

**American Bar Association
Forum on the Construction Industry**

Selecting Outside Counsel

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I. What are You Looking for in Outside Counsel Services?

When you go shopping, do you go with an idea of what you are looking for or do you just "window shop" to see what's available? In "shopping" for legal services, the more experience you have in using legal services, the more likely you are to take the former approach rather than the latter. The marketplace is crowded with emerging new concepts for providing cost-effective, efficient legal services. The genesis of these emerging concepts has largely resulted from concerns over the inherent inefficiencies of the billable hour system. While a discussion of those emerging concepts is beyond the scope of this Workshop, the cost of legal services remains an obvious consideration in the selection of outside counsel.

While cost is an important factor, we may not feel we "price shop" for lawyers -- but do we? There are e-mail networks among inside counsel that seek referrals. Price is very often one of the primary considerations in the retention of outside counsel. The construction industry is comprised of businesses of every size, ranging from small to mid-sized companies to huge multi-national corporations. The small to mid-size companies may be at a disadvantage in negotiating billing rates, simply by virtue of the fact that they do not wield the same market power as the huge multi-national corporations who are able to leverage lower rates as a result of the volume of near constant legal work that they generate for their outside counsel. A recent ABA survey showed a marked skepticism by in-house counsel about the actual level of interest outside firms have in implementing alternative billing methods.¹

The Association of Corporate Counsel ("ACC"), working originally through the Small Law Department Committee, has been very active in a program known as "Value Challenge."² The concept is simple: returning the desired outcome at an appropriate cost. The program involves a dialogue between inside and outside counsel. It started as an effort to bring this

discussion down to the smaller companies, with small law departments. So what key criteria are we looking for when we evaluate outside counsel? Size, name, reputation, referrals, low hourly rates, expertise, political influence, responsiveness? Start with what the company needs, or wants, or both.

II. The Effect of Management Attitudes and Input on the Selection of Outside Counsel

The methodology of selecting outside counsel is largely a matter of personal choice based on both the culture of company for which the work is required and the needs of the in-house counsel doing the hiring. The following are suggestions of various considerations in-house counsel may find helpful in evaluating potential outside counsel for retention. These selection considerations are aimed at the kinds of matters that are not of the "bet the company" variety. In those cases, many rules go out the window, and legal expense is often the least of anyone's concern. For instance, one of my first assignments as a new Associate in my first law firm was to learn all there was to know about the Illinois Motor Fuel Tax Law. A client had just been served with a 67 count felony indictment for violation of that law. The client was not quibbling about how many hours were spent in the library reading every case ever decided under that law (there were 38 at the time). This paper and most of the discussion in the Workshop will focus on the routine matters that, while not life threatening, do have an impact on the bottom line of both operating units and the company as a whole.

This is a Workshop on selecting (as opposed to managing) outside counsel; therefore, we will focus on relationships that are not of long-standing. One of the more difficult components of selecting a new outside counsel is simply beginning a relationship with someone who does not know your company or its corporate culture. While embarking on this new relationship will

involve a learning curve, it is important to "choose wisely" so that the curve is short and this initial obstacle can be cleared to allow for effective communication and representation.

If you are the first lawyer your company ever had in-house, you were likely faced, at the very outset, with some initial assumptions of how your presence would impact the expenses attributable to outside legal services. Those in top management, who participated in the decision to hire an in-house lawyer, may have been advised that this action will not eliminate all outside legal fees (especially if their regular outside counsel participated in the process of hiring you in some way). However, upon learning that there is now a lawyer in-house, some managers with significant operations responsibility, may assume that outside legal fees are a thing of the past -- the new lawyer can "do it all". Naturally, this assumption adds some challenge to the internal discussion of why it is necessary to retain an outside lawyer.

Once you have crossed that hurdle, there are other considerations to the retention of outside counsel that come up along the way, considerations that run the gamut of the who, what, why, where and when of the retention. We will endeavor to examine a few of these considerations, presenting a blended perspective of both an inside counsel and an outside counsel. In order to arrive at the recommendations we have set forth in this workshop, we were required to "walk the walk and talk the talk", that is, to communicate effectively with one another from both perspectives to examine where we were in agreement and where it is clear that, historically, the parties to the process require better communication in order to facilitate the development of a mutually rewarding relationship. As in any negotiation, in order to communicate effectively, it helps to know what the other side is concerned about, and what their goals are. Any outside counsel retained to represent the company must be able to meet a certain set of expectations in order to become -- and remain -- an effective part of the team. Clear

communication of those expectations will go a long way to developing a mutually satisfactory relationship on both sides of the equation.

