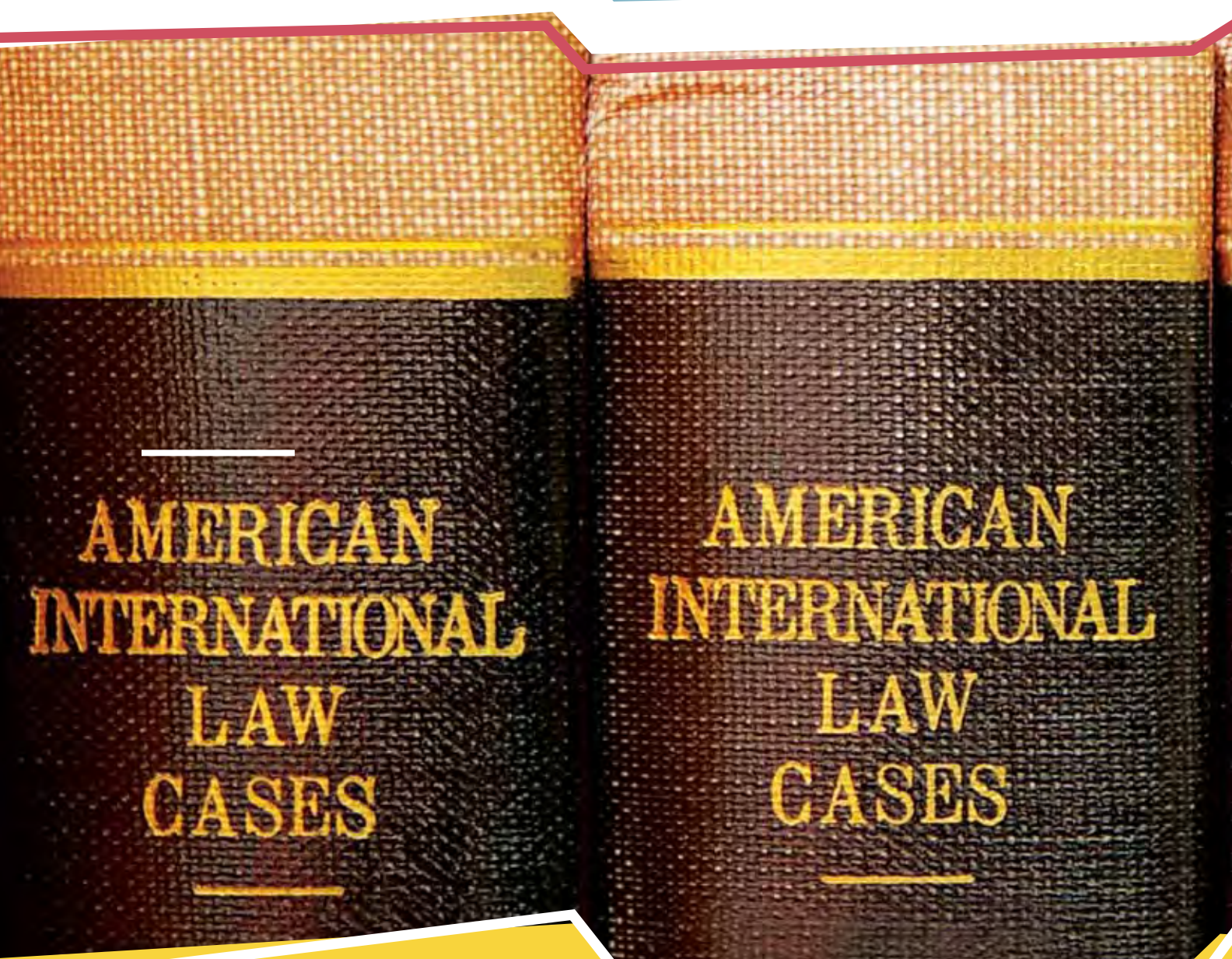


Regardless of your duties as in-house counsel or the nature of your company's business activities, odds are you will require the services of outside counsel occasionally or on an ongoing basis. Certainly, any number of outside counsel would be happy to have your company as a client, but selecting and working with outside counsel can be harrowing or even hazardous for your company if not done correctly. Even if you are experienced and have established relationships with outside counsel, you should be cognizant that, as times and circumstances change, new approaches are necessary when engaging and managing outside counsel. This is particularly true in the current economy, which dictates smartly managing outside legal counsel to ensure alignment with your company's needs.

