

Risk Management Intensive for In-House Counsel ¹

Session 2: Instructing Private Practitioners and/or Barristers.

A Practical Guide.

William Lye

Barrister at Law, Victorian Bar

I. Introduction

The In-House Counsel is the person who has the strategic responsibility for the legal, risk compliance, and company secretarial functions of the organisation. But whatever the task or title, the In-House Counsel is regularly viewed by management or the board as the “highly paid” problem solver, and ends up handling a broad range of legal and non-legal matters which he or she has might not have the knowledge or experience. The truth, however, is that the In-House Counsel is often over-worked and under-paid !

In Session 1, the legal concepts as to conflicts of interest, the duty of loyalty and legal professional privilege were discussed and a legal paper presented to be tucked away for that rainy day when it is needed. It is important for In-House Counsel not only to know the law but how best to handle professional and ethical issues in the context of wearing the legal hat and the business hat in a fast changing world economic landscape.

This paper seeks to provide a guide to In-House Counsel as to why, how and when to instruct private practitioners and/or barristers in the broader context of the In-House Counsels’ general practice. It does not seek to be an exhaustive practical guide as matters of practice are ultimately a matter of taking a common sense approach tempered with the integrity and character of the person.

The ideas in this paper are based on the author’s ² own experience as a practising barrister, non-executive director, board member, and entrepreneur.

II. Do more of what you can do and outsource what you can’t do

In-House Counsel often wears two hats – lawyer and business adviser. Business decisions are, however, often incongruous with legal paradigms. As a result, the In-House Counsel’s role has the potential of becoming muddy. Undoubtedly, the penultimate aim is to add value to the organisation’s bottom line and at the same time to ensure that management avoids legal risks. This simple rationale is easier said than done.

¹ Paper presented on 20 March 2009 for the Continuing Professional Development programme arranged by Leo Cussen Institute in the seminar series Risk Management Intensive for In-House Counsel

² Master of Entrepreneurship and Innovation (Swin, pending), LLM (Mon), BSc (Computers), MAICD.

As the pressure of cutting costs and expenditure mounts, developing new skills and reassessing the role of In-House Counsel within their organisation are becoming increasingly important.

When an organisation faces tough financial challenges, it is not only important for the In-House Counsel to maintain his or her sense of ethical and social responsibility but to find new ways to deliver effective solutions, build valuable networks, up-skill with a broad range of knowledge and share expertise in order to provide greater added value to the organisation.

Before embarking on a process of outsourcing work to external lawyers or consultants, there is an opportunity to realign one's thinking as to how innovative activity could be achieved. This necessarily begins from a self assessment of the individual's capabilities and resources and working out what could be done and how best to achieve those goals within a limited budget and time frame.

A. Cut your coat according to your cloth

According to Saul Eslake, the Chief Economist of the Australia & New Zealand Banking Group³, the prospects for the world economy in 2009 look bleak and the "advanced" economies as a group are likely to experience their first annual contraction in economic activity since the end of the second world war by the order of 1%. Growth in emerging economies will slow more sharply to an average of 4% or less.

With the tightening of expenditures in organisations, In-House Counsel are required to take on even more of the work load and minimise further expenditure on external lawyers or consultants.⁴ While such measures appear appropriate to management or the board, it has the tendency to expose In-House Counsel to potential risks of making wrong decisions. So, how does one take appropriate action to suit the circumstances or resources ?

Given the decline in transactional activity in the legal service market, clients' bargaining power is now greater than a year ago. In-House Counsel ought to take this opportunity to seek to change the pattern and find alternative fee arrangements and discounted billing rates from their external lawyers.⁵ If a good working relationship has been built over a long period of time with external lawyers, In-House Counsel ought not be embarrassed to discuss cost cutting measures including asking the external lawyers for free preliminary advice from time to time.

Although In-House Counsel insist upon high quality service especially from the larger external lawyers, there is no reason to think that the smaller and boutique law firms are not able to provide value for money and retain a high level of quality of service.⁶ Scaling down by using several smaller and boutique practices for specialty work could lead to better management of resources in the long run.

