

IN-HOUSE LITIGATOR

THE JOURNAL OF THE COMMITTEE ON CORPORATE COUNSEL

A Good Fit: Lawyers of Color and In-House Practice

By *Diane C. Yu*

The opportunities that in-house counsel practice offers to minority lawyers are considerable. Notwithstanding the pay, power, tradition, and independence that attract many to private practice, I have found that the in-house lawyer’s life—in both corporate and public sector incarnations—has a number of advantages and pathways for success for attorneys of color. Furthermore, the prestige and visibility of general counsel as leaders in the profession have increased sharply over the past two decades, which inures to the benefit of the lawyers working under them. I thoroughly enjoyed my years as General Counsel for the State Bar of California, the nation’s largest bar, and as Managing Counsel and Associate General Counsel at Monsanto Company. Though the settings and clients I had in these two positions superficially would seem quite different (i.e., a mandatory bar organization that represents and regulates 160,000 attorneys versus a large, multinational corporation), both positions afforded me unique and extraordinary legal experiences that undeniably helped me grow and develop as a lawyer.

First, for in-house counsel, the nature of the fundamental work experience, while focused clearly on the client entity, is sufficiently varied so as to give one exposure to a variety of practice fields. In a world of ambiguity and constant change, achieving depth and breadth in one’s practice is both a plus and a great comfort. In-house lawyers are constantly advising their clients on legal, compliance, risk assessment, business,

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Who Is the Customer? Rainmaking from the In-House Perspective

By *Patricia Eastwood*

When I was working in a law firm before moving to an in-house position with a large corporation, I asked a senior partner for some advice on rainmaking. He looked at me and without hesitation said, “If you feed them, the work will come.” While that one-liner might be viewed as a simple nod toward the traditional business lunch (and in ancient times, the multiple martini lunch), the partner was actually providing me with much deeper insights into how business might come to your law practice. I did not fully understand all that his one line response implied until much later, after I had gone in-house. After a short time in my new role, I realized that in-house attorneys usually do not have time to initiate new relationships with outside counsel. Thus, the burden generally rests on the shoulders of law firm attorneys to pick up the phone and do something. A simple lunch or an invitation to join a local bar event can do wonders to start a relationship. And showing an interest in the company and its lawyers can create a professional synergy that may eventually lead the in-house lawyer to call you to obtain either legal advice or a referral to another attorney.

Most often, it is the rush to find help with a specific, pressing legal matter that drives in-house attorneys to consult with lawyers they know already. It takes more time and effort to cold call a lawyer who is only known to you

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 **SECTION of LITIGATION**
AMERICAN BAR ASSOCIATION

Message from the Cochairs

Happy 25th Anniversary! As a new cochair, I am deeply honored to have this opportunity to chair the Committee on Corporate Counsel, along with my cochairs Hob Jordan and Robert Simpson. Before I embark on this important task, I would like to take a moment to reflect on the history of the Committee on Corporate Counsel over the past 25 years, as our outgoing cochair Bob Craig wisely suggested.

When the Committee started in 1982, things were quite different. An actor named Ronald Reagan was finishing his first term as president; compact disks were about to replace the stacks of records and tape cassettes on our shelves; a future global giant of a company was born when an 18-year-old Michael Dell began selling personal computers out of his dormitory room to fellow students; we were spellbound by an alien named *E.T.*; and we were (or at least I was) busy attempting to master the moves of Michael Jackson and Madonna. And, miraculously, lawyers (and their children) were able to go about their daily activities without being strapped to a BlackBerry, cell phone, headset, or iPod. How simple life used to be.

In this backdrop, a simple, yet brilliant, idea was born. The ABA Section of Litigation saw the need for a committee that would focus on the unique needs of in-house and outside lawyers who represent corporations. The newly founded Committee on Corporate Counsel of the ABA Section of Litigation began with barely enough members to fill a telephone booth. With the hard work of 24 distinguished cochairs before me, including our most recent chairs, Bob Craig, Eileen Letts, and Bill Garcia, the Committee has grown to 1,300 members, with more than 200 lawyers attending our three-day CLE seminar every year. This year, along with our seminar cochairs Kenneth Berman, Evelyn Brantley, David Chaumette, and Holly Harvey, we are honored to see the return of former cochairs Nancy Higgins and Francis Burke Jr., who will serve as honorary meeting cochairs for the Committee's Silver Jubilee Seminar, February 15–18, 2007.

The Committee boasts a balanced number of in-house and outside counsel in every state—from 200-plus-lawyer legal departments of Fortune 100 global companies to single-lawyer legal departments of start-ups in Silicon Valley, and from national to regional law firms of every size and expertise. Although they are from all walks of life, our members have one thing in common: They are in-house litigators dedicated to protecting their in-house client. The Committee's mission is to provide our members with resources to do that—to keep our members abreast of the changes in law and regulations and trends that affect our in-house clients, to provide a forum where in-house and outside lawyers can have an open dialogue that would result in best practices for litigation management, and to lead the profession in finding solutions to various professional issues, including promoting diversity in the profession.

The Committee has watched the role of the in-house lawyer change dramatically over the years. In the early 1980s, only some corporations had legal departments, and, if they did, the

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Message from the Editorial Board

“Survey says”—opportunity. Not one but three surveys of corporate law departments released in the second half of 2006 reflect that opportunities abound for in-house attorneys and the private practitioners who serve them. The surveys were conducted by Altman Weil, Inc.; Hildebrandt International; and BTI Consulting Group, Inc. Highlights of the survey results were publicly released.

The most likely future practice growth areas identified by respondents to the Hildebrandt survey were, in descending order, international law; mergers and acquisitions; regulatory; commercial contracts; intellectual property—patents; intellectual property—licensing; and employment and labor. Although litigation was not among these areas, there should still be plenty of opportunities for both in-house litigators and the outside counsel who want to represent them. Both Altman Weil and Hildebrandt found that corporate law department expenditures rose an average of 7 percent or more during 2005. Altman Weil also found that corporate law departments grew substantially in 2005, with the average number of lawyers each department employed rising to 3.49 per billion dollars of revenue, compared to 2.93 lawyers per billion dollars of revenue in 2004. Hildebrandt found that companies were holding the line on growth in law department staff, but also found that total cash compensation for in-house attorneys had increased by an average of 8 percent, with the median increase being 6 percent.

According to Altman Weil, large law departments (of 26 or more in-house attorneys) used an average of 136 outside law firms each year. Even among all law departments, large or small,

corporate respondents used an average of 54 outside law firms per year. And not all of these corporate/law firm relationships are stable. Indeed, more than half of the corporate counsel who responded to BTI reported having replaced or demoted at least one of their primary law firms in the previous 18 months. Remarkably, only 30.7 percent of the corporate counsel who responded to BTI reported being satisfied with their primary outside law firms—a substantial drop from the 43.5-percent satisfaction-level BTI had found a year earlier. There’s plenty of opportunity for new relationships—and to strengthen existing ones—in those responses.

What do corporate law departments want most from their outside counsel? Expertise. According to Hildebrandt, the most important considerations in selecting outside counsel were legal expertise, subject matter knowledge, and business knowledge. According to Altman Weil, the most important factors in selecting outside counsel were firm specialization, followed by responsiveness, cost, and prior history with the corporation.