A PRIMER ON RETAINING



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&

RELATING TO OUTSIDE COUNSEL

By Hayden O. Creque and Irvin Schein

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Selecting Outside Counsel

A poor choice of outside counsel in the beginning can drive an unsatisfactory experience in the end. Making the best choice is crucial, and involves several steps: Your analysis should begin with considering the nature of the work to be done.

There are three broad categories of legal work for which outside counsel are generally required: commodity work, one-off projects and “bet-the-company” work. The factors for choosing outside counsel will differ for each category.

Commodity work refers to projects of moderate to no complexity that can be handled satisfactorily by competent counsel. Such tasks are handled by outside counsel on a volume basis and are usually assigned to law clerks or junior associates working under the supervision of a senior lawyer. For commodity work, the most important factor is cost. As a general rule, the greater the volume of available work, the lower the price should be.

A one-off project refers to matters that require the application of greater skill and attention than commodity work but does not involve volume. While price will be a factor, you should be more concerned with engaging counsel with the requisite level of knowledge and experience to promote efficient resolution.

“Bet-the-company” work refers to matters where nothing less than the best counsel will suffice. Price is less relevant than the necessary expertise. Failure will have disastrous consequences; it cannot be tolerated. Apply the highest level of research and degree of care in selecting counsel for these projects.

There are many resources available for choosing counsel. Referrals are most valuable. They ensure that aside from issues of price and expertise, you will be able to establish a working relationship based on a colleague’s prior successful experience. (For information on how your in-house colleagues rate the value they have gained from outside counsel and more, check out ACC’s Value Challenge Index by visiting www.acc.com/valuechallenge/valueindex/index.cfm.)

Consider using a request for proposals (RFP) process. Although “beauty contests” can be tiresome, a well-researched and well-presented proposal by outside counsel can help you understand the firm’s qualifications and develop a rapport with the team. As part of the process, consider asking for references from other in-house counsel for comparable matters.

If you are selecting litigation counsel, assess prospective counsel’s skills in evaluating cases and settling them



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through alternative dispute resolution mechanisms or otherwise. For multijurisdictional work, consider consulting the local affiliate of a national or international law firm, which can reduce the time you spend seeking counsel in other jurisdictions. (The size of outside counsel’s firm may be relevant depending on the nature of the matter. It is not always necessary, however, to hire the biggest firm in the market.)

Finally, and particularly where specialized expertise is essential, conduct online research for counsel who have authored scholarly works on the relevant subject. Industry experience may be crucial; the existence of published work, along with trade association affiliations and other similar contacts, may indicate that the firm or lawyer you’re considering has industry knowledge that will reduce the learning curve.

Look for counsel with whom you can establish a comfortable, long-term relationship. From a cost-containment perspective, seek law firms that aren’t merely managed on a pure profit-maximization model, where rates are simply increased on an annual basis without reference to other

factors. A well-managed law firm should be ready to take a big-picture, long-term view of your relationship. Such a firm is likely to be more collaborative and more flexible in terms of hourly rates, and will ensure a satisfactory relationship through the proper management of legal costs.

Alternative billing arrangements are becoming more attractive both for in-house and outside counsel. You should explore flat fees on a per-matter or per-annum basis. A well-managed firm will be receptive to a reasonable alternative billing arrangement. In addition, you should look for firms that use technology to facilitate communications and help manage costs. For example, technologically advanced firms use software that permits electronic access to your files at all times, on a secure basis, allowing for transparency in who is billing for what service.