³ Eslake, S, 2009, "Economic Overview", in Committee for Economic Development of Australia, *Economic & Political Overview 2009*, Melbourne, February

⁴ A survey by Deloitte Forensic Disputes found that most corporate counsel predict a rise in commercial and legal disputes, and expect to handle more matters in-house. See <http://www.deloitte.com/dtt/cda/doc/content/ACLA%20Report%2007-08.pdf>

⁵ Fisher, R, 1985, "He who pays the piper", *Harvard Business Review*, March, 150-159

⁶ Merritt, C, 2009, "Corporates turn to boutiques", *The Australian*, 20 February

For smaller organisations where the In-House Counsel is unable to handle a matter due to the lack of resources, expertise or experience then the best course to adopt is to be able to justify to the board or management that external lawyers would not charge open-ended hourly rates but would settle for a negotiated fixed rate, and deliver results on a tight timeframe.

Ultimately, it is In-House Counsels' role to provide legal advice to the organisation at less cost than the external lawyers, and the tension between using external lawyers and avoiding the feeling of redundancy is a fine one. However, there is no better time than now to obtain further legal education⁷ by engaging in post-graduate studies and/or attending a wider range of Continuing Professional Development programs either offered by organisations such as Leo Cussen Institute⁸, the Law Institute of Victoria⁹, Australian Corporate Lawyers Association (ACLA)¹⁰, and specialists associations.

While there is a fee associated with some of these programs, the investment by the organisation could be justified on the basis that the long term savings in equipping the In-House Counsel with a broader range of practice areas would obviate the need to incur additional costs to engage external lawyers.

One useful approach is to advise your external lawyers to put you on the mailing list for their seminars, which are free, and make a point to attend them in order to gain up to date information.

B. Develop useful allies early by building a supportive network of trusted advisers

For In-House Counsel who have little or no experience with legal warfare, receiving a Writ against the organisation might seem like a nightmare unfolding. Conversely, the organisation might be the subject of a hostile takeover and the board would be looking to the In-House Counsel for preliminary strategies to avert it. If you don't know how the system works, you are not going to do as well.

In the story of the ill-fated alliance between the dolphin and the lion against the bull¹¹, the lion, the king of the animals of the land, and the dolphin, the king of the sea creatures, agreed to assist one another. When the lion asked the dolphin for help against his arch-enemy, the bull, the dolphin wanted to help but could not come out of the sea. The lion felt betrayed but the dolphin said "I am not to blame ! My nature is that of a sea creature, and it means that I cannot come onto the land."

The same is true of people. When we form business relationships with one another, we must choose allies who can come to our aid in moments of peril. In order to be ready for any kind of problem, In-House Counsel must establish relationships early with the right kind of network of specialists or consultants to call upon at the appropriate time.

So, where are these allies found ? A good starting point for getting advice and/or "word of mouth" recommendations is from one's peers and colleagues. Another resource is

⁷ Downes, L, 2004, "First Empower All the Lawyers", *Harvard Business Review*, December, 19

⁸ See <http://www.leocussen.vic.edu.au>

⁹ See <http://www.liv.asn.au>

¹⁰ See <http://www.acla.com.au>

¹¹ Gibbs, L (translator), 2002, *The Dolphin and the Lion* in Aesop's Fables, Oxford University Press, 2008 (reissued)

from ACLA, which is the peak national association representing the interests of more than 8,000 lawyers working for corporations and government in Australia.¹² Many of you are likely to be members of ACLA but how many are actually taking advantage of its extensive education and networking events ?

Most In-House Counsel would have worked as solicitors and were likely to have been members of the Law Institute of Victoria (LIV), which is the state's peak body for lawyers. There are a host of information, services and resources available to assist the lawyer in everyday practice. The LIV has more than 14,500 members who comprise of legal and non-legal professionals from the private sector, government, tertiary institutions, industry and local community.¹³

There is also the Victorian Bar, the professional association for lawyers practising solely as barristers. The total number of barristers currently in practice is 1,740 comprising of 227 Queen's Counsel or Senior Counsel and 1,513 Junior counsel.¹⁴ While barristers tend to do advocacy work and are specialists in evidentiary matters, they are also fiercely independent when providing advisory work.

