

# **The Do's and Don'ts of Hiring and Managing Attorneys**

by

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## **About the Author**

Over the course of an 18-year legal career, Tim Pickwell has represented some of the biggest names in the franchise and restaurant industry—and also advised some of the smallest. He gained his initial franchise experience negotiating international license agreements as corporate counsel for 6,000 unit franchisor CENTURY 21® Real Estate (1988-1994). He then headed up the international franchise division of \$2.2 billion revenue, publicly-traded JACK IN THE BOX® Restaurants (1995-2000), and served as corporate counsel to its purchasing, IT and marketing departments. From 2000-02 Mr. Pickwell was general counsel of a Silicon Valley-based pre-IPO telecommunications start-up, and also represented several other start-up and telecommunication companies. More recently, Mr. Pickwell served as Senior Vice President, General Counsel (2002-05) to the Coco's® and Carrows® restaurant chains, where, among other things, he supervised franchise sales and operations.

Mr. Pickwell's unique in-house background enables him to provide practical, business-oriented solutions to franchisors and franchisees. His expertise includes intellectual property licensing and trademark matters, international franchising, retail lease drafting and negotiations, franchise registration and compliance, litigation advice, and general corporate and business matters. Clientele includes established franchisors, large restaurant companies, multi-unit franchisee organizations, as well as single-site retailers, and start-up franchisors. Mr. Pickwell is a member of the California Bar, and is admitted to the Federal District Courts for the Northern, Central and Southern Districts of California. He serves on the Franchise Law Committee of the State Bar Business Law Section, and his firm is a member of the California Restaurant Association and the American Association of Franchisees and Dealers. Mr. Pickwell is an Honors Graduate of the University of California, San Diego, and obtained his J.D. from the University of California, Hastings College of the Law. He resides in North San Diego County with his wife and three children.

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## **I. Introduction**

### **A. What value will you get from this presentation?**

I've learned over the years that executives, especially executives with MBA's and business degrees get extensive training in Finance, Marketing, even human resources / personnel relations, but little in the way of how to manage attorneys.

The most sophisticated users of attorneys that I have worked for came by their education in the school of hard knocks—usually depositions in some protracted lawsuit.

So, my goal in a few hours is to leave you with:

1. A better understanding of how to use attorneys.
2. A better idea of what kind of training your attorney has and how that may shape how they advise you.
3. A better understanding of the economics and law firm realities motivating your outside counsel, and how to get more value and even free time from him or her.

### **B. What information will you leave with?**

1. Benchmarking for your company's legal spending.
2. Tools to identify the right attorney for the right problem.
3. Ideas for determining if you need an attorney, and how they should fit into your company.
4. Better understanding of how to use attorneys to reduce risk.

## II. ATTORNEYS

### A NECESSARY EVIL? Or, JUST EVIL?

#### A. Attorneys

1. Love Them, Hate Them, Not Going Away
  - a. Most countries wish they had our rule-of-law  
  
HANDOUT.
  - b. Intn'l Experience – Most nations admire our transparency, and the ability to research and know your business partners is key to the transparency of our system.
  - c. Although I chafe under the regulatory environment myself, it does provide a lot of clarity in business transactions, and thus helps facilitate them. Attorneys play a crucial role in managing the myriad regulations and disclosures that help the wheels grind.
2. You can rant and complain about attorneys, or manage them and use them effectively
3. Your attorney can give you a competitive advantage
  - a. Reduce legal exposure
  - b. Reduce management distractions
  - c. Add value to a deal
  - d. Not overwork a deal.
  - d. Acquisitions
  - e. Have analytical training and can bring a different perspective to a problem.
  - f. If experienced or expert in a field, may know more than you about the situation.

**PRACTICE TIP:** Lay out the problem, and ask your attorney for her opinion. Too many executives spend their time telling the attorney what they want to happen, and much time and effort is spent

micromanaging the process, instead of letting the attorney get to the desired outcome.

B. Where do business attorneys come from?

1. Law Schools and the State Bar

a. Legal Education—what is it really good for?