How to take advantage of these opportunities? If you are an outside attorney, a good place to answer that

question is Patricia Eastwood’s article in this issue of *In-House Litigator*, titled “Who Is the Customer? Rainmaking from the In-House Perspective.” Ms. Eastwood provides an in-house perspective on how private practitioners should market to corporate counsel.

If the opportunity you seek is to “go” in-house by obtaining a corporate counsel position, then your first stop should be Diane Yu’s article in this issue, titled “A Good Fit: Lawyers of Color and In-House Practice.” Ms. Yu offers valuable insights not only for lawyers of color, but also for all lawyers, about the opportunities available through in-house practice.

In this issue, we are fortunate to have a third contribution authored by in-house counsel, titled “The In-House Perspective on Jury Trials: Be Prepared to Tell Your Story,” by Scott L. D’Angelo. Mr. D’Angelo emphasizes the importance of learning your client corporation’s story and telling that story effectively to a jury at trial. Our final featured article is Part II of Joel Rice’s guide for young in-house attorneys about employment law.

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A Practical Guide to Employment Law for Young In-House Attorneys

By Joel W. Rice

EDITORS' NOTE: This is Part II of an article prepared by Mr. Rice that provides an overview of the key employment law issues facing corporate counsel and is intended to serve as a quick guide for the young practitioner or those new to their in-house positions. Mr. Rice wishes to thank Jenifer M. Robbins, General Counsel, FPL Advisory Group, for her helpful editorial advice and input in connection with the preparation of this article.

Part I of this article briefly described the major sources of employment law and dealt with issues pertaining to hiring/recruitment, attendance/leave, and employee pay and classification. In Part II, the following topics will be addressed: (1) handling the “problem employee,” (2) conducting internal investigations of employee misconduct, and (3) electronic issues in the workplace.

Dealing with the Problem Performer

Despite your best efforts not to hire the “walking lawsuit,” there is no way to completely avoid the problem employee. This section of the article will briefly identify the warning signs of the problem employee, and then discuss steps you can take to address the situation while at the same time minimizing the risk of exposure to legal action. The problem employee represents a significant potential cost to your company, not only in terms of legal fees and litigation exposure, but also in terms of lost productivity and lower morale among the other employees. For these reasons, it is imperative to take appropriate and effective measures when dealing with such individuals.

Identifying the Problem Employee

When should you begin worrying that your company is confronted with a problem employee? Typically, before the situation becomes critical, there are plenty of

warning signs. The red flags can include any of the following issues:

- repeated attendance issues
- reduced work output or problems with work quality
- attitudinal changes, including lack of energy or enthusiasm, or defensiveness in the face of constructive criticism
- interpersonal friction with supervisors and/or coworkers
- changes in appearance or dress that may be indicative of substance abuse or other personal problems

As discussed below, it is important to get a handle on the situation when the earliest warning signs arise before it becomes irremediable.

Managing Risk Posed by the Problem Employee

What are steps you can take to minimize the risk to your organization posed by the problem employee? The first step, discussed in Part I of this article, is to avoid hiring the problem employee in the first place by ensuring your company’s managers are screening applicants effectively in a lawful manner. There are other steps you can take, however, to minimize exposure after the individual is hired.

Communicate policies and expectations. Your company’s managers should be trained to clearly communicate to all new hires the expectations for their position. If your company has written job descriptions, they can be a valuable tool for reinforcing what is expected of the employee. Of course, to use job descriptions in an effective manner, they must be accurate and up-to-date. Make sure Human Resources and the manager for that area review the job descriptions on a periodic basis to ensure they are current. The written job description should clearly identify the essential functions of the position. Also, any job description should contain a statement that your company

reserves the right to amend or add to the duties of the position at any time. The benefit in establishing clear expectations upfront is substantial. Remember, the longer an individual remains in a position that is a mismatch for his or her skills, the more costly and traumatic it is for all concerned to address the situation down the road.

Performance reviews. It is not enough to establish initial expectations for the position. Your company should have a formal review system in place that provides ongoing follow-up reinforcement of those expectations. Examples of common pitfalls associated with performance appraisals are listed below:

- **Lack of training.** Managers are not trained on how to use the performance review as an effective tool to improve performance and avoid the kind of misunderstandings that result in lawsuits.
- **Lack of follow-through.** It is of no use to have an annual review process if there is a lack of commitment to do it. The lack of feedback can be damaging to morale, especially where employees are expecting it on a periodic basis.
- **Favoritism by certain managers.** Performance reviews are only effective if they represent an objective assessment of the individual’s performance. To head off the specter of favoritism, at least one other individual—either a Human Resources official or a higher-ranking manager—should scrutinize the review.
- **Grade inflation.** This is probably the single most common flaw in a company’s performance appraisal process. Your managers must be encouraged to be honest in their evaluations. Not everyone is an A student. All employees have some area they could be working on to improve. Unrealistically glowing reviews render it that much more dif-

difficult to take disciplinary action later on if that becomes necessary. Moreover, from a litigation perspective, it increases the chance that any adverse action eventually taken will be viewed as a pretext for an unlawful motive.

- **Lack of specificity.** To provide meaningful feedback, as well as a road map for explaining an adverse action down the road, reviews should be as specific as possible. Managers should not say “the employee’s attendance slipped in the last year.” Rather, the review should state that “in the last year, total unexcused absences increased from two to ten, and the employee was tardy on five occasions.” Similar specificity is helpful in connection with other constructive criticism.

An effective performance appraisal system can ward off the need for disciplinary action by alerting the employee upfront of those areas that need improving. If the employee does not turn things around, the performance reviews can provide essential documentation that the company acted “fairly,” and that if there were problems, they were of the employee’s own making. This is an important component in shaping a juror’s perception of the dispute if the problem employee is eventually terminated and files a lawsuit.

Taking Effective Disciplinary Action

Sometimes problems arise or persist no matter how well you communicate the company’s expectations to the employee. Performance issues should not be permitted to fester. The greater the passage of time between the underlying conduct giving rise to the discipline and the discipline itself, the more likely it is that the discipline will be ineffective and, just as importantly, perceived by a potential juror as concocted or unjustified.

Before taking any disciplinary steps—whether a verbal warning, written warning, or something more serious such as probation, demotion, or suspension—you need to take inventory. At a minimum, the following checklist should be followed by your company’s managers:

First, what protected classification does the employee fall within? Have others outside of that protected classification

been treated consistently? For example, if discipline is contemplated for an employee over the age of 40 based on excessive absenteeism, it is important to make sure that younger employees are being held to the same standard.

Second, has the employee complained of anything? If the manager issuing the discipline is aware that the employee has complained of discrimination or about any other aspect of the company’s practices, you or your company’s Human Resources department should be contacted. Retaliation complaints are often more troublesome to defend than the underlying employment complaint. While the presence of a complaint does not insulate poor performers from criticism, managers should be on guard in these circumstances.

Third, depending upon the severity of the problem, the size of the organization, and the nature of the discipline, it may be advisable to involve in-house counsel, the Human Resources department, or both.