Finally, look for counsel willing to invest in regular meetings to understand your work. Meetings should be non-billable time, spent at your premises, learning and understanding your business and discussing its goals so that counsel can be proactive in meeting your future needs. Also, look for counsel who will bring two or three people to a meeting but only bill for one, in order to introduce you to younger lawyers and display sensitivity for your need to be cost-conscious.

Getting Off on the Right Foot

After you select outside counsel, strive to establish a mutual understanding of the new relationship, including the scope of work and the likely costs. To avoid unpleasant

Controlling Legal Costs

1. Make certain that outside counsel is clear on your business objectives, and that their bills reflect those objectives.
2. Review your legal spend with your outside law firm annually and set goals for the coming fiscal year. The billable hour is simply not designed to generate efficiencies. Agreeing on the total spend will encourage the law firm to work efficiently while delivering a quality product.
3. Define the value of the work that is being sent to the law firm. From an established value will naturally come an agreed-upon pricing model.
4. Stop using bill-auditing firms. These businesses add time and costs that will eventually be passed on to you by the law firm.
5. Ask for discounts off the billable rate; if the firm is unwilling, ask for an alternative billing arrangement.

Editing the Retainer Letter

Every retention agreement is negotiable. Following are sample terms that you should edit, add and delete from your retention agreements:

Changes	Revision	Comments
Time shall be calculated on the basis of time actually expended, except that telephone calls and conferences shall be computed in quarter-hour increments such that, for example, a 25 minute conference will be billed as half of an hour.	Time shall be calculated on the basis of time actually expended.	Never accept a rounded-up fee arrangement.
Client agrees to reimburse counsel for all out-of-pocket expenses paid by counsel.	Client agrees to reimburse counsel for all reasonable out-of-pocket expenses. Counsel must obtain pre-approval of all out-of-pocket expenses and disbursements over \$100.	Never give counsel authority to incur significant expenses without your approval.

Additions

1. Client considers general overhead and administrative costs part of the hourly rate. Therefore, client will not pay for such costs, including but not limited to research fees, photocopy charges, messenger fees, postage or for reviewing and preparing firm invoices.	2. Client will pay only for the most senior attorney's time for in-firm conferences.	3. Client expects all work will be assigned appropriately, with billing rates and the experience of attorneys properly matched to the work at hand. Client encourages the use of paralegals where appropriate.
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Comments:

1. Most law firms negotiate a flat fee for legal research services. It is now arcane for a firm to bill for those expenses, or for other expenses that in any other business would be considered overhead. If outside counsel insists on billing for those expenses, then you should receive assurance that the cost is a pass-through and there is no upcharge.
2. In-firm conferences are one of the biggest causes of chagrin for your client. It is appropriate for outside counsel to confer internally, but it is unfair that you should pay \$1,200 for a half-hour meeting (\$500 for the partner on the file, \$300 for the junior partner and \$200 for each of the two associates).
3. Clearly a senior partner should not do work that is delegable to a junior associate and associates should delegate work when appropriate down the line to paralegals and secretaries.

Delete

Any clause that purports to waive in advance the occurrence in the future of a conflict.	Any clause that makes reference to an annual change in billing fees without any obligation to provide advance notice.	Any clause that states that your file remains the property of the law firm after termination of the relationship, or that assesses a fee for obtaining a copy of the file.
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Comments:

1. These clauses are always problematic and can have unforeseen consequences. Furthermore, they are not enforceable in all jurisdictions. Waivers should be just in time.
2. It is bad form for outside counsel to change fees without notice and it can have a surprising effect on the amount of your bill.
3. As a client, you should always be entitled to a copy of your file regardless of whether the relationship ends productively. Furthermore, you should not have to pay for a copy unless the cost of providing it is significant.

surprises, it is critical to establish the terms of engagement through early, open and candid discussion. Get a retainer letter that specifies the scope of the engagement, the hourly rates or other billing arrangement, and the guidelines for disbursements. Stipulate that you wish to approve these matters before work begins, to avoid expensive surprises down the road.

