WINNING THE BEAUTY CONTEST: SUCCESSFULLY RESPONDING TO REQUESTS FOR PROPOSALS

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FEDERATION OF DEFENSE AND CORPORATE COUNSEL
2008 ANNUAL MEETING
MANAGEMENT ECONOMICS AND TECHNOLOGY OF PRACTICE SECTION

CINDY WILLIAMS

Ms. Williams serves as Corporate Counsel and Director, Government Affairs, at Federal Signal Corporation. Prior to joining Federal Signal, she was a trial attorney at Lord, Bissell & Brook. She graduated from Indiana University School of Law, *cum laude*, and received a Bachelor of Arts, with distinction, from the University of Michigan. She is admitted to the bar in both Illinois and Florida. Her community and charitable work include serving as: a Trustee and the current President Pro Tem, of the Village of Hinsdale; a Board Member of the Illinois Lincoln Series; a Tiffany Circle Member of the American Red Cross; and a Director, Emeritus, of the Hinsdale Junior Woman's Club.

DAVID BERTSCHI

David Bertschi is a founding partner at Bertschi, Orth & Smith LLP. David is fluently bilingual in English and French and has appeared before all levels of the Courts and Administrative Boards and Tribunals in Ontario and at the Federal Court of Appeal. For over 23 years David has restricted his practice to Insurance and Commercial litigation. In recognition of his varied and substantial experience in insurance litigation, David has been invited to write and speak on numerous issues of interest to insurers and self-insured corporate clients. David has been invited to speak by professional and advocacy associations on such topics as Aggravated and Punitive Damages, Employer Commercial and Social Host liability, Uninsured and Underinsured Liability, PIPEDA (Canada's privacy statute). David was a sectional lecturer at Carleton University and was a seminar leader at the Bar Admission Course. David is scheduled to speak on "Emerging Issues in Damages" at a joint program sponsored by the Ontario Bar Association, the Carleton County Law Association and the Advocates Society. David is also scheduled to speak in October at the Fall Symposium for the Canadian Defense Lawyers where he will share his views on Trial Tactics, Procedures and Evidence.

CRAIG S. NECKERS

Craig S. Neckers is a shareholder in the Grand Rapids, Michigan office of Smith Haughey Rice & Roegge. He practices in the area of commercial litigation, professional liability and product liability defense. Mr. Neckers has been national counsel for a major motor vehicle manufacturer in a particular class of cases involving light trucks. More recently, he has devoted a considerable amount of his practice to the many issues concerning damages that arise in catastrophic personal injury cases. Mr. Neckers has served as faculty member for the Institute of Continuing Legal Education Trial Advocacy Institute. He is the former Chair of the FDCC Commercial Litigation Section and served as Chair of the 2005 FDCC Law Practice Management Conference.

REID S. MANLEY

Reid Manley is a partner at Burr & Forman LLP which maintains offices in Alabama, Mississippi, George and Tennessee. Reid practices in the firm's Litigation section, and is the Co-Head of the firm's Consumer Finance Section. Reid represents consumer finance and mortgage companies throughout the country.   Reid has defended clients in single plaintiff cases, as well as mass actions and class actions filed by consumers. These complaints involve causes of actions that include violations on the Truth in Lending Act, Home Ownership Equity Protection Act, Fair Debt Collection Practices Act, Fair Credit Reporting Act, Real Estate Settlement Practices Act, as well as other predatory lending causes of action such as loan flipping, insurance packing and violation of various State Unfair Practices Acts. Reid also represents mortgage companies and correspondent lenders in repurchase and/or make-whole disputes as well as litigating mortgage fraud cases. He also handles general commercial litigation, intellectual property litigation, and insurance coverage disputes.

Reid earned his B.A. from Washington & Lee University and his J.D. from the University of Alabama. During law school, he was also Senior Editor of the Alabama Law Review, and a Hugo L. Black Scholar. Reid is a member of the bar in the states of Alabama, Mississippi, Kentucky, Tennessee, Texas, Florida, and West Virginia and is admitted to practice before all U.S. District Courts in Alabama, Mississippi, Kentucky, Tennessee, and Florida, the U.S. District Courts for the Eastern and Southern Districts of Texas, and Southern District of West Virginia, and the U.S. Courts of Appeal for the Eleventh, Fifth and Seventh Circuit.