The strength of each of the tripartite lawyers' group (with the fourth group being government lawyers) is now evident especially with ACLA as a national association representing corporate lawyers with international alliances. The question, however, is whether there is a cost effective way for In-House Counsel to engage external lawyers in specialty areas of work.¹⁵

However, like the dolphin and lion fable, when you are faced with immediate peril unless you form the right alliances, others might not be able to come to your aid when you really need them.

C. Be competitively innovative by looking for new ways of doing things

The concept of lawyers engaging other lawyers to undertake legal work on behalf of clients is not new. Historically, solicitors had to engage barristers to appear in court as they did not have a right of audience.¹⁶ Solicitors had to undergo apprenticeship and articled for a term of years. He or she was not required to read the law books. Barristers were seen as "men learned in the law" and solicitors were seen as first-rate persons of business and the barrister was the person the solicitor consulted !

While there is no longer a divide between solicitors and barristers as solicitors are able to undertake barristers' court work, barristers are still bound by rules of conduct not to engage in solicitors' work. In practice, however, solicitors often engage barristers to undertake work ranging from advice to advocacy in the courts.

¹² See <http://www.acla.com.au>

¹³ See <http://www.liv.asn.au/about/ourmembers/>

¹⁴ See <http://www.vicbar.com.au/b.3.2.aspx>

¹⁵ This question is beyond the scope of this paper but initiatives are being developed to address the same

¹⁶ Lawyers of London, "The line between barrister and solicitor", New York Times, 27 August 1893

The Commercial Bar Association of Victoria (CommBar)¹⁷ and ACLA are currently collaborating to develop practical initiatives for In-House Counsel to directly access barristers¹⁸ willing to undertake work mutually beneficial to its respective members.

An interesting result of the joint CommBar and ACLA survey¹⁹ revealed that approximately 12 % of In-House Counsel did not know that they could engage a barrister directly without going through an external lawyer but 45% of In-House Counsel have never engaged a barrister directly.

Having a wide network comprising of commercial barristers ready for action would also be a new way of getting assistance and outsourcing legal work. The two effective and often forgotten “products” offered by barristers are the retainer and the advice in conference.

Barristers also regularly deal with professional and ethical scenarios and are bound by professional rules of conduct.²⁰ Barristers are adept in getting to the heart of the problem quickly and are often very cost effective for “high level” advice.

When you have developed sufficient rapport with barristers and especially with Queens Counsel or Senior Counsel, the ability to call on them for help is an invaluable privilege. You have access to the best representation or advice in case you find yourself in a legal quagmire within your organisation.

The difference with external lawyers as a source of help is that the external lawyers have been retained to act for the organisation over a longer period of time and as such would more than likely be in a position of conflict to provide the In-House Counsel with advice or representation regarding an issue of conflict within the organisation.

The strength of such a relationship takes time to develop and ought to be cultivated sooner rather than later.

With many former partners or senior associates of major law firms opting for smaller and boutique private legal practice, In-House Counsel have a greater pool of external lawyers to choose from. These lawyers are accustomed to providing high level of service but are also able to charge at a fraction of the fees due to the reduction of significant overheads. Areas like intellectual property, licensing, employment, securities, resources law and planning and environment are no longer in the province of larger law firms. There are also smaller commercial litigation law firms who would give the bigger players a run for their money.

It will take courage and faith to adopt a new approach to delivering cost effective service yet maintaining a high level of standard and quality. In-House Counsel must have the strategic intent²¹ to be competitively innovative within the organisation yet be able to contain competitive risks within manageable proportions.

¹⁷ See <http://www.commbar.com.au>

¹⁸ A member of the Victorian Bar may be instructed by an Australian lawyer holding a current practising certificate to advise or to appear in court. There is no prohibition for accessing a barrister directly. This is to be contrasted to the Victorian Bar’s Direct Access Rules where it applies to lay clients or approved professional bodies

¹⁹ Vine, P, Loughnan, M and Lye, W, 2009, “ACLA and COMMBAR survey results on briefing barristers directly”, February, Unpublished

²⁰ Annesley, R, 2006, *Good Conduct Guide. Professional Standards for Victorian Barristers*, Victorian Bar, <https://www.vicbar.com.au/ssl/practice/e.7.11.aspx>

²¹ Hamel, G and Prahalad, CK, 2005, “Strategic Intent”, *Harvard Business Review*, July-August, 148

III. Managing expectations for better outcomes

The *Legal Profession Practice Act 2004* and the relevant professional conduct rules of the Law Institute of Victoria provide helpful guidelines for conducting a legal practice professionally and ethically.