A. Ability and Willingness to Predict Outcomes

The operations manager must, by necessity, plan, forecast, budget and look ahead. Those to whom he or she reports expect it. As a result, the operations manager wants -- and needs -- to know what the outcome of that legal matter that cropped up last quarter is going to be, and what effect it will have on the bottom line. The question is often posed as "can we win this one?" A simple "yes or no" answer is expected. Unfortunately, most lawyers have a difficult time with committing to "yes or no". Regardless, if this is the type of answer that the company demands, it is incumbent on in-house counsel to choose an outside counsel that can respond in that manner (even if the response then contains a bit of equivocation by way of explanation).

Effective communication between in-house counsel and outside counsel regarding both the facts pertinent to the matter and the expectations of the company for file handling are essential to establishing a good start to the new relationship. The reality is that the manner of providing legal services to individuals and companies of all sizes is highly dependent upon the client itself. No two companies have the same set of expectations; therefore, the in-house counsel and outside counsel must discuss, in detail, the company, its culture, its philosophy on business and customer interactions, etc., so that the company's overall objectives in the matter can be achieved in the manner desired. The building of a new relationship, by its very nature, is a somewhat fluid process, so the parties must each be committed to working with one another throughout the life of the matter to fine-tune any issues which may arise.

When selecting an outside counsel, it is important that the lawyer be attuned to the needs of the company and to the reporting requirements of its managers. When asked to provide a

prediction as to the likely outcome of the matter on which assistance is sought, outside counsel must be willing to expand on the standard reply of "it depends." If a lawyer is accustomed to dealing with clients who simply refer a matter and then say "call me when its over", he or she may have a hard time with the concept of predicting outcomes and supporting those predictions in a manner that assists the operations manager in meeting the requirements of the company. Therefore, it is important for the in-house lawyer to communicate how this matter fits into the operational considerations of the manager who will be making the ultimate decisions about settlement, going forward with the deal, or changing the way the company handles certain transactions.

Business people like percentages, 50-50, 60-40, 70-30, so it helps to find an outside counsel who can explain things in those terms even if they feel more comfortable utilizing a small factor of safety (i.e. 60% chance of being granted summary judgment on Counts I, II and III of the lawsuit, give or take 10%). Predicting outcomes with a high-level of certainty can be difficult and many outside counsel are reluctant to predict outcomes at the earliest onset of a matter -- especially in litigation where nothing is black and white. Nonetheless, outside counsel should be willing to provide in-house counsel with an evaluation of the likely outcome of the matter based on their experience and knowledge in the area in question.

It should be acknowledged that the reliability of a predicted outcome is directly impacted by the quality and completeness of the information provided by the company to outside counsel. Inside counsel and the company should understand that, beyond providing outside counsel with the most complete information possible, there are certain factors, particularly in litigation, which may be unknown at the outset. Unknown factors may impact the predicted outcome. For instance, a change in the law, the discovery of previously unknown and unfavorable facts, a

judge who does not rule consistently with the law, or the leanings of a jury may impact outside counsel's predicted outcome. It is the job of outside counsel to always base outcome predictions on the most current state of the law and the facts and, in the face of anything that changes those predicted outcomes, to communicate both the change in the predicted outcome, the reason for the change immediately.

In selecting an outside counsel, we want someone who looks beyond the immediate matter to discuss the long range impact of that matter on not only the business, but on the company's relations with its customers and business partners. In this area, experience is a big factor. Ask about experiences in similar matters (with names left out of course). Don't be afraid to dig beyond their comfort level to inquire about how things were handled on similar matters and what might be done differently in your case. If the outside counsel is reluctant to discuss past experience or hides behind "privilege" step back and look around a bit.

B. Ability and Willingness to Predict Costs Associated with the Retention

Predicting cost should be as important to outside counsel as it is to the company. Alternative billing arrangement should be discussed at the outset to determine whether the matter involved is of a type suited to a non-hourly billing arrangement.

The seminars on budgeting and alternative billing arrangements are legion; however, if you were just served with a complaint, or must file one yourself in a jurisdiction where you have never used outside counsel before, one factor to consider is: How much is this going to cost? It is the first question the business people ask. The cost of pursuing the matter is a big part of the decision making process. Most astute business people know that fighting for principle is expensive. The legal cost is a cost of the transaction. Even a good result in litigation is usually just a reduction in loss or cost, not a money making prospect.