You should also discuss logistics, such as how communications will take place. Do you prefer to have many points of contact within the law firm or a single point of contact? Spell that out. Discuss your preferences regarding emails, which can be time-consuming and tiresome, as well as expensive. Establish conditions when you'd rather have outside counsel phone you than engage in lengthy email correspondence.

Regardless of the nature and volume of the work, you should ensure that outside counsel is flexible in billing support staff time, time spent by their lawyers conferring with each other, time spent by younger lawyers and staff attending meetings with you, as well as such direct expenses as photocopying and binding. In litigation, disbursements relating to document management and discovery requirements can be substantial and should be addressed at the outset.

Look for a law firm that is internally cost-conscious. If the firm is active in attempting to drive costs out of its own business, it will likely be prepared to pass those savings along to clients.

All of these details should be negotiated in advance within the context of a specific budget. Outside counsel should be asked for a game plan or strategy with respect to each piece of work undertaken. Naturally, this requires outside counsel to exercise significant project management skills and to collaborate effectively with you in setting tangible goals. For that reason, serious consideration should be given to requiring that outside counsel develop a game plan before engagement, and preferably as part of the RFP process.

A budget for each file is also essential; you should be prepared to pay for it if necessary. A firm's reaction to a request for such a budget is indicative of its attitude toward cost containment.

Assess potential conflicts carefully. Certainly, in "bet-the-company" matters, no possible conflict can be tolerated. Outside counsel must confirm not only that no conflict exists, but also that if a future conflict should arise, outside counsel will continue to act for you — or will bear the costs of bringing new counsel up to speed. The engagement may involve retaining outside counsel on a broad basis to deal with a variety of matters, but with specific project assignments to be undertaken under that umbrella. In such cases, it may be appropriate to have several retainer letters — one outlining the terms of engagement overall, and others that are less comprehensive but more specific, reflecting the terms of the specific projects.

Maintaining the Relationship


Open and candid communication is as important in maintaining your relationship with outside counsel as it was at the outset. Ideally, you should establish a regular timetable for progress reports to be provided, measured in elapsed time or following certain events, or perhaps both. Just as law firms prefer to establish regular billing cycles, you should insist on a regular reporting cycle.

At the conclusion of a project or a matter, or some pre-arranged interval during the course of a matter, undertake a formal discussion with outside counsel to share candid feedback. Strive for an open discussion reflecting on the aspects of the work and the relationship that each of you liked, as well as constructive comments on how things might be improved in the future.

Time to Say Goodbye

Ideally, the project or matter will conclude satisfactorily and the engagement will end on a successful note. Unfortunately, that is not always the case. At some point, every in-house counsel has to face the prospect of terminating a relationship with outside counsel. It is vitally important to avoid burning bridges, as it is impossible to say what the circumstances of a next encounter with the outside counsel will be. If you are terminating the relationship due to dissatisfaction, let the law firm know your reasons. You will be rendering a service to the firm, and you will understand your own concerns better once you articulate them; you will also recognize mistakes you may have made. This information will be invaluable to you when making your next choice of outside counsel. Frank discussions with outside counsel help keep the door open to a resumption of the relationship on a productive basis in the future, if appropriate.

Candid Communication Contributes to Success

It should be clear that a successful relationship with outside counsel begins with careful and thoughtful selection. From that point forward, the key to success is honest, candid discussion and free-flowing communication. The right outside counsel will not only do the work properly, promptly and at a fair price, but also will be mindful of the need to keep you informed and to make you look good to your client — the company that employs you. Good outside counsel will not only provide you with legal advice and legal service but will become a trusted confidant and an essential part of your team. That is what you should seek as well. 

View additional ACC resources on the *Outside Counsel Relationship* on page 46, and the *Outside Counsel Legal Services Agreement Checklist* on page 48.

Have a comment on this article? Email editorinchief@acc.com.