To the extent that there are certain rules applicable to Corporations or its officers, they are set out in the *Corporations Act 2001*. However, management are not specifically governed by any form of professional conduct or code of practice. They view being bound by a set of rigid rules as extraordinary and beyond the scope of their job description.

So, how does In-House Counsel manage everyone's expectations and yet maintain the integrity of his or her reputation and limit any adverse consequences from inaction ?

A. Protect your reputation no matter what it takes

Being an In-House Counsel is not a business development job. It is not about sales, marketing or closing the deal. It is foremost a legal job. It is about protecting the interests of the organisation and minimising the risks of exposure to losses. Therefore, it is not only important to understand the role of In-House Counsel but it is critical to ensure that others see you perform that role.

So, wearing two hats on one head often blurs that distinction for In-House Counsel. As the legal advisor to the organisation, In-House Counsel ought to only provide legal advice and spell out clearly the option and risks for the organisation in relation to a particular issue. It is not for In-House Counsel to make the business case or the business decision.

It is understandable, however, that management often view the In-House Counsel as nothing more than an overhead and more likely to hinder innovation or business objectives rather than progress the organisation's profit-driven objectives. As a result, In-House Counsel could become entangled in a "management oriented" approach to providing legal services.

While in practice, this is far from the truth, there is a heavy burden on In-House Counsel to be the "conscience" of the organisation and to ensure the organisation minimises its risks in business decisions or outcomes.

There are, however, only three fundamental rules to remember as In-House Counsel regardless of which hat is on the head.

- Rule Number 1: You are an officer of the Court. Your principal duty is to the Court unless you no longer maintain a practising certificate.
- Rule Number 2: You are an officer of the Company. Your secondary duty is to the Company and not its officers or stakeholders.
- Rule Number 3: You are not going to gaol for anyone.

By reminding yourself of these three simple rules, you will avoid majority of the conflict of interest scenario and have the courage and conviction to put forward a legal position in the best interests of the organisation.

The more difficult question is what to do when faced with situations when you need to handle a piece of new, unwanted and often ambiguous information which might not be in the best interests of the company. The line between moral decency and deception could be tricky to manage. Undoubtedly, the existence of such information must be disclosed. The complicated question is to determine how the disclosure should be made.

This is where In-House Counsels' network of supportive advisors and mentors become crucial. Internally within the organisation, it is absolutely necessary to find and nurture a strong rapport with independent non-executive directors as potential people to seek guidance. For larger organisations, the chair of the audit committee would be a good example.

B. Encourage a rigorous code of ethics within the organisational culture

Before a U.S. Senate Judiciary Committee on 6 February 2002, Boston University law professor Susan Koniak put a pointed question: What were Arthur Andersen's lawyers doing while Andersen's accountants and staff were shredding Enron documents?²²

A good lawyer will make the law clear to his or her client. The problem arises when lawyers forget their role and start being creative. As lawyers, we are paid to monitor what is legal and what is not. In practice, however, In-House Counsel is mixed into management where there are no codes of conduct.

The more organisations seek employees who value ethical conduct, the greater the likelihood that they will get employees who expect the organisation to practice what it preaches.²³

A rigorous code of ethics would likely curb misconduct and make better managers.²⁴ Most organisations have a written code of ethics they ascribe to. It is like having the "ten commandments". Living to the code is a different matter altogether.

Lawyers as opposed to management are required by law to adhere to a professional code of conduct and the meaning and consequences of those codes are taught at University and sustained through continuing legal education. Consequences of non-compliance could spell the end of one's career in the law. Through these codes of conduct, a high level of trust emerges which empowers the legal practitioners to conduct themselves with the highest standard and integrity.

