a respondent to the Outside Counsel Survey expressed frustration with respect to “clients who have no appreciation for what we do.” These observations point to the importance of outside attorneys and their clients establishing a clear understanding at the outset of any project on expected deliverables, timing, and costs.

29 Id. at 4.
30 Id. at 5.
31 Id.
32 Inside Counsel Survey, one respondent.
33 Id.
34 Id.
35 Id.
36 Id.
37 Outside Counsel Survey, one respondent.
The third source of client disconnect cited in the Cambridge Study was the certainty and predictability of service delivery. Inside counsel believed they were not receiving sufficient information on the cost and timing of delivery of legal services to provide to their business people. A number of the firms surveyed acknowledged the problem and have invested in project management software and other tools to address the issue. However, some firms expressed concerns that many kinds of legal work remain inherently uncertain, hampering their ability to provide reliable information on timing and costs.38

The findings of the Cambridge Study on the severity of the firm-client disconnect showed a troubling gap between outside attorneys and their clients. Outside attorneys believe clients generally value their services, citing the amount of repeat business their firms received. Clients on the other hand did not see the disconnect narrowing, and believed that outside attorneys and their firms did little to understand their clients’ businesses and had a lack of appreciation for the cost pressures faced by inside counsel.39 Notably, while every respondent to the Outside Counsel Survey described aspects of what they believed to be their (or their firm’s) consistent practice of “over and above” service, certain respondents to the Inside Counsel Survey commented that they had yet to experience “over and above” service from an outside attorney.40

Another dichotomy identified by the Cambridge Study is that outside attorneys and their firms tend to regard the client relationship as a series of distinct transactions and focus on providing the best advice for each matter. Clients, on the other hand, tend to emphasize the overall relationship as separate from the transactions. Clients expressed concern that they wanted their outside attorneys to help create value in the relationship, but that firms did not see value in things that are not immediately billable.41

The disconnect described in the Cambridge Study is clearly troubling, as it threatens the ability of outside counsel to work productively with their clients and build the strong relationships necessary to effectively achieve their clients’ legal goals. Addressing the disconnect requires first, that both outside counsel and clients recognize this disconnect and the ways in which it manifests at different touch points in the outside attorney and client relationship; and second, that both outside attorneys and clients consciously work to modify their behaviour to close these gaps. The sections of the paper that follow attempt to provide a roadmap for doing just that, and with respect to closing the gap, provide practical examples, tips and tactics to help both outside attorneys and their clients in the quest to align their interests.

IV. UNIQUE CONSIDERATIONS FOR INTERNATIONAL WORK

Selection of outside counsel and management of the relationship involves unique considerations when outside counsel is located in a foreign country. Cultural differences, language barriers, and even geopolitics and foreign currency exchange rates can frustrate North American inside lawyers when navigating the landscape for legal services overseas. To add to the confusion, there is no shortage of U.S. law firms with a global presence and the advertised expertise to service the needs of their U.S. clients anywhere in the world. While there is no one-size-fits-all approach to this process, legal departments of U.S. companies should be mindful not

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38 Id.
40 Outside Counsel Survey and Inside Counsel Survey, multiple respondents.
41 Cambridge Study, supra note 28, at 8.
to presume that what works at home will work as well abroad, or that they need look no further than their U.S. counsel for a recommendation.

A threshold issue typically involves the process for selecting counsel in a foreign country. A natural starting point often involves simply asking trusted U.S. counsel for recommendations. This is a reasonable first step, with the resulting likelihood that U.S. counsel recommends a local lawyer who: 1) resides in the local office of the U.S. counsel’s law firm; 2) is linked to U.S. counsel through a personal network; 3) has worked with the client’s U.S. counsel; and/or 4) is owed a favor because the local lawyer referred a client to the U.S. counsel. While none of these factors is necessarily problematic or disqualifying, it is equally true that each is likely to be wholly unrelated to the specific needs of the client in connection with the matter at hand. A U.S. counsel’s familiarity with a friend or colleague’s credentials or positive past experience are valid data points, but they should not truncate an objective analysis of the client’s transaction and its specific needs.

Independent market research to support and validate U.S. counsel’s recommendations, together with interviews of prospective candidates deploying “hard” criteria intrinsic to the matter at hand (e.g., subject matter expertise) and based on the specific needs of the client, should play a role in the selection process. Although often more subjective, certain “soft” criteria, such as the local counsel’s proficiency in English and/or any U.S. legal training are also important factors to take into consideration. Once a selection is made, close scrutiny of the local counsel’s engagement letter is essential to the prospective relationship, and the letter should reflect the parties’ mutual understanding of the project, scope of the engagement, billing practices, and other key details.

U.S. lawyers must also be mindful that local law and the rules governing the legal profession will not necessarily operate in ways that are analogous to those in the United States. More specifically, foreign counsel’s relationships with other clients may not necessarily present the same conflict-of-interest considerations to which U.S. counsel are accustomed, and the very skills and experience that may motivate the selection of a particular local counsel are often the same qualities prized by the U.S. client’s competitors in the foreign market. U.S. counsel should discuss any such relationships in advance of the engagement to determine whether they may be disqualifying under the company’s guidelines for outside counsel.

Franchise companies with international operations need to be aware that issues of the attorney-client privilege and work product privilege are handled much differently in many civil law jurisdictions than they are in the United States. Beyond the threshold question of determining what law applies to privilege questions in international matters, some civil law countries deal with privilege issues in a different manner than under U.S. law. Civil law countries often have statutes

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42 Rolf Giebeler, Decisions in Deutschland: Choosing a Law Firm for Corporate Transactions in Germany (And Elsewhere), ACC DOCKET (Jan./Feb. 2013).
43 Id. at 62.
44 In the experience of one of the authors, foreign counsel’s familiarity with the prospective U.S. client’s products and services, together with detailed knowledge of the U.S. client’s standing and reputation in the local marketplace, has proven to be a particularly relevant and meaningful example of such “soft” criteria.
45 Ava Borrasso, Privilege and International Implications Against the Backdrop of the Panama Papers, BUS. LAW TODAY, July 2016 (hereinafter, “Borrasso”).
that protect “professional secrets” in their criminal codes or ethics rules. The privilege typically belongs to the client and in some jurisdictions the client may not waive this privilege.\textsuperscript{46}

Another important consideration involves the scope of the attorney-client privilege and protections for attorney work-product under local rules, particularly as they may apply to inside counsel. For example, and unlike in the United States, the attorney-client privilege may not apply to inside counsel to the same extent as it applies to lawyers in private practice. The European Commission has ruled that the principle of confidential communications does not apply to inside counsel, regardless of the bar or law society where the lawyer is admitted or enrolled.\textsuperscript{47} However, in many Latin American countries the privilege is applicable to inside counsel. The failure to provide the privilege for communications by inside counsel is based on the perceived lack of independence by the lawyer that is required for a communication to be privileged. This independence is perceived to be lacking because of the lawyer’s exclusive relationship with one client.\textsuperscript{48} The implications of such rulings for U.S. inside counsel are obvious and should inform their communications when working on matters overseas.

