



## EFFICIENCY, VALUE AND COLLABORATION: NEW APPROACHES FOR IN-HOUSE AND OUTSIDE COUNSEL

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### Driving Value and Efficiency While Managing Outside Litigation Teams: A Dual Perspective from an Outside General Counsel

*Eric L. Probst*

Effective in-house counsel management of outside counsel starts and ends with collaboration—a teamwork approach to defending and resolving lawsuits. Like all relationships, the in-house and outside counsel one thrives on communication. In-house counsel must communicate expectations to their outside counterparts, their corporate reporting responsibilities, and the company's approach to and tolerance levels for litigation. They should demand that their outside attorneys provide the information they want and need, but understand that outside factors often influence the legal advice they receive, and these factors, unfortunately, are sometimes immutable. The relationship has, as one of its goals, cost efficient and reliable legal service, and the goal can be achieved if the in-house attorney sets the company's agenda for the litigation at the outset when assigning the claim.

This article shares the experience of the author who has litigated and managed a nationwide portfolio of lawsuits as an outside counsel and outside general counsel.

"Mia San Mia<sup>1</sup>"

Relationships are built on understanding. Outside

counsel must know the client, its culture, and the business unit involved in the lawsuit. In-house counsel must direct, shape, and manage outside counsel. The inside lawyer must instruct the outside lawyer on who the client is beyond its name, the products it sells and the services it offers. To effectively represent the client, the outside counsel must understand the client and its business units at their most base level—the people. Outside lawyers represent multiple clients, and some even in the same industry, but each is different. Moreover, different business units within a company can have different cultures and approaches to litigation. An outside attorney must almost become an employee in understanding and identifying with the client in order to most effectively advocate for it in court.

1. The Client: Outside attorneys rarely spend enough—or no—time learning who the client is beyond what they must understand to defend the lawsuit. More is required because no two clients are the same. Product manufacturers, for example, are "product proud," and their pride extends from the factory floor, to the engineering unit, to the office of the general counsel. The in-house attorney must share this "corporate pride" with the trial lawyer so the lawyer can relate to company witnesses during investigations and deposition preparation, and ultimately share this feeling and convey the company's position to opposing counsel, the court and the jury. The outside lawyer cannot fully obtain the client's ethos from its website, its mission

<sup>1</sup> Mia San Mia is a Bavarian phrase that loosely translates to "We Are Who We Are."

statement, or its code of ethics and conducts. While these documents shed light on who company is and what it stands for, only the employees can communicate to the trial attorney what it means to work for the company. The in-house lawyer can start the dialogue, but should consider introducing the outside legal team to employees who represent what it means to work for the company.

2. The Client's Culture: Every company, small and large, has a unique culture. Some small companies operate as "Mom and Pops", as do some larger companies; yet some other small companies are quiet structured. While larger companies tend to be more organized, with updated policies and procedures, some business units can be less organized, more prone to lawsuits and have "skeletons" in the closet that require extra attention. In closely-held companies, where Board members actively manage and oversee litigation decisions, the outside attorney must know the players, who the player is, and what issues most plague the majority shareholders about the company's litigation portfolio. For example, is the majority shareholder concerned about the impact of legacy litigation on the future market value of the company for the shareholder's heirs? While the outside attorney strives to provide legal counsel divorced from these potentially complicating influences, the attorney must appreciate them. Insight into such corporate subtleties can only come from the in-house counterpart.

The corporate approach to risk is arguably the most important aspect of the culture the in-house attorney must share with the trial lawyer. No two companies approach litigation the same. Tied to corporate pride, risk aversion is critical information for the outside attorney. It guides not only how the attorney approaches the litigation, deals with adversaries, mediators and judges, but is the undercurrent for corporate communications. The outside lawyer wants to know how the client's decision makers will approach the lawsuit and litigation is general. Outside lawyers are sensitive to how their recommendations are received. If the client desires early case resolution, or is generally litigation averse, the in-house must share this apprehension to allow the outside lawyer to consider the apprehension when providing legal advice.