The Socratic Method and Christopher Columbus Langdell.

i. Paper Chase—exercise in intimidation.

90% Rote Memorization.

Hastings History Professor.

Weeds out the weak.

2. Law School Career Path Shapes Destiny in 2<sup>nd</sup> Year

Government v. Civil

a. Government: Criminal v. Civil

b. Civil: Litigation v. Transaction

c. Law today rewards specialization

## II. MANAGING OUTSIDE COUNSEL

### A. 10 Most Common Mistakes Businessmen make in hiring attorneys

#### **SLIDE**

10. Fail to ask the lawyers' hourly rates.
9. Fail to request an estimate of fees.
8. Fail to hire an industry expert/specialist.
7. Pay for training young associates at big firms.
6. Fail to limit number of time keepers.
5. Fail to explain business objectives.
4. Don't take the advice they just paid for.
3. Blame their attorney for bad facts, bad law and a bad case.
2. In litigation, get impatient, and switch firms.
1. Fail to hire an attorney until it's too late.

#### **10. Fail to ask the lawyers' hourly rates.**

- A. Large firms achieving stratospheric rates: \$500+ hour.
- B. Non-partners being billed at \$495 / hour.
  - (i) Kevin Nowicki story  
Snr. Associate; not partner track at Gibson Dunn
  - (ii) Tim Freudenberger story  
Partner at Paul Hastings  
HR practice didn't fit at large firm  
Billing rates out-of-whack

#### **9. Fail to request an estimate of fees.**

- A. You may envision the classic "quick and dirty" one hour project.
- B. Your attorney may envision a 10 hour research memo.

- C. Or, there may be complexities that you haven't thought through.
- D. It's important to align your expectations.

EXAMPLE: My own painful experience. Was having a cordial lunch with some Employment lawyers with a big, national firm. A BIG national firm. We got to discussing the pitfalls of paper trails, records, and liability. And, I asked them—or they offered—to do a memo and provide the company with a detailed record retention schedule.

I got back a 50 page spread sheet with almost every record imaginable.  
Cost: \$20,000.

Meanwhile, my employee found one on the internet that was almost as good—but was free.

Shame on me for not asking.

**8. Fail to hire an industry expert/specialist.**

- A. You will pay to train a non-expert, and even then the result may not be good.
- B. A relatively expensive subject-matter expert may be less expensive in the long run due to having access to forms, templates, and familiarity with short-cuts.

**7. Pay for training young associates at big firms.**

- A. Multiple examples from the dot.com era
  - (i) 2-3 year associates doing all the work with no supervision

**6. Fail to limit number of time keepers.**

- A. Gibson Dunn & Crutcher: 22 time keepers on one bill.

**5. Fail to explain business objectives.**

- A. Maybe you plan to sell a business unit in 24 months; resolving a matter could be critical.
- B. Maybe you intend to discontinue a product line, or close a plant; a stop-gap solution may work just fine.
- C. Your attorney may not be aware that something is a recurring problem, and you want a comprehensive strategy.

**4. Don't take the advice they just paid for.**

- A. EME CT Issue

- i. Don't sell or offer to sell.
- ii. Dire consequences.
- iii. Accepted LOI and check and then put "coming soon" on the corporate web site.

**3. Blame their attorney for bad facts, bad law and a bad case.**

- A. Chances are your attorney wasn't at the scene of the crime.
- B. Chances are your attorney wasn't involved in the Supreme Court opinion that he is explaining to you.
- C. Better to get objective advice, than clobbered in court.

**2. In litigation, get impatient, and switch firms.**

- A. There is much in litigation that attorneys can't control. If you don't understand what is going on, work until you do. But, becoming frustrated and switching attorneys rarely works.

EX: Vince with employment law problem.

**1. Fail to hire an attorney until it's too late.**

- A. This falls under the rubric "penny wise, pound foolish."

Examples: Limit role of attorney in narrow attempt to limit costs.