Once a preliminary inventory is undertaken, the manager should meet with the employee and hear the employee’s side of the story before discipline is imposed. There may be extenuating circumstances the company had not considered that underlie the performance problem. For example, the employee may have a medical problem that can be reasonably accommodated. The performance issues may relate to a drug and/or alcohol dependency. If your company has an employee assistance program, a referral could be made to that program. In addition to these specific considerations, simple fairness dictates that the employee be permitted to tell his or her side of the story. Certainly, a juror will expect that this took place.

All discipline should be documented. This includes verbal warnings, which should be accompanied by a note to the file. Documentation makes it easier for the company to assess what action to take if problems persist. Furthermore, documentation makes it more difficult for the employee to later claim that no warning was given. If managers find it difficult to prepare a disciplinary write-up, forms can be utilized to save some of the time associated with the paperwork process. The disciplinary write-up should include a

statement that further consequences may result, up to and including termination, if the problem persists. If the employee is being given a written warning, he or she should be asked to sign, and refusal to sign should be noted on the warning document. It also may be useful, if practicable, to have Human Resources sign off as well. Any formal disciplinary document should be vetted to ensure that it appears fair, that it is focused on the performance issue, and that the criticisms are neither snide nor personalized.

Termination

There will be instances where, despite your best efforts, the situation with the problem employee cannot be salvaged, and the individual’s employment must be terminated. If you have done your job by making sure your managers are (a) communicating clearly the company’s expectations, (b) reinforcing those expectations in meaningful performance appraisals, and (c) documenting discipline that has

There will be instances where, despite your best efforts, the situation with the problem employee cannot be salvaged, and the individual’s employment must be terminated.

been administered in an even-handed manner, then termination should not be a cause for undue concern. The following are a few pointers for minimizing your company’s risk of exposure in connection with the termination process itself.

The termination meeting should take place in a quiet, private location. Ordinarily, there should be at least one witness in addition to the person conducting the termination meeting. If the individual being terminated has a history of volatility, make sure that building security is notified in advance and on alert in the event problems arise.

The manager should plan carefully what will be said at such meeting. If there is time to do so, the remarks should be vetted with your office or Human Resources. Assuming the bases for termination are well-known, the explanation can be brief. The termination meeting is not the place to debate the merits of the decision. However, a succinct and accurate explanation is helpful to avoid claims in any subsequent lawsuit that the reason for the termination was made up or concocted after the fact.

Immediately after the termination meeting, the discussion should be documented in a note to the file to blunt any later attempt by the employee to mischaracterize what was said.

The termination should be conducted in a way that preserves the employee's dignity. If at all possible, try to conduct the termination toward the end of the workday, or at some other time when fewer employees may be present. Also, in most instances, the employee should be given the option of packing up or retrie-

ving items during nonworking hours to avoid needless embarrassment.

Tender of a release should be considered where the individual is in a protected class and especially where there have been indications of likely litigiousness. Be aware, however, that to be enforceable, the release must be accompanied by additional compensation beyond that to which the employee is already entitled. In some instances, depending upon the nature of the employee's conduct, your company may not be inclined to offer any enhanced severance to the individual.

Also, a release will be of no effect if it was offered under circumstances that rendered the employee's acceptance involuntary, such as not permitting the individual adequate time to consider the document and consult with counsel. In addition, if the individual is over the age of 40, the release must comply with the dictates of the Older Workers' Benefit Protection Act, which provides for a specified time period to consider the release and a revocation period after signature.

Internal Investigations

As in-house counsel, you may confront personnel matters for which an internal investigation is warranted, or even required, to arrive at the proper course of action. Investigations are often necessary to resolve issues of potential workplace misconduct—such as theft, fraud, violence in the workplace, or drug and alcohol use on the job. An investigation also may be triggered by a sexual harassment complaint. Once you have determined that an investigation is necessary, it is important to do it right. A poorly done investigation can result in a wrongful discharge claim, defamation accusations by the accused, or increased exposure when defending against a claim for sexual harassment. Conversely, a properly conducted investigation can greatly lessen the risk of exposure to legal action and, in the case of sexual harassment claims, can afford the basis for a complete affirmative defense to liability.

Initial Steps

In the initial stages of an investigation, there are several steps that should be taken right away. At the outset, the personnel file of the employee under investigation, as well as that of the accuser, if

Other Related Disciplinary Issues

For most performance problems, it is helpful to document that the employee has been warned and is on notice of problems with his or her employment. But be wary of instituting a formal written policy of "progressive discipline." In some jurisdictions, such policies can give rise to contractual or quasi-contractual entitlements. If your company has promulgated a progressive discipline policy, make sure that the concept of "at-will employment" is affirmed and that the right to proceed directly to termination is reserved if, in the company's sole discretion, termination is warranted.

Options Other Than Termination for Dealing with the Problem Employee

Demotion

This is a possible solution where there is a mismatch between the demands of the position and the individual's skill set. Demotion, however, can damage the individual's morale. Also, if the problem employee leaves thereafter, there is an increased risk of a constructive discharge claim. The strength of such a claim depends on the nature of the demotion and whether it can be portrayed by the employee as a substantially negative change in status and responsibilities.

Performance Probation

Employers will sometimes place a poor performer on a last chance probation in which the employee is informed that certain improvements must be seen within a defined period of time (e.g., 90 days) or termination will result. While probation has its place, a couple of points should be kept in mind. First, if the employee demonstrates the improvement sought, you are then committed to reinstating him or her. Therefore, this option should only be considered if you genuinely consider the employee to be salvageable. Second, some problem employees are capable of "getting their act together" for a short period of time but then inevitably relapse. You must carefully consider whether probation is simply forestalling the inevitable. This will depend upon a careful assessment of the individual case.

Leave or Suspension

Suspension is certainly an option short of termination for certain violations of workplace rules or acts of misconduct. Before suspending the individual, however, make sure your managers have conducted a thorough investigation and are confident that the individual is being treated consistently. If others have committed the same offense but have not been suspended for it, there must be other, differentiating factors (e.g., a pattern of misconduct) that justify the difference in treatment. A leave of absence is sometimes warranted where the individual is under investigation for misconduct that raises safety or security issues. This topic is discussed in the section of this article covering the conduct of internal investigations.

applicable, should be reviewed. In addition, all documents reflecting the applicable company policies should be examined. Also, all pertinent emails and documents stored on the employee's work computer should be obtained. In that regard, it is important to ensure that no potentially pertinent information is deleted from the subject's computer pending the completion of the investigation. For example, if information is automatically deleted from the company's computers pursuant to a predetermined protocol, steps should be taken to countermand such process. Another preliminary consideration is whether the target of the investigation or, in some instances, the complaining employee should be placed on leave pending the outcome of the investigation. This will depend upon the nature and severity of the misconduct at issue, including whether there are ongoing risks to employee safety or security.

The threshold question for in-house counsel confronting the prospect of an investigation is: Who should be conducting it? There are several alternatives, each with its own built-in advantages and drawbacks.