Further, clients often litigate aggressively to send a message to plaintiff's counsel and the plaintiffs' bar. Because the message to the plaintiff is communicated at the outset, and sometimes before the complaint is answered, in-house and outside counsel design the response, with in-house counsel outlining the client's general approach, before the complaint is answered. "Sending a message" through litigation is most apparent in discovery—answering written discovery, corporate witness depositions, and discovery disputes—and ultimately influences the client's trial decision. The collaboration takes on added importance when the client defends a portfolio of similar or related litigation. If business unit leaders are driving the message, the outside legal team should meet them to appreciate how the company will fight the lawsuit.

3. The Client's Product or Service: Before serving as the outside general counsel for a national construction company, I served as its outside counsel in New Jersey, handling construction defect, breach of contract, product liability, and consumer fraud disputes for over 15 years. Defending these matters involved working with operations personnel as much as the legal department. Over time, as a young associate, I learned how it constructed the home improvement it sold, to the point where I could have served on one of its crews. When I assumed the outside general counsel role, it surprised me that none of the outside attorneys took the time to understand the client's business, construction practices and methods, and sales strategies, unless prompted. Legal department personnel should connect outside attorneys to operations personnel so outside lawyers can "talk the talk and walk the walk;" outside lawyers should also undertake their own study. If they do not, or if their course of study is not rigorous to the company's standards, the in-house attorney should not be shy about addressing the learning curve—and, if it cannot be corrected, finding new counsel. Educating outside counsel applies no matter if the client manufactures automobiles or medical devices, operates a trucking company, designs and sells computer software, or runs a restaurant in Manhattan.

**“So tell me what you want, what you really really want....”<sup>2</sup>**

Outside law firms serve in-house legal departments. Like all service providers, the counsel provided is only good if the lawyers know and understand what the in-house lawyers need, want and expect. Sometimes general counsel wants an answer to a specific question. To get that answer, the in-house attorney must frame the question with specificity, so the outside attorneys know which question to answer and why. Appreciating the “why” allows the outside litigator to grasp the pressure points affecting the client’s request, and how the answer might fit into the corporation’s global approach to litigation. Effort—and money—are wasted on both sides of the relationship when the in-house lawyer does not explain in concrete detail “the ask,” and the outside lawyer does not answer the questions.

These expectations include deadlines. Too often “Wednesday” turns into “Friday” or “early next week.” If the inside attorneys sets a deadline goal, ensure the outside attorney meets it. If they do not, discuss the reasons why to ensure it will not happen again.

However, the outside lawyer is equally responsible for avoiding communication breakdowns. Whether receiving a new case or discrete research assignment, or managing a portfolio of matters in a mass tort litigation, the lawyer must ask the inside counterpart: “what do you need?” The more effective outside attorneys I worked with as outside general counsel asked this question and then delivered a response tailored to that request. Outside counsel sometimes do not appreciate that their deliverable might be turned into a Board report or submission to an insurance carrier for coverage. In-house attorneys can promote the effectiveness of the deliverable by defining, up front, for the outside lawyer what written product they need.

With in-house budgets tight, cost saving measures are at the forefront of every assignment. Outside counsel can better assist attempts to manage legal spend when inside legal department personnel communicate the form of the deliverable they need. Are brief e-mail summaries sufficient compared to full blown reports? Does the client want to pursue

limited, strategically-targeted discovery instead of traditional, overbroad discovery requests that often result in little to any relevant information. What role will in-house attorneys play defending the case? Billing guidelines do not cover these more subtle issues so the in-house attorney should set the parameters of the representation from Day One.

**“Who are you?”<sup>3</sup>**

The famous lyrics, screamed by Roger Daltrey, lead singer for The Who, are illustrative for the in-house and outside attorneys trying to establish a solid working relationship between themselves. Not only should the outside lawyer ask “Who Are You,” the follow up question, as contained in the song—“Because I really want to know”<sup>4</sup> also should be asked. But the in-house attorney needs to break the ice—and engage the outside attorney personally—to promote an effective working relationship. From beginning to end, the inside lawyer and outside lawyer are in a relationship. They have to know who each other is to make it work.