V. KEY TOUCH POINTS IN THE ATTORNEY/CLIENT RELATIONSHIP IN THE CONTEXT OF THE NEW LEGAL ENVIRONMENT

A. The Courting Process from the Outside Lawyer’s Perspective – Pitching and Retaining New Business

1. What Are Firms Selling and What Are Businesses Buying?

Evidence shows that there may be a fundamental divide in what outside attorneys are selling and what clients are buying. As underlined in the Cambridge Study reviewed above, and summarized in a recent inside panel presentation:\textsuperscript{49}

<table>
<thead>
<tr>
<th>Outside Counsel Like to Sell</th>
<th>Clients Like to Buy</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Access to Information</td>
<td>• A solution to their problem</td>
</tr>
<tr>
<td>• Strategy</td>
<td>• Plain and simple</td>
</tr>
<tr>
<td>• Negotiator</td>
<td>• Less expensive is better than more expensive</td>
</tr>
<tr>
<td>• Courtroom Skills</td>
<td>• Faster is better than slower</td>
</tr>
<tr>
<td>• Experience</td>
<td>• An 80% solution may be fine</td>
</tr>
<tr>
<td>• The “best and the brightest”</td>
<td></td>
</tr>
<tr>
<td>• No stone unturned</td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{46} Id. at 2.

\textsuperscript{47} Julien Rivet, Don’t Blow the Privilege: Attorney-Client Privilege for In-House and Outside Counsel, INT’L BAR ASS’N INT’L FRANCHISING NEWSLETTER (May 2014).

\textsuperscript{48} Borrasso, supra note 45, at 3.

Essentially, firms and lawyers sell expert legal advice for businesses to apply, while businesses wish to buy solutions to their legal problems.

a. **Expertise**

A number of the “products” identified above as what outside attorneys like to sell, namely strategy, courtroom skills, experience and “best and brightest” boil down to expertise. Outside lawyers and their firms have traditionally tended to view expertise as the key factor in the selection of counsel. This was unsurprisingly reflected in our Inside Counsel Survey where respondents indicated that in hiring outside counsel they look for: “relevant franchise experience,” knowledge of specific legal issues the client is dealing with, “subject matter knowledge” and those “on top of legal issues.” What was almost always emphasized with legal expertise, however, was specific experience including experience with the same or similar “jurisdiction, size of clients assisted in the past,” and substantive knowledge and experience with the business. As noted by a respondent to the Outside Counsel Survey, “no client wants to be your first rodeo.”

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### Ways to effectively differentiate an attorney or a firm’s expertise in a pitch

- Reframe expertise specifically to the matter being sought and provide insight into strategy and approach as a “freebie” at the outset;
- Attribute recommendations and endorsements from other satisfied clients; and
- Include “insider” information about other parties involved in the matter and their outside attorneys (where relevant).

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However, expertise is a bit of a conundrum when it comes to a client’s selection of outside legal providers. It will come as no surprise that outside attorneys and firms must have the requisite subject matter expertise in order to be retained. But with the exception of a very narrow band of outside attorneys (and note that the reference here is to specific attorneys, not firms), with expertise so niche, so specialized, and so unique, that they are the “one and only one to go to” for a particular type of matter, this is by and large untrue. Outside attorney or firm subject-matter expertise, as perceived by clients (which is really the only perception that matters), is often not “special,” and in pitch scenarios, inside counsel frequently show a healthy skepticism in response to statements that a particular lawyer is the “expert” in the space. If a firm or lawyer has been invited to the table to pitch for work, expertise is often expected and assumed. It is “table stakes.” In franchising for example, there are a number of law firms with strong franchise expertise, profile in the franchise industry, and representative client rosters. While inside counsel clearly value expertise, it is often not the differentiator. For example many respondents to the Inside Counsel Survey notably did not flag legal expertise or knowledge as a key element of what they look for in pitches.

Further, and perhaps a more delicate point, is whether expertise can actually be effectively discerned by certain clients. As expressed by Bruce MacEwen in *Tomorrowland: Scenarios for Law Firms Beyond the Horizon*: “[a]ll but the most sophisticated clients find it famously difficult to

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50 Inside Counsel Survey, multiple respondents.

51 Outside Counsel Survey, one respondent.
accurately assess the quality of their lawyers.”52 The reality is that legal work can be exceedingly complex and filled with grey areas. Most answers to nuanced legal problems are not right or wrong, and there are varying approaches to these issues that may or may not work, to varying degrees, based on factors outside of the outside attorney’s, and often the client’s, control. Apart from blatant negligence (which, frankly, does not even necessarily come to the fore in all instances), whether one lawyer’s technical legal advice is better than another’s is not always easily identifiable. Reasonable consumers of legal services may not align on what, exactly, expertise is, and perhaps that does not matter. So if expertise is an imperfect differentiator, how do clients effectively choose firms?

b. Pricing and Value

When it comes to landing on the right pricing, it is essential to understand a client’s objectives. No matter how much you love the Cadillac, you may only be able to afford the Chevrolet. You may be able to afford the Cadillac, but find that a Chevrolet adequately meets your needs. You may be entirely unable to afford the Cadillac, but you buy it anyway. While price or economy is clearly a factor in every engagement, it is perhaps more useful to reframe the discussion as one of value:

“Audi, BMW, and Lexus without question provide quality and value, but few would say they provide economy. On the other hand, Honda Civic, Toyota Corolla, and Hyundai Elantra deliver on economy and to many millions of buyers also provide impressive value, but few would say they deliver a “quality” automotive experience given the available alternatives.”53

“Right-sized” pricing, or pricing for “value” is key. What are the client’s goals and what do they wish to accomplish? How much is a piece of work worth to them and what is their budget? What has their experience been with the cost of similar work in the past? As one respondent to the Inside Counsel Survey emphasized: “sometimes the reason we have a small budget for a project is because it is low risk or low priority for us.”54 Clear and early communication between clients and outside attorneys on these points is therefore critical to proper pricing.

Further, in pitching scenarios, price is often the only objective criterion that a client can use to compare firms. But not all price comparisons are “apples to apples,” and in considering price it is rarely a “race to the bottom of which firm can do it the cheapest.”55 Clients and their outside counsel need to land on what is being priced out, so that the comparisons are helpful. Hourly rates are often the default for such comparisons, as they are most easily lined up, but, as discussed above, hourly rates only tell one part of the story. What is in and outside the scope of work? Who is the team? Who is expected to do what on the team? What is the length of the retainer? What strategy should be adopted, or should alternative strategies be priced out? The more parameters provided by the client in soliciting pitches for a project, the more easily responses can be compared, and the more realistic the eventual budgets or fee proposals.

53 Id. at 172.
54 Inside Counsel Survey, one respondent.
55 Id.
c. Service Experience

In addition to expertise and pricing, as highlighted by the Cambridge Study, service experience is an often overlooked but effective element in a pitch. How outside attorneys service their clients, clear communication on key elements such as price and the timely delivery of services, for example, has a clear correlation to profitability. Research shows that the firms performing at best in class service levels experience 30% higher profits, 7% rate premiums across all staffing levels, double the fees from a single client, and 35% higher client retention. We live in the “age of the customer” — a time when focus on the customer matters more than any other strategic imperative.

“Outside the legal world there has been a massive evolution in what is considered good customer service. You used to simply buy a hammer at Home Depot. Now when you go to Home Depot to buy a hammer, you get training in how to select the right hammer, courses in how to use it, personal advice on how not to misuse it and so forth. Appliances are not only delivered but also installed and repaired. And so forth. The application to the service you provide clients should be obvious.”