Do it yourself. One option is to conduct the investigation yourself. This maximizes your control over the conduct of the investigation but has distinct disadvantages as well. Investigations are often time-consuming and may be difficult to manage along with all of your other day-to-day duties and responsibilities. The other disadvantage is you will potentially become a witness in the event of subsequent litigation and run the risk of waiving the attorney-client privilege. These disadvantages often militate against in-house counsel actively conducting the investigation.

Human Resources. Another option is to have your company's Human Resources department conduct the investigation under your direction. This frees up your time to focus on broader tactical and legal considerations. Also, it reduces, if not entirely eliminates, the prospect of your becoming a witness down the road. Of course, special care should be taken to ensure that all communications to and from Human Resources are identified as attorney-

client and/or attorney work-product.

Outside investigator. In some instances, you should consider bringing in a third party to conduct the investigation. This may be warranted where the investigation pertains to a high-level official in the organization, or where there are accusations of systemic wrongdoing. An outside investigator—often, but not necessarily, an attorney—provides an independent perspective that may be useful. One downside, however, is that an outside investigator will lack the detailed knowledge of the company and its operations that an insider would possess. Also, certain types of outside investigations could be deemed “consumer reports,” triggering Fair Credit Reporting Act obligations.

Involvement of law enforcement. If there are indications that the misconduct in question involved the potential commission of a crime, the appropriate state, local, and/or federal law enforcement authorities should be contacted. This is an area where obtaining advice of knowledgeable outside counsel is critical before action is taken.

Conduct of the Investigation

Employee interviews. In conducting most internal investigations, witnesses will need to be interviewed. Typically, if the investigation is prompted by an employee complaint, the accuser is interviewed first, followed by the witnesses identified by the accuser, and culminating in an interview with the accused. If applicable, persons identified by the accused as having relevant knowledge and information also may be interviewed. The investigation should be limited to those likely to have pertinent knowledge and information. The venue for the interviews should be calculated to draw as little attention to the investigation as possible from those who do not have a need to know. In some instances, for reasons of witness safety or security, it may be advisable for the investigator to conduct the interviews at an off-site, neutral location.

In terms of the conduct of the interviews, the following admonitions generally apply:

- The interviewer should identify a neutral purpose for the interview,

which is typically to gather facts relating to the accusation at issue.

- The witnesses should be informed that they are not to discuss the topics covered in the interview with coworkers or others.
- The witnesses should be told that every effort will be made to preserve the confidentiality of their identity but that the company cannot guarantee such confidentiality.
- The witnesses should be assured that retaliation by the accused or by anyone else at the company will not be tolerated. Witnesses should be encouraged to report any instance of what they believe to be retaliation.

The overall approach to the interviews should be akin to that of Jack Friday of the old *Dragnet* television show: “Just the facts, Ma’am.” The interviewer should not offer personal opinions or conclusions. The questioning

In the course of conducting an internal investigation, it is important to minimize your company's exposure to a potential defamation claim by the accused.

should typically begin in an open-ended fashion, and then hone in on the core matters in dispute. If the investigation is prompted by an employee complaint, the possible motives of the accuser also should be explored. Committing the witness statement to writing is often desirable. Care should be taken, however, to avoid injecting opinions or legal conclusions in the written statement because it may be discoverable in the event of subsequent litigation. Finally, the interviewer should always be flexible and willing to deviate from the “script” if the interview takes an unexpected direction.

Investigation report. Once the investigation has been completed, it is time to prepare the written report. The report should identify the persons interviewed and set forth the factual analysis. While the report should state the investigator's findings, these should not be framed in terms of ultimate legal conclusions. Rather, the report should state, for example, whether there is a good-faith basis to believe the company's policies and procedures were violated, or whether certain inappropriate conduct took place. Legal conclusions and recommendations should be kept separate from the investigative report itself, to ensure that the attorney-client privilege is preserved. It should be assumed that any statements in the investigative report will be discoverable in a subsequent lawsuit.

Disciplinary options. Depending upon the results of the investigation, a variety of disciplinary actions against the accused may be appropriate—ranging from a mere warning, to a suspension without pay, all the way up to and including termination of employment. Even if the investigation proves inconclusive, it is useful to remind the accused in writing of the company's policies in the area in question and of the need to adhere to such policies in the future. Also, the accused should be reminded in writing that retaliation against anyone involved in the investigation is strictly prohibited. In certain instances, transfer

of the accused or the complaining party to a different position may be an option. If transfer of the complaining party is under consideration, take care that such transfer could not reasonably be construed by the complainant as "punishment" for having complained.

Related Issues

Workplace searches. Some internal investigations may require you to conduct a search of the workplace for relevant evidence. The protections afforded by the Fourth Amendment to the U.S. Constitution do not apply to the private workplace. Nevertheless, state laws may confer privacy rights, even in the employment setting, so care should be taken before embarking on any search. At a minimum, your company's handbook should make clear that employee lockers, company-provided toolboxes, and other company-owned items are subject to search. Even with such a handbook statement, you should attempt to obtain the employee's written consent to a search. Because many investigations will involve examination of materials on the company's computers, employees should be informed in writing that the company has the right to inspect and monitor employee information stored on company computers, including email transmissions and Internet files. Monitoring of electronic information is discussed at greater length in the final section of this article.

Defamation or Other Claims. In the course of conducting an internal investigation, it is important to minimize your company's exposure to a potential defamation claim by the accused. The following steps should be taken to help ensure that the investigation is cloaked in a qualified privilege:

- Make sure only those who have a legitimate need to know are involved in, or apprised of, the investigation. Typically, this means upper management, in-house counsel, and the head of Human Resources.
- Interviewees should be told to keep the interview confidential and not to discuss the subject matter or the facts of the interview with coworkers.

- Care should be taken to avoid discussing the ongoing investigation in the hallway, lunchroom, or any open area where you could be overheard by other employees.
- The investigation notes and report should be kept in a physically secure location. Also, there should be limited electronic access to the report. Password protection should be in place to ensure that only the investigator or those under his or her direction or control will have electronic access to the document.

To guard against claims of false imprisonment by either the accused or a witness, never insist upon proceeding with the interview if the employee expresses a desire to terminate. Having an additional person present as a witness to the interview also may safeguard against spurious false imprisonment claims.

Electronic Issues in the Workplace

Computers and other electronic devices are ubiquitous in the modern workplace. While such devices are essential to the operation of most businesses, their use raises employment law-related issues that are discussed in this final section of the article.

Employee Internet and Email Use

Most employees have access to the Internet at work for the purpose of sending and receiving email to customers, conducting research, and performing other business-related tasks. Employee access to the Internet carries with it certain risks, which must be managed effectively. For example, excessive personal use of the Internet at work can be a distraction and a drain on productivity. Also, the Internet and email can be vehicles for an employee to engage in harassing conduct. The harassment could consist of sexually explicit email messages or sexually explicit images downloaded from the Internet that are visible to coworkers. The ease of access to the Internet and the ready availability of electronic communication have rendered such abuses increasingly common in the workplace. In addition to the above issues, employees tend to communicate more casually in email form than they would in business correspondence.

Practice Tip for Young In-House Lawyers

"Do all you can to learn about your company's business. Enlist company veterans outside the legal department as mentors to help you understand what is important to them and your company. The knowledge you pick up over time will help you offer better, and more insightful, legal advice to your client."