**Don't** spend \$2,500 to have an attorney review a software agreement.

**Do** spend \$38,500 in settlement of that contract.

**Don't** spend \$275 to have an employment-law associate spend one hour to review a proposed termination.

**Do** spend \$85,000 to settle the wrongful termination lawsuit.

- B. Ask your attorney, what should I know about the law effecting my business?

**B. Understanding Law Firm Economics**  
(And How that Affects the Way You Are Treated)

HANDOUT – May 1, 2006 American Lawyer Article

Average profits per partner at the nation's top 100 firms were \$1.0 million.

Trends:

- \* Fewer equity partners
- \* Cost cutting
  - Rents
  - Staff

HANDOUT – Altman Weil (Consulting Firm) 2003

150 Lawyers + = Revenue per lawyer of \$4557,088

9 lawyers or less = \$292,100 revenue per lawyer.

Salaries = \$246,799 for partners; 1,729 billable hours  
= \$109,419 for associates; 1820 billable hours.

HANDOUT – American Lawyer Top 100 and 200 for gross revenue.

1. What drives law firm **economics**?
  - a. A classic large law firm is a pyramid with a base of associates and paralegals with partners at the top of the pyramid.
  - b. Firms don't make money billing out partner time alone, no matter how high the rates are.
  - c. Firms need to employ the associates. They live off the difference in what they bill and what they pay.
    - (i) Starting salary for 1-2 year associate at large firm \$140,000
    - (ii) 2,000 hours x 200 / hr = \$400,000.
    - (iii) You get the picture.

2. Complex internal billing systems.
  - a. Firms have complex internal billing systems to reward partners who bring in clients. So,
  - b. Partners get credit for (in order):
    1. Work that they generate and perform;
    2. Work that they generate;
    3. Work that they perform.
3. So, the biggest incentive for lawyers at a large firm is to generate work from “their” client, and either (i) perform it, or (ii) delegate it
4. Lawyers don’t get as much credit for work that someone else generates, but that they perform. So, they theoretically have less incentive to do work for someone else’s clients.
5. Which all gets back to the need to generate clients. It pays off on many levels: “book of business”, direct hourly rewards, credit within the firm.
6. **A fundamental problem with how firms are organized.**
  - a. Corporations recognize that different people have different personalities and skill sets. Some are engineers, some are outgoing salespeople, some are studious number crunchers.
  - b. Lawyers are expected to generate business (sales), get articles and treatises published (academia), do the work (studious), and self-promote along the way (marketing). They also manage their own small or large business, so they are expected to be business people as well.
  - c. Naturally, few meet this ideal, but the pressure to generate your own clients in order to have a book of business is critical.
  - d. A good book of business is \$500,000. Over a million is considered excellent. A partner at a 20-lawyer firm I know leads his firm in generating business, he was at \$2.2 million last year.
7. **Small and Mid-Size Firms and Sole Practitioners**

Small Firms (2-5 attorneys), Mid-sized firms (5-25 attorneys), and Sole practitioners have a different economic model based on lower over-head or lifestyle.

- a. Large Firm Lawyers who start small firms.
- b. Some small firms are really small groups of silos that band together to reduce overhead, share expenses, and look bigger. The occasional internal referral is a plus, but not critical.
- c. Can be tremendous value in small firms or sole practitioners. But, use them properly.

*EXAMPLE:* Century 21 v. Re/Max. Two sole practitioners v. 2-3 of the largest firms in America.

### **C. How To Improve Your Relationship and Get Free Stuff**

1. The critical driver for all attorneys is generating good clients who generate steady revenue and pay their bills.

If you fall into this category, you should have no trouble getting free stuff from your favorite lawyer.

2. Invite your attorney to provide regular updates / seminars for your staff. For the opportunity to gain face-time with you and your executives, most attorneys leap at the chance.
  - i. An 8-hour, full-day HR training session is not the same as an “update.” You can expect to pay for that.
  - ii. I attend client Board meetings and quarterly executive staff meetings for free. It keeps me in tune with the client, they love to see a few “no charge” items on a \$7,000 bill, and I can sometimes spot an issue that helps them and leads to more work.
3. Attorneys / Firms have a “marketing budget” so they can bill certain uncollectible hours to training and client development.