ACC Extras on...The Outside Counsel Relationship

Education

- *Attend ACC's Corporate Counsel University.* Want to learn more about working with outside counsel from your in-house colleagues? Attend Corporate Counsel University® (May 23-25, 2010, Hyatt Regency Indianapolis) and sign up for the program on effectively working with outside counsel. Learn from in-house experts on how to select, evaluate, compare and retain the outside counsel that best suits the organizational needs of your company. For more information: www.acc.com/CCU10.

ACC Docket

- *Small Law: Raising Outside Counsel Right (Nov. 2008).* Working with outside counsel can be a frustrating and tiresome process. In this article, learn seven methods in-house counsel can implement to lessen the tension. www.acc.com/docket/raisingcounsel_nov08
- *Tips & Insights: Managing Outside Counsel Relationships with James R. Buckley (Nov. 2007).* James R. Buckley has had to venture into the outside counsel world to find talent to assist Lockheed Martin in a few legal matters. Here are some tips and insights into working with outside counsel and cultivating relationships with outside counsel. www.acc.com/docket/t&i/buckley_nov07
- *Outside Counsel Selection Process: Preparing for Success (Jan. 2004).* This article takes you through each stage of the comprehensive outside counsel selection process — identifying issues and recommending courses of action for legal departments. www.acc.com/docket/counselsele_jan04

Program Materials

- *Challenges Facing In-house Counsel in Our Current Economy (Oct. 2009).* Today's economic climate heightens the urgency of securing the maximum value for your expenditures. How should you work with your in-house and outside colleagues to meet the CEO's and other management's value-added expectations? This panel discusses important issues as the economic climate changes the legal profession. www.acc.com/inhouse_econ_oct09
- *Effective Outside Counsel Management (July 2008).* Learn how to select, evaluate, compare and retain the outside counsel that best suits the organizational needs of your company. Develop lists and criteria for preferred legal service providers and specialized firms. www.acc.com/outside_mgt_jul08
- *Leading Edge Processes for Selection of Outside Counsel (Oct. 2006).* This seminar provides a how-to guide to using the best processes to select outside counsel. Topics covered include when and how to use RFPs, preferred provider networks, auctions and other types of selection processes. www.acc.com/selectcounsel_oct06

InfoPAKSM

- *Outside Counsel Management (Jan. 2006).* This material provides in-house counsel with information focused on outside counsel management and contains checklists, sample billing guidelines, engagement letters and RFPs. www.acc.com/infopaks/ocmgt_jan06

Quick Reference

- *Tips for Improving Relationships with Outside Counsel (Aug. 2007).* View this checklist from ACC's 2007 Annual Meeting on how to improve outside counsel management skills. www.acc.com/quickref/improvrelat_aug07
- *Top Ten Methods to Manage Outside Counsel (Dec. 2006).* Read these tips on how to appropriately manage your outside counsel. www.acc.com/quickref/10methods_dec06

Webcast Transcript

- *Tracking Outside Counsel Performance (Sept. 2006).* This webcast includes a panel of in-house counsel from small, medium and large departments sharing strategies used in tracking outside counsel performance. www.acc.com/transcript/trackperf_sept06

ACC Value Challenge

- *How to Create and Sustain Intimate Partner Relationships.* Law Departments and outside legal counsel practice candid dialog on how to better communicate expectations. In this article, learn ways to foster such relationships. www.acc.com/advocacy/valuechallenge/toolkit/upload/how-to-create-and-sustain-intimate-partner-relationships.pdf
- *How to Identify the Most Successful Lawyers for Tough Negotiations.* Your decision to select a lawyer merely can't rest on prestige and size of a law firm. This decision must bring about the goal of efficient and effective value for services. Our litigation analysis in this article can give you the knowledge you need to make this decision. www.acc.com/advocacy/valuechallenge/toolkit/upload/identify-the-most-successful-lawyers-in-tough-negotiations.pdf
- *How to Create a Successful Partnering Strategy.* Your partnership with outside counsel can be a successful relationship if ways to manage cost while delivering quality service are discussed openly. In this article, you can find ways to achieve such a goal. www.acc.com/advocacy/valuechallenge/toolkit/upload/how-to-create-a-successful-partnering-strategy.pdf

ACC has more material on this subject on our website. Visit www.acc.com, where you can browse our resources by practice area or use our search to find documents by keyword.