Reid is Chair of the Commercial Litigation Section for the Federation of Defense and Corporate Counsel

IDEAS FROM IN-HOUSE COUNSEL

Fundamental Principals

-Most attorneys/firms will do a better than average job answering the request for proposal, i.e. they will get the legal propositions correct
-In many cases all the RFP's will look alike
-Most counsel will follow the rules for submission of the RFP
-Most counsel and or/their team will have adequate experience
-Almost all counsel will agree to alternative billing structures, flat fees and/or some type of creative billing arrangement
-Most responses to proposals are heavy on the canned firm credentials and marketing materials but light on creativity and strategic thought

Keys to Winning the Assignment

1. **Advanced Information and Intelligence**.

The most important thing you can do to increase your chance of success is to call your contacts and get as much advance information about the RFP itself, the selection process, the legal matter, and the process that will be followed to select counsel. This is not a guessing game. In-house counsel have a strong interest in ensuring that you are successful when you give your presentation. If you fall flat then in-house counsel will look bad in front of the General Counsel and other business people. In most instances, in-house counsel will prep you prior to your presentation with all the information you need if you ask them. Find out the basics such as how long you will have to present and who will be present for the company.

2. The second most important thing that you can do is have a young associate research the case, the jurisdiction, the judge, the law in the jurisdiction etc. If the company has related litigation or legal matters in other jurisdictions make sure you have reviewed available pleadings. Go to the company website and read press releases related to the litigation, product, etc. Read the company's SEC filings related to legal matters and do a Google search for news articles about the matter if it has been covered by the press.

3. Come to the meeting prepared with an organized plan for handling the case. We want attorneys that can craft a plan to aggressively move the case.

4. Find a way to distinguish yourself and your firm.

    a. Provide "insider knowledge" on a topic in your jurisdiction.
        i. Novel judicial program, legal theory or discovery process.

ii. Highlight special experience/and or contacts that you have related to an assignment. For example, we looked hard at the firm that highlighted the fact that one of their attorneys was a volunteer fireman. In pharmaceutical cases you should mention that your attorneys/paralegals are registered pharmacists. In a product case you should note if you have staff members that are trained in engineering. Bring out your subject matter experts.

iii. Mention significant contacts that you have with groups that will help the client defend the litigation. We hired one firm because of its close relationships with a City fire department. Mention the fact that one of your attorneys worked at the FDA or that one of your attorneys serves on a working group with a governmental agency that is relevant to your case.

iv. Tell us if you know the plaintiff's attorney. We were very intrigued by one attorney who knew plaintiff's counsel well enough that she called him to get his perspective on the file before she came in for her presentation.

v. Tell us what you know about the Judge. Have other attorneys in your firm tried cases in front of him? What do the bar associations say about the Judge? Come prepared with jury verdict information related to the outcomes in the Judge's courtroom.

vi. Tell us what you know about the plaintiffs. One firm impressed our entire committee when they brought in a worker's comp case filed by one of our plaintiffs. They impressed us even more by presenting us with a spreadsheet containing all worker's compensation awards for firefighters with a hearing loss disability.

vii. Attach relevant information beyond the RFP. For example, one firm attached the OSHA requirements from the state, another got us the fire department manual and training manuals. Another gave us a copy of the causation jury instruction—critical because it showed they were thinking ahead about the case which was a real plus for us.

5. Make sure that you personally connect with someone at the meeting or someone affiliated with the client.

    a. Know who is making the decision to hire counsel and find out how you can connect. In most instances it will be a combination of in house counsel, business people and other trusted counsel such as national coordinating counsel or some other outside counsel that has done work for the corporation.

6. Demonstrate that you have good ideas on strategy for the litigation. We don't want our case to go on autopilot.

   a. For example, we looked favorably on a firm that told us about their strategy of associating with a well known attorney from the outlying jurisdiction during the motions for dismissal. We hired this firm, used this strategy, and all of our cases in NY were dismissed by way of motion prior to any discovery taking place.

7. Bring your "A" team to the presentation at the company and make sure the entire team has a speaking role.
   a. If you are the rainmaker make sure you bring the hot shot litigator that you plan on having handle the case to the meeting.
   b. Bring young associates that will do the day to day work on the file but make sure that they have a role at the meeting.

8. Provide only strong references.

9. Demonstrate that you are passionate about wanting to get the business and that once awarded the case and client will mean something to you beyond collecting receivables every quarter.

<u>How Does The Corporation Decide Who Gets The Business?</u>

A critical factor is relationships.

1. Does this firm/attorney have a past relationship or history with the company or any of the in-house attorneys?
2. Does this firm/attorney have relationships with any of our current counsel and can they vouch for the attorney?
3. Does this firm/attorney have a relationship with any colleagues of the in-house counsel?