By David S. Starr, Vice President and Deputy General Counsel, Belo Corp.

Indeed, for many employees, email has become a substitute for phone conversation. The problem, however, is that hasty and ill-considered email communications can create significant potential exposure for employers, particularly in light of the fact that such communications often remain in the company's servers and are potentially retrievable months or even years later.

One option for addressing employee abuse of the company's computers is to simply ban all personal, nonbusiness use. For most companies, however, such a prohibition would be nearly impossible to police. Furthermore, it could lead to problems of discriminatory enforcement. Assuming some personal use of the company's computers is permitted, you should make sure that policies are in place to preserve the company's prerogative to monitor employee Internet and email use on the job. Such monitoring of employee use of company-provided computers is unlikely to run afoul of federal or state wiretapping laws. Moreover, most courts that have considered the issue have concluded that employees have little, if any, privacy interest in communications made on the job with company computers. Nevertheless, the prudent approach is to make sure your company has a clear statement in the employee handbook informing employees that their email communications and Internet use on company-provided equipment are not private and that the company reserves the right to monitor such activity. The handbook also should make clear that excessive personal use of company computers or inappropriate activity can result in discipline, up to and including termination, where appropriate. Furthermore, your company's harassment policy should specifically prohibit sexually inappropriate emails or the downloading and dissemination of obscene or pornographic materials.

In addition, your company's managers should be trained about the importance of proper email communication. Manager emails to subordinates should be appropriate and business-oriented, and email messages should never be sent in anger. Inappropriate or ill-considered emails by managers can be devastating to an employer in subsequent litigation.

Such stark, black-and-white evidence is far more damaging than an employee's recollection of a phone conversation. Certainly, important personnel decisions should not be the subject of impulsive email communications. This caveat applies with even greater force to messages sent on personal electronic devices, such as Blackberry, which tend to be cryptic and can easily be taken out of context to make the manager, and, by extension, the company, look unsympathetic and insensitive.

Employee Blogging

The term "blog" refers to a weblog, which is essentially an online journal or diary. Blogs are increasingly popular, with millions of individuals either creating their own blogs or regularly reviewing or contributing to others' blogs. Most blogs concern hobbies or other subjects of personal interest that should raise no concern for employers. Employment issues can arise, however, when an employee is blogging on company time using company computers. Even if the employee's blogging is done during off-work hours at home, it can raise legitimate concerns for your company. For example, an employee's blog could be used as a tool to harass, demean, or belittle managers or coworkers. The blog also could reveal confidential information or trade secrets or simply place the company in a bad light. These risks are exacerbated by the fact that blogs have a degree of permanence and are potentially accessible by a wide audience.

Given the increasing prevalence of blogs and the unique risks they pose if used inappropriately, guidelines should be established—either in a stand-alone blogging policy or as part of your company's broader policies on computer and Internet use. A blogging policy should encompass at least the following components:

- There should be a clear statement that the employee has no privacy interest in blogging activity done at work on company equipment. The policy should reserve the company's right to monitor such activity and to discipline the employee for excessive or inappropriate blogging.
- Blogging should be cited as an

example of conduct outside the workplace that could be cause for discipline if it places the company in a bad light.

- The company also should warn employees that they are not to reveal confidential information or trade secrets in their blogs. This admonition could be incorporated into a broader confidentiality policy or trade secret agreement if one exists. Employees also should be warned against incorporating company logos, trademarks, or service marks in their blogs without the company's express permission.

Most courts have concluded that employees have little, if any, privacy interest in communications made on the job with company computers.

Furthermore, if the company is identified in the employee's blog, the employee should make clear to the reader that the views expressed in the blog are those of the author, and not reflective of the company's views or opinions.

- Employees should be advised that blog content that could be construed as discriminatory or harassing toward others at the company is in violation of the company's antidiscrimination and antiharassment policies.

Employees in the private workplace do not have First Amendment rights with respect to statements made in blogs. Nevertheless, some state laws provide protection for employee conduct that occurs outside the workplace, particularly if it has a political component. Also, some blog topics could be viewed as concerted activity protected under the

National Labor Relations Act. Apart from such legal considerations, disciplining employees for the content of their blogging activity done on personal time at home could be destructive of morale. Accordingly, special care should be taken before disciplining employees for the contents of their personal blog activity during off-work time. At a minimum, it should be clear that the blog violates an established policy of the company, whether relating to harassment, disclosure of confidential information or trade secrets, or conduct that plainly brings the company into disrepute.

Electronic Discovery Issues

The computerized workplace has significant implications for the conduct of discovery in litigation generally, and employment litigation in particular. Often, the documentation pertinent to employment disputes is now in email form. Critical documents may exist in various drafts or iterations in the company's computer hard drive. The sheer volume of potentially discoverable electronic information raises issues concerning the cost of document production, which party to the litigation should bear that cost, and how to screen for potentially privileged information. There is also the potential for judicially imposed sanctions if relevant electronic documentation can be shown to have been carelessly deleted by the company.

In light of the above-described issues, you should make sure your company has a workable document retention policy that accounts for the new realities of the electronic age. While there is no one-size-fits-all solution, any electronic document retention policy should address the following topics:

- (a) There should be a protocol for the type of emails and other documents that can be immediately deleted. Time frames should be established for retaining those documents that are not capable of being immediately deleted. Categories of documents that should never be deleted also should be identified. The operation of the company's electronic deletion policy should be clearly understood by your managers.
- (b) The policy should address where

the saved information is retained, and in what form. Is there too much redundancy? Not enough redundancy? Is the saved information in searchable form? Company managers are often unaware of the extent to which electronic data may still exist on a backup tape somewhere.

- (c) A protocol should also be established for suspending the deletion of documents that are relevant to a pending claim. As soon as the company is on notice of a claim, a determination should be made as to the categories of electronic documents that should be protected. In employment litigation, the company will certainly be viewed as on notice at the time a charge is filed with the EEOC if not earlier in some instances. The appropriate managers should be notified of any directive, and there should be regular follow-up to make sure the directive continues to be adhered to. The consequence of failing to follow a reasonably careful protocol in this area could be a spoliation of evidence finding by a state or federal judge, with a range of potentially unpleasant sanctions.

The Federal Rules of Civil Procedure were recently amended, effective December 1, 2006, to better address some of the thorny issues raised by electronic discovery. Among other highlights, the Federal Rules now specifically require that electronic discovery issues be addressed at the initial pretrial and in the parties' scheduling conference. The amended rules also provide that a party is not required to produce electronic information if it can show that the information is not reasonably accessible due to the cost or burden associated with retrieval. This defense to production may be overcome if the opposing party demonstrates good cause. The rule governing sanctions also has been amended to prohibit their imposition in most circumstances where a party has failed to produce electronic information due to the routine, good-faith operation of an electronic information system. This latter provision underscores the importance

of having a coherent electronic document retention policy.