4. If your attorneys specialize in a certain industry, they should already be on top of trends, and they can spread the cost of updating across their client base.
  - (i) Watch out for firms charging for newsletters.
5. If you have a good relationship with your attorney, they won't nickel and dime you.
6. Maintain that Business Relationship—But Keep Your Distance
  - a. Putting an Attorney on Your Board
    - i. Good for the attorney, but what do you get?
    - ii. You already pay for their best advice.
    - iii. They will steer business to their firm.
    - iv. Presents ethical problems for the firm / attorney.
2. Giving Your Attorney Equity in Your Business
  - a. Could be a good idea in lieu of pay.
  - b. Otherwise, it's much like putting one on your Board.

### III. Hiring Your First General Counsel

#### A. **When** is it time to hire an in-house counsel?

1. Transactional legal costs exceed in-house salary.
  - a. This could be patent
  - b. Real Estate
  - c. Contracts
2. You or Senior Exec spending over 25% of time managing litigation.
3. You see errors or weakness in areas due to lack of ready access to legal advice: HR, hiring, firing, real estate, corporate governance.

#### B. **Who** do you hire?

1. Do you start with a high-powered (expensive) GC?; or
2. Do you start with a glorified (cheaper) paralegal.

EXAMPLE: A new client in OC that employs 17 outside firms. However, they have a low level internal contract-attorney with no industry experience.

#### 3. The Best Attorney For **Your** Company

Understands Your Business or Industry

#### d. Understands His / Her Business

- i. Is networked and connected
- ii. Involved in a profession that changes frequently.

#### e. Demonstrates Leadership, Outside-the-Box Problem Solving

- i. The CENTURY 21 trademark problem
  1. Fought the facts – lost
  2. Fought the law – lost
  3. Changed the law – won

#### f. Gives you confidence in that “bet the company” case.

#### C. Where to you put the legal function? Who do they report to?

1. Overwhelming choice is CEO.
  2. Good GC's won't report to the CFO.
    - a. Lose independence.
    - b. Perceived as part of the Finance Team.
    - c. Advice, value, subordinated to cost containment.
    - d. Buried within the organization.
    - e. Information filtered.
- D. What should your attorney supervise?
1. I have supervised Property Management, HR, Franchising and Risk Management. Overall, I'd say "never again."
  2. Legal problems with attorney's supervising other departments:
    - a. Attorney-client privilege muddied and destroyed when attorneys wear a business hat.
    - b. Attorneys who make it as business people only succeed when they walk away from the law entirely.
    - c. Significantly difficult to balance legal advice with business issues.
  3. If you are dead-set on having the attorney manage something, I'd say "Property Management". Huge legal component; records and data management; deadlines, option exercises. Dovetails nicely with legal skill-set.
- Next, I'd consider Risk Management.
- If your attorney supervises HR, it looks defensive.
- E. You Must Have Realistic Expectations—And So Must Your Attorney
1. They call it "General" Counsel for a reason
    - a. A "Day in the Life" [SLIDE]
    - b. See "Reaction Hire" Below
  2. The Adonis Ad

- a. Wanted: “Experienced Patent Litigator with SEC experience and 10 years of Human Resource Law.”

3. In-house litigation—a Bad Idea

- a. But, in-house attorneys need litigation experience in order to manage outside counsel and assess cases.

F. Mistakes in Hiring In-House Counsel

1. The “reaction” hire

2. Getting hung up on narrow expertise.

- a. Legal training is nothing but the ability to research, read, and understand new areas of the law.

- b. FAR-FETCHED EXAMPLE: Jim Schutz.

3. You Get What You Pay For.

4. Why do attorneys come in house?

- a. To work less.
- b. Lost clients.
- c. Personal relationship.
- d. Even if successful in their practice, tired of the pressure to sell and bill. Not being lazy—but billing out your life in 10 minute increments is not a life. And the pressure to always generate clients is the same pressure that you face to always generate customers.
- e. Something new.
- f. Equity and prestige.

