

Lateral Thinking: Non-Traditional Relationships Between Lawyers and Law Firms

Law practice in the 21st century requires innovation, flexibility and responsiveness. Meeting the needs of clients in a competitive environment means that resources need to be deployed with economy and precision. Law firms confront a vast array of problems in the matters they handle for their clients. There are times when permanent staff and partner expertise will not adequately respond to the issues presented. When this happens, law firms can take a page from the internet economy and shop for expertise to meet their clients' requirements.

There are a number of models which allow expertise to be recruited and deployed on a temporary or long-term basis without adding permanent employees and their accompanying overhead. These models differ from the traditional 'Of Counsel' role which is usually taken by a senior or retired partner and involves annual compensation at some level.

Co-Counsel

A more focused and flexible arrangement is to seek co-counsel for a particular file. Candidates would include leading practitioners in a specialty area. A review of candidates can continue until a good fit is found.

A co-counsel agreement should be drafted and signed in relationship to every matter in which co-counsel is involved. A copy of the agreement should be kept in the file. A copy should also be sent to the client. This agreement should address the following issues:

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- A. File management – File sharing protocols and responsibility for procedural requirements must be agreed upon.
- B. Discovery, mediation, arbitration and trial – The role of counsel and the law firm in each critical stage should be discussed and agreed upon as early as possible.
- C. Settlement – The role of counsel in reviewing settlement offers should be defined. Where counsel has a role in advising the client on settlement, he/she should also review and approve all settlement documentation.
- D. File Funding – The source of disbursement funding for the file should be identified. If counsel will be contributing to this funding, there should be an allowance in the apportionment of fees to reflect this commitment.
- E. Apportionment of Fees – The agreement is normally based on time and resources committed, responsibility and risk assumed, and the result achieved. If the firm has a contingency fee agreement (CFA) with its client, there should be a clear understanding on whether counsel’s fees are also contingent on success. The agreement should require counsel and the firm to keep dockets of time devoted to the matter and an obligation to make those records available to the other party on request. Principles of fairness and good faith should govern the apportionment of fees.
- F. Insurance - Co-counsel should ensure that all activity for and with the client firm is covered by E&O insurance.

In my experience it is helpful to have an understanding in place between counsel and the firm on a starting point for the apportionment of fees. For example, if it is a personal injury matter and the contingency fee agreement calls for a fee to the client of 30%, it may be useful to agree that counsel will be paid 1/3 of the firm’s

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fee in the absence of any special circumstances. This ratio might change if the matter goes to trial and counsel assumes a leading role in that event. A flexible arrangement is critical, but a starting point is also helpful.

Contract Lawyer

Another common solution to specialty resourcing is the hiring of a contract lawyer for the duration of a particular file or client need. As in the case of retaining co-counsel, a broad range of candidates can be considered from among the ranks of those with the specialty skills required. Usually these lawyers will be more junior than those retained as co-counsel. They would ordinarily be expected to flesh out the ranks of the firm's permanent legal resources with the expectation that they would leave the firm when the work is completed.

The logistics of contract lawyers is fairly simple and would ordinarily not require a departure from a standard time-limited employment contract.

Agents

Where resources are needed in another jurisdiction, there is a choice between engaging co-counsel and using an agent. For procedural steps and relatively simple legal tasks, the employment of a local law firm as an agent is usually adequate. Again, the logistical arrangements are simple and straightforward resulting in an easily containable expense.

Ongoing co-counsel relationships can be established with local firms where practice areas require repeat engagements.

Practice Consultant

The final category for discussion is that of practice consultant. This occurs rarely in our very traditional profession but, in my view, has great potential for improving the efficiency, effectiveness and quality of a firm's practice in a specialty area.

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In this model, a recognized expert in a specialty is retained to review the firm's practice and personnel and make recommendations to improve the way work is done. The nature of the task can be customized to the perceived needs of the firm. The investment in the exercise can be controlled and restricted. The relationship between the consultant and the firm can be adapted to an ongoing one if that is seen as beneficial to the firm's practice.

A practice consultant can play a hybrid role, combining co-counsel work on specific matters with practice consulting to the firm's specialty lawyers.

The formal relationship between a law firm and co-counsel requires careful thought and good documentation. The relationship between a law firm and a practice advisor is more complex than a co-counsel arrangement, extending beyond work in individual files from which fees will flow. The agreement between the advisor and the firm is a negotiated document. No two will be identical but they should share the following characteristics:

- A. A definition of the practice advisor's role as counsel in individual matters with the adoption of co-counsel agreements in each of those files;
- B. A definition of the practice advisor's role in respect of practice management; continuing education and mentoring;
- C. A definition of the place the practice advisor will hold in the firm's public face and marketing;
- D. A definition of the accountability of the respective parties for matters not relating to a specific file;

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E. Confirmation of insurability;

F. A clear understanding of how the relationship will be communicated to clients and how client expectation will be managed;

G. An outline of the basis for remuneration.

Experienced and knowledgeable lawyers are available in the marketplace for recruitment by firms with the business acumen to recognize this talent. This expertise can fill gaps in the firm's legal resources and, in the role of practice advisor, can help the client firm's lawyers to achieve a higher level of skill, effectiveness and profitability.



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