The idea of management behaving like a professional is alien although the push to make management a profession is not new.²⁵ Of course, some might argue that it is likely to be

²² Fryer, B, 2002, "Can you trust your law firm?" in an interview with Susan Koniak, *Harvard Business Review*, November, 22-24

²³ Dawson, S, 2000, "Whistleblowing: a broad definition and some issues for Australia", *Published as Working Paper 3/2000 by Victoria University of Technology*, Business Ethics Research Unit, School of Management, Victoria University

²⁴ Khurana, R, and Nohria, N, 2008, "It's time to make management a true profession", *Harvard Business Review*, October, 70-77

²⁵ *Supra* at 72

more difficult for business people²⁶ to adhere to an ethical mind than it is for other professionals because business was not strictly speaking a profession.

Psychologist Howard Gardner suggests, however, that a person with an ethical mind would ask: “What kind of a person, worker, and citizen would I want to be? If all workers in my profession adopted the mind-set I have, or if everyone did what I do, what would the world be like?”²⁷

While what gets in the way of doing the ethical thing is the influence of the rotten few, organisations can no longer sit idle. The opportunity exists for In-House Counsel to contribute toward the development of knowledge and competency standards required within the organisation and promote a rigorous code of ethics. Setting and maintaining high standards of integrity in the work place will ultimately have a positive influence on others.

An organisation whose culture is built on ethical, fair and honest conduct will find it easier to wrestle with “grey” areas affecting the interests of the organisation. This, however, takes time for there to be a culture of change.²⁸ It is clearly not enough to espouse high standards. To live up to them and help others do the same requires an ethical mind that lets you practice your principles consistently.²⁹

Ultimately, In-House Counsel must speak out about outrageous conduct³⁰ or resign.

C. Get aggressive about passivity thereby limiting the potential risk of scandal to the organisation

Being a bystander in an organisation is no longer an option. In *Conspiracy of Fools: A True Story*³¹, Kurt Eichenwald tells the story of the 2001 collapse of Enron. Eichenwald wrote about the complicity of Enron’s accountants, their lawyers (both internal and external), the senior management and the board engaging in massive book-cooking with little interference from the managers, lawyers and advisers. Clearly, the picture that emerged was that of a corporate culture rife with greed and immoral practices for self-gain.

Passivity is a curse and is an epidemic in many organisations today.³² Samuelson and Gentile’s³³ research has shown that people usually don’t act on their values because they don’t consider such action to be part of their job. Business people view moral and ethical dilemmas as exceptions. They feel that by confronting such dilemmas, they are stepping outside their comfort zone and beyond their competencies. It is easier to choose the path of least resistance.

²⁶ Bhide, A and Stevenson, HH, 1990, “Why Be Honest if Honesty Doesn’t Pay”, *Harvard Business Review*, September-October

²⁷ Gardner, H, 2007, “The Ethical Mind”, *Harvard Business Review*, March, pp. 51-56

²⁸ Amabile, TM, Hadley, CN, and Kramer, SJ, 2002, “Creativity Under the Gun”, *Harvard Business Review*, August

²⁹ Gardner, H, 2007, (supra)

³⁰ Lye, W, 2008, “Blowing the Whistle – Does the Current Law Afford Effective Protection?”, *Unpublished paper presented in Governance and Corporate Leadership*, Australian Graduate School of Entrepreneurship, Swinburne University

³¹ Eichenwald, K, 2005, *Conspiracy of Fools: A True Story*, Broadway Books

³² Samuelson, J and Gentile, M, 2005, “Get Aggressive About Passivity”, *Harvard Business Review*, November, 18-20

³³ Supra

Most organisations don't just want their employees to think about doing the right thing but to actually do the right thing. While it might be argued that such "moral intrusions" are beyond the role of In-House Counsel, foremost as an officer of the court and legal officer of the company, In-House Counsel must embrace the responsibility to facilitate such a process and indeed assist others over any mental hurdles they might have.

In order to limit the potential risks of mala-administration and rorts in an organisation, getting aggressive about passivity must be part of one's psyche and every day practice. By doing so, less skeletons will be found in the cupboard.

IV. When to instruct private practitioners and/or barristers

A. Identifying the need early

Perceiving a threat that no one discusses is likely to create more unproductive work that leads to misunderstanding and stress than a threat that has been clearly identified and made the focal point for the problem to be solved by the most appropriate means.³⁴

The matters in which In-House Counsel could instruct private practitioners or barristers would depend on the size of the organisation and its resources. In larger organisations, the legal department would have deep expertise and knowledge of their industry and business drivers. They would generally handle most of the matters in-house.

