A View From the Inside Looking Out

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I. How to Initiate a Relationship

1. Selecting outside counsel is a very anxiety-inducing experience for us
   A. We’re relieved when we’re assigned a case in a geographic area where we have “go to” counsel in a particular subject matter
   B. Absent a prior relationship, we’re going to be strongly influenced by personal recommendations from our colleagues in-house and then in the industry.
   C. If no such recommendations, will go to secondary sources like Select List, Super Lawyers or Best Lawyers for ideas. However, it is very hard to distinguish between “best lawyers” or “super lawyers.”
   D. We’re ultimately taking a significant risk because the choice of outside counsel can be outcome-determinative but the qualities that make for excellent outside counsel are difficult to determine from an Internet search and a telephone interview.
   E. Replacing outside counsel mid-case is always the last resort so we really want to make a good decision on the front end.
   F. We don’t like the “dog and pony” show any more than you do but sometimes we have to go through the due diligence process, particularly when we are dealing with internal political issues, have a number of good choices or it is a high exposure case.

2. Most generalized law firm marketing is ineffective
   A. We mean it when we say we hire individual lawyers and not law firms
   B. No matter how clever or well-produced, written brochures are not very meaningful
   C. A substantive article showing your particular expertise in a subject matter is more likely to be impactful.

3. Docket-Trolling
   A. Even though you are the bearer of bad news, may be a way to remind in-house counsel that you have expertise in that particular area of the law and are available to help.
   B. Not particularly helpful if you are writing to state that you have other lawyers in your branch office where the lawsuit was filed with expertise in this area.

II. Things that Outside Counsel Should Do/Know

1. Avoid surprises.
   A. We have to keep our internal clients updated on the case so a surprise to us is a surprise to them. It either looks like we are asleep at the switch or we are not effectively managing our outside counsel. Don't make us look bad.
   B. Get written discovery to us right away or if it was delayed for some reason, make sure we can get an extension of time to respond. Don't make us clean up your mistake.
   C. Anticipate when you are going to need information from us, particularly affidavits. It may take us some time to find the information or the right person. We're navigating complicated bureaucracies and the correct answer to a particular question, especially a question
about historical business practices, can be difficult to find. If you need a visual reminder of this point, think about the final scene from “Raiders of the Lost Ark.”

D. Send us drafts of briefs and other significant filings as well in advance as you possibly can. On the other hand, don’t send us a first draft with the expectation that we’re going to clean it up for you or you’re going to do substantial additional edits after you get our comments.

E. You are responsible for your associates and paralegals. Their mistakes are your mistakes because you assigned them to the case.

2. You can’t communicate too much with in-house counsel.

A. Many in-house counsel do not want lengthy status reports that took ten billable hours to prepare. More frequent and shorter status e-mails are usually more preferred.

B. Most of us do not want the right of pre-approval for ministerial tasks, but we usually want to be consulted about substantive decisions that could impact the case. If it is unclear whether a particular issue is ministerial or substantive, send us an e-mail outlining your plan of attack and give us the right to object.

C. Most of us want to be consulted before you decide to research a particular area. We often have memos or briefing that either may make the research moot or at least will be a great starting point. Check before you “reinvent the wheel.”

D. Contact us ahead of time if you are going to be sending an invoice with an unusual amount of time or expense. We generally appreciate an explanation up front rather than having to contact you about why the bill is so high.

3. In-house counsel is both your partner and your client.

A. We’ll often be your almost exclusive contact for litigation needs until we need to produce witnesses for deposition or there is some particular subject matter that requires a business person to explain.

B. Significant part of our role is to insulate the business people from the day-to-day demands of litigation.

C. As lawyers who often have private practice litigation experience, we expect to be part of the strategic and tactical discussions on how we achieve the right outcome for a particular case.

D. Make sure you understand what objectives we are trying to achieve (or what pitfalls we are trying to avoid) in the case. There may be many factors at play that go beyond narrow definitions of “winning” and “losing” at trial.

E. Be respectful of our time off and vacations and we’ll try to be respectful of yours.

4. Understand the culture of the particular law department and corporation.

A. Don’t expect that because we are a large corporation, we have a “team” of people in the law department who are able to undertake time-consuming or complex tasks.