What are some of the key factors that have been identified as important to a strong service experience from an outside law firm? Unsurprisingly they overwhelmingly include responsiveness (which was cited in some form by almost every respondent to the Inside Counsel Survey), knowing the client’s business and industry, supporting the client in success with its stakeholders, and helping the client meet their goals and solve their problems. For example, a client may need to use their outside lawyers as an avenue for dealing with the entirety of their business issue and an external attorney who “sticks to their lane” may leave the client frustrated with their service experience. For instance, there is no doubt that a client may need certain niche expert services, tax accounting, human resources or immigration services, or other services, in order to complete certain transactions, and that their primary firm is not able to provide these services. However, when they ask their outside counsel for help and the ball bounces back to them to navigate the landscape of identifying the right people for these services on their own, they may feel at a loss. While the advice that specialists are needed may be well founded, outside counsel when approached on these issues should wherever possible work with the client to “quarterback” by making the necessary introductions and connections. Being able to articulate and demonstrate at the pitching phase of the relationship what a client’s service experience will be can provide a firm a definite advantage.

59 Inside Counsel Survey, multiple respondents.
60 Inside Counsel Survey, multiple respondents.
B. The Courting Process From the Inside Lawyer’s Perspective

There is, of course, no “magic bullet” to making a successful pitch for a prospective client’s legal business. As discussed above, the fiercely competitive, data-driven market for legal services now affords most businesses a myriad of choices when it comes to their legal spend, and new technologies and business models give clients leverage to customize their relationships like never before. That said, such innovations also provide law firms with unique opportunities to capture new business and strengthen their existing client relationships.

Jennifer Hightower, senior vice president and general counsel of Cox Communications, probably captured the sentiment of most inside counsel in a recent interview: “If there is just one thing outside counsel should know, it’s how important it is that they understand my business.” Accordingly, a law firm’s successful pitch for new business should demonstrate a comprehensive understanding of the prospective client’s business and its role in the market. This should include, in addition to a discussion of the legal landscape in which the business operates, a demonstration that the law firm has a working familiarity with the business’ standard “SWOT” (strengths, weaknesses, opportunities, threats) analysis. The reason for this is simple: in addition to subject-matter expertise (which, as discussed above, is increasingly viewed by most inside counsel as a commodity), and in the current economic environment, clients are seeking efficiency and a strategic partnership when evaluating outside counsel.

The greater the outside counsel’s familiarity and expertise with the client’s business and its strategic objectives, the easier it is for outside counsel to align and economically calibrate its services to the client’s needs. Indeed, the key driver behind virtually all of the disruptive forces discussed in this paper (disaggregation of legal services, emergence of alternative legal service providers and AFAs, technology-based legal project management) is the need for greater efficiency in the delivery and consumption of legal services. A successful client pitch will find a way to strike this chord, and perhaps even include prepared, easy-to-understand metrics that can communicate the law firm’s ability to deliver value beyond simple cost reduction. The standard law firm pitch normally includes a projected budget and information on the firm’s subject matter expertise. But to stand out a pitch should include examples of innovative solutions to a current client’s need for cost savings and/or greater efficiency. At a minimum, the successful pitch will reflect the firm’s sensitivity to the increasingly rigorous performance metrics upon which legal departments are now being evaluated by their internal constituencies and take a proactive stance regarding the value-added services discussed above.

Conversely, experienced inside counsel would have little problem identifying elements of a pitch that land wide of the mark. These can range from the administratively comical (handing out materials prepared for last week’s pitch to the prospective client’s main competitor; failing to realize prior to the pitch that the firm is disqualified from representing the prospective client due to a bona fide conflict of interest raised by the prospective client as the pitch gets underway) to the insensitive (“we are taking a look at the diversity thing”), to the arrogant and/or tone-deaf (sending a bill for the pitch). The biggest misfire, however, is also the one that is the easiest to avoid: failing to demonstrate how the firm’s expertise and personnel can add value to the prospective client’s business. Distinguished deal-makers, litigators, and subject-matter experts can be found with the click of a mouse or a phone call. What prospective clients would like to know in an initial meeting is how much the outside lawyers have thought about the prospective

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61 Hensley, supra note 16 at 1.
clients’ business and how they envision the services they provide advancing the tactical and strategic interests of that business. While certainly there are exceptions to this rule and there will always be limited, clearly-circumscribed and short-term crisis engagements that need not always take the broader relationship into consideration, few successful pitches will fail to incorporate thorough due diligence on the prospective client’s business.

C. Initiating Client Relationships

It is easy to overlook how problems in documenting and managing the administrative details of the relationship from the outset can impede an outside lawyer’s ability to develop and strengthen these relationships. Most lawyers have forms of engagement or retainer agreements, and look at preparing these agreements as fill-in-the-blanks paperwork to be handled with as little effort as possible. In doing so outside counsel may be overlooking a golden opportunity to lay a strong foundation for a new or expanded client relationship, provide clarity and alignment of the client’s and the firm’s expectations from the outset of the relationship, confirm the administrative processes to be followed with the client, and raise and resolve potential points of disagreement between the client and outside counsel. Addressing these details in a well-drafted but succinct engagement agreement can help avoid friction as the relationship develops and show a firm has genuine interest in learning and respecting the company culture of a new client.

A good engagement agreement should address such topics as: (1) the scope of the work the firm will perform; (2) the law firm personnel who will supervise and conduct the work; (3) the terms for billing and payment, paying close attention to the client’s billing guidelines and internal procedures for processing payments; and (4) a general overview of the client’s preferred or required reporting and communications processes for keeping the client informed of the status of matters being handled by the firm. The engagement agreement may also represent the best opportunity to address and resolve areas of potential conflict between a law firm’s policies and procedures and those of the client in areas such as billing and periodic client reporting. A thorough understanding of the client’s internal procedures for dealing with outside counsel will enable the law firm to seek variances when situations arise where the firm realizes it will be unable to comply with these procedures.

Although the initial documenting of the lawyer-client relationship may seem mundane, it can have a profound effect on its success or failure. The failure by outside counsel to follow their client’s internal procedures or to promptly and effectively address issues when they occur may lead the client to believe that the outside counsel does not sufficiently value the relationship and can detract from the good work being done for the client. Such failures may also lead to delays in the payment of the firm’s bills. Inside counsel faced with a multitude of demands on their time have little appetite for dealing with errors in billing or other failures by their law firms to follow the client’s processes and procedures.

D. Issues in Working With New Clients

Of course the primary factor that determines the value to the client of a new outside attorney and client relationship will be the quality of the work product. The client will measure the value of the relationship by such factors as the skill and personal qualities of the law firm personnel assigned to a matter, the ability and willingness of the law firm personnel to perform their work in a manner that is consistent with the client’s direction, the ability of the firm to meet deadlines established by the client, the firm’s ability to use its knowledge of the client and its culture to provide practical business solutions to its legal issues, and the firm’s ability to help the client prepare and manage realistic budget or fee arrangement for a transaction or litigation work.
1. **Budgeting**

The budgeting process is an area where a law firm has the opportunity to display its understanding of the client’s culture and administrative processes. Any good inside lawyer can make a case for how their expert negotiating and case management skills saved the company great sums of money and achieved more positive results in resolving disputes. Regardless, business colleagues often view the legal department as a drain on the company’s resources. Effective management of the resources allocated to the legal department is an important metric by which the legal department’s performance is judged. By assisting in the timely preparation of realistic budgets or fee arrangements, managing the law firm’s personnel within the parameters of these budgets and arrangements, and providing timely and reasonable explanations when variances occur, a law firm will go a long way toward earning the trust of the legal department and the constituencies served by that department. Staying within budget or within any alternative fee arrangement and providing cogent explanations for variances is one way outside firms can help inside counsel look good to their business colleagues.

