

Of Counsel Interview . . .

Litigation Consultant Offers This to Law Firms: Communicate and Provide Access to Clients

When the business and litigation consultants at Washington, DC-based The Kenrich Group conduct an investigation involving a government contract accounting dispute, they usually dig deep and reach far. After all, when a company's officials, or more often the company's attorneys, hire Kenrich, they expect the kind of attention to detail that any good consultancy offers when assisting its clients, especially because they know that the other side is painstakingly perusing small mountains of documents.

Several years ago, however, when attorneys at Washington's Venable called on Greg Bingham, a long-time consultant and expert witness who is now a vice president at Kenrich, they needed him to scale things back. The government was investigating a Venable client to see if the rules for accounting for government-expenditure personnel were being followed.

"This was a small client that I had, and they couldn't afford the kind of detailed investigation that you usually like to have," says Thomas Madden, who chairs Venable's government contracts practice group. "We were trying to look for patterns to see if we needed to be concerned. Greg suggested using a regression analysis, taking a sample of time cards over a particular period of time to see if any patterns emerged from that."

Bingham's approach did uncover some patterns that helped Madden and his team make legal decisions for the client, and he did this within the client's tight budget. "The costs were much less than if Greg had gone in and examined every single time card and compared them all against the requirements of the contracts," Madden says, adding that this strategy demonstrates Bingham's creativity. "Greg's imaginative,

he works hard, and his client-relations skills are excellent."

Bingham talked with *Of Counsel* about the services that Kenrich provides and how it distinguishes itself from its competitors, his career, and his formal training as an engineer and how it helps him serve clients. He also offers law firms some recommendations for dealing with government contract matters. What follows is that excerpted interview.

Of Counsel: We want to talk about your career and the specifics of what The Kenrich Group does and what advice you may have for lawyers at law firms. First, could you offer, as the cliché goes, the "elevator speech" to describe Kenrich? Who are your clients? What services does your company provide to them?

Greg Bingham: Sure. We offer financial accounting and economic and engineering analysis for our clients, which are construction companies, nuclear facilities or utility companies that use nuclear power, government contractors, and other commercial entities. Much of our work involves a dispute or investigation of some kind. Company X sues Company Z, and there's a dispute. The attorneys figure out the legal entitlement, and we focus on the damages, the dollar amount, the economics and accounting. That's what I would cover in an elevator speech.

OC: You also supply testimony assistance.

GB: Yes, several of us, including myself, provide expert witness testimony in these disputes. We offer our expertise in economics, accounting, finance, engineering, and, in some cases, we offer our opinions about the operations of certain types of companies. We work primarily with outside law firms.

Communication Is Key

OC: As you know, your colleague at Kenrich, Kim Reome, wrote an article for *Of Counsel* recently [see the July 2008 issue, p.5] in which she discusses the importance of communication between clients and their law firms and consultants, especially as a way of avoiding the sticker shock that some clients get when they open their invoices and see the total amount of legal fees that their lawyers billed. Could you elaborate on this? Have you experienced instances when you've seen poor communication?

GB: Yes, I think Kim summed it up well with the idea of "no surprises." That's something that we talk a lot about. I've seen [the effects of poor communication] many times. I try to make it a practice to have regular status meetings, and at those meetings I disclose what I've incurred to date in fees and what I anticipate incurring next week and the following week. Often there will be work plans that we will have created, and we have discussed with counsel that this is the work that we will perform. Once you've done that, it's important to get together regularly and say, "This is where we are on the work plan. These are the stumbling blocks that we have. These are the issues we're dealing with."

When we do this, then maybe counsel or inside company executives can get us the information that we need or get us access to the people we need so that we can complete our work more efficiently. As part of that, we explain where we are on our fees. Sometimes we communicate that to outside counsel, and it doesn't get communicated on to the company. If there's a fall down, that's usually where it is. It's better if there is a team that includes company people, outside counsel, and the consultant that meets regularly, whether that's once a week, once a month, or a conference call. It doesn't have to be a formal sit-down meeting, but it needs to be a discussion of where we stand on the issues, including fees.

OC: If you were to give a piece of advice to some of our readers, lawyers at law firms, what would you recommend that they do?

GB: Well, some of the counsel we work with are just brilliant at figuring out the right approach from a legal perspective regarding how to

try the case. But from the point of view of organizing a team of people to get things done, they [attorneys] just don't think that way. You need somebody on the team, preferably from outside counsel, who looks at it from a project management perspective.

That person should consider all the things that need to be accomplished and how [the case] should be staffed to get it all done when the team needs it done. That's not something that a typical attorney will learn in school. Who studies project management in college? It's civil engineers. But project management is an important process to understand for major litigation.

Opening Access Lines

OC: That's terrific advice. You've worked with a lot of law firms. What else do you see that law firms can improve upon in terms of dealing with their clients?

GB: This is not intended to be self-serving, but attorneys need to make sure that the consultants have access to the company [their clients]. We, consultants, need information—accounting records, finance records, operational records, interviews of various people in the company. We need all of that, and sometimes outside counsel will not want us to contact the company directly. They'll want to filter those requests through outside counsel and to the company. That can slow things down, and then the company is often not familiar with what the consultants are doing. The company official sees an invoice eventually and says, "Wait a minute. I didn't know about this." It's just better to give consultants direct access to the people at the company.

Now, you might lose a little control if you give greater access, but that's just something that attorneys need to work with. When we have [such] access, we at Kenrich always try to keep the law firm very involved with what we're doing. They have a bigger-picture perspective of the case. If they see us doing something that they don't think fits into the grand strategy, they can tell us. Or we can have a dialogue about that before we launch off into something. Often there are things that we know are important from an

economic or accounting perspective but that that they might not realize are important.