If the company is seeking to file a lawsuit, it is important that in-house counsel communicate to outside counsel what the company is seeking to achieve, so that in-house counsel and outside counsel can develop a litigation plan that will achieve those objectives without "over-litigating" the case. What is a "win" to the company under the circumstances presented? How intimately will in-house counsel be involved in the day-to-day litigation process? As the litigation progresses, in-house counsel and outside counsel should periodically re-evaluate the facts which have been discovered and the track of the litigation to determine if changes to the litigation plan need to be implemented to best ensure that the company's goals are met.

Costs of litigation, especially when the company is a defendant can, occasionally, get afield of initial cost estimates. It is important for outside counsel to work with in-house counsel to develop a cost estimate which is based on both a set of specific tasks anticipated to be necessary in the litigation and on a typical matter of this nature as handled by outside counsel in the past. Just as in predicting outcomes, the company should know that after the inception of the litigation, certain factors may come in to play which impact the initial cost estimate. For example, if the company is a defendant in litigation where the plaintiff is represented by a lawyer with no experience in the area of law involved, the case is likely to be over-litigated (as a consequence of the plaintiff's lawyer trying to learn the law through the case) or if it becomes necessary to take appellate action.

Outside counsel should know that neither in-house counsel nor the company like surprises, especially ones that impact the cost of the proceedings. It is the job of outside counsel to advise in-house counsel of anything which transpires in the litigation that impacts the cost estimate so that decisions can be made regarding the litigation plan.

C. Responsiveness

Look for someone who calls you back. If the outside lawyer is so busy that they cannot respond in a timely manner, then perhaps they just aren't that interested.

The lawyer must understand that managers must report quarterly, and sometime monthly, on many matters. As a result, they can't wait two weeks into the next quarter to be surprised by the latest prediction of fees and outcomes. Be specific in the direction that you provide to outside counsel regarding both the communication protocol to be used for the matter at hand and what your expectations are for "timely" reporting of a change in predicted outcome or cost-estimates.

Establish communication lines up front. You want someone who will commit to certain lines of communication, through the legal department. Discourage use of anyone who wants to go direct to management on all matters. You will be held accountable for what the outside counsel does, or does not do, so you need to be inside the loop.

In addition to establishing an expected line of communication for the outside counsel, lines of communication should also be established up front with the various managers, employees and representatives of the company will take part in the evolution of the matter. This will assist in maintaining efficiency of communications which will, of course, result in less legal fees being incurred. If in-house counsel is involved in the communications between outside counsel and other members of the company, the redundancy that would result from outside counsel later having to advise in-house counsel of what transpired can be avoided. This will further assist you, as in-house counsel, in being able to immediately respond to whatever action needs to be taken as a result of the information obtained during the discussion between outside counsel and other members of the company.

D. Ability to Develop an Early Resolution Strategy

The biggest pitfall in the retention of a new outside counsel is the unwitting retention of an outside lawyer who "churns the file". You want someone who is comfortable handling a matter on less than a "cavalry charge" basis. The outside counsel needs to be able to scale back from the "bet the company" mode. In order to achieve this, the outside counsel should have a full understanding of expectations for appropriately staffing the matter, what the company desires to be the ultimate outcome of the matter, and what legal actions are necessary to realistically achieve the company's goal in this matter. Points are given to the outside counsel that can make good suggestions on how to reach a final solution by other than the "normal" approach of slugging it out until the last one is standing.

Many construction cases seem to get bogged down in serial mediations which, contrary to their hype as alternatives to litigation, often do little to move the case along. There are meetings and conferences that do little more than set dates for the next conference. As in-house counsel, you may have seen enough of this to know that there must be a better way. We are interested in a lawyer that can discuss ways to break this cycle and try to get to a resolution. If it is one of those cases where you are a minor party, and no one will even talk about settling you out, then the outside counsel should be able to work with you on keeping the fees down, while we all wait for the ultimate settlement opportunity. For example, does the roofer's lawyer really need to attend the deposition of the foundation sub?

What the company most needs in outside counsel is not someone who is simply a "Yes-Man", agreeing with everything in-house counsel says no matter if their own experience tells them that a contrary result will be reached. What the company needs is an outside counsel who will be invested in the company's success long-term, beyond the matter at hand -- an outside

counsel who asks the right questions of the company, who assists the company in pulling together information necessary for a complete risk-reward analysis, so that the company isn't blind-sided by the development of adverse facts that can negatively impact a predicted outcome. The company needs someone who can counsel the company based on objective standards while communicating that advice in a thoughtful and professional manner.

III. Management Outlook: Why Do We Need to Hire Outside Counsel When We Have You?

To some managers, and even some CEOs, the worst thing about legal issues is paying legal fees. The outside counsel who can deal with that attitude is helpful in moving the process along. Ask this question: If the case is settled for \$20,000 after a year of wrangling, and \$40,000 in fees, why didn't we just pay the \$20,000 up front. The answer may be obvious, but you need to find someone who can deal with these types of questions, in a tactful and positive way.

On the transactional side, there may be pressure to have the in-house lawyer handle everything so that fees for outside counsel are not incurred. Many transactions can be handled in-house, but there are some where it is dangerous to have the generalist "wing it" when a little specialized help will add to the outcome. You need an outside counsel who will partner with you to work as a team, not one who feels the need to re-do everything the in-house lawyer has already done thereby adding unnecessary expense. Often, all the in-house counsel needs is someone who is licensed in, and has the knowledge of, the jurisdiction. Sometimes you need an opinion letter from an outside firm to meet some closing requirements. When partnering with outside counsel in this manner, each engagement should contain clear guidelines as to who is responsible for doing what.

Once the company accepts the idea that the in-house legal department may not be able to perform every bit of legal work that the company requires, some in-house counsel may find themselves living in the shadow of the outside counsel who has represented the company for years and who happens to be an old buddy of the CEO or of another top manager. This is the flip side of selecting outside counsel, namely, getting rid of, or at least end running, the entrenched counsel.

If the entrenched counsel's area of expertise is different from the type of matter you have in front of you, this may be an opportune time to broaden your horizons. If the entrenched counsel is part of a large firm, you may not need a new firm -- just a new face. Ask if the firm has a specialist in as narrow an area as you can define. Hopefully, they do. If not, this gives you an opening to search wider, without getting the call from the CEO wanting to know why "we are not using" his old buddy.

IV. Litigation Aside, in What Other Areas of Law is Outside Counsel Typically Needed?

Litigation is the most common type of work that is referred to outside counsel. What about all the "other stuff" on which you may need some outside help, despite expectations of some in your company that you can handle it inside. Every company is different.

A. Contracts

In evaluating potential outside counsel to assist with contract negotiation or drafting, you need someone who knows enough about the construction business, and where your company fits into it, to help you put together what you need without re-inventing the wheel. This may be a joint effort where the basic structure is done by in-house counsel with a later review for suggestions by outside counsel.

The key is to establish the ground rules up front -- define your expectations for this transaction. Are you trying to draft something that will give you all the breaks and rights, and strip the other party clean? The alternative may be to try to draft a contract that is reasonable and that is likely to be signed pretty much as is -- even if the other party does read it and even if they send it to their lawyer for review. If the latter is your goal, make that clear when discussing the project with outside counsel. The whole process is a waste of time if you send it outside, and the lawyer wants to give it the full court press because he or she believes that is what they are supposed to do.

It may be helpful to look for an outside counsel with experience representing different members of the construction industry. If you are a contractor, you may not want an outside counsel who only represents contractors, as they will inherently share your point of view. You are looking for experience, not bias. The outside counsel who is myopic in his or her view of the world will likely not prove to be of great assistance. It may also be useful to look for an outside counsel with experience in both drafting contracts and litigating them. Lessons learned in litigation or arbitration can be invaluable to tightening up provisions in contracts which you may think are iron-clad, but may not hold up when challenged.

Clearly define, up front, the scope of the project up for which the outside counsel is being retained. You, as the in-house lawyer, need to keep some business focus. It does no good to have a great contract that protects the company from everything ranging from liquidated damages to the swine flu, if your operations people cannot sell it. If the outside lawyer does not buy into your approach, perhaps it is time to look for someone else.

B. Mergers & Acquisitions

This may be one area where outside help is really needed, if for no other reason than it eats up a tremendous amount of time -- you won't be able to do anything else for weeks. You want to retain an outside counsel that has experience in this area and that has a proven track record for efficiency. Often there are brokers or corporate headhunters involved in finding prospects for acquisition. These individuals may have recommendations for outside counsel to assist in the M&A process. Ask about past deals. What were the fees in relation to the value of the deal? How much of the spade work can be done in house to save cost? If it is, make sure it is not duplicated outside.

C. The Specialty Needs

Every in-house legal department in every part of the construction industry is different. In-house lawyers usually devote their time to the issues that most affect the company. Aside from litigation management, the department may routinely handle contract negotiation and drafting, licensing and intellectual property issues, employment and labor issues, and so on. Depending on how many lawyers make up the in-house legal department, different members of the department may develop different areas of expertise inside the company. Small in-house legal teams comprised of one or two lawyers often cannot effectively develop expertise in all of the areas of law which are implicated by the day to day running of a corporation, nor can small teams typically handle all of the legal issues which rear their heads on a daily basis.

If you are a member of a small in-house legal team and you have made a decision to concentrate on certain types of matters, numerous others require the attention of outside counsel with expertise in those areas. Developing a good network of outside counsel is critical to the overall management of the many legal issues with which you are faced. Your outside counsel

network should be comprised of people from whom you know can get a quick response and solid advice regarding the most appropriate and most efficient handling of any particular matter outside your area of concentration. Sometimes all you need is a few minutes on the phone. Sometimes you need an explanation of new legislation in a particular state that may require across the board changes in some standard practices or procedures used by the company. In short, you need a network of specialists who handle these issues everyday, for whom the area of specialty is their specialty.

Your network of "specialty" outside counsel may come from a large firm with numerous specialty practice areas, or perhaps from a boutique firm with a concentration in a highly specialized area which directly fits your needs. What you don't want is an outside counsel who claims to be able to help and then sends an associate to the library to spend a week researching the topic. The savvy practitioner who can answer your questions over the phone, or at least give you a good read with maybe a quick look at one or two points, is worth developing a relationship with, as is the practitioner who is willing to admit that he or she doesn't have the specific experience you are seeking on this occasion, but is willing, on their own dime, to help you find the right person to help you get your questions answered. That practitioner deserves to stay on your short list of "go to" outside counsel for matters that later arise within their area of expertise.

There are certain areas of law which you will, undoubtedly, encounter at some point in your position as in-house counsel. Your network of specialty outside counsel should contain a roster of potential counsel who will be able to address questions which arise in these areas of specialized expertise. For example, the economic troubles of recent months has required some in-house counsel to deal with bankruptcy courts for the first time. A claim form arrives in the mail because the sweep of the debtor's records references your company in the files. The in-

house counsel immediately gets a phone call from the branch office that received the notice regarding the debtor's filing for bankruptcy. They want to know what to do with the notice and when they can expect to get the money owed by the debtor. As the in-house counsel, you want a quick answer on some general points of bankruptcy law and procedure. If you have a contact with an outside firm that has a bankruptcy practice group, you may be able to obtain all the information you need about the notice, the form and the proper procedure in a ten minute conversation which might cost \$100. Compare that cost to the time it would take you to research and locate the same information on your own, being sure to factor in all of the other items which would receive no attention while you undertook and completed that task. If the same bankruptcy issue arises and you have not yet developed a relationship with an outside counsel who can readily address your questions and if you don't have the time or resources to undertake this task yourself, you might find yourself with the unenviable task of locating and setting up a meeting with a new outside counsel, or sending the notice and claim form to the new outside counsel only to have to then wait for a lengthy memo explaining the whole bankruptcy code before you can call the branch office back and tell them what they can expect. The motto of this story is: be prepared.

D. Employment Law Matters

As a natural consequence of working for companies that have employees, most in-house counsel have to deal with a variety of employment issues on a regular basis. Most companies can expect, at some point, to be involved in litigation involving some facet of employment law. If we were to try to imagine an ultra-slim, silver-lining that might be result from being embroiled in litigation, it might be that this is an area of law where involvement with outside counsel in the litigation of a prior employment law matter often results in an established, reliable resource for

in-house counsel to obtain good advice from outside counsel on other (non-litigated) employment law matters. Whether the issue involves a labor union, a change in federal regulations, or any one of a myriad of other employment related matters, reliable resources for employment law issues are a critical component of the seamless operation of the company's day-to-day business. If your company does business in more than a couple of states, you need a wide network of outside counsel at your disposal. This may be achieved through either relationships with multi-jurisdictional firms or through other good sources for referrals.

In a recent article in the ACC Docket, one company outlined their method of handling employment matters through an outside firm with a multi-jurisdictional practice in many of the locations where the company maintained facilities.³ This involved a retainer and a hold-back pending an evaluation of the work performed. The representation did not involve the defense of lawsuits, but rather a significant level of pre-litigation counseling to head off potential litigation. The company was spending enough on the retention of the outside firm (the old fashioned way) to justify this arrangement, but not enough to justify a dedicated employment specialist in-house. One of the hallmarks of this arrangement is that the cost to the company become much more predictable -- which is helpful for budgeting purposes. If your company is involved in a similar situation, it may benefit you to examine what your legal costs for outside counsel have been and then approach the outside firm about such an arrangement.

E. Updating Policies to Meet Changes in Legislation or New Evolving Case Law

One of the biggest challenges to the legal department of a corporation is to keep up with the changes and updates in legislation, regulations, and the continual evolution of the law resulting from opinions issued by the various state supreme courts. The number of states that most in-house counsel have to cover makes this a difficult proposition.

This is where an established relationship with outside counsel can provide good and timely information to which you might not otherwise have immediate access. Many law firms publish client alerts or other types of newsletters on various topics. These are very often delivered via e-mail. Once you have established a relationship with outside counsel in a particular city or state, ask about these kinds of services. Couple this with the updates available from the ABA and ACC and you will find that you have a lot of resources at your disposal which can assist you in being updated on relevant changes in the law. At the very least, if you need further information, you have someone you can contact to get you started.

V. Interviewing/Evaluating the Outside Counsel Candidate

There are numerous areas of inquiry that may be addressed when vetting a lawyer to serve as outside counsel for the company, many of which may be unique to the company's past experiences -- both good and bad -- with outside counsel. What follows is a discussion of a few topics that you may wish to discuss or evaluate outside counsel on as part of the "interview" process.

A. Alternative Billing Arrangements

In another article appearing in the ACC Docket, the approach one company has taken to interviewing outside counsel on billing arrangements is outlined.⁴ While the company profiled is not a construction company (and is larger than many companies within the construction industry, including the size of its law department), the questions used by this company to interview outside counsel on billing arrangements may have some broad usefulness. For the purposes of this Workshop, the questions have been modified somewhat to make them more generic.

1. Has your firm instituted any cost containment models, practices or procedures. If so, what are they and how do they work?

2. Are there any services, or aspects of litigation, that can be performed by your firm on a flat fee basis?
3. Has your firm previously participated in any kind of results oriented billing arrangements and, if not, are they open to discussing such an arrangement in relation to this matter?

B. Fitting Within the Construction Model: Willingness to Add Value at the Front End with No Guarantee of Retention.

What is the biggest impediment that keeps business people from calling lawyers? The hourly rate. Right or wrong, the perception among business people is that there is no investment by lawyers in developing business with their company and no sharing of the risk. This perception is one reason why today there are more in-house counsel than ever before.

In the construction industry, the business people that in-house counsel deal with everyday are accustomed to spending a great deal of time and effort just trying to get the job. No payment is ever received for this investment of time and effort. These same business people often ask the question: Why can't lawyers do a little of the same? Why can't outside counsel engage in a pre-engagement "walk-through" with the billing clock either turned off, turned down, or calibrated at a flat rate? Don't be afraid to ask that outside counsel do some of this preliminary work at a reduced fee, or to request that no fee be charged for the initial conference. As we often counsel our business clients on contract changes, you never get anything you don't ask for.

With a little effort, there is no reason that outside counsel and in-house counsel should not be able to arrive at an arrangement that meets the construction model the business people are seeking. If in-house counsel is going to be successful in getting the outside counsel to commit to this concept, he or she should first make sure they are speaking with someone that has the experience to discuss a construction matter and who has the authority to agree to such an arrangement. The reality is that you will never get what you don't ask for and many lawyers will

be willing, if asked, to spend some amount of time with you discussing the details of the case if it means that they might be able to "land" the representation.

An outside counsel with whom your company does not have an entrenched relationship may be eager to demonstrate his or her commitment to the company by "donating" some time in this manner; however, in-house counsel would do well to make clear that the donation is just that -- a donation -- not time to be billed after the representation is given. An outside counsel with whom your company is entrenched may also be willing to donate time in this manner as a means of continuing client development; however, given the existence of the relationship and the continual contact between in-house and outside counsel regarding various matters requiring the attention of outside counsel, in-house counsel should anticipate that a specific request may be necessary in order to secure such a concession off the usual billing practices employed between the parties.

C. Demonstrating Ability Through Initial Impressions Formed at the "Walk-Through"

Regardless of whether the matter involves a new outside counsel or an entrenched counsel, when a lawyer agrees to make a commitment to the construction model and to donate time at no fee or at a reduced fee, in-house counsel should be prepared for the meeting which has been requested. Do your homework to gather as much background information as possible before the meeting, so that the effort will be productive. Just as a construction project typically has a set of plans and specifications before the bid is let, so should any meeting with outside counsel be carefully thought and planned for so as to maximize its impact and to set the course for an efficient resolution to this issues involved.

In non-litigation matters, one of the most important points to make with outside counsel is to, at the very outset of the representation, clearly communicate what the company desires to

be the end result of the task which is being assigned. Define the parameters with specificity so that there can be no misunderstanding. Thoughtful and precise definition of the desired outcome is also necessary in litigation. If the company is determining whether to take on the role of a plaintiff, be clear about what it is that the company is trying to accomplish by filing the litigation. If the company is involved in litigation as a defendant, this initial discussion with outside counsel is where the process of evaluating the cost and the risk begins.

Ideally the outside counsel, if given enough information, can give you some idea at the "walk-through" of how they will handle the matter, who will be involved, what the business risks are that will require a decision, and how much the project should cost. While the total cost of litigation is a little harder to predict given the variables of the process, if outside counsel has experience in the field and in the jurisdiction, he or she should be able to call on past experience to give some educated estimates.

1. Reasonable Expectations of Information to Be Gained From Outside Counsel at the Walk-Through in Relation to Litigation

At a minimum, an outside counsel who is qualified to represent the company in the litigation should be able to discuss some of the following pieces of information with the in-house counsel at the "walk-through":

- Impressions of the relative strengths/weaknesses of the case based on the information conveyed
- Identification of additional information which will need to be discovered or which may serve to support your position
- Information regarding the court in which the matter is (or is proposed to be) pending, including information regarding favorability of venue relative to position as plaintiff/defendant, removal considerations, etc.
- Alternative dispute resolution rules, practices (check your contract to see if they are required), and knowledge of mediators/arbitrators who will actively seek to resolve the dispute rather than drawing it out to generate fees

- Knowledge of opposing counsel, if the company is a defendant
- Applicability of affirmative defenses, if the company is a defendant, and of statutory provisions which may allow for the recovery of attorneys fees and expenses of litigation in the absence of a contractual provision entitling the company to such an award; and,
- Local rules and practices on discovery

2. Reasonable Expectations of Information to Be Gained From Outside Counsel at the Walk-Through in Relation to Transactional Work

The outside counsel who is qualified to represent the company in transactional matters should already be familiar with the type of transaction for which they are being retained. The company should not have to pay for the outside counsel to become familiar with routine transactions -- they are being retained for their expertise in this area. If they aren't experienced in the type of transaction involved, then perhaps you should consider retaining a different outside counsel. An outside counsel who is qualified to represent the company in a particular transaction should be able to discuss some of the following pieces of information with the in-house counsel at the "walk-through":

- Type of transaction
- Basic documents needed from the company
- Typical hot button issues involved in this type of transaction
- Regulatory Issues to be dealt with

D. Other Evaluation of Outside Counsel at the Walk-Through

Beware the outside counsel candidate who does not demonstrate an ability to listen to in-house counsel or other members of the company at the "walk-through" discussing the matter for which outside assistance is needed. The outside counsel candidate needs to listen to the information that you are trying to convey. If he or she cannot take a backseat in the process long

enough to listen to what is being said and, if necessary, to read between the lines to develop an understanding of how the company desires the matter to be handled, they may start giving opinions which are not in harmony with either the evidence or the objectives of the company. This should be considered a "red flag" to the retention of the outside counsel in question.

One such experience involved a lawyer who wanted to tell the prospective client about all the trials he had won and how he loved trying cases. In many ways this was not encouraging and was incongruous with the company's desire for how the dispute should be handled. The company wanted the matter to be resolved as efficiently and quickly as possible. There is nothing efficient or quick about trial. There is a view, held by some, that a case that goes to trial is one in which one side or the other has a significantly incorrect view of their case, the other side's case, or both. This may account for why it has been reported that in excess of 95% of civil cases never proceed through trial. The lawyer, however unintentionally, was communicating that the dispute would not be resolved efficiently, quickly or in the manner desired by the company, but would instead be subjected to unnecessary expenditures of time, money and resources. By failing to actively listen to the company's perspective on the dispute and their desired resolution of same, the outside counsel talked himself out of an engagement he might otherwise have secured.

E. Outside Counsel's Ability to Handle Business Concerns

How tuned in to business side issues are the outside counsel? If a dispute comes up while a project is still underway, do they know what to do to keep the project moving, and counsel your business people? When a dispute arises on a project which is underway, in-house counsel would do well to choose an outside counsel that has experience acting in a "project

counsel" role, keeping in the forefront of their mind that oftentimes the most important thing is to keep the project moving even while trying to resolve a dispute that threatens that goal.