For smaller organisations with fewer resources, barristers are increasingly being instructed on commercial matters directly by In-House Counsel.³⁵ Regardless of the size of the organisation, if the matter appears litigious, barristers (especially Queens Counsel or Senior Counsel) could offer the client:

- A "high-level" and critical view on the merits of the case
- Personal attention to the matter
- Cost savings
- Quicker response without having to go through bureaucratic procedures
- A more effective approach to working out a solution rather than merely finding an answer

The process applies to boutique law firms that specialises in specific areas of law. For example, mining and resources law firms, intellectual property specialists, migration experts, etc.

³⁴ Hamel, G, and Prahald, CK (supra) at 159

³⁵ Vine, P, Loughnan, M and Lye, W, 2009, (supra), where 55% of respondents surveyed stated that they had engaged barristers directly. However, 12% of respondents surveyed did not even know that they could engage a barrister directly

B. What types of work could be briefed out ?

Generally, there is no limitation as to the types of work which In-House Counsel could use the services of private practitioners or engaging barristers directly without going through an external law firm.

Where the threat of litigation is looming, for example a potential breach of confidentiality by an employee, In-House Counsel could engage a barrister directly without going through an external law firm for specific advice³⁶ as to whether or not any interlocutory relief could be obtained. If so, immediate steps could be taken to go to court and seek an interlocutory injunction.

Questions of interpretation of contracts and strategic advice as to dealing with breaches of regulatory requirements are other examples where barristers could be retained directly.

As specialists in evidentiary matters, barristers could also be used to identify the nature of the evidence required and witnesses from whom such evidence are to be taken. Where the barrister is involved at the outset of the litigation, the overall strategy as to the collection of evidence and discovery of documents could be mapped out with effectiveness.

Setting a clear direction as to the tactics of a case is vital to the ultimate goal of either winning the case or defending it successfully. Majority of potential disputes facing the organisation could be dealt with strategically by a barrister getting involved early as barristers are experienced in being able to get to the guts of the issue without spending an inordinate amount of time to do so. It is this sort of pre-emptive strike that saves the organisation from weeks of uncertainty as to what it ought to do.

More often, the organisation requires specialist advice and many barristers have deep expertise in areas of law, for example, constitutional law.

The untapped areas where barristers could also be engaged directly are in mediation and arbitration. Appropriate dispute resolution clauses are now a common feature in an organisation's contracts. In a recent survey by Deloitte Forensic, it was found that 93% of In-House Counsel surveyed expected to have their organisation's disputes resolved by a negotiated settlement, as opposed to judicial determination by a court.³⁷ Engaging a barrister to appear in a pre-litigation mediation to resolve a potential dispute is not only cost effective but provides In-House Counsel a better process in handling disputes facing the organisation.

Where an organisation has a larger legal department, engaging a barrister in an arbitration would avoid duplication of work and increased legal costs.

³⁶ Vine, P, Loughnan, M, Lye, W, 2009, (supra) where the results suggest that 74% of work barristers were engaged in directly by In-House Counsel involved the provision of written advice and 45% involved oral advice

³⁷ Deloitte Forensic In-House Counsel Survey, 2009, "How Do In-House Counsel Manage in Volatile Times?", www.deloitte.com.au

Of course, not all matters are suitable for engaging a barrister directly. Where the organisation has received a Writ involving a large claim or intending to issue proceedings involving large monetary sums, it is important that a suitable external law firm be engaged to conduct the day to day grind of the litigation. Such resourcing is vital to the continued survival and performance of In-House Counsel, who is dealing with a myriad other issues affecting the organisation.

Private practitioners rather than barristers are also better able to provide services of a non-litigious type. Examples are conducting due diligences, advising on procedures involved in takeovers, mergers and acquisitions, property transactions and the like.

C. Small is the new big

Given the current difficult economic times, and the potential of disputes increasing, organisations can no longer afford to lose control over the costs of handling those disputes. Traditionally, disputes have ended up in court with long delays in getting before a Judge for adjudication and a bottomless pit of legal costs.