You will no doubt find that employment-related problems are some of the thorniest and most challenging you will confront in your career as an in-house attorney. While no overview of a legal topic as vast as employment law could possibly address all the myriad of issues with which you are likely to be confronted, hopefully, this two-part article has provided a helpful framework for approaching some of your company's more important and recurring employment-related problems. ■

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GC News



David F. Snively was named senior vice president, secretary, and general counsel of Monsanto Company, effective September 1,

2006. Transacting business in over 160 countries, Monsanto invents, develops, licenses, and produces leading seed brands in crops such as corn, cotton, oil seeds, and vegetable seeds; the company also manufactures the world's best-selling herbicide, Roundup. Before his promotion to general counsel, David managed Monsanto's litigation, including his successful representation of the company in novel biotechnology patent litigation, *In re Agent Orange*. David has been a valued member of the Committee on Corporate Counsel for a number of years. He currently serves as a vice chair of the Committee, and he has previously served as a cochair of the annual CLE seminar, among other positions. The Committee congratulates David on his well-deserved promotion. ■

A GOOD FIT: LAWYERS OF COLOR AND IN-HOUSE PRACTICE

(Continued from page 1)

and, often, strategic matters. There also may be special work assignments that only those employers can offer. While general counsel for the State Bar of California, I argued more than 30 lawyer discipline and admission cases in the California Supreme Court, and one in the U.S. Supreme Court—the latter, of course, a rare event for any lawyer. Coupled with regular and direct contact with one's client, this combination of work duties meets both quality and quantity needs of ambitious and talented lawyers. It's never boring when one is in-house, because things are continually in flux and lawyers are often at the pulse of the action.

Second, with an in-house client, lawyers no longer need to concentrate their energies and efforts on generating business. Virtually every study of minority lawyers in private firms indicates that the relentless and increasing demands of rainmaking are especially daunting for minorities, creating disadvantages vis-à-vis their white counterparts. Law school does not teach students how to generate business, and a great many lawyers of color lack access to those in wealth or power positions who could become prized clients, and lack the mentoring and informal networking benefits that reportedly flow more frequently to their nonminority colleagues. In this vein, one of the heralded joys of being in-house is that lawyers have more time available for developing their legal knowledge and expertise, without the stress and frustration of also competing in the marketplace for clients.

Third, in-house practice depends heavily on teamwork and collaboration. All members of the in-house law department have common goals, and that unity and the way in which companies or public sector agencies themselves are governed put a premium on the ability to work together to get the job done. Such departments are typically "lean and mean," and the emphasis on efficient lawyering—on making the numbers in the corporate setting, or staying within publicly set budget parameters in the

public sector world—is everywhere evident. There also may be more emphasis on continuity, rather than rapid turnover. For many lawyers of color, this is a preferred work environment because it fosters a more collaborative style that rewards productivity and results, rather than face time in the office, hours billed, and the names in one's Rolodex.

Fourth, it is no secret that many large corporations and public agencies are far more diverse in their workforces than major law firms, and have progressed further in terms of realizing and promoting the importance of having a truly diverse employee base. The woeful statistics on the number of minorities who have risen to positions of power and leadership within law firms even to this day reinforce this reality. Within corporations and public entities, there are likely to be more people of color already there (creating the desired critical mass) and a longer-standing policy in favor of diversity (typically articulated by the CEO or public agency head). These organizations have come to this policy position largely in response to expectations that they reflect the global or multicultural customers or populations they serve. Thus, there may already be in existence a commitment from the highest levels to ensure diversity and the success of all their employees. They are delighted to acquire from the ranks of law firms top minority lawyers who may find the corporate environment more to their liking.

In contrast, law firms have been slower to see and make diversity a priority. As Tenth Circuit Judge Robert Henry once said, "On [diversity], the law is in the rear and limping badly." For two decades, the "moral imperative" argument ("it's the right thing to do") has been invoked often, but has led to little measurable change in the composition of firms or the advancement of minority lawyers within them. Then, in the 1990s, the "business case for diversity" began to be promoted—along the lines of "it's smart to take advantage of all available legal talent" and "our clients have started to ask us about our firm demographics

and given us some aspirational goals on diversity." However, not until corporate clients in this century began openly and aggressively demanding that law firms present legal teams that are diverse in gender and racial/ethnic composition or face reduction or loss of business has real progress begun to materialize. Examples of such teeth-bared initiatives originating from the client side include the "Call to Action" by Sara Lee's Rick

"On [diversity], the law is in the rear and limping badly."

—Judge Robert Henry

Palmore and a prominent group of general counsel and well-publicized steps taken by companies such as DuPont and Shell to hold workshops for their outside counsel to encourage compliance with diversity objectives. These efforts have slowly begun to transform the culture of law firms. Bottom line: It's hard to ignore the need for diversity when clients make such demands. Changes are definitely in the wind.

Fifth, in addition to rendering legal services themselves, an extra function of in-house attorneys is the hiring and management of outside counsel who supply expertise and coverage in certain areas where in-house lawyers cannot economically render service. This dual responsibility keeps the work interesting and dynamic. Moreover, it gives corporate counsel valuable management and administrative experience, which can prove to be extremely useful later in one's career. I know that was the case for me. I had my first shot at law department management in 1987, which has held me in good stead ever since. Mastering management responsibilities also means that lawyers can envision careers on the business side, which opens up new horizons. It's nice to have options.

Sixth, companies and the public sector tend to be more creative and accommodating when it comes to how work gets done. For instance, while 96 percent of law firms have alternative work schedules in place, studies by the American Bar Association's Commission on Women on the Profession, which I formerly chaired, indicate that only a very low percentage (perhaps 4 to 5 percent) of lawyers ever take advantage of such programs. Why? Because they report that they will be stigmatized, will be perceived as less committed, will receive less mentoring and grooming for higher-level opportunities, and will receive assignments less likely to win them partnership or promotion attention. In short, utilizing balanced-hours programs puts a major speed bump in their career paths.

On the contrary, most companies and public agencies have been handling alternative schedule requests successfully for years. I continue to be amazed at how difficult it still seems to be for women lawyers in firms to gain comparable favorable treatment to overcome work/life balancing conflicts. A woman's pregnancy has a set timetable, and that timing allows one to plan. It's not a totally unforeseen or random act! One innovative technique we used at Monsanto when a female attorney went on maternity leave was to have a senior woman associate from one of our outside counsel firms sit at her desk for the several months while she was away. Because that associate had done work for us before, we had high comfort with having her temporarily fill in. It benefited her—she got to know us even better and that enhanced her performance and expertise—and the law firm was pleased to have their employee gain the additional understanding and insight about us that the close contact yielded. For women of color contemplating having a family, it may be prudent to look carefully at corporate in-house jobs and their track record for supporting work/balance flexibility.

I'll insert here a special note about public agency inside counsel positions. These can be very attractive to lawyers of color for a number of reasons: the tendency to be a hospitable climate; past

record of promoting minorities; and commitment to work for justice and for the best interests of the public, which may be consonant with one's own values or reasons for attending law school. At the federal level, working in the Department of Justice has been a positive experience for many. Consider the career trajectory of former Assistant Attorney General Deval Patrick, who was thereafter general counsel for two Fortune 500 companies and is now governor of Massachusetts. State and local government roles can produce invaluable insider's knowledge of how the system works, and trial or management skills. Again, other leadership roles may follow if one handles the public spotlight with effectiveness and sensitivity.