2. **Staffing**

The assignment of lawyers and other personnel to work with a new client or a longstanding client on a new matter can present a number of challenges and opportunities for a law firm that can either strengthen or impair that firm’s relationship with its clients. The reputation of one or more lawyers in the firm for handling certain kinds of matters is often a significant factor leading a client to a firm, and the client will expect to see that particular lawyer working on its matter. Given the complexities of staffing, it is important at the outset for the firm and its client to agree on the level of involvement that lawyer will have in a matter. Certain inside counsel hire “lawyers and not law firms.”\(^{63}\) Conversely, certain clients off the bat want to see a “demonstrated deep bench” and that “more than one attorney at the firm can help me.”\(^{64}\) Similarly, when firms and clients have established relationships clients often will have preferences regarding who they want – or do not want – to work on a matter. Ultimately it is a question of “matching lawyers” and “the right attorney for the right job; if a second year associate can draft with review time by a partner, the partner shouldn’t be doing all the work.”\(^{65}\) However, it sometimes makes more sense “to have the partner do the work than an associate who spends double the time and has meetings and reviews with the partner on numerous occasions.”\(^{65}\)

In this era of the customer, outside lawyers must engage their clients in discussions about the initial assignment of personnel to a matter, and maintain a staffing dialogue as the matter evolves. Clients do not like being told with whom they must work, and it is important for the health of the long term relationship that outside lawyers do whatever they can to accommodate a client’s staffing preferences. Of course, they must do so within the context of their own internal firm constraints including the workload of individual lawyers, the needs of other clients, and whether the requested personnel have the background, training, and experience necessary to handle the client’s matter. A firm’s perception of the personal compatibility of the requested attorneys with the inside counsel and business people with whom they will work will also be a factor. These issues can lead to a delicate balancing act for the firm, requiring that these issues be addressed between the firm and the client at the outset of a relationship or matter to avoid misunderstandings.

\(^{63}\) Inside Counsel Survey, one respondent

\(^{64}\) Inside Counsel Survey, one respondent.

\(^{65}\) Inside Counsel Survey, multiple respondents.
or dissatisfaction by the client as to how a matter is being staffed. Staffing must be an ongoing dialogue between outside counsel and their clients.

3. Project Management and Communications

Another important issue to be addressed at the beginning of a law firm/client relationship relates to project management communications between the firm and its client. Inside counsel may use certain project management software as part of a company-wide project management system. It is important for inside counsel to communicate their project management needs to their outside attorneys at the outset of the relationship to identify issues between their project management system and the support systems used by the outside attorneys so that these issues can be resolved.

All law firm personnel working with a client need to be familiar with the client’s project management protocols. The lead lawyer working with the client should be aware of all entries made in any client-facing project management software used by a firm. In addition to being compatible with the client’s project management systems, a law firm should ensure that its communications with clients are consistent with the firm’s ethical obligations to maintain the confidentiality of client information and help preserve the attorney-client privilege and work product privilege where applicable. Timely and accurate communications by a law firm to inside counsel can help strengthen the relationship by giving inside counsel and their business clients real time access to the status of individual matters and upcoming deadlines and other required actions.

E. Issues Related to Communications Between Law Firms and Their Clients

One of the keys to establishing a strong relationship between a law firm and a new client is the development of effective means of communication between the law firm and inside counsel and the client’s business people who interact with the law firm. The development of effective communication protocols requires satisfying the client’s objectives while being mindful of the law involving attorney-client privilege and applicable ethical rules.

Lawyers communicating with inside counsel and other client representatives must always be aware of whether the communication is intended to be covered by the attorney-client privilege. This privilege covers “(1) communications, (2) made between privileged persons, (3) in confidence, (4) for the primary purpose of obtaining or providing legal advice.” This statement of the privilege raises issues concerning the parties to the communication, whether the communication was made in confidence, and the primary purpose of the communication. These factors need to be considered when using project management software and related tools for keeping inside counsel and other client personnel informed regarding matters being handled by a law firm. Limiting access to these tools to employees of the client who have a need to know the status of matters described in the communication and password protection for these tools may help to maintain the confidential nature of these communications. In addition, outside firms should

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66 A law firm’s ethical obligations regarding confidentiality are addressed in Model Rules of Prof’l Conduct R. 1.6 (2018). See the discussion of attorney-client privilege issues at Section V.E. infra and the discussion of attorney-client privilege issues in international matters discussed in Section IV, supra.

67 This paper discusses privilege issues only briefly as they relate to the themes of this paper. For an excellent recent article on the attorney-client privilege see Caroline B. Fichter and Theresa Koller, Privilege Issues in Franchise Systems, ABA 40th Annual Forum on Franchising W-11 (2017).

68 Id. at 2.
be wary of discussing such subjects as next steps, strategy, or the ultimate goal for the resolution of a matter in any mode of communication that is not protected as to confidentiality.

The requirement that a communication be made primarily for the purpose of obtaining or providing legal advice raises concerns for both inside and outside lawyers. As inside lawyers are called upon with increasing frequency to provide business advice, it becomes more difficult to protect some communications under the attorney-client privilege, particularly where a communication may deal with both legal and business issues. Federal courts have used two tests—either a standard that the predominant or primary purpose of the communication was to obtain legal advice or a less stringent “because of” or “but for” standard in which in viewing all of the circumstances of the communication a court determines that was prepared “because of the need to give or receive legal advice.” To the extent that a communication by either outside or inside counsel includes information that could be considered business advice that communication should avoid also including legal advice if it is likely the client will want to assert the attorney-client privilege related to this advice.

F. Issues Facing Small Firms and Small Business Clients

Small law firms and small business clients confront many of the issues discussed in this paper in the context of their larger counterparts. Issues such as providing more for less, globalization, rapid changes in technology, and the disaggregation of legal services face these solos or small firms and small business clients. Although in some cases size puts small firms and clients at a disadvantage, the current legal services environment provides opportunities as well.

Solo practitioners and small law firms that have well-established niches can take advantage of disaggregation by getting involved in large projects involving multiple firms. Small firms with potentially lower overhead may be in a good position to offer lower rates or a variety of AFAs such as those discussed in this paper, particularly to smaller clients always looking for ways to control legal costs. Small firms that develop a niche in providing general counsel services are in a good position to market these services to small businesses that do not have in-house counsel. Such firms are particularly well-positioned to leverage the analytics of their practice to illustrate its value proposition and help small businesses understand what is “typical” when it comes to external legal spend. Small law firms with well-established niches can also market themselves to larger law firms as partners on multi-firm projects. Small firms may also have addressed diversity issues in a way that make them attractive to large clients that value diversity in their counsel selection.

Communications between small businesses and their counsel can also be easier than with large firms and large clients. The flat organization structure of a smaller client makes it much easier for outside lawyers to communicate directly with the ultimate decision makers at the client. Today’s technology may provide tools to assist in this communication process that are reasonably affordable to small businesses and their counsel. Smaller business clients, possibly even more so than their larger counterparts, will value the small firm lawyer who can provide practical business solutions to their legal problems.

69 Id. at 7.
70 Id. at 11.
G. Billing a File

1. Hourly Rates and Uncertainty

A climate of growing vigilance with respect to legal spend on the client side, coupled with steadily falling realization rates on the outside attorney side, has brought on the proliferation of alternative fee arrangements or “AFAs” and the appeal of the certainty that they can provide.  

Several of our Inside Counsel Survey respondents point out that AFAs and new and creative, or flexible billing arrangements, are key to their evaluation of outside counsel pitches. Interestingly, less than half of the respondents to our Outside Counsel Survey indicated that they proactively offer AFAs to clients, with the other half split between whether they offered AFAs at all, or only when prompted. 

