

## ETHICS

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# The In-house Counsel and External Counsel

Since the 2008 global economic crisis companies around the world seem to be confronted with legislation on almost every aspect of their activities. Kathryn Britten, Global Head of KPMG's Legal Services Sector, observed that: "Companies are facing a cloud of regulation that is adding a layer of complexity to almost every commercial decision that they need to take". This has necessitated a shift in the role of an in-house counsel from being only a legal advisor to being a business strategist who needs to be conversant with corporate strategy in order to identify and steer the company away from any risks.

For specific tasks general counsels will have to rely on the expertise of external counsels. Conflicts between both parties might arise when there is a communication gap and expectations are not clearly defined by both parties at the start of the relationship. Trying to understand the expectations of both parties was the main aim of the counsel to counsel roundtable at the 9th Annual Conference of the Section on Business Law. It was chaired by George Etomi, Managing Partner, George Etomi and Partners, moderated by Pippa Blakemore, Strategic Business Partner, the PEP Partnership LLP. The Panelists were Irene Otike Odibi General Counsel FBN Capital, Rume Rotimi General Counsel MTN Nigeria, Ola Alokolaro, Senior Partner, Advocaat Law Practice and Donna Obaseki-Ogunnaike, Partner ACAS Law.

The resume of the moderator Pippa Blakemore is truly impressive. She has worked for more than 80 regional, national and international law firms as a consultant in her own words this gives her a firsthand understanding of the challenges facing the clients of law firms and facing general counsel. Most of the panelists were in-house counsel with over 19 years of commercial law experience so they were able to give in-sights on the expectations of general counsel. The seasoned commercial lawyers on the panel were able to relate the position of external counsel.

The roundtable was very engaging and delegates were able to form little discussion groups to brainstorm on the relationship between in-house counsel and external counsel. What emerged from the discussions was that in-house counsel had the following expectations of external counsel;

#### Knowledge of their Business Strategy:



In-house counsel want external counsels to know their business strategies so that they can deliver solutions that will enhance their businesses. Furthermore, Mark Edwards, IP litigation counsel at DuPont states that in-house counsel have a role to play in helping external counsel understand their business strategy, he was of the view that "It's important for us to help outside counsel understand the business and business objectives and then creatively work with them to achieve those business objectives." "I see my role as a liaison between outside counsel and the business to make certain outside counsel is adequately serving the business' needs."

**Practical Solutions:** most in-house counsel want practical solutions to their legal problems, they already have an idea of the law. They would like external counsel to honestly let them know if a particular instruction can be carried out and if a better option exists. Also, they do not appreciate legal opinions that are too academic. More importantly, they want external counsel to explain the risks involved in the options they offer.

On the other hand external counsel expect **Communication:** external counsel require general counsel to give proper briefings. This includes informing them about the objectives of the transaction. Where the external counsel does not understand the instructions given by in-house counsel it is advised that he seeks clarification.

It is important for in-house counsel to know the client and goals for each legal issue and communicate those goals to outside counsel. Mark Dupont elucidates that the best results are achieved when in-house counsel get to know outside counsel, establish relationships and speak as frequently as possible to ensure everyone's on course keeping the business objectives in mind at every step. "If there's no communication," he says, "typically that's where there are problems. The closer you are with outside counsel, the more you can emphasize what the goals and objectives are, the more you can stay attuned to legal strategy being developed, and the more you can contribute to the development of legal strategy with outside counsel."

If there is a gap in the expectations of the in-house counsel and the performance of the external counsel or likewise parties should be

encouraged to have a sincere conversation about how progress can be made in future assignments.

Regarding litigation in-house counsel should have discussed their expectations so that both parties understand each other. To buttress this point, Harry Payton in his article "A Guide to Partnering with Outside Litigation Counsel" advises that the best relationship between outside and in-house counsel is like a partnership. It is a relationship to which each is asked to contribute, and it is a relationship that fosters a full and free exchange of ideas. The client, through management by in-house counsel, has to provide outside counsel with the tools necessary to prosecute or defend the litigation, including witness time, access to relevant records, and the assistance of knowledgeable information-technology personnel to mine all information that bears on the matter."

He further advises that in-house counsel and external counsel should determine the litigation strategy. For example, he explains that counsel should determine if the client wants to win at all costs or play it conservatively. "If public perception is important to the client, it must communicate its philosophy and ethical standards to outside counsel. Outside counsel must also understand the client's business to know how best to present the client's philosophy during litigation. In-house counsel should make a point of inviting outside counsel to visit the client's offices, plant, or other facility to better understand its business."

**Financial Incentives:** external counsel want to be promptly and adequately remunerated for their services. Most times, external counsel complain that they are paid according to a fee scale that is outdated. Going forward, external counsel and in-house counsel should meet to discuss a budget when a matter arises.

#### Conclusion

At the end of the roundtable there was a consensus that in-house counsel and external counsel should see their relationship as an equal partnership. In this partnership, communication and trust are essential. The in-house counsel should trust that the external counsel would act with integrity and the external counsel expects that the right instructions have been given.

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