In-House Counsel must now find new ways of servicing the needs of the organisation and yet maintain a balance between costs effectiveness and value for money. The key to any change is to collaborate with people of like mindedness.

Small is the new big.³⁸ The concept is simple but hard to implement as there is a culture that small means poor quality. However, many organisations can no longer afford to spend a large amount of their cash on huge legal fees. They would have to re-think their attitudes. Do bigger law firms really provide better service? Do bigger law firms really provide better quality advice. Big certainly means that there are more resources but are there more economies of scale? Big, however, means bigger overheads, which leads to bigger fees charged.

On the other hand, small means that the legal practitioner is far more involved with the client and closer to the issues that affect the organisation. Small means that the practitioner could respond quicker and control his or her costs structure. Of course, these are generalisations which assume the practitioner has experience tempered with deep knowledge and skills.

It is, however, apt that barristers are well placed to provide a cost effective service to the client with the care and attention needed on a matter. To the barrister, he might be a small practice but he or she inevitably thinks big to compete and survive.

³⁸ Godin, S, 2006, *Small is the new big*, Penguin Books

V. How to find the best lawyer for the job ?

A. Make effective use of the internet and social networking

“Word of mouth” recommendation from peers is still the best way to find someone. However, like a “dating” or “matching” service, it often leads to disappointment or incompatible personalities.

The best way to find a private practitioner or barrister is to find out what they are like on the internet. Google first. Ring later. It is one thing to find an academically impressive lawyer, and it is another to find the right lawyer for the organisation’s current needs. Internet searches would reveal many more things than one might expect from a “word of mouth” referral. An interesting approach is to do an “image” search of the lawyer to see what comes up. There could be intriguing results !

The Law Institute of Victoria’s web site provides a list of accredited specialists in specific areas of law or legal practice. They are a particularly useful point of contact when looking for an external law firm or private practitioner to engage.

The Commercial Bar Association of Victoria’s web site³⁹ is also another good starting point. While barristers are self employed and maintain a “solo practice”, they often work in teams for larger matters. They are generally “court specialists” and retained specifically to handle litigious matters. Barristers, particularly those practising in commercial and/or corporate law, however, do much more than court work. They also provide “high level” strategic and legal advice, they draw and settle pleadings, they advise on the discovery of court documents, they draw and settle witness statements, they guide the evidentiary process, and they attend any public examinations or alternative dispute resolution process on behalf of the clients.

How do you know whether the private practitioner or barrister is any good ? When contacting them, ask for a profile or resume. You might receive a 50 page document or a one-liner. This is also a good way of working out what sort of person you are dealing with – the long winded or the arrogant.

In order to find the best lawyer for the job, four important considerations feature prominently:

- Can they provide quality advice ?
- Can they provide practical advice ?
- Can they provide a cost effective service yet maintain high standards ?
- Can they respond quickly with the resources they have ?

This involves forming a view about the individual’s intellectual capacity and ability to form practical judgment. There will be occasions when you need a “black letter” legal advice. Looking for authors of legal books is a good way of finding out who is the “guru” in that area of law.

³⁹ See www.commbar.com.au for barristers holding themselves out as practising in commercial law and generally see www.vicbar.com.au for all other barristers. You can search for barristers with varying seniority, expertise, admissions in different jurisdictions, language skills, accreditation and breadth of life experiences

It is likely to be the case that the more senior you are in the organisation, the more input you have on who to engage. In the end it boils down to whether you are able to connect with the person.

Look for team players. Collins⁴⁰ considers that the most important thing about building teams is to get the right people on the bus and place them in the correct seats. In-House Counsel is often the driver of the bus, and knows the destination and unless his or her invited passengers have the same idea about getting to the destination, the journey would be tiresome, ineffective and eventually everyone will end up in the wrong destination.

B. Prepare your materials well

The more relevant information In-House Counsel could provide to the private practitioner or barrister, the better the outcome would be. For example, if you are seeking legal advice from a barrister, prepare the following:

- An information kit about the company and its senior executives. This could be as simple as referring to a link on the organisation's web site
- Questions you require a legal answer and/or solution⁴¹
- Briefly set out the key facts, the relevant parties, the issues or problems
- Provide copies of critical documents
- Indicate when you require a meeting and the time frame for the advice (oral or written)

The same points apply equally to a litigious matters. In theory, these points appear simple but in practice, it is often the case that In-House Counsel do not have the time or the resources to prepare such materials. It is important, however, that In-House Counsel recognise that if he or she intends to engage a barrister directly without going through an external law firm that the barrister is prepared to accept instructions directly as some barristers are not prepared to undertake instructions directly from organisations because of a perceived lack of proper instructions or provision of written instructions and/or documents.

