

**BRIEFING NOTE**

**The New World Order: Selecting and Managing Your Legal Counsel**

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**Introduction**

When we emerge from lockdown or circuit breaker, the world that will greet us will be slightly but significantly different. Working from home will be a respected business practice. Video conferencing will be encouraged as an alternative to business trips. And the provision and cost of professional services will come under even greater scrutiny. If professional services can be provided remotely why should clients pay for expansive office suites, time incurred in travelling and a standing army of associates and support staff? The answer is, they should not. But when faced with a complex dispute, how does a client ensure that it is properly and effectively represented whilst at the same time retaining a reasonable budget for the costs? In this article, we offer five practical steps to selecting and managing your legal counsel.

**Step 1: Selection of Legal Counsel**

Michelle Obama once said that she could understand people who voted for Donald Trump but she could not understand people who did not vote at all. Mrs. Obama is a qualified lawyer and the same principle can be applied to the selection of legal counsel. Selection of counsel has to be a conscious, informed choice, not a choice made by defaulting to a panel law firm. In selecting legal counsel, clients should be mindful of three factors: (i) the experience to understand the dispute; (ii) the time to prosecute the dispute; and (iii) the passion to drive the dispute. A client will likely be engaged in the dispute for up to two years, during which period there must be a trust and confidence in counsel to deliver the commercial result. In selecting that counsel time and effort must be invested to ensure the relationship will endure.

**Step 2: Letter of Advice**

The letter of advice sets out an overview of the dispute and provides the client with guidance as to the time, cost and prospects of success. If requested, as it should be, before the start of the engagement then it serves three important purposes. First, it assists in selecting legal counsel by providing an opportunity for counsel's experience to be demonstrated. If the advice is thin on technical or sector detail, perhaps the search must continue. Second, it gives an indication as to the strategy that might be adopted throughout the dispute. If the advice is heavily caveated and offers only a 50/50 prognosis, perhaps counsel cannot give the client the direction that it will need when the gloves come off, as inevitably they do. Third, having selected legal counsel, it makes counsel accountable as against the advice that it has provided. The "risks of litigation" is not an excuse for a disappointing result. If an adverse outcome is anticipated then counsel should be advising early settlement on best commercial terms.

### **Step 3: Hourly Rates**

Hourly rates as a means of costing professional services should be as anachronistic as the fax machine is as a means of telecommunication. Technology has moved on but many law firms have not and continue to embrace the hourly rate. Why? Because the remuneration of the equity partners is often calculated with no more complexity than applying the formula:

$$\frac{\text{No. of Equity Partners} \times \text{USD1 Million} + \text{Fixed Costs} + \text{Salaries}}{\text{No. of Lawyers} \times 1,800 \text{ hours per Lawyer}} = \text{USD } X / \text{USD } Y \text{ per Hour}$$

X is the target revenue for the firm adopting Y as the average hourly rate per lawyer. Using this model, the equity partners target an income each USD1 million, more if the chargeable hours are achieved, less if they are not, and pass that to the client through the hourly rate. Of course, this model also encourages the generation of chargeable hours. A double whammy.

The alternative is a fixed fee, either for the matter in its entirety or for various stages, such as pleadings, evidence, trial and closing submissions, appeal etc. For the client, visibility is the main advantage of a fixed fee but, if agreed for the entire matter, it also incentivises counsel to work towards a commercial settlement and so avoid the time heavy period before and during trial. For the law firm, a fixed fee generates early cash flow which is critical and, in avoiding the time incurred in chasing outstanding invoices, justifies any discount demanded.

### **Step 4: Lean and Mean**

Judges frequently remark that no matter how complex the dispute, the documents critical to its determination rarely exceed more than two lever arch folders. Even in the age of email and e-discovery, that still holds true. And it applies equally to the number lawyers assigned to a file. No matter how complex or document heavy a case may be, a senior lawyer assisted by two capable junior lawyers and a member of the firm's professional staff should be adequate, provided that each team member is experienced, dedicated and passionate to the matter at hand. If more lawyers are assigned to the file then the costs go up and uniform, co-ordinated thinking breaks down. Too many cooks really do spoil the case management broth.

### **Step 5: Taxation**

If all else fails, clients are entitled to have their costs taxed, which means that the Courts will assess whether the costs charged to the client are reasonable, taking into account the complexity of the dispute and the conduct of the parties in resolving the dispute. Taxation is not available in arbitration and clients may surrender their rights to have their costs taxed if they enter into a contentious business agreement with the law firm they engage. But if the steps taken above have been followed then it is unlikely that there will be a dispute over the final bill. That bill will be proportionate to the amount in dispute and should reflect the value that good counsel can add to a client's business, even in the cauldron of a commercial dispute.

### **Final Word**

At Sharpe & Jagger we focus on the quality of our counsel and the efficiency of our service. We work with our clients to find a commercial solution at a reasonable cost. And that is why, unlike other firms, we publish our rates and fees, and articles such as these, on our website. Like our clients, we are learning to adapt to new ways of working. But one thing we have always known is that whilst it is important to win, it is equally important not to win at all costs.

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