Outside Counsel Legal Services Agreement Checklist

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As a part of your in-house counsel activities, it is likely that you will be asked by your company to review an outside counsel legal services agreement. As with any substantive agreement executed by your company, outside counsel legal services agreements are important contracts. Companies typically spend more on their outside counsel arrangements than on their own in-house law departments.¹ The following is a practical Outside Counsel Legal Services Agreement Checklist containing 70 required and optional items:

1. Consider the use of a multi-year (e.g., three-year) master agreement with separately authorized/ signed statements of work for each legal matter. [Development of the specific statement of work for each legal matter would address: effective date of the specific legal services matter; confirmation that any conflicts have been resolved; names/contacts for applicable engagement and relationship attorneys for each party; and a clear and complete scope of the legal services matter (to include background, objectives, duties, obligations, requirements, tasks, deliverables, schedule, assumptions, your company's responsibilities, budget, staffing plan and a statement of work pricing type (e.g., fixed price or hourly rates)]
2. Use an ownership/use of legal services work products provision (a clause saying who owns what regarding work products)
3. Use a SOX 307 reporting requirements provision (a clause requiring the outside counsel to be compliant with SOX 307 reporting regarding work for the client)
4. Include diversity requirements
5. Consider including pro bono requirements
6. Address conflicts (actual, potential or subject matter) and establish a conflict waivers procedure
7. Address confidentiality of your company information
8. Address attorney-client privilege
9. Address data privacy
10. Add a termination for convenience provision
11. Address publicity constraints
12. Add a document retention provision
13. Address business continuity
14. State governing law
15. Consider a convergence on several preferred outside counsel providers that can provide the full range of legal practice areas in return for discounted rates and volume discounts
16. Consider the use of alternative billing when applicable (discounted rates, volume discounts, cap on annual hourly rate increases, incentive billing, value based billing, performance billing, firm fixed fee, blended rates, etc.)
17. Consider risk-sharing provisions
18. Consider the use of off-shore outside counsel firms by your company and outside counsel
19. Consider the use of ebilling by outside counsel tied to in-house concurrent of matter management
20. Use centralization of outside counsel authorizations by only in-house legal, or else resulting invoices will not be valid (i.e., centralization of authority is a phrase that means in-house counsel must first approve the initial authorization of the outside counsel work, or else the resulting outside counsel invoices are not paid)
21. Use of better outside counsel project management techniques [e.g., statements of work, periodic progress reports (to include an assessment of the current merits of the matter, range of current liability exposure, estimate of settlement value, cost of going to trial, etc.), engagement plans, designated engagement and relationship attorneys for both outside and in-house counsel for each matter; etc.]
22. Use periodic outside counsel performance assessment/ scorecards
23. Use matter budgets with monthly spend vs. budget vs. progress analysis
24. Use monthly skill vs. task analysis for each matter
25. Use prior approval for outside counsel expenses/disbursements
26. Obtain periodic range of exposure reports from outside counsel for each matter (i.e., each case should be analyzed to determine potential liability exposure to the client company)
27. Consider potential use of contract attorneys by your company and by outside counsel
28. Consider the use of actual and virtual secondment of outside counsel
29. Consider use of virtual outside counsel firms
30. Require a monthly write-off hours report from outside counsel
31. Consider adding a provision of free training (with the possibility of CLE credit) for in-house counsel provided by outside counsel
32. Require outside counsel to be responsible for complying with your company policies and guidelines
33. Require the outside counsel be knowledgeable about your company
34. Require outside counsel (on each invoice) to report monthly professional fees and expenses and disbursements; total year-to-date professional fees; total year-to-date expenses and disbursements; total inception-to-date professional fees; and total inception-to-date expenses and disbursements