OC: Again, it comes down to open lines of communication.

GB: Yes, well put.

OC: Greg, this is a real softball question, but I'll ask it anyway: What is it about Kenrich that distinguishes you and your colleagues from other similar consultants?

GB: Let me give you some examples to answer that. One is the level of expertise. We have some people who are quite near the top in their profession, with years of experience and training.

And, we are client-service-oriented. Sometimes you'll have consultants who are really smart, but they don't care so much about the clients. For a fee, they will give you answers to problems or analyze things, but they don't really care so much about helping clients achieve their goals, solve their problems.

In other words, a consultant may think, "I'm a PhD economist with degrees from all the great institutions in the world, and I'm smarter than everybody in the room. And if you ask me a question, for a fee, I'll answer it." But you don't think of this person as client-service-oriented. We are. We want what's best for the client.

I don't want to group all of our competitors into one category, but there are competitors of ours who are quite large entities, and they have an incentive to keep a lot of people busy. So sometimes when a client hires this type of consultant, they think that they're hiring a person with 20 years of experience. But others often do the work, and the client doesn't see the experienced person as much as they would like. The experienced people at our firm are much more engaged in the work.

OC: Clearly you're one of the people at your firm who has got a lot of experience. Earlier you mentioned civil engineering in terms of project management. You have a background in electrical engineering, with an undergraduate degree in that field. How has your early engineering training come into play with doing the work that you do today? Or does it?

GB: It does. And it does maybe because I'm a technically oriented person. I've worked a lot over the years for companies that have complicated products, for example, an aerospace defense company that's building ships or aircraft or computer companies. The process that they use to make their products is complicated, and I like to figure that stuff out. I enjoy it. That helps me because there are instances when you can't understand the cost records if you don't understand the operations of the company or the technology behind the company.

There are also situations when I'm interviewing engineering personnel, and I have credibility. Maybe I shouldn't have, but they hear that I'm an engineer and they are more open to discussion than they would be with someone who's not an engineer. That's a bias from which I often benefit.

OC: What's one of the most exciting cases that you've worked on?

GB: I can't go into detail; I can only describe it generically. I was working for a high-profile Washingtonian who was a CEO for a not-for-profit entity and the investigation was in the newspaper a lot. My work on the investigation was not disclosed, and I won't disclose it here. But some of the things I'd discover, I'd read about later in the paper. That was exciting. It was not by far the largest investigation that I've ever worked on, but it was fun to read about it in the paper.

Narrowing the Investigation

OC: Speaking about investigations, what should lawyers understand if one of their clients is being investigated for financial wrongdoing? Let's say it concerns billing or something like that.

GB: Understanding the context is a very difficult thing to do. Sometimes there will be a whistle-blower, someone who at some point was a company insider, maybe still is, and that person has a view about something that the company did that was wrong. The insider is giving that information to a US Attorney, and the person who is supplying that information may not understand the complex operations as well as they think they do.

So when they try to translate that to the US Attorney, a little gets lost in translation. The US Attorney doesn't just want to call the company and say, "I understand that you're over-billing the government on contract ABC." Maybe the attorney wants to broaden the investigation so that he or she obscures the nature of it, thinking that if there's *this* wrongdoing in the company maybe there are other things as well. So the investigation is very broad, asking for any and all documents relating to dot, dot, dot.

Consequently, the company gets this request for information, and it asks, "What's going on here? We just got this from a US Attorney." They infer that there must be an investigation. But they get this long list of requested documents, some of which they've never heard of before. But some of the documents requested are so specific and titled in such a way that they deduce that the US Attorney has been talking to a company insider.

So for outside counsel or inside counsel, they need to understand this entire context.

OC: Would the first task that an outside counsel would need to do under these circumstances be (1) calm down the client, who sees this over-reaching investigation coming down the pike, which may turn into a more narrowly tailored probe, and then (2) the attorneys would say, "Still, you better be prepared to get your documents together and ready to send over to the US Attorney's office"?

GB: Yes, and they'd also want to suggest a dialogue, a friendly dialogue, with the US Attorney. Maybe they would lead with, "If you insist that we provide you with the documents on this list, we will give them to you. But first I want you to know that this will be X amount of documents"—and in some cases I've seen that it

would be millions of pages of documents—"and maybe if you tell us what you're trying to figure out, we would be able to get you a more narrowly focused set of documents, so that you, the US Attorney, will have fewer documents to deal with and we, the company, will be able to produce them more quickly."

Now the US Attorney may say, "Well, I don't want you to know what I'm looking for." So there's this dance. The company would come back with, say, a suggestion to have the request limited to just the documents related to its government contracts. The company might say, "We don't see how documents related to private commercial contracts would assist you in analyzing over-billing of the federal government." Or maybe they ask for the request to be limited to the last five years rather than for a longer period of time. Or maybe the company suggests that they supply a sample of documents, and then they can take it from there. There are different ways to try to narrow an investigation.

OC: Let's say that a law firm has a client that has run into a government contracting conflict of some sort. Can you point out one or two things that the law firm should know about in terms of a contracting issue?

GB: The first thing that the law firm should know to do is to get a specialist involved quickly. That specialist can be from their firm or from a consulting firm or from somewhere. The laws and the regulations relating to government contracting are so very complex depending on the area, for example, the Cost Accounting Standards. Even many accountants don't understand all 19 of these complex standards. So specialists are key. ■

—Steven T. Taylor

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