The hourly rate based model allocates all risk associated with any particular legal matter or outcome to the client. Well-crafted AFAs can therefore be a useful tool in the client/outside attorney relationship as they share the risk of uncertainties in legal matters and require clients and outside attorneys to realistically assess the value of any particular legal outcome or product, and align their interests, at the outset of an engagement. However, designing an effective AFA is not necessarily as easy as one might hope, and not all AFAs are created equal.

2. What is an AFA?

An AFA is any fee arrangement that is not based on billing time by the hour at a particular rate. While the concept is simple, many outside attorneys and firms, and many clients, have had a hard time wrapping their head around how to apply them. Many so called AFAs are really just billable hours in disguise. For example, discounted hourly rates or blended hourly rates are not AFAs. Nor are caps on hourly rates. Examples of true AFAs include fixed fees – specified amounts for specified deliverables; contingency fees; reverse contingency fees; hybrid fee agreements, “cap and collar” arrangements with shared savings, holdback or bonus arrangements.

3. Elements of an Effective AFA

Clear communication, level-setting expectations, and frank conversation with respect to the value of a piece of work at the outset are critical to a successful AFA. As with many factors in an outside attorney and client relationship, there is no “one-size fits all” solution for AFAs. Clients and outside attorneys need to evaluate together what the value of a result or piece of work is to them. Outside attorneys have to meet their clients in the middle by understanding what it will cost them to deliver that work or result – and accept that their ability to do so may be uncertain. Notably, many of the required items for an effective AFA necessarily align with those items to be covered and discussed with a client on engagement, and that ought to be included in an engagement letter, as reviewed above. Where used properly, AFAs incentivize clients to think clearly and early

71 For a more comprehensive review of AFAs and their application to franchise matters, please see: Kathryn Kotel, Norman Leon and Vanessa Szajnoga, New Fees, Same Work – Preparing and Responding to Alternative Fee Arrangements, ABA 40th Annual Forum on Franchising W-12 (2017).

72 Inside Counsel Survey, multiple respondents.

73 Outside Counsel Survey, multiple respondents.

74 The practice of applying one hourly rate consistently to all hours worked on a particular matter, regardless of the individual lawyers who billed those hours.

75 Lamb, supra note 58 at 18.
about the results they want to achieve, and incentivize outside counsel to act efficiently in obtaining those results and in sharing their clients’ risk.

<table>
<thead>
<tr>
<th>Checklist for developing an effective AFA</th>
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<tbody>
<tr>
<td>• What type of AFA best fits the matter at hand?</td>
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<tr>
<td>• Who is doing the work? Who is the lead and who makes up the larger team?</td>
</tr>
<tr>
<td>o Who will stand up in court or be negotiating the deal?</td>
</tr>
<tr>
<td>o Who will be holding the pen in the agreement?</td>
</tr>
<tr>
<td>o What parts of the work, if any, will be done internally by the client?</td>
</tr>
<tr>
<td>o What parts of the work, if any, will be done by third parties:</td>
</tr>
<tr>
<td>▪ External providers</td>
</tr>
<tr>
<td>▪ Experts</td>
</tr>
<tr>
<td>▪ Other outside attorneys involved in the work?</td>
</tr>
<tr>
<td>• What are the applicable timelines?</td>
</tr>
<tr>
<td>• What technological/software tools will support the work?</td>
</tr>
<tr>
<td>• What is the scope of work being done?</td>
</tr>
<tr>
<td>o What will fall outside of the AFA and how will that work be billed?</td>
</tr>
<tr>
<td>• Under what circumstances, if any, or on what timeline, if any, will we need to reassess the AFA; what are the trigger points for any change?</td>
</tr>
<tr>
<td>• How and when will work done other than under the AFA be billed?</td>
</tr>
<tr>
<td>o At the outset?</td>
</tr>
<tr>
<td>o At the end?</td>
</tr>
<tr>
<td>o In monthly or other regular installments?</td>
</tr>
<tr>
<td>o At various milestones in the project?</td>
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</tbody>
</table>

Importantly, none of the answers to the above questions should be provided in a “top down” manner. Clients and outside attorneys need to work together to determine those answers that can meet both of their goals.
Examples of AFAs used in franchise matters confirmed by the Outside Counsel Survey

- **Fixed fees or portfolio pricing** - For the “commodity” sections of high volume franchise work that are document heavy and highly repeatable, for example, rolling out new sets of franchise documents to a network, or conducting due diligence on a franchise transaction or for the review and production of documents in a lawsuit.

- **“Off the shelf” fixed pricing for certain projects or pieces of work** – i.e.: An FDD will cost you $X; An FDD with the following with cost you $X + $Y.

- **Project-based fees paired with premium and risk-sharing arrangements** – Transactions in franchising may lend themselves to premiums where particular matters close on time or early, or discounts where the deal breaks up.

- **Fixed fees per phase paired with premium and risk-sharing arrangements** – Litigation lends itself to division in a number of phases, for example early case assessment, pleadings, documentary discovery, examinations, depositions, motions, trial preparation and trial. Fixed fees can often be attributed to each of these phases, with certain premiums payable if client goals in the phase are met or exceeded (e.g. early dismissal or settlement).

- **Fixed fees for work performed and billed over a set time period (i.e.: monthly or annually)** – These may work best for general commercial advice, risk management or those instances of one off calls that may require outside attorney input or “litmus test,” but do not really stand on their own as a new file. For example, certain firms may offer a form of a “hotline” program where for a set fee they identify a group of attorneys who will act as general resources on any and all legal issues that may come up for the client up to a certain threshold of hours.

4. **Why Is It That My Lawyer Can’t Really Tell Me What Something Costs?**

A common objection raised by outside counsel with AFAs is that due to complexity, the individual or “bespoke” aspects to every legal problem, and factors outside of outside counsel’s control (and often the client’s control as well), it is hard to predict how much a particular draft agreement, transaction or defense of a lawsuit will cost. The only reason the cost of these tasks is unpredictable is because outside attorneys and firms (and hence their clients) are accustomed to tying them to time. As emphasized by Patrick Lamb in his excellent, and accurately (if unimaginatively) named “Alternative Fees for Litigators and Their Clients”:

“Our clients confront unknowns and uncertainties every day. What do they do? They deal with it. I once sat on a panel with the general counsel of a company that tore down and rebuilt nuclear power plants on a turnkey fixed price basis. When asked what he thought about the uncertainty of litigation as a reason for not fixing a price,

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76 Lamb, supra note 58 at 110.
he just laughed and said, “Welcome to the real world. Try dealing with the uncertainties of rebuilding nuclear power plants. If we can fix prices in that world, litigators can do it in theirs.” Jeff Carr, the iconic general counsel of FMC Technologies is equally direct: We make and sell equipment on a fixed price basis that has to operate flawlessly on the ocean floor for more than 20 years. That’s our world. I am unmoved that you can’t figure out how long it will take to defend a lawsuit.”

No wonder frustration arises where clients wonder why their lawyers and firms cannot tell them what something costs!

It is not however just outside attorneys who must commit to moving away from a time = dollars scenario for AFAs to work. Clients must be committed as well. For example, under AFAs, clients will often require “shadow billing,” or the practice of keeping track of hours spent on a particular matter, even where the fee is fixed, with an eye to determining whether they are better or worse off under an AFA. For AFAs to truly work, both sides should think of them in a way entirely divorced from billable hours or the time spent on a matter. They should be about value in achieving goals/results – not used as a comparator. The question should not be “would I have paid/would I have been paid more or less on an hourly retainer,” but rather, “was there value to me as a client or as a law firm in a legal outcome at this price.”

