Selecting and Managing Outside Counsel:

Negotiating the Complex Business, Financial & Legal issues

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What Clients Want (and Need)

- Predictable and controllable fees
- Greater commitment to understand the company
- High quality, efficient services
- Partnership relationship
- Added value
- Law firms should be profitable, but share the burden of the current economic crisis.
- Relationship between legal fees and outcomes
- Accountability
- Alignment of interests

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Why Alternative Fee Arrangements Failed in the “Old Days”:

- Companies did not have reliable historical data regarding types of cases, volume, total spend per case, settlement amounts, average life of case and procedural stage of case at close.
  - Technology resources are far better now and many companies can now gather and share this data for the last 2-5 years.
  - Consider sharing data under a non-disclosure/confidentiality agreement
- Companies were reluctant to share any historical data
- Firms lacked reliable data
- Firms didn’t know what to ask for from the company or how to analyze the information they received
- Arrangements often didn’t provide downside protections for firms or share upsides with firm.

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Alternative Fee Arrangements: The Wave of the Future

Company concerns about alternative fee arrangements:

- Will company retain decision-making and control?
- Will quality be maintained or improve?
- Will experienced attorneys still want to work on the matters?
- Will the matters get the same attention and priority?

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Alternative Fee Arrangements: The Wave of the Future

Current Climate:

- In-house counsel trade associations' involvement:
  - Advocating alternative fee arrangements and added value;
  - Providing tools and resources, including templates for creating preferred panels of law firms
  - Organizing roundtable discussions and facilitating the sharing of information about alternative fee arrangements and law firms that are using alternative fee arrangements.
  - Creating templates to reject annual hourly rate increases
- Litigation department budgets decrease each year even though outside counsel fees have historically increased each year.
- Outside counsel fees are often the largest part of a litigation department's budget

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Alternative Fee Arrangements-The Wave of the Future

Most common types of Alternative Fee Arrangements:

- Discounts, caps and modified rates
- Contingent fee arrangements
- Fixed fee arrangements (by the case, groups of cases or geographical area)
  - Can put “collars” around the fixed fees to protect both sides from excessive downside or upside
- Hybrid arrangements (ex. Discounts with tiers and capped partner rates)
- Alternative staffing arrangements within the law firm

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Alternative Fee Arrangements: The Wave of the Future

Life After the Deal is Done:

- Once the alternative fee arrangements are in place, company will want financial data from the firm to calculate the savings
- Periodic evaluations of performance of outside counsel by in-house counsel
- Periodic meetings with outside counsel to discuss issues and how outside and in-house counsel can improve
- Continuing dialogue regarding mutual expectations
- Facilitate coordination among the firms used by the company to share information

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Overview of Legal Department

WellPoint, Inc. Legal Department:

- Approximately 100 in-house attorneys
  - 30 litigation attorneys
  - 70 business counseling attorneys
- In-house attorneys located in at least 15 states

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Use of Outside Counsel for Litigation

Historical Use of Outside Counsel in Litigation:

- Over 200 law firms used nationwide for litigation
- Each in-house counsel had discretion to select outside counsel for each case
- Traditional billable hour/Few special fee arrangements

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Historical Use of Outside Counsel for Litigation

Problems:

- Interests not aligned;
- Fees unpredictable and difficult to budget/accrue
- Lack of dedicated team
- Little added value
- Lack of efficiency
- Potential for inconsistent positions on similar issue
- No central control
- Lack of in-depth knowledge by outside counsel of the company, its operations and goals

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Outside Counsel Initiative

Goal of Outside Counsel Initiative:

- Create a preferred panel of no more than 15 law firms to handle core issues litigation nationwide
- Improve efficiency
- Ensure consistency
- Negotiate more advantageous fee arrangements
- Give firms greater access to, and understanding of, the company
- Obtain added value from outside counsel
- Create a partnership

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Outside Counsel Initiative

Process Overview:

- Asked all in-house litigation counsel to rate the most often used law firms against established criteria
- Used the results of the in-house survey to determine which firms would received an RFI
- Sent out comprehensive RFI to select group of firms
- Analyzed results of RFI and decided which firms would receive a more targeted RFP
- Decided how many panel firms was appropriate based on size of company and outside counsel spend
- Decide the types of cases and states for which a preferred panel of law firms should be developed
- Sent out RFP to smaller group of law firms
- Conducted in-person interviews of national preferred panel “finalists”

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Outside Counsel Initiative

Process:

- Moved rapidly, but process still took 1½ years
- Significant due diligence regarding alternative fee arrangement models used by other companies and by outside counsel
- Formed in-house team of litigators to manage the process
- Created a database identifying all active outside counsel to understand our starting point
- Worked extensively with Finance Department to determine the amount of spend with each law firm for last two years
- Created outside counsel evaluation form for in-house counsel to numerically evaluate the six law firms each considered to be the best (could evaluate more if appropriate)
- Evaluated results and selected law firms to continue in process

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Process (cont.):

- **Prepared extensive RFI to firms asking**:
  - description and background information on firm
  - description of the firm's capabilities and staffing
  - description of possible educational seminars and training that firm could provide to WellPoint
  - experience in certain substantive subject areas
  - identity of proposed liaison partner
  - success at working with different alternative fee arrangements
  - top litigation successes for WellPoint in last several years
  - examples of creative solutions used in litigation to obtain favorable results for client
  - commitment to diversity
  - description of how they could best "partner" with WellPoint to provide effective litigation services
  - success rate at staying within established budgets with other clients in protracted and contentious litigation
  - innovative arrangements with vendors
  - technological capabilities of firm and how technology is used

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Process (cont.):

- **Offsite with in-house project team following receipt and review of RFI responses**
  - identified “state” subject matters
  - identified “national” subject matters
  - identified subject matters that would be carved out from preferred panel arrangement
  - deselected firms
  - RFI responses were scored but scores were of little value
  - frank discussion and consensus were key
  - after initial deselection of firms, determined which firms would be asked to bid on “state” subject matters and for which states and determined which firms would be asked to bid on “national” subject matters

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Process (cont.):

- **Drafted and issued RFP to select law firms asking firms to bid on "state subject" matter litigation in a particular state or states, "national" subject matter litigation or both.**
- **RFP:**
  - provided projected 2008 budget for the scope of litigation identified in each RFP
  - lacked ability to provide more detailed historical spend by subject matter
  - advised firms that the preferred panel would not be an exclusive relationship or definitive commitment to give each particular cases
  - identity and experience of core team members
  - extranet capabilities
  - expenses firm would be willing to absorb
  - quarterly training/education seminars
  - fee arrangement proposal
  - how firm would handle class actions/significant cases in states in which the firm does not have an office
  - extent of litigation experience in states in which the firm does not have an office

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- **Process (cont.):**
  - After receipt of RFP responses:
  - Conducted in-person interviews with national firm candidates
  - Offsite to select preferred panel in most of WellPoint's core states and national counsel
  - Discussed desired terms of retainer agreements
  - Identified non-billable expenses
  - Fee arrangements considered:
    - fixed fee
    - reduced hourly rate with success bonuses
    - tiered discounts based on volume with or without partner and associate caps
      - important that any tiered discounts and caps applied to business counseling and litigation

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Results:

- 11 “state” firms selected
- 3 “national” firms selected
- Prepared and negotiated retainer agreements with each of the 14 firms
- Executed two year written retainer agreements

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Post-selection:

- Quarterly evaluation of each preferred panel firm by each in-house litigation attorney
- Quarterly meetings with preferred panel firms to discuss issues, results of quarterly evaluation and relationship
- Created internal policy and process for in-house counsel to assign a case to a non-preferred panel law firm
- Communication regarding mutual expectations key
- Facilitate coordination among preferred panel firms

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Questions?

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