In fairness, there are some minuses in any field or practice, and the in-house life is no exception. It can sometimes be burdensome or risky to have the one-client identification. Business changes rapidly, and all those mergers and acquisitions that lawyers are working on create turmoil and new entities that will frequently be downsized. Moreover, in-house attorneys can never escape from their clients. Their offices are just down the hall, and they can

drop in on you at any time. It's also a myth, though persistent, that in-house work is easier on the hours than in private practice. In some cases, that may be true, but in many others, expect to work a great many more hours than you thought would be the case. (As mentioned above, however, you'll likely find more receptivity to telecommuting, flextime, and other innovative work schedules.)

On balance, I strongly recommend that lawyers of color give careful thought to a career as an in-house lawyer. Do your due diligence and choose wisely—not all corporations are alike, so select one with strong and integrity-rich leadership—and search out public agencies that are noted for their accomplishments at advancing their diverse talent pools. Whether you look to corporate in-house or public sector legal counsel positions, you just might find the right mix and a good fit, both personally and professionally. ■

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In-House Decisions

Counsel's Recollection of Internal Investigation Held Nondiscoverable

By Stephen J. Siegel

It is said that a party may not accomplish indirectly what it is forbidden to do directly. This maxim recently helped lead a federal district court to deny a motion to compel discovery concerning an in-house counsel's recollection of an internal corporate investigation he had conducted. In *In re Linerboard Antitrust Litigation*,¹ the district court denied a motion to compel defendant Temple-Inland, Inc. (Inland), to produce a corporate representative for deposition about its in-house counsel's recollection of an internal investigation.²

The dispute arose in private antitrust litigation against Inland and other manufacturers and sellers of linerboard and related products. Before the suit was filed, the Federal Trade Commission (FTC) had investigated the linerboard industry. In response to FTC inquiries, Inland submitted a "White Paper" and produced documents. The White Paper asserted, among other things, that the reason Inland had taken more "downtime" during 1993 than it required to simply maintain and repair its equipment was "to reduce Inland's 'excessive inventories.'"³

In a subsequent private antitrust suit, plaintiffs obtained voluminous discovery from Inland relating to the FTC investigation, including the White Paper and all documents Inland shared with the FTC. Inland also produced another 150,000 pages of documents, responded to seven sets of interrogatories, and produced 10 current or former employees for deposition. Among those deponents were all five individuals named in the White Paper's discussion of Inland's decision to take the additional "downtime."⁴

Nonetheless, plaintiffs sought to compel Inland to produce a corporate representative to testify under Fed. R. Civ. P. 30(b)(6) concerning facts learned by its General Counsel, Steven L. Householder (Householder), in an inter-

nal investigation that he had conducted at or around the time of the FTC investigation. Plaintiffs argued that they needed the deposition for several reasons, including (a) because other Inland witnesses could not recall certain information that Householder might remember and (b) to impeach the testimony of Inland's witnesses. Inland objected to the requested deposition on various grounds, including that the deposition sought its counsel's work product and, in effect, its counsel's testimony.⁵

The district court denied the motion to compel. The court acknowledged that (a) relevant facts are discoverable even if communicated to counsel and (b) facts learned by corporate counsel during an internal investigation are part of the corporation's knowledge.⁶ Nevertheless, the court held that Householder had conducted his investigation in anticipation of litigation and his recollection of facts learned in that investigation was protected work product.⁷ More specifically, although Householder's investigation was intended to learn the facts, the court deemed his recollection of that investigation to constitute "opinion" or "core" work product because it reflected his mental impressions.⁸ Thus, Householder's recollection was discoverable only upon a showing of "'rare and exceptional circumstances.'"⁹ By contrast, "fact" work product is more readily discoverable, upon a showing of "'substantial need'" and that the "'substantial equivalent'" of the information cannot be obtained without "'undue hardship.'"¹⁰

The *Linerboard* court distinguished decisions in *In re Vitamins Antitrust Litigation*¹¹ in which a district court ordered corporate defendants to produce for deposition Rule 30(b)(6) witnesses who had been educated about facts gathered by their counsel in preparing governmental submissions. The *In re*

Vitamins court had ordered the depositions "'regardless of whether such facts are memorialized in work product protected documents or reside in the minds of counsel.'"¹² The *Linerboard* court distinguished the two *In re Vitamins* decisions on several grounds, including that Inland's corporate representative had been well-prepared for the deposition in other respects and that the *Linerboard* plaintiffs had available to them extensive nonprivileged sources of the information they sought from Householder.¹³ Ultimately, however, these distinctions do not fully explain the different outcomes in *Linerboard* and the two *In re Vitamins* decisions. It appears that, at bottom, the *Linerboard* court disagreed with the *In re Vitamins* decisions. As the *Linerboard* court noted, the *In re Vitamins* court did not "provide any comment on the merits of the work product arguments" raised by the corporate defendants in that case.¹⁴

The *Linerboard* court also rejected plaintiffs' stated justifications for the deposition—to fill gaps in other witnesses' recollections and to impeach other witnesses' testimony—as insufficient to warrant what it deemed to be the "functional equivalent of a deposition of Householder covering information learned through his service as in-house counsel."¹⁵ Because the court deemed the requested deposition to be equivalent to deposing Householder directly, it applied a test under which opposing counsel may be deposed only if "(i) no other means exist to obtain the information . . . ; (ii) the information sought is relevant, non-privileged; and (iii) the information sought is crucial to the preparation of the case." The court found that plaintiffs had not satisfied this test principally because they had not demonstrated that the information Householder might recall, and which other Inland witnesses could not recall,

was, in fact, “crucial” to plaintiffs’ case.¹⁶

Finally, the court rejected plaintiffs’ contention that by providing the White Paper to the FTC, Inland had waived work product protection for Householder’s recollection of his internal investigation. The court reasoned that Inland had not affirmatively relied upon the White Paper in the private antitrust suit, nor asserted that its internal investigation foreclosed antitrust liability. Moreover, the court held that the doctrine of “subject matter” waiver did not extend to “opinion” work product. Accordingly, Inland had effected no broad waiver of work product protection by its disclosures to the FTC.¹⁷

Thus, the court protected Inland against disclosure in a Rule 30(b)(6) deposition of its counsel’s recollection of facts he had learned in his internal investigation. As explained above, at least three factors appear to have been decisive to the court’s decision. First, Inland provided plaintiffs with voluminous other written and deposition discovery.

Second, plaintiffs failed to show that Householder was likely to know crucial facts at the heart of the parties’ dispute and that other Inland witnesses could not recall such facts. Third, Inland did not affirmatively rely upon Householder’s investigation or recollection as grounds to defeat the private antitrust claims it faced and, thus, Inland was not trying to “have it both ways.”