5. The Mechanics of Billing

It will come as no surprise that the single unique issue most raised by respondents to the Inside Counsel Survey as an “inside counsel pet peeve” or reason for replacing outside counsel concerned inflated or unjustifiable bills, billing for out of scope work, and poor billing practices. Inside counsel stress “get the bills out promptly, don’t sit on them.”

Time spent on billing matters is not something outside lawyers look forward to, but even such a mundane activity can provide a good opportunity to enhance an outside attorney’s relationship with their clients (or at least not undermine it). Rod Stewart tells us that every picture tells a story, but little did he know that so does every time entry on the bills sent by outside counsel. Good bills should have time entries that: (1) follow a consistent format and all client guidelines; (2) provide sufficient detail to enable the client to see the value received; and (3) break time blocks into small enough increments that they aid clients in assessing the law firm’s productivity. It is important for the billing attorney to carefully proofread each bill so the firm is not sending a bill for payment of thousands of dollars that is riddled with typos and inconsistent entries. Billing attorneys must also ensure that the billing accurately reflect any AFAs in place between the client and its law firm. Outside attorneys should also proactively review their bills on a substantive basis as to the value provided for services rendered, and make any adjustments before they go out the door. The Inside Counsel Survey reflected an appreciation for advanced notice of significant bills.

All timekeepers for a file should be fully educated on each client’s unique billing requirements. The billing attorney must pay close attention to the billing of expenses, which can

77 Id.
78 Inside Counsel Survey, one respondent.
79 Inside Counsel Survey, one respondent.
be a frequent source of error. When a law firm has received a retainer or other form of advanced payment, both ethical obligations and good business sense require that these funds be carefully managed and properly accounted for to the client. Some clients have requirements for when bills must be sent and many firms have guidelines on timely billing. The billing attorney should carefully monitor the collection of bills, because slow payments by clients may be a red flag showing their dissatisfaction with the lawyer/client relationship. When alternate fee arrangements are in place it is important that all law firm personnel working on the file understand the arrangement and how it may impact the recording and billing of their time. Some clients may also have established limits on certain activities such as multiple lawyers billing for a single conference call or meeting, and the billing lawyer must be aware of these restrictions.

VI. GROWING THE RELATIONSHIP

A. Cross-Selling and Integrated Service Teams

Research has shown that lawyers and law firms perform best, retain clients best, and understand a client’s business best when there are multiple relationship touch points with those clients. The typical law firm has about 23% of the current business they could be getting from a top client.\(^80\) Work is being left on the table. Clients on the other hand profess to wanting to limit the number of legal providers they work with in order to maximize institutional knowledge within firms or lawyers of their business. It would seem then, that using cross-selling or multi-faceted or panel retainers makes intuitive sense and is a win-win for both in-house and outside counsel.

Professor Heidi Gardner of Harvard Law School, who has written extensively with respect to the issue of collaborative selling by lawyers and law firms,\(^81\) describes the real ouch point of cross-selling as the legal version of a “do you want fries with that?” upsell phenomenon.\(^82\) No client wants to be “upsold,” and no outside attorney wants to be seen as a “sales” person forcing additional unneeded services on a client. As commented by one respondent on the Inside Counsel Survey, “[do not invite] me to a dinner where suddenly there are 10 lawyers I do not know.”\(^83\)

In his book “Creating a Cross-Serving Culture Shift: Mastering Cross-Selling for Lawyers and Leaders,”\(^84\) consultant and attorney David Freeman attempts to counter the “up-sell” dilemma by exploring a client-centric approach that reframes cross-selling as “cross-serving.” Appropriate cross-selling or “cross-serving” by an outside attorney is really about having a deep understanding of a client’s business and the problems they face, and assisting them in finding solutions to those problems:

“What is important to understand is that the cross-selling of legal services to clients is not actually about selling but about lawyers being responsible, concerned

\(^80\) BTI Consulting, MAD CLIENTIST BLOG, supra, note 56.


\(^83\) Inside Counsel Survey, one respondent.

professional advisors. It really is a matter of being client-centered and doing what is best for the client."\(^8^5\)

As reviewed above, outside attorneys need to think like their clients by taking on the practices reviewed in this paper, and understanding “their industries, challenges, goals and aspirations. . .[they should] read industry publications, visit their facilities, attend strategic planning sessions and join them at industry conferences."\(^8^6\) Knowing a client’s business inside and out will create “opportunities to be helpful – rather than selling.”\(^8^7\)

Outside attorneys must also coordinate internally on their service of a particular client. Franchisors run complex businesses, and it is not uncommon for them to use one firm for a number of its needs: franchising, real estate, and employment, for example. Many of the benefits and improved efficiencies and client-experience in cross-serving are quickly undermined by an uncoordinated outside attorney team.

<table>
<thead>
<tr>
<th>Law firm internal strategies for coordinating client needs and spotting opportunities</th>
</tr>
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<tbody>
<tr>
<td>• Regular (monthly, quarterly) team meetings to discuss different work going on with the client.</td>
</tr>
<tr>
<td>• Brainstorming with the team information learned from the client on new issues they are facing or may face.</td>
</tr>
<tr>
<td>• Group email address for those working on the client where updates can be shared.</td>
</tr>
<tr>
<td>• Centralized shared space for client documents and correspondence (this may already be accomplished through a document management system).</td>
</tr>
<tr>
<td>• Developing overarching client plans on how to meet the client’s needs.</td>
</tr>
</tbody>
</table>

B. Connections Outside of File Work

In order to address the outside attorney and client disconnect reviewed earlier where outside attorneys tend to approach their client relationships as transaction or matter based, and inside attorneys value relationships with their outside attorneys that transcend any one particular matter, outside attorneys need to consider ways in which to maintain their connections with their clients outside of particular files. The following section of this paper addresses different tactics outside counsel can deploy to build relationships outside of particular matters, as well as guidance on how to ensure these relationship-building endeavors provide value to both outside and inside attorneys.


\(^8^6\) Freeman, supra note 84, at 36.

\(^8^7\) Id.
1. **Continuing Legal Education**

Consistent feedback from internal counsel shows that they see their outside counsel as key to keeping them apprised of legal developments that affect them – and that being “jacks of all trades” in their legal jobs, they simply cannot keep on top of all of the areas of expertise relevant to their day to day work. Inside counsel also require continuing legal education (“CLE”) credits to meet the minimum requirements for maintaining their professional accreditation.

Many firms have found presenting CLE programs for their current clients, prospective clients, and referral sources to be an effective means to promote their firm by demonstrating their expertise in specific subject matter areas. Programs on topics such as employment law enable the firms to invite in-house lawyers, solo practitioners and small firm lawyers, as well as human resources professionals and executives of their clients and prospective clients, all of whom have an interest in remaining informed of recent developments in this rapidly changing area. Improvements in technology have made it easier to provide these programs as webinars for people who cannot attend the program in person.

In at least some states and provinces it is relatively easy to obtain approval for CLE credits for lawyers and human resources professionals for these programs. Such programs also enable firms to develop the presentation skills of their younger lawyers, provide high quality written materials with the firm’s name prominently displayed, and provide opportunities for social interaction before or after the program.

The above factors all make CLE programs a natural choice for outside attorneys when working to build relationships and maintain connections with their clients outside of immediate file work. Of course, given that law-firm hosted CLE programs are ubiquitous, in order to ensure they provide value to clients and stand-out from the masses, outside attorney hosts must be thoughtful in their approach to them.