Until I served as outside general counsel, I did not fully appreciate the many roles general counsel play. Their job responsibilities extend beyond litigation management, and often include budgeting, operations, compliance, safety, risk management, insurance, licensing, contract review, and Board reporting. Of course, the size and business type of the company influence the in-house lawyer’s day-to-day obligations. When the outside legal team—partners, associates and paralegals—understand the hats the in-house counsel wears, and when they wear the hats, they can better provide legal advice and service to the client.

An important aspect of the in-house and outside counsel relationship is understanding the dynamics of the in-house attorneys’ relationship with the company’s business units and the Board. Though certain information cannot be shared with outside legal personnel, the more information the outside lawyer has access to, especially pressure points related to litigation, the more effective the attorney’s legal counsel will be. Discovery, settlement, and trial decisions cannot be made in a vacuum because these corporate background issues play a significant

<sup>2</sup> Lyrics from Wannabe, Spice Girls (Virgin – EMI Records, 1996).

<sup>3</sup> “Who Are You” off of the album Who Are You, The Who (Polydor Records, 1978).

<sup>4</sup> Id.

role in shaping decision making.

### **Conclusion**

Building a solid relationship between in-house and outside attorneys—becoming partners in defending the lawsuit—is key to managing litigation, whether the claim involves a defective product, a commercial motor carrier crash, or business-to-business

contract dispute. Trust is the core of the relationship, which has to be earned on both sides. Varied factors impact the management of the lawsuit—the industry involved, the availability of insurance coverage, and the potential ramifications of an adverse result—requiring in-house and outside counsel to collaborate and flexibly approach and evaluate the case’s strengths and weaknesses to achieve the client’s litigation goals.



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Diane Averell is a member of the firm's Management Committee. Diane strives to serve the best interests of her clients by understanding their business, products, and long-term goals. She works to understand the business environment behind the case in order to define what will constitute a "win" for her clients. Armed with this insight, Diane is a fearless advocate and works tirelessly to defend her clients while respecting their business objectives.

Diane has handled business-to-business disputes and defended personal injury claims on behalf of publicly traded companies, privately held corporations, and family-owned enterprises. Representing manufacturing companies, she has also defended failure-to-warn product liability claims related to prescription and over-the-counter drugs, industrial chemicals and minerals, petroleum products, automotive parts, trucking equipment, industrial machinery, construction equipment, power tools, and tobacco products. Although she handles all aspects of complex litigation, her passion is working with toxicologists, epidemiologists, and physicians to defend her clients' products on the issues of general and specific causation. Diane has tackled medical and scientific literature related to a wide range of human cancers (bladder, liver, kidney, prostate, breast, ovarian, uterine, lung, leukemia and non-Hodgkin's lymphoma) as well as stroke and cardiac disease. The culmination of her careful research and preparation is the strategic and surgical depositions of the plaintiffs and their experts, always with an eye towards summary judgment or eliminating the claims remaining for trial.

**Practice**

- Litigation
- Life Sciences Litigation
- Product Liability
- Toxic and Environmental Tort
- Business Disputes and Counseling

**Industries**

- Chemical
- Life Sciences
- Manufacturing

**Honors and Awards**

- Mass Tort Litigation / Class Actions - Defendants (2020)
- Recognized on the New Jersey Super Lawyers List, Personal Injury-Products: Defense, 2016 - 2019.
- Recognized by New Jersey Law Journal in their annual "40 Under 40" list of attorneys, 2011.
- Recognized on the New Jersey Super Lawyers "Rising Stars" List, 2009 -2010, 2013.

**Education**

- Villanova University School of Law, Villanova, PA, J.D., 2000 - Champion, 1999 National Family Law Appellate Moot Court Competition; Best Brief, 2000 National First Amendment Appellate Moot Court Competition
- Villanova University, Villanova, PA, B.A., cum laude, 1997 - Phi Kappa Phi National Honor Society; Phi Sigma Alpha National Political Science Honor Society