B. Generally speaking, we may not have the litigation-specific document indexing and review software and applications that it makes sense for law firms to purchase.

C. Understand that a company’s business records are organized according to what makes sense for the business needs of the enterprise. Litigation demands usually are an afterthought, if they are considered at all.
D. Always follow the billing guidelines or obtain advance permission if you need to deviate for some reason.

5. Understand the way the particular in-house lawyer works.
   A. Try to learn the extent to which in-house counsel is familiar with litigation in general, the substantive law (e.g., ERISA, ID, Life) and the jurisdiction.
   B. Have a discussion up front in terms of expectations for who is going to be doing what and frequency and mode of communication.
   C. Make sure you understand what the in-house counsel’s desired outcome is for the case. You may not know what you think you know.
   D. Most of us want to know when you disagree with us on strategy or the possible outcomes in a particular case.

6. Understand the client’s clients and customers (internal business people and group policy holders)
   A. Understand that we have business interests that may be more important than the outcome on a particular matter.
   B. Also understand that you may represent us once a year but we are often working with particular business people every day and we need to maintain those relationships.

7. Protect the brand.
   A. Reputation has always been important but it has increased in importance in the Internet Age. Or, put another way, a company’s reputation is easily damaged by communications spread through the Internet.
   B. A legal argument may look good on paper but always consider how it will be portrayed in the media.

8. We expect you to advise, not just advocate.
   A. Our clients look to us to give them predictions about likely outcomes based on the facts, law and venue. We need to factor your opinions in with our own.
   B. Tell us if you think that we don’t have a good chance of winning and explain to us why you think that is so. Far better we hear it at the pleading or written discovery stage while there is something we can do about it than when we are preparing for trial.
   C. Don’t equate honesty in your advice with weakness. Most clients will appreciate the honest assessment without thinking you are an ineffective advocate.
   D. Don’t become invisible in the mediation process when the business person is looking for guidance on whether the settlement is reasonable or not.

III. Pet Peeves

1. Doing work that client doesn’t want (or doesn’t want to pay for).
2. Not allowing in-house counsel input on setting litigation deadlines.
3. Sending us first drafts of briefs.
4. Getting basic facts wrong.
5. Not properly supervising the work of your associates and paralegals.
6. Initiating settlement discussions or suggesting possible settlement outcomes without our advance discussion and approval.
7. Making your delay our problem.
8. Not properly managing your relationship with opposing counsel and counsel for co-defendants.
9. Not pushing back on onerous discovery demands and/or not appreciating how onerous the discovery demands actually are.
10. Being reluctant to predict a case outcome or to opine on case value.

IV. Trends in LHD and ERISA defense

1. Prelitigation settlement
   A. Growing field
   B. May be more important after new regulations; robust prelitigation settlement initiatives can encourage plaintiffs’ attorneys to wait for conclusion of administrative proceedings even if they think there is a violation of the regulations
   C. Important to track plaintiffs’ attorneys who are looking to use prelitigation process to push unmeritorious claims

2. Internal demographics
   A. Shift from “boomers” to “Millennials” is in full-swing
   B. Insurance companies are losing experienced claims analysts, managers and directors to retirement at an accelerating pace.
   C. Being replaced at the bottom end with new analysts, many of whom do not have the patience for lengthy tenures before being promoted.
   D. Net loss of experience has an impact on the front end on claim administration and on the back end in litigation defense.

3. External demographics
   A. Insured doctors are aging out of “own occupation” policies
   B. Older claimants are seeking to extend benefits after age 65

4. Insurance processes are becoming less analog and more digital
   A. Every part of the process is becoming electronic and Internet-based
   B. Can be helpful in establishing facts and circumstances of transactions that result in litigation
   C. Requires our outside counsel to become facile with the electronic processes so that we can get information into evidence and properly explain it to a jury.
   D. Use of “big data” and analytics in underwriting process is a topic NAIC is evaluating

5. Arbitrary and capricious or de novo review
   A. Sense is that different standards don’t affect overall win/loss percentage Insured doctors are aging out of “own occupation” policies
   B. But there are cases where judge will state it is upholding decision as reasonable even if he does not agree with it
   C. Makes sense to keep the arbitrary and capricious standard where possible.

6. Cost-of-insurance disputes
   A. Growing interest by plaintiffs and regulators