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**Ways to make client CLE events more effective**

- Personalized invites should clearly articulate the value to a particular client – don’t leave the value proposition of an event unarticulated, or assume it stands on its own.
- Obtain, market, and be clear about any official accreditation for any particular event.
- Provide take-away materials – whether a PowerPoint, or thought piece, or both on which the event was based.
- Consider accessibility and whether events can be provided by way of conference call or remotely through Skype or webinar.
- Be interactive. Speak to the audience and involve them – make your session a dialogue.
- Invite other firm lawyers to participate or even simply attend the session in order to build on existing relationships and build new ones.
- Consider tailoring the session to the specific needs of a client or conducting a session on site at the client.
2. **The Client Newsletter, Blog Post or Legal Update**

Client publications, be they newsletters, blog posts, or email blasts also seek to address feedback that clients rely on their outside attorneys to keep them apprised of legal developments relevant to their industry. There is no law firm or outside lawyer, who does not at some point market her expertise by way of “thought piece” or article targeted at clients. “Content marketing” is ubiquitous in the legal industry, and here to stay. That being said, some outside counsel do it better than others.

- **Personal** – These nuggets of expertise by way of marketing missive are most effective when delivered with a personalized touch. Where a particular piece will be of special importance to a client, it is most effective to send it directly from an attorney (as opposed to a broad firm or marketing department address), ideally with a brief cover note. Even better, a quick call to a contact about the piece before sending it, or in follow-up, can generate conversations on critical issues.

- **Accessible** – Good newsletter writing must take into account the audience’s situation. Most client recipients will skim it quickly before deleting, or may even delete it without opening it first. Getting the point across early and clearly is essential. “Point first” writing is therefore critical. If a client can’t answer “why am I reading this” or “why does this matter to me” after the subject line of the email sharing the newsletter, the newsletter has already failed. Even where your recipient may have a very sophisticated understanding of the legal issues being addressed, it is also always advisable to avoid legalese and keep the language as plain as possible so they can be easily digested on the fly. Lists, bullets and subheadings help on this point as well. And keep it short! A firm can always offer a link to a more technical analysis.

- **Insightful** – A synopsis of a legal development, while helpful to those short on time, is less helpful than a clearly expressed view on the impact of the development on the particular client or others in the industry. Outside attorneys should connect the dots in their newsletters. Newsletters that stand out are those that clearly articulate the importance and potential impact of any legal developments.

- **Timely** – It is exceedingly rare for a client in the franchise space to have only one set of attorneys, and the likelihood of their receiving multiple newsletters on key developments is high. In order to stand apart and provide the best client service, outside attorneys will want to be at the head of the pack. If a legislative development or judgment on a case affecting a client is released, ideally the author of the newsletter will want to be the first to alert the client to it. That being said, the outside attorney should not let being quick mean sacrificing the importance of having something to say. It is no client service to jam a client’s inbox with unformed drivel or cut and paste sections from decisions.

- **Judicious** – Apart from ensuring that outside firms are compliant with any privacy or anti-spam laws (and this should of course be a given!), from a pure relationship perspective outside attorneys should not bombard their clients with legal newsletters on everything under the sun. The outside attorney should be particularly wary of automated firm mailing lists and should ensure to confirm with the client directly about what types of newsletters or updates they may wish to receive.

- **Appropriate** – Outside counsel should ensure that any commentary made about a new legal development – exciting as it may be – does not impact the interests of an existing client in an ongoing legal proceeding or transaction. Avoid business or legal conflicts at all costs. One
would hate to have one’s own words read back to them as part of an argument in court, or otherwise hurt an existing client’s interests!

Where it could be useful to clients, and a competitor or market commentator has already written on a development, outside counsel should not shy away from sharing these with their clients. This can be an excellent way to leverage pre-existing content while providing a service for your client. An inside counsel tells the story of a very compelling use of a client newsletter. A new legal development arose in a key area affecting the inside counsel’s business. One of his trusted advisor attorneys forwarded a newsletter to him with a cover note indicating that while the piece was a couple of weeks old, he thought the client might be interested as he expected the legal developments discussed had implications for this client’s business. The issue had not yet come to the client’s attention, and he was receptive, appreciative, and read it with interest. However, he was then astonished to see that the piece being sent to him had been authored by another one of his frequently used outside attorneys! Not only was that disconnect a clear lost opportunity for that outside attorney to build his relationship with the client, it ended up being harmful to that relationship.88

3. **Social Events**

A social event can be an excellent way to grow and reinforce the relationship between client and attorney. As described by networking guru Keith Ferrazzi, nothing breaks down barriers and brings people together like a bottle of wine or meal, preferably at your home.89

Consider diversity needs when planning your social events. Diversity of background, religion, age, mobility, interests, to name only a few. There is no one-size-fits-all or silver bullet for social events. All clients are individual people with individual likes and dislikes, as well as constraints on their time. The key to a good event is getting to know your client. This does not need to be a guessing game. Outside attorneys interested in hosting their clients should not be afraid to ask their clients what they would like to do and who they would like to include.

Note that regardless of diversity of interests, there may be policies in place that prevent clients from being hosted at purely social events, or from receiving gifts or other perquisites from their outside counsel. It is not uncommon for corporate policy to dictate that certain activities, often purely social ones without an educational component, are not permitted. It can be awkward trying to navigate these restrictions, and clients and outside counsel should have clear conversations about any such policies.

Consider also whether any particular event is actually an effective one for advancing your relationship-building goals. Theatre tickets or concerts are often used for client events, but unless you are having a bite to eat or go for a drink before or after, rarely afford the opportunity for conversation. Clients may very much appreciate tickets to such events, but consider whether you really need to be there – these may be an excellent gift.

An outside attorney inviting a client to a broader social or CLE event for firm clients at large, should not forget to act as a host for their client over the course of the event. Meet them at the event’s start or find them early. Be attentive to these clients during your event and introduce them to others. Be sure to escort them out at the event’s end. Where an outside attorney has

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88 Inside Counsel Survey, one respondent.
89 KEITH FERRAZZI, NEVER EAT ALONE, EXPANDED AND UPDATED: AND OTHER SECRETS TO SUCCESS, ONE RELATIONSHIP AT A TIME 205 (2014).
multiple clients attending and therefore multiple hosting duties, they should ensure that they have invited enough firm lawyers to assist in hosting them. It is also best practice to make it explicitly clear in the invite that they are welcome to bring someone else from their business or organization, which can ease social pressure and create a more positive experience.

### Logistical considerations in hosting a successful client event

#### What is the Event Timing?
- Does it conflict with any religious holiday or busy part of the year (end of school) that may impact the client?
- Does end of day work best for the client, or are lunches or breakfasts better?

#### Location and Transportation
- Is there a location close to your clients’ offices?
- Where will clients be coming from or going to afterwards?
- How will clients get to and from the event? Can that be facilitated? If transportation will be an issue for clients, can those arrangements be made in advance?
- Do the clients have any dietary, mobility or other restrictions?

#### Who’s on the List?
- It can make for a more comfortable social event where more than one person from the client and more than one person from the outside firm are invited. This is particularly so where the relationship between client and outside attorney is new.
- Include people from various teams who are of similar age and demographic to try and increase points of contact.
- Can you involve any other contacts or third parties who might be helpful relationship building for clients?

Outside attorneys and firms should not be afraid to think outside of the box. Creative events will be the most memorable. For example, consider participating in a charitable or community cause or event that can pair outside attorneys and their clients together in an initiative supporting a commonly held cause. In instances where many of the participating individuals may have young families, firms may wish to consider an event that can include children. One firm known to the authors held a father and daughter Taylor Swift concert Father’s Day event for outside attorneys, inside counsel and business people and their children. Is there a personal milestone that a client is experiencing – a wedding, a birth of a child, completing an IRONMAN triathlon? Celebrate accomplishments with them. Clearly it is not every outside attorney/inside attorney relationship that should or will develop into a friendship, but outside attorneys should
strive to be relationship driven. As noted by a respondent to the Inside Counsel Survey, it is a truth well-known that it is “harder to fire your friends.”