Once you have determined what materials to provide to the barrister, send the documents to the barrister and arrange to meet in the barristers' chambers or ask the barrister to attend your organisation's offices.

C. Control your external lawyers and how you use them

Most organisations have a budget to fund the use of external lawyers for matters outside the expertise of In-House Counsel. It might be prudent to consider how much of the budget ought to be allocated for generalist work and for specialty work.

For example, if an organisation is in the food distribution industry and has an In-House Counsel to manage its legal contracts with suppliers, buyers, etc, and uses an external

⁴⁰ Collins, J, 2001, *Good to great. Why some companies make the leap and others don't*, Random House

⁴¹ It is important to understand the difference between obtaining an answer to a problem and finding a solution. For example, you might wish to know whether there is a breach of a regulation and the answer could be simple. However, how do you overcome the breach is about finding a solution. Identifying the sort of advice you require is vital to avoid a "black letter" response

lawyer for property related matters, there is no reason why the In-House Counsel could not retain a barrister without having to go through the external lawyer to advise specifically on matters relating to the termination of an employee for breach, the enforcement of intellectual property rights, small claims in the Tribunal or lower courts.

Negotiate and settle on the fees at the outset. Barristers generally do not charge for telephone conversations, making photocopies, providing tea or coffee. Barristers tend to charge either on an hourly basis or on a daily basis. The “per day” fees are usually charged for matters requiring appearance work, ie, court, mediation, arbitration appearance or general preparation for a trial. “Per day” does not mean 24 hours. Generally, it means work done between the hours of 9am to 5pm, or by agreement.

For advice in conference, the best approach is to agree on a fixed fee. For example, if no written advice is required, the fixed fee would usually include time for reading and general research, if necessary, and the time spent in conference. Depending on the level of expertise required, there could be a fixed lump sum fee for the oral advice which is not referable to time but more to the expertise of the barrister and the value of the advice to the organisation. Again, it is better to make sure that the fees are agreed upon at the outset to avoid any misunderstanding.

If written advice is required, the fees to be charged are generally in addition to the above. In-House Counsel ought to check with the barrister when asking for the advice to be put in writing after an advice in conference. If the barrister is happy to provide a written advice at no further charge then it would be advantageous to have the advice in writing otherwise agree on the fees at the outset.

Where private practitioners are engaged, it is imperative to work out the ultimate per hour costs of providing the service. Unlike barristers, law firms have a team of solicitors potentially working on the matter. For example, when attending a conference, there could be as many as three or four lawyers’ time involved in the preparation for the conference. Indeed, there could be more than one lawyer in attendance at the conference. Having several lawyers working on the matter on an hourly basis could add up very quickly to thousands of dollars per hour. These are the hidden traps which In-House Counsel need to be aware of and manage their external lawyers.

Most law firms would be happy to negotiate lump sum fees or cap their charges for specific tasks. It is also important to negotiate and fix disbursement items such as costs of photocopying, mail and courier deliveries, telephone calls, briefing and attendance by solicitors upon barristers without the prior approval of In-House Counsel, research conducted on every possible area of law affecting the issues, etc.

VI. Conclusion

This paper seeks to provide a basic guide to In-House Counsel as to dealing with issues affecting the practice of the law in an organisation. It is not meant to be comprehensive.⁴²

Understanding the role In-House as a lawyer rather than a business adviser would minimise the potential of conflicts of interest. Adhering to a rigorous code of conduct would

⁴² For more information, the author may be contacted at wemlye@foleys.com.au

ensure high standards and encourages the organisational culture to act with honesty and integrity.

Simple rules of engagements with private practitioners and/or barristers set out in this paper serve to assist In-House Counsel to keep his or her eye on the ball. Ultimately, most problems can be solved by using a common sense approach and keeping things simple.