

A professional headshot of a middle-aged man with grey hair and a mustache, wearing a dark suit, light blue shirt, and patterned tie. He is looking directly at the camera with a slight smile.

# Critical Preparations

By Richard G. Stock, M.A., FCIS, CMC, Partner with Catalyst Consulting

This is the twenty-first in a series of articles about how corporate and government law departments can improve their performance and add measurable value to their organizations.

My first article for *Legal Business World* was “Negotiating with Law Firms” in early 2018. For the most part, it reported the findings of Altman Weil’s Chief Legal Officer survey (2017). At the time, I concluded that “fair and informed negotiation of operating and financial arrangements with preferred law firms requires companies to enforce guidelines for matter staffing, matter budgeting, expenses and billing. Non-hourly fee arrangements for complex and routine work should be the order of the day, and in-house counsel should be proficient with every aspect of AFAs if they are to be accountable for the business side of the relationship with external counsel”.

Today, 30 months later, the evidence suggests that many company legal and procurement departments continue to underperform when sourcing external legal services. One of the primary reasons for this is insufficient preparation. This brief article is intended to make the eventual negotiations with law firms as effective and efficient as possible. One assumption in writing this piece is that such negotiations would be in respect of multi-year portfolios of legal work rather than for single legal matters. I also favor non-hourly fee arrangements for almost all types and complexities of work.

### **Building Blocks**

There are three critical building blocks when sourcing external legal services. Each depends on the participation and collaboration of Procurement/Strategic Sourcing and of the legal department with its legal leadership - and with the legal operations professional when there is one.

### **Securing Sponsorship**

The first step is to forge a formal alliance. Procurement should develop a detailed sourcing program for legal services. It should describe the company’s non-financial objectives for convergence, the optimal configuration of primary and secondary firms by jurisdiction and globally, simplified reporting and billing requirements, and the place of technology to improve effectiveness and efficiency.

The sourcing program should set out the company’s objectives for non-hourly pricing, annual price increases, disbursements, law firm performance, annual review and adjustment mechanisms, and payment terms. The sourcing program sets a financial target for total legal spend and for savings to be achieved with the Request for Proposals (RFP) or Invitation for Strategic Partnering (ISP).

The written sourcing program should also describe Procurement’s division of labor with the law department for the preparation and conduct of negotiations. The company’s law department should then sign off on the program before the work begins. Progressive companies typically share many, but not all, of their non-financial and financial objectives in the RFP / ISP and in the meetings with law firms.

### **Scoping Legal Services**

The second building block – scope of work – is typically core procurement competency. Providing extensive detail in the RFP / ISP about the scope of legal work which may be available to law firms over time is the basis of migrating the relationship with law firms from that of a traditional vendor where the company

purchases one hour or one matter at a time, to that of a strategic business partner that is prepared to adopt non-hourly pricing, innovate with service delivery and operating practices, and invest in technologies that the law department that of a traditional vendor where the company purchases one hour or one matter at a time, to that of a strategic business partner that is prepared to adopt non-hourly pricing, innovate with service delivery and operating practices, and invest in technologies that the law department can use. See Ben Heineman's *The Inside Counsel Revolution*, starting on page 401.

Scoping legal services for sourcing purposes means describing each category of work, the types of matters and the complexity mix for each category, and the estimated volumes of work by category and by jurisdiction. The scope of work should set out the optimal practice patterns – staffing ratios – by legal category.

Not every company wishes to reveal this level of detail, perhaps reticent that by doing so it will raise expectations in law firms which cannot be fulfilled. However, all estimates are provisional, and none constitutes a guarantee of work to any firm. The advantages of sharing this information outweigh the perceived risk of doing so because firms will be more prepared to accept the company's non-financial and financial objectives when preparing proposals and negotiating favorable long-term arrangements.

### **Pricing**

The third building block calls for consensus on the most effective form of pricing legal work. When favoring non-hourly fees as the predominant financial arrangement for most categories

and complexities of work, the fee configuration should stimulate and reward effectiveness, efficiency and innovation in legal services provided there is a measurable contribution for each of these.

### **What to Negotiate**

Quite specific questions should be asked of the law firms in the RFP / ISP. These can be expanded for both the financial and non-financial elements. The answers will assist in qualifying firms and accelerating the negotiation process. Consider the firms' written responses to be the early stage of negotiations.

Some of the *non-financial elements* to discuss with firms include:

- a commitment to detailed matter planning and budgeting to manage the number and distribution of hours before they are worked by the firm
- coverage by the firm for each legal specialty, for various levels of partner / associate / paralegal experience, and by jurisdiction
- the expertise and availability of the law firm's team members at all levels of experience
- service level guarantees with key performance indicators, covering all offices of the firm as well as the allocation of work by primary firms to secondary firms
- a relationship partner accountable to the company for all aspects of the firm's professional and financial performance
- acceptance of the transfer of administrative and management reporting from the company to primary and coordinating firms to minimize the company's investment in infrastructure.

Some of the *financial elements* to cover with the RFP / ISP and in meetings with firms include:

- the company's preferred staffing distributions by category of work
- the use of alternative fee arrangements
- the prices and related conditions/discounts for the work proposed by the firm
- the stability of prices over the RFP / ISP reference period
- fees for performance and / or innovation as part of hybrid fee arrangements
- the admissibility of disbursements
- the speed of payment and its relationship to price
- annual review and adjustment mechanisms based on work type and volumes

### **Roles and Responsibilities**

The working group charged with scoring the proposals and meeting the firms should consist of no more than five individuals: the Project Manager, likely from Procurement; a second person from Procurement to record discussions and decisions as well as to run all financial projections; the CLO or deputy; and one or two senior members of the law department representing significant legal categories. Because the sourcing process can stretch out over time and the documentation can be extensive, a five-member working group is sufficient, assuming there is consultation with other stakeholders at select intervals. One of the group members should be proficient in the full range of AFAs and law firm economics.

Experience suggests that the law department should take the lead in "negotiating" the non-financial elements. It is preferable that these

be addressed before the financial elements. Discussion of the financial elements should be led by the Project Manager and/or by the company's AFA specialist – ideally an individual from Procurement, provided there is a very good understanding of law firm economics, the full spectrum of alternative fee arrangements, law firm cultures, and partner compensation systems.

### **Conclusion**

Successful negotiation of sustainable relationships with law firms depends on putting the three building blocks in place, developing a detailed scope of work for the RFP/ISP, explicit statements of financial and non-financial objectives for legal services, and meaningful roles and responsibilities for the procurement and legal departments during the sourcing process.

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### **About the Author**

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