Corporations that face requests to discover, directly or indirectly, their counsel’s recollection of relevant facts should try to establish that such extraordinary discovery is unwarranted based on grounds similar to those the *Linerboard* court accepted and relied upon—namely, by showing that the corporation has provided ample other discovery, the information sought is not essential and/or is available from other sources, and the corporation itself has not asserted that its counsel’s recollection or advice defeats the suit. ■

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Endnotes

1. 237 F.R.D. 373 (E.D. Pa. 2006).
2. *Id.* at 390.
3. *Id.* at 376–77.
4. *Id.* at 378.
5. *Id.* at 379–80, 384.
6. *Id.* at 380.
7. *Id.* at 385–86.
8. *Id.* (citing FED. R. CIV. P. 26(b)(3)).
9. *Id.* at 382 (citation omitted).
10. *Id.* (quoting Rule 26(b)(3)).
11. 217 F.R.D. 229 (D.D.C. 2002), and *In re Vitamins Antitrust Litigation*, 216 F.R.D. 168 (D.D.C. 2003).
12. *In re Linerboard*, 237 F.R.D. at 382 (quoting *In re Vitamins*, 217 F.R.D. at 234–35).
13. *Id.* at 383.
14. *Linerboard*, 237 F.R.D. at 382 n.8.
15. *Id.* at 384.
16. *In re Linerboard*, 237 F.R.D. at 385 (quoting *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (1986), *reh’g denied en banc*, 1987 U.S. App. LEXIS 2002 (8th Cir. Jan. 30, 1987)).
17. *Id.* at 389.



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The In-House Perspective on Jury Trials: Be Prepared to Tell Your Story

By *Scott L. D'Angelo*

It is often said that a good trial lawyer is a good storyteller—someone who is able to take the most complex, and often boring, legal and factual concepts and weave them into a relevant and engaging narrative. While some lawyers are able to develop their themes and stories on the eve of trial, the rest of us mere mortals must do so through preparation—early and often. As a jury trial approaches, nothing will make your in-house counterpart happier than knowing that you are prepared to tell a story at trial and not just “put on evidence.” The best way to do so is to use in-house counsel to help you reach that goal. This article highlights a few tips designed to assist you in doing so.

First, always litigate the case with the assumption that it is going to go to trial. Start thinking about your trial story and themes from the inception of your engagement. Share your thoughts early on with in-house counsel. Because in-house counsel will know the client, and often the key witnesses, better than you, he or she can provide valuable advice on the efficacy of your themes and strategies. Most importantly, he or she can tell you what he or she does not like. Clearly, it is better to know that sooner rather than later.

Second, learn as much about your client's business as early as you can. Offer to visit the client's headquarters or manufacturing facility—on your own time—to understand how it operates and what is important. Doing so will not only demonstrate your commitment to the client, it will help you develop your client's story at trial. Corporations are so often viewed as nameless, faceless entities that are synonymous with greed. Understanding that your client's manufacturing facility is the largest employer in a rural area, or that the company was started in the CEO's garage with one big idea, may help to provide the backbone or

background for your trial story.

Third, when economically feasible, test your trial story or a subset of your themes using jury research. Invite in-house counsel to attend the session. It is important for in-house counsel to have a firsthand understanding of the effectiveness of the trial story and, in particular, whether the participants express negative opinions of the client or the client's brand(s). When conducting jury research, make sure to give your client the most “bang for the buck.” Schedule the research early enough in the litigation to be able to adjust your strategy if necessary. Make sure your opponent's position is presented in an effective manner. Otherwise, your results will not be an accurate gauge of the strengths and weaknesses of your trial story.

Fourth, revisit your trial story periodically throughout discovery. Identify the holes or gaps in your story while you still have the ability to fill them by disclosing or identifying new or additional witnesses. Use in-house counsel as an ongoing resource to assist with the process. Too often, those gaps are left until the eve of trial when it is too late to address them or when testimony is introduced through a witness who is not the best candidate to present such testimony.

The same logic applies to your expert witnesses. Think early in your case about topics on which expert testimony is needed, and start searching for your witnesses sooner rather than later. Allow enough time to review thoroughly your expert's credentials, background, and, if applicable, past testimony. Make sure that your expert's personality meshes with your overall trial story and themes and that you are confident he or she will represent the client's brand appropriately. Again, discuss with in-house counsel how you view your expert's role in your trial story.

Fifth, while it may seem like a simple proposition, make sure to communicate

effectively with in-house counsel about the logistics of the trial. Where will it be held? What is the anticipated start date? Who must be there and for what duration? Who will be the company representative? It is important for in-house counsel to understand these issues early so that he or she can effectively communicate with the witnesses. With all of the substantive issues addressed during the life of the case, these little details can easily get lost in the shuffle.

Sixth, 30 to 60 days from trial, if not already required by in-house counsel, be prepared to present a trial plan. Meet with in-house counsel to present your final trial plan and story after the dust from discovery has settled. Do so by discussing your story and the final themes of your case. Discuss the witnesses you will present and the specific areas of testimony that you expect each to present. To the extent that certain witnesses will need more preparation than others, bring that fact to in-house counsel's attention. Doing so will help further refine your story and themes and ensure that in-house counsel and your client fully understand the strengths and weaknesses of the case so they can make an informed decision about whether to settle if that possibility still exists.

In sum, remember that your client always has a story to tell at trial. Make sure that you plan your case and your trial strategy to account for and include that story. Partner with your in-house counsel to achieve that goal and, ultimately, you will get better results and have a happier client. ■

“The In-House Perspective on Jury Trials: Be Prepared to Tell Your Story,” by Scott L. D'Angelo, published in Intellectual Property Litigation, Volume 16, No. 5, Spring 2005, located at http://www.abanet.org/litigation/committees/newsletter_gratis/ip_litigation.pdf. © 2005 by the American Bar Association. Reprinted with permission.

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IN-HOUSE TOP 10

By Chris Ducanes

The *In-House Top 10* provides insightful comments from in-house counsel, past or present, put in David Letterman-esque list form. This edition's Top 10 comes from Chris Ducanes, who served as the vice president and general counsel of Healthvision, Inc., for more than six years. Prior to that, he served as the general counsel and assistant secretary for OAO Technology Solutions, Inc. Mr. Ducanes is located in Las Colinas, Texas.

The Top 10 Ways to Manage Your Time and Attention as General Counsel

10. **Work Earlier or Work Later Than Normal Business Hours.** Try completing tasks requiring your complete focus either before the morning barrage of calls begins or after the general population that needs your attention has left work. This will give you a solid block of time to concentrate on important tasks and issues
9. **Assess Your Work Week Prior to Monday.** Take the time to assess your work week/schedule on the preceding Sunday or Friday to help you gain insight into what work you will need to prioritize over other work. This will help you be more proactive in accomplishing your goals rather than reacting to the issues brought up by others during the week, especially on Monday morning.
8. **Schedule Your Work Week in Advance.** Once you have assessed your priorities, schedule those priorities into your calendar in sufficient blocks of time. This will help you accomplish your own goals and will make it easier for other people to schedule meetings with you.
7. **Schedule Time Just for You.** Make a habit of blocking off a certain amount of time just for you every week. This blocked time may be used to check email, read periodicals, read contracts, answer calls, or whatever you choose. You may end up using the time to catch up on other priorities that have not been addressed. Once you have scheduled an appointment with yourself, it is essential that you keep it.
6. **Turn Off Your Email and Email Notices.** With the massive amount of emails that most of us receive and our compulsion to answer it immediately, our productivity often comes to a screeching