5. Focusing on dollars

- a. Experience v. Cost
- b. Value v. Salary
- c. The Trap of the CFO equation

The CFO assumes it’s a straight dollar swap. 2000 hours of an in-house counsel should reduce outside legal fees by some proportionate amount. It never works out. You still have litigation (which can be

reduced and managed better), but you will still have outside spending).

G. What should your in-house counsel do?

g. Where is the real money?

1. Litigation

a. prevent litigation

i. In-house training, seminars

ii. Stay abreast of new regulations

2. Manage Litigation

a. Hire the right attorneys

b. Supervise them

c. Work in-house to reduce discovery costs and distraction to the business.

3. Big Risks

a. So focus on insurance, risk

h. Contract Negotiations

1. Typically not “big” savings from a legal perspective

2. Again, focus on the risks, downside, indemnity

3. Should provide

a. Forms, continuity, consistency

b. Internal checks & balances

i. “Sales Prevention Department”

1. Attorneys are not typically risk takers

a. But, a good in-house counsel can put risks in perspective for businessmen.

j. A Department Head with a Budget

1. Benchmarking

2. Litigation management

a. Big spike theory of litigation

## IV. Billing & Litigation Budgets

### A. Litigation

1. Litigation is the most expensive and unpredictable of matters.
2. Large volume of repetitive cases (personal injury, auto accidents) permits accurate fee structures—**but not on an individual case.**
3. If you are a defendant in litigation, the following is outside your immediate control:
  - b. The plaintiff's expectations
  - c. The plaintiff's attorney's expectations
  - d. The plaintiff's attorneys experience
  - e. The judge you get
  - f. Witnesses
  - g. How hard the opposing side will pursue the case.
  - h. The timing of when the other side will file motions, and what motions they will file.
4. So, for these and other reasons, litigation often defies proper budgeting and the cash flow that business men need to operate. This drives executives crazy, but it is a fact.

#### **WHY THE JUDGE DOESN'T CARE ABOUT YOUR CASE**

The judge does care. However, he doesn't look like he cares. Here's why:

##### **The Busy Judge**

Judges have 200+ cases. Judges have civil cases and criminal cases. In our system, a man's liberty is considered more important than another man's purse, so criminal matters are heard before civil matters. An exasperated Judge once told a lawyer who complained about a hearing date being set too far in the future: "Counselor, there are crimes that haven't even been committed, yet, that will go to trial before your case."

##### **The Distracted Judge**

I've been in court many times, and no matter how important your case is to you or your client, you get some perspective on why it's not that important to a judge, when you go to some of his earlier hearings.

We were in trial, and had broken for lunch. At the lunch break, the bailiff passed the word to the jurors and attorneys that the judge would be delayed by a sentencing hearing, so our case would not resume until 1:30.

I went back early to watch the sentencing. A very large man was chained and shackled to the bolts cemented into the floor. He had one hand free. Which he waived around while he made his speech to the judge. He said, "Judge, this is about you and me now, man to man. When I get out, it's going to be about you and me." He went off on a tirade, and they called in six burly Sheriffs to restrain him.

After being threatened by a hardened, bitter, violent and large criminal, the judge took a brief recess, and then we resumed our trial over a small civil dispute.

I wondered if we had the judge's full attention that afternoon.

## **B. Litigation Budgets**

1. [PROVIDE SAMPLE BUDGET] [SLIDE]
2. Given what you don't control, litigation budgets are never reliable. None-the-less, they are a recommended exercise because they start to put some flesh on the expenses and the "discovery."
2. "Discovery" is code for depositions, document exchanges, etc. It is the bulk of the expense in a case.
3. Fee Agreements
4. Req'd under CA law for amounts over \$1,000
5. 96-98% of cases settle.

## **C. Transaction Budgets**

## **Summary**

Approach legal work ALMOST like any other part of your business. Understand it; understand what motivates your vendor; and manage it accordingly.