



PARTNERING WITH OUTSIDE COUNSEL IN TIMES OF CRISIS

**(WHAT OUTSIDE COUNSEL SHOULD DO TO EFFECTIVELY MANAGE THE
MATTER)**

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WHAT IS A CRISIS

A CRISIS IS ANYTHING THAT CAN ADVERSELY IMPACT:

- THE FINANCIAL SECURITY OF YOUR COMPANY;
- THE BUSINESS REPUTATION OF YOUR COMPANY OR ONE OF ITS EXECUTIVES, MANAGEMENT TEAM OR BOARD OF DIRECTORS; OR
- THE RELATIONSHIP YOU HAVE WITH CUSTOMERS.

EXAMPLES:

- PRODUCT FAILS IN THE MARKET
- A SENIOR MEMBER MAKES A STATEMENT THAT IS DETRIMENTAL TO YOUR COMPANY'S BRAND OR IMAGE
- PUBLIC ALLEGATIONS OF DISCRIMINATION/SEXUAL HARASSMENT
- MAJOR ANTI-TRUST INVESTIGATION



CRISIS MANAGEMENT PLAN

- Companies should have a crisis management plan in place;
- The Chief Legal Officer should be a member of the crisis management team; and
- The Legal Team should serve a critical role in managing the crisis.

Legal's Role:

- Bringing calm and thought to the situation;
- Understanding the issue; and
- Providing clear and effective communication.



PARTNERSHIP WITH OUTSIDE COUNSEL

- SELECTING THE APPROPRIATE COUNSEL
 - Make sure you select someone with expertise in the area;
 - It is not just that they worked for an agency but that they have critical relationship with current agency employees; have applied the current policies and have a successfully resolved similar matters.
- NEGOTIATING RATES AND FEES
 - Higher rates do not equate to better attorneys;
 - Secure fixed rates;
 - Require a budget for the process; and
 - Enter into an Outside Counsel Retention Agreement with your company's requirements.



PARTNERSHIP WITH OUTSIDE COUNSEL

○ ESTABLISHING APPROVAL GUIDELINES

- Require Company approval for any research, memos or motions.
 - Outside Counsel must provide a written request to prepare the memo stating why Outside Counsel believes he/she must complete the research. Only pay for legal research memos that you request or for which Outside Counsel requested permission and you provided such permission in writing.
- Require Outside Counsel to respond to the following questions in writing prior to filing any motions:
 - 1) the purpose for the motion;
 - 2) whether the motion is routine in nature for the matter at hand or whether Outside Counsel has a strategic reason for filing the motion;
 - 3) the probability of success of the motion;
 - 4) the benefit, if any, of the Company prevailing on the motion; and
 - 5) the estimated cost of the motion through any potential appeals.



PARTNERSHIP WITH OUTSIDE COUNSEL

- UNDERSTANDING THE ELEMENTS OF THE CASE
 - Your first request is a memo that explains the potential legal claims (criminal/civil); the elements of the claims and burden of proof; the potential liability; and a summary of actual judgments/rulings;
 - Depending on the complexity, you may want an initial memo followed by a more substantive memo;
 - As you gather information having this memo will assist you in knowing what information is important/significant;
 - This memo should frame your presentation regarding the topic; and
 - The memo should also guide your discussions with Outside Counsel so that you can make sure you direct the services of the case.



PARTNERSHIP WITH OUTSIDE COUNSEL

○ SECURING AND MANAGING SUBCONTRACTORS

- In securing and gathering information, it is highly likely that Outside Counsel will recommend retaining subcontractors to review the information as well a company to assist with e-discovery.
- I highly recommend that you negotiate this contracts on your Company's behalf.
- If possible, set up the temporary work stations within your offices or an agency near your office.
- Make sure you are not overstaffing the project.
- Make sure that you involve your IT Team to ensure that the data is transferrable to and compatible with your Company's computer system.
- It is critical that you maintain ownership of the data and do not have to pay continuous maintenance fees.



PARTNERSHIP WITH OUTSIDE COUNSEL

○ MANAGING AND COMMUNICATING INFORMATION

- It is important that your General Counsel or a senior person on the legal teams attend all meetings and calls with the government entity/adverse party.
- While Outside Counsel may suggest that you should not or do not need to attend the calls/meeting, you should insist as it shows how important it is to your Company and so that you can assess the situation first hand.
- Not only should you review all information sent to other parties but you should actively engage in developing the strategy and drafting the communication.
- Do not allow Outside Counsel to control the case. While they may have a certain level of expertise, you will always be the best advocate/voice for your Company. Make sure you are part of the team.



PARTNERSHIP WITH OUTSIDE COUNSEL

- PREPARATION FOR CONTEMPORANEOUS LITIGATION (CLASS ACTIONS)
 - Always manage the case in preparation for civil actions, particularly class actions;
 - Make sure that you are controlling or maintaining information so that you can transition to another law firm for contemporaneous legal actions because all law firms are not experts in all matters.



PARTNERSHIP WITH OUTSIDE COUNSEL

○ FINAL POINTS:

- Remember the goal is to have a productive and beneficial relationship with Outside Counsel;
- While law firms have a business goal of making money, Legal Department have a responsibility to preserve Company assets;
- Even in the midst of a crisis, Legal must be diligent in managing Outside Counsel and monitoring legal fees and expenses; and
- More importantly, Legal must stay actively involved in the matter to make sure the process is aligned with the Company's goals, values and views.

