CHOOSING THE THIRD WAY

Hiring Big Law can be costly; a boutique may be risky. What’s a GC to do?

[ BY CHRIS COLVIN ]

DO GENERAL COUNSEL WANT ALTERNATIVES to paying top-dollar rates for Big Law attorneys on big-ticket litigation and other high-stakes matters? Of course they do, as reported in countless articles. However, as most readers of Corporate Counsel will recognize, this is easier said than done. Precisely because of the high stakes involved, it is essential to minimize risk. And you have to pay more to lower risk, right?

Not necessarily. This article proposes one answer to the tough question of how GCs can lower costs—and lower risk—in hiring outside counsel.

Most of us have participated in numerous discussions on this two-part theme:

1. We have a high-stakes litigation matter on our hands. We’ve always used a handful of Big Law firms—they’ve usually done a fine job, and my management feels much safer when we hire a “big name.” But those bills can be whoppers.

2. We also know some high-quality boutique specialty firms, and we’ve used them for medium-sized and small matters—and gotten great results at a very reasonable cost. But if we hire a boutique for a high-stakes matter and don’t get a great result, management will ask why we didn’t play it safe by hiring a Big Law firm. It may be that a Big Law firm would not have gotten a better result, but I don’t relish testing out that argument on management.

Sound familiar? The first way costs too much, but feels like a safe and well-worn path. The second way would save a lot of money, but feels risky and unfamiliar.

I propose a practical and commonsense “third way” that I believe allows GCs to have their cake and eat it too. My own field is intellectual property, and I have always felt that a high-stakes IP litigation is like brain surgery. You are literally exposing your company’s IP “brains” to judicial scrutiny, a process that in a large case can be both essential to your company’s future and enormously risky. I submit that, like actual brain surgery, a second opinion should be the standard of care for high-stakes litigation.

The third way I propose is to hire one of your usual Big Law firms to lead your team, but also bring on board a high-quality boutique firm that you’ve worked with, or know about. Many excellent boutiques are willing to be brought on as cocounsel in high-stakes matters—at much lower billing rates or even on a monthly fixed-fee basis.

Adding a lower-cost/high-quality boutique to your litigation team can add deeply experienced counsel at a much lower cost than Big Law partners with equivalent experience. Indeed, many partners in boutique firms were Big Law partners before founding their own firms. According to Jordan Kanfer, general counsel of NTT America, “There are increasing numbers of former Am Law 200 partners who have left their big firms behind and founded excellent boutiques. They spent years litigating with and against some of the best attorneys in the industry, and they bring their skill and experience to their new firms, but at a significantly lower price point.”

REDUCING COST WITHOUT ADDING RISK

Utilizing this third way, the GC and in-house team managing the matter can push any appropriate tasks to seasoned lawyers at the smaller firm to take advantage of better billing rates. Exactly what tasks those may be can be determined and adjusted as the matter moves forward. Those adjustments will come naturally as the two firms learn to work together and the in-house team manages tasks and expenses.

Dimitrios Angelis, the general counsel of Wockhardt Ltd., a global pharmaceutical and biotechnology company, has found that “cocounsel can absolutely be used effectively to both manage costs and offer precise expertise.
where needed. Just like there might be one general overseeing the battle, there could also be a special-ops team that performs discrete activities along the way.” For example, “having a focused boutique firm help with litigation is a great way to save money on written briefs and motions before the court.”

Admittedly, having two firms in harness together can lead to ego clashes and jockeying for the lead role. However, these issues are far more likely to occur when two Big Law firms serve as cocounsel. I submit that they are more easily managed when firms of different size serve as cocounsel, where one firm is confident of its leadership role and that role is made clear at the outset.

Indeed, most boutique firms will be quite comfortable playing a supporting role, especially if you have not worked with the firm on a large matter in the past. Most boutiques also will be happy to have the opportunity to work on higher-stakes matters than they might typically handle (but which likely are precisely the types of matters they worked on earlier in their careers). In fact, you should consider asking your usual Big Law firms to recommend a boutique with whom they would be comfortable working as cocounsel—and explain in a very up-front way that you want to try this approach as a way to manage your legal costs. Most Big Law partners, if being candid, will admit that several of their former colleagues are excellent lawyers who run high-quality boutiques.

**ADDING PERSPECTIVES IMPROVES YOUR RESULTS**

I believe that the third way I propose can lead not only to equivalent results at lower cost, but to better results—and for commonsense reasons. First, as your management will appreciate, what better way to keep your lead counsel “on their toes”—both in terms of efficiency and substance—than to have another (and less costly) firm on board that is readily available to provide second opinions on important issues? According to Angelis, bringing a boutique firm on board as cocounsel “provides a sanity check and an easy way to delegate large volumes of work.”

Also, it is fair to say that most partners in boutique firms have more experience than their Big Law peers in doing more for their clients with fewer resources. This is true both because they literally have smaller supporting teams to “lever” and because their clients often have less money to spend on a given matter. And many boutique partners are simply more entrepreneurial-minded than their Big Law counterparts—not surprising, since they are running a more entrepreneurial enterprise.

A Big Law project team might be ideal for analyzing a novel legal theory from every possible angle or crafting a brief with every word chosen just so, but a boutique firm will often come up with efficient and eminently practical ways to “cut the Gordian knot”—because in their daily practice, they are required to come up with creative, efficient solutions. Both perspectives have value—one is not inherently better than the other—but bringing both perspectives to a problem is more likely to lead to an optimal result, especially when applied across the diverse spectrum of issues that arise during a complex, high-stakes matter.

Finally, as an added bonus, the third way I propose provides a low-risk way to evaluate a boutique firm as potential lead counsel on future matters—without immediately giving them the lead in a high-stakes matter, a move that could give management heartburn. You might learn that hiring a boutique is safer than you thought—and that you can have your cake and eat it too.

Chris Colvin is a founding partner of the IP boutique Colvin Hudnell LLP. He also founded In The House, a professional networking community for in-house counsel, and Partnero, a networking community for law firm partners.