

When to bring in outside litigation counsel: A cost-benefit analysis

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When a business dispute begins, the question of if and when to engage outside litigation counsel naturally arises. Many companies delay engaging outside counsel until a lawsuit is imminent. The fear is that engaging outside counsel before it is absolutely necessary will result in additional and unnecessary costs.

Generally speaking, this fear is driven by the belief that legal bills should be delayed as long as possible, in part, because engaging outside counsel will all but ensure long, protracted litigation, and the related expenses, will materialize.

The opposite, however, is often true. Engaging outside counsel when the dispute is developing can often assist the company in limiting costs and, in some cases, avoiding litigation altogether.

Outside counsel, at a minimum, can assist in the early assessment of the matter, preserve privilege, and help develop the facts and evidence in a favorable manner. That work better positions the company for early resolution and, if necessary, to put on a more persuasive case in the courtroom.

Early risk assessment

An early and accurate risk assessment will benefit the company. Outside counsel can bring a fresh, objective view to the table and identify potential legal, financial or reputational risks. Specifically, outside counsel can:

- Evaluate the strength of the company's position and likely outcomes.
- Identify strengths and weaknesses in the evidence.
- Help shape a legal strategy that minimizes risk.

By shaping the narrative early rather than reacting later, businesses can manage expectations, better control outcomes and reduce exposure. Often, the most difficult task for business leaders is determining whether a claim is worth bringing or, if threatened with a claim, the availability and strength of defenses. An early risk assessment, assisted by outside counsel, can aid in this process.

Preserving attorney-client privilege

Outside counsel can also guide internal communications and help preserve attorney-client privilege, providing an important layer of protection. This allows business leaders and their employees to have honest and open communications about the direction the dispute can and should take.

Outside counsel can assist the business in organizing and preserving relevant evidence, presenting the most persuasive story and putting the company in the best position should litigation ultimately arise. Preserving the privilege during this process allows the company to freely analyze and discuss the evidence, and to the extent available, assess their counterparties' position.

Developing the relevant facts and focusing the investigation

Whether in the courtroom or arbitration, outside counsel can work with in-house counsel to marshal the evidence and develop the case. When done at the outset, the company is better positioned for a successful resolution or litigation if that outcome is unavoidable. Indeed, companies often find that early assistance from outside counsel helps avoid bigger, more expensive problems down the road.

Finally, the optics of bringing in outside counsel

early can be managed. If doing so presents a problem to a business relationship, outside counsel's involvement does not have to be publicized.

Matters involving regulatory implications, public scrutiny or material contracts are especially ripe for early involvement of outside counsel. Assuming their involvement can be coordinated with in-house counsel and the business's leaders, outside counsel can better position the company for success and do so at a lower cost than if they are brought in later to file a complaint or defend

the lawsuit.

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