The number two factor is past performance and relevant experience

The number three factor is whether your firm has a working style that will be compatible with the culture of the in house legal department and other counsel on the case such as national coordinating counsel. If you have a department that is collaborative is your firm collaborative?

The number four factor is whether you have a book of business with other comparable corporations. If you are already DuPont panel counsel we are going to look favorably on your response to the proposal. Another well regarded group has already vetted you and presumably is happy with your day to day handling of cases and you have demonstrated that you have good relationship skills.

The number five factor is whether you are responsive. When we need information for a board presentation, press release, SEC filing, or litigation report we don't have time to track you down.

The number six factor is whether you meet our needs for the particular work. We develop a matrix related to the type of counsel needed. If we are in a judicial hell-hole we will seek high profile counsel. If we are in a defense minded jurisdiction we may go with lesser profile counsel. If we have a well renowned plaintiff's attorney against us we will probably hire someone of his/her caliber or better. If we have a B- worker's compensation attorney we will not usually hire the best attorney in the jurisdiction. If this is a high stakes piece of litigation then we will probably pay more money to hire counsel that can most effectively deal with the case. If it is a run of the mill case then we will not be so inclined.

Cost is rarely the driving factor. In NY we hired the most expensive firm because their attorneys knew plaintiffs counsel and understood the fire department due to handling insurance claims after 911. You must do more if you want points in this category than stating "We are open and willing to explore alternative fee structures." You need to articulate the plan, how it works, and why it works for you and your clients.

IDEAS FROM OUTSIDE COUNSEL FOR MAKING YOUR PROPOSAL THE WINNING PROPOSAL

- The first question you should ask yourself is whether you should even respond because RFPs are time consuming and can cost money.

- When deciding whether to respond, consider the type of work. Does your firm's experience match up with the client's needs; does your firm's expertise include the contemplated work? Can you properly staff the work if you win it? Can your firm do the work at a profit?

- If you have not been contacted, ask for the RFP. The worst the client can say is no. Also, work on marketing and branding your firm so it becomes recognized and receives the next RFP.

- Can you read between the lines to determine what the client is looking for?

- What is likely to drive the decision making process on the client's side?

- Some proposals will provide the criteria the client will be using in determining which firm they will give the work to, and sometimes they will not. If not – you should make a list of criteria the client could possibly be looking for to give you some direction as to what should be promoted in the proposal.

- Make sure you have all the information you need to write the proposal. It is a good idea to meet the client before you start writing, even when the relevant information is provided, to make sure that your proposal is as tailored to their needs as possible. Get to know the client to the extent that it is possible before you make the response.
- Find a coach on the inside, that is, someone who can answer questions and provide insight about what the client is looking for that is not set out in the RFP.

- Ask why they are seeking proposals. Are they unhappy with present counsel? Who is present counsel? Is cost a driving factor, or something else? Are they moving towards regional or national consolidation? Why did they ask your firm to submit a proposal? Is there a timeline for making a decision? Are there special circumstances that you need to be aware of? What type of relationship does the client want with its outside counsel? Who is responsible for managing the competitive process? How many other firms are competing? Who are they? How and why are you stronger than your competition and how can you demonstrate that strength?

- What should the fee structure look like?

- Make sure to READ the proposal and provide EVERYTHING that is asked for. If your firm decides to compete, be sure to follow the instructions completely.

- Take the time required to make the response as thorough as possible.

- Consider the best way to inform the client why your firm should be chosen.

- Follow up after submission to be sure the response has been received and to offer to answer any question.

- Determine the best person within the firm to interact with the prospect.

- Determine who needs to be part of any team that will respond.

- Determine who needs to be part of any team that may do the work if it is awarded to your firm.

- Keep in mind–everything needs to start and end with the client.

- Do not promise something you cannot deliver.

- Consider any conflicts that may arise because of the RFP and possible ethical considerations.

- Differentiate your services–get information about who else the proposal was sent to, as well as information about the legal problem.

- It is important to have a proposal process regarding any RFPs that come across your desk because then you can develop tools to help you get through the process. You still need to make sure your RFP is new and fresh so do not keep sending out the same RFP after just changing the client name.
- It is important to debrief the client after the process and find out why you won or lost. You might also want to ask the client at the outset if it is possible to follow up after the process is over.

- It is also important to debrief the RFP team after the process is over.

- You need to understand the prospect's goals and challenges.

- You need to get to know your client – look into their industry, etc.

- Try to get some networks going that will help you respond to RFPs, such as online resources, other firms, client organizations.

- Try to get other clients to speak on your behalf rather than just talking about yourself without proof.