Finally be sure to have fun. Which should of course be intuitive – although often overlooked in the world of corporate event planning. Events are most successful when they revolve around something that both client and outside attorney enjoy. Golf may be something a client loves, but if you dread it you are unlikely to make up a fun duo or build a meaningful experience on a golf course.

4. Communication After the Closure of a Deal, File, Case or Outside of the FDD Cycle – “You Don’t Bring Me Flowers...”

Clients have often expressed the feeling of being abandoned by their lawyers once immediate engagements are concluded or fall into a dormant period. This is particularly acute following periods of intense work together, including potentially a system-wide FDD update, an M&A transaction or the conclusion of piece of significant litigation. Consistent communication between outside attorneys and their clients permits outside attorneys to learn issues in the business and identify where they could add further value. It also allows them to stay top of mind for the next matter. Regular communication can also provide inside counsel with a sounding board or “litmus test” for new directions being taken by the business, and provide them with reassurance that outside counsel are up to date on the issues they are facing. In the middle of an urgent mandate is rarely a time to get to know the broader interests of a client.

Tips for Outside Counsel on Staying in Touch

- **Plan to do it.** While it may feel automated to diarize communications (because it is), a good way to remain in touch is to maintain a list of key contacts and diarize points to reach out to them over the course of the year – at least once a quarter is a good rule of thumb. This can be done through calendar appointments, tickler or other reminder systems.

- **Share** CLE invitations, client newsletters, relevant general information with them.

- **Invite** them to broader client or community events that your firm may be involved in, or create a client specific social event for them. Have you just closed a transaction, finished a trial, settled a lawsuit or reached another milestone with a client? That’s an excellent time to initiate an event.

- **Follow client contacts and the client businesses themselves** through LinkedIn, Twitter or other relevant social media platforms in order to keep apprised on particular milestones or achievements, and use those as reasons to reach out.

- **Show up.** Attend industry events and conferences where clients are likely to be and reach out to solidify meeting times with them in advance.

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90 Inside Counsel Survey, one respondent.
VII. THE END OF THE ROAD

A. Turn-Over Rates for Outside Attorneys and Firms

“The purpose of a business is to create and keep a customer.”91 According to the ACC’s 2018 survey of approximately 1300 Chief Legal Officers in forty-eight countries, one of three terminated at least one outside counsel relationship for underperformance in 2017, and over 43% are planning to or considering terminating an outside provider or firm in 2018.92 Given the expense, time and pain experienced in a client’s transition between attorneys, this number is particularly unsettling. What are the “fatal” mistakes that outside attorneys make in order to face such a fate, and how can they be avoided?

1. “Fatal” Mistakes

The current environment for legal services is a dynamic one, buffeted by new services models and the ever-growing forces of technology and big data. Smart outside counsel can and should harness these forces of change in the service of innovation and improved client service—as well as in the service of client relationship risk-management. Modern technology offers law firms accurate, real-time visibility into all of their matters, as well as many tools to track the performance of their personnel, both of which render many of the mistakes that can spell the end of a client relationship fairly avoidable. Examples of behavior cited as the primary reasons for firing outside firms or deciding not to send them additional work are summarized below.93

Outside counsel mistakes that can spell the end of a client relationship

- Agreeing to a budget for a particular matter, then ignoring it for no good reason and without discussion.
- Adding additional lawyers to a matter without prior discussion/approval.
- Failing to contain costs.
- Poor billing practices.
- Preparing (and billing for) a twenty-page research memo that 1) was not requested and 2) a client does not have time to read.
- Reflexively raising rates each year without warning or discussion as to why it is necessary for the law firm to do so.
- Unresponsiveness.
- Circumventing the inside legal contact and communicating directly with (or accepting work assignments from) the client’s business team.
- Failing to stay informed about the client’s business.

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93 Inside Counsel Survey, multiple respondents.
While far more rare, outside counsel do also on occasion end relationships with their clients. Reasons cited for this in our Outside Counsel Survey (outside of non-payment of bills), included lack of candor, honesty or failure to disclose information, lack of cooperation, and misalignment with a firm’s practice or business model.\(^{94}\)

**B. Other Issues at the End of the Relationship**

The end of the relationship between a law firm and its client, whether precipitated by the firm or the client, raises a number of practical and ethical issues that must be addressed. Ideally the transition out of a relationship will be handled in such a way that the opportunity will exist for future work by the firm for the client. The Model Rules provide that a lawyer “shall withdraw from the representation of a client” if the client discharges the lawyer.\(^{95}\) Law firms may withdraw from representing a client for reasons described in the Model Rules, including where a client insists on taking an action with which the lawyer has a fundamental disagreement, where the client substantially fails to fulfill an obligation to the lawyer and has been given reasonable warning that the lawyer will withdraw, or the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client.\(^{96}\)

When withdrawing from a litigation matter the law firm also must observe the applicable provisions regarding notice or permission from the tribunal before withdrawing.\(^{97}\) The Model Rules spell out certain obligations of the law firm upon the termination of a relationship, requiring a lawyer to “take steps to the extent reasonably practicable to protect a client’s interests”, including providing “reasonable notice”, allowing time for the client to secure other counsel, surrendering certain property to the client and refunding unearned advance payments of fees and expenses.\(^{98}\) After terminating a relationship the outside law firm also must be aware of its duties under the Model Rules to avoid certain future representations that are adverse to the interests of a former client.\(^{99}\)

**VIII. CONCLUSION**

Lawyers are not immune from the forces of disruption that have impacted many other businesses and professions. Technological changes, globalization, disaggregation of legal services, competition from third party service providers, and pressures on inside and outside counsel to provide more for less all impact providers and purchasers of legal services. A significant disconnect exists between inside and outside lawyers in their perception of these trends and how they impact the providing of legal services.

In this paper we have examined these issues from the perspective of inside and outside counsel based on the authors’ experience as both inside and outside counsel, our research on these issues, and the valuable responses we received to a survey of Forum on Franchising members who are inside and outside counsel. In an increasingly competitive legal environment outside counsel must always be mindful of the need to provide timely and effective legal services.

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94 Outside Counsel Survey, multiple respondents.
96 Id. at R. 1.16 (b)(4), (b)(5), and (b)(6).
97 Id. at R. 1.16 (c).
98 Id. at R. 1.16 (d).
99 Id. at R. 1.9.
work with clients to implement mutually beneficial alternate fee arrangements, communicate effectively with their clients, and develop and implement effective business development programs.
APPENDIX A – SURVEY QUESTIONS

Inside Counsel Survey

1. What do you look for in a pitch from outside counsel?

2. What are the primary reasons you have fired outside firms or declined to send them additional work?

3. What can outside law firms do to better understand your company’s business?

4. What is your biggest outside counsel “pet peeve”?

5. What is an example of excellent “over and above” service from an outside attorney?

Outside Counsel Survey

1. What does your firm do to better understand your client’s business?

2. Do you proactively offer alternative fee arrangements to clients, and what if any kinds of alternate fee arrangements have you found most effective in increasing profitable work from clients?

3. What is your biggest client “pet peeve”?

4. What do you think is most effective in a pitch?

5. Other than for non-payment, have you ever “fired” a client? In what circumstances (outside of non-payment), would you “fire” a client.
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