35. Require a negotiated contractual budget with each legal matter
36. State that in the event of conflicts between the master engagement agreement and the applicable statement of work, the statement of work will prevail
37. Require that outside counsel discuss potential alternative dispute resolution methods for matters with your company at the outset of a legal matter engagement
38. Set up a one outside counsel lawyer rule for meetings, negotiations, depositions and court appearances unless otherwise agreed to by your company in advance
39. State that your company does not pay for replacement attorney learning time or other ramp-up learning costs
40. Prohibit duplication of effort
41. Require that charges for outside counsel inter-office conferences be minimized.
42. Require run-rate forecasts of anticipated future costs reports on a matter at any time if so required by your company
43. State that attorney fee rates are firm for one year. Use percentage cap (e.g., 3 percent) on annual attorney fee increases
44. Require additional volume percentage discounts at the end of each year to apply for the next year
45. Require timely monthly reports of accrued but unbilled (pending) charges if so required by your company
46. Require compliance with all applicable insider-trading laws, FCPA, anti-boycott laws and export compliance laws/regulations
47. Consider the use of a prompt payment discount
48. Consider reasonable charging limits such as no more than 10 hours per day for a given attorney (unless approved in advance)
49. Address how travel time will be handled (e.g., no attorney fees for travel time)
50. Consider requiring: (1) prior approval on air travel; (2) compliance with your company travel policy; and (3) use of company-approved hotels
51. Require timely prior written notification to your company if outside counsel becomes aware that matter budget will be exceeded
52. Prohibit formula billing (e.g., \$100 for a letter)
53. Require compliance with equal opportunity, anti-discrimination, affirmative action, etc.
54. Consider stating that charges for computer research (Lexis Nexis, WestLaw, etc.) are not billable
55. Consider stating that photo copy costs in excess of \$XX require prior your company's approval. (Perhaps require the use of your company-approved photo copy supplier)
56. State that non billables include: office supplies, local telephone, per-page fax charges (excluding long distance charges), routine mail, etc.
57. Require the use of your company-approved couriers
58. State that there is no alcohol reimbursement
59. State that there is no overtime transportation for outside counsel personnel
60. Prohibit phone charges at hotel rates
61. Require the use of good judgment on business meals
62. Consider the use of videoconference instead of travel if reasonable
63. Attach a list of all of your company's affiliated entities that are to be covered by the agreement
64. Seek most-favored-customer pricing
65. Use service level agreements, which refer to the service quality and performance (if appropriate)
66. Potentially use an audit rights provision
67. Consider prohibiting your company's responsibility for third-party invoices
68. Address how attorney fee disputes will be handled (via arbitration, litigation, etc.)
69. Require that copies of all pleadings, correspondence, memos, etc. be provided to your company
70. Include a partnering provision to proactively help discover mutually beneficial ways to improve the outside counsel relationship as well as to discover ways to further enhance communication, innovation, technology improvements, performance, risk-reduction, continuous improvement and spend/cost savings with outside counsel

The goal of an outside counsel legal services engagement agreement is to facilitate a win-win in-house/outside counsel relationship.² Every outside counsel engagement arrangement for legal services has some unique aspects that may not be addressed in this checklist. However, if you routinely use this Outside Counsel Legal Services Agreement Checklist as one of several resources when you review a legal services agreement with outside counsel, you should see a large number of substantive, material, risk-reduction, performance-improvement and cost-savings issues that will be addressed at the onset of the engagement.

END NOTES:

1. 2005 ACCA/Serengeti Managing Outside Counsel Survey: *Assessing Key Elements of the In-house Counsel/Outside Counsel Relationships*, p.14.
2. Excerpted from Ronald F. Pol, "Get More Value from Outside Counsel: Show Them the Flipside," *ACCA Docket*, April 2003, www.acca.com/protected/pubs/docket/am03/flipside1.php.