F. Special Considerations Relating to Insurance Staff Counsel or Panel Counsel

If a dispute arises to which insurance may apply, in-house counsel needs to have a good understanding of the requirements of the various policies maintained by the company. How much control does the company, in its role as the Insured, have? If the company has a large deductible or SIR, a lot of the early costs (and maybe even the whole risk) are really funded by the company's money, not the carrier's. The company is best represented by a lawyer who is accustomed to dealing with the ultimate client, the Insured, not a lawyer who is accustomed only to dealing with the claims representative and who views the insurance carrier as "the client".

Insurance defense counsel, whether on panel or on staff with the carrier, may not be as attuned to business issues that may be a factor in settlement decisions. If customer relations are a factor, particularly where third-party claims and cross-claims are involved, will the lawyer retained by the insurance company listen to your concerns and, more importantly, follow your directives when they do not conflict with the terms of your policy of insurance? It may be that the customer who has dragged you into the case is not in control. Their deductible may be small enough that the decisions are really being made by their insurance carrier.

In these situations you want to work closely with the carrier on the selection of counsel. Do not just accept the selection they make. Do not be afraid to "interview" the claims representative about the defense counsel that he or she is seeking to assign the defense of the company to. You should approach this in a manner similar to that you would with your own retention of outside counsel. Ask about experience and track record. If the company has previously been involved in litigation in the same jurisdiction and was represented by counsel

retained by the carrier, request that the carrier retain the particular lawyer that previously obtained a good result for you. The opposite situation may also present itself in that you may request that the new litigation matter not be assigned to the person who represented the company the last time.

Talk to the lawyers recommended by the carrier. Ask the same questions you would ask of any prospective outside counsel. If you can, go and meet the defense counsel in person. It may be a useful trip. Many staff counsel are surprised by these visits, as they don't often see the Insured's representative, much less their in-house counsel, showing up in their office. They are usually pleased that you have taken the time to meet with them and it re-enforces the message that the matter is important to the company in more ways than just the numbers listed on the insurance claim report. You may find that they are more responsive to a person they have actually met.

If you have a good working relationship with a firm or lawyer in a certain location, try to get the carrier to talk to these people about the representation. Explain to the carrier that you are comfortable with this lawyer or firm and that they know your company. If your carrier has a dedicated construction claims unit, they may know some good construction lawyers; however, if the claims are handled by a general claims unit, you will need to work with them on the different aspects of a construction case that may be different than other matters they see every day.

G. Specifications for the Initial Walk-Through

The following are some commonly asked questions, the answers to which may help us in our evaluation of both outside counsel and the merits of a piece of litigation. If you have already compiled this information at the time of the initial meeting with outside counsel on a litigation matter, the meeting may be more productive -- and less expensive. It may also give you a place

to start from in the difficult questions about cost and cost saving measures. Finally, by providing outside counsel with this level of detail and gauging their level of detailed analysis which results from having been given this information, you might better be able to determine, at the very outset, whether the outside counsel appears to have the capabilities you are looking for in a representative of the company. This can be used as a form for your preparation for your initial meeting with outside counsel.

"Pre-Bid Walk-Through" – Litigation

Date of Initial Meeting

What do we know, that is either not disputed or easily established?

What are we still looking for:

We need some help to determine:

We will have to get this information through discovery:

Major facts in dispute:

Alternative Positions:

Supporting Evidence:

Evidence Needed to Refute Adverse Positions:

What we don't have that would help:

What we don't have that helps the opposition:

What we have that helps:

What we have that hurts:

Credibility Issues:

Ours:

Theirs:

Verdict potential:

High:

Low:

Settlement Value Range:

Cost to resolve:

Are Attorneys fees recoverable by either party?

Any other Comments:

Participants:

Company:

Law Firm:

Insurance Carrier(s):

¹ Weiss, Debra Cassens, *In-House Counsel Vote 'No Confidence' in Firms, Shrug Off Talk of New Legal Model*, ABA Journal, June 30, 2009.

² See Program materials from ACC 2008 Annual Meeting.

³ Wolf, Mark and Notestine, Kerry, *Controlling Outside Counsel Costs through an Alternative Billing Model*, ACC Docket, May 2008.

⁴ Paulmann, Frederick H., *Effective Partnering between Inside and Outside Counsel*, ACC Docket, November 2008.