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An Ounce of Prevention – Strategic Outside General Counsel Solutions

by Mark Foster, Counsel

All businesses (big and small) face legal issues every day ranging from the urgent (a lawsuit was just filed against the company), to the routine (a customer marked-up our form contract), to the mundane (where do we put our minimum wage poster?). For most businesses, the urgent issues are easy: select and engage a law firm or attorney with expertise in the subject matter. The routine and mundane legal issues are not.

The Corporate Dilemma

Most executives and managers realize that engaging outside attorneys for every routine legal matter can get expensive quickly; outside counsel fees are often unpredictable (and therefore difficult to budget) and frequently outweigh the value of the business matter (i.e., unanticipated legal fees can quickly erode profits). With that said, most prudent business executives also realize that the failure to consult an attorney with respect to many legal issues can (and frequently does) expose their businesses to undue risk and potential liability if not handled correctly.

In order to solve this corporate dilemma, businesses traditionally take one of two paths:

- 1. Hire an in-house attorney to handle day-to-day legal matters.** This path offers predictability for budgeting purposes, potential costs savings (assuming there is enough work to keep the in-house attorney busy) and peace of mind for executives. Nonetheless, it is difficult to quantify the added value of an in-house attorney and even more difficult to reduce the overhead burden as work flow fluctuates; OR
- 2. Address day-to-day legal issues among the business team and hope that the routine legal issues do not develop into urgent legal issues (also known as the “hope and pray” approach).** This path is less expensive in the short term, but risky in an increasingly complex and litigious business environment. *This approach also seems to be the preferred choice for most small to mid-size businesses.*

Having recently joined Snell & Wilmer after 13 years as an in-house attorney for three very different companies, I set out to find an alternative solution to this corporate dilemma that offers predictability for clients, real cost savings and the intangible benefits offered by traditional in-house counsel. Although not new, outside general counsel (Outside General Counsel) services can offer an elegant solution to a traditionally challenging corporate issue.

What are Outside General Counsel Services?

Outside General Counsel services offer clients access to an experienced attorney under a retainer (or reduced fee) arrangement in order to allow the client and the attorney to develop a working relationship based upon trust, consistency and sound legal advice. Clients benefit from this arrangement by having a “go to” attorney who over time gets to know the client’s business operations, management team and legal/business sensitivities coupled with expense predictability under a retainer fee structure. This significantly improves the delivery of legal services to clients because it reduces and even eliminates the ramp up time when a new legal issue arises and encourages clients to pick up the phone or forward an email when legal issues arise by offering a predictable cost structure. Law firms benefit from this model because routine issues sometimes turn into urgent issues and being that first legal point of contact allows a full service law firm to capture a larger share of a client’s litigation, corporate and transactional work when these significant issues inevitably arise.

What types of legal issues are best suited for the Outside General Counsel arrangement?

Although every business is different, the types of routine legal issues facing companies are seemingly universal. The most typical routine legal issues are related to contracts, corporate governance and employment-related matters.

► **Contracts:** Every business enters into contracts every month. These include contracts with customers, vendors, suppliers, landlords, lenders,

investors, franchisors, franchisees, consultants and the like, and include things like non-disclosure agreements, leases and countless other agreements. Reviewing contracts for legal pitfalls before they are signed will help facilitate contract administration and prevent future disputes.

► **Corporate Governance and Best Practices:** Most businesses are structured as legal entities (corporation, limited liability company, limited partnership or trust). Each legal entity is subject to certain contractual and statutory requirements that frequently require corporate resolutions, appointment of officers, corporate minutes, written consents, risk management and reporting. Without periodic legal review and housekeeping, business entities fall out of compliance with their governing documents and expose businesses to undue risk relative to investors, lenders and other stakeholders.

► **Employment Matters:** Every business with employees in the State of California is faced with a complex and frequently changing set of rules related to employment matters. Companies reduce the size of their workforce, terminate underperforming employees, respond to wrongful termination claims, and deal with a variety of other issues ranging from medical leave to sexual harassment. Without regular legal advice and guidance (including updating policies and procedures), businesses address these issues at their own peril.

The one universal reality for businesses today is that unexpected legal issues will arise and a company that is prepared with a legal team at the ready will be able to respond and mitigate risk better than its competitors.

Who makes a good Outside General Counsel?

The best Outside General Counsel are attorneys who understand the goals and objectives of their clients’ businesses and executive teams *and* who are prepared to offer practical solutions based upon this institutional knowledge and sound legal analysis. Too many attorneys merely issue spot and offer the client a menu of potential risks. The most effective Outside General Counsel will offer these alternatives and then make a clear recommendation for action. This attribute alone saves the client time and money by avoiding a painstaking review of potential legal issues, not all of which are created equal.

In order to be truly effective, Outside General Counsel also need to have the resources of a *full-service law firm* with a diverse range of specialties. Without these resources, Outside General Counsel will not be able to truly fulfill the goal of providing timely and targeted legal solutions through prevention and, if necessary, zealous advocacy.

In an increasingly complex legal and regulatory environment, businesses should consider engaging Outside General Counsel on a monthly retainer basis who can navigate the intersection of business and the law seamlessly. This acumen is developed only through a true appreciation of a client’s business model and objectives and is fostered through an open and regular dialogue between business clients and attorneys.

For more information about Outside General Counsel services, visit <https://www.swlaw.com/services/outside-general-counsel>.

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Mark Foster recently joined the Orange County and Los Angeles offices of Snell & Wilmer after more than 13 years as in-house corporate and real estate counsel to major investment and development companies. His practice includes Outside General Counsel services as well as the representation of institutional owners, operators and developers, financial institutions and investors focused on equity investments, joint venture formations, acquisitions and dispositions, leasing, real estate-related lending, and debt restructuring, workouts and reorganizations. Reach Mark at mfoster@swlaw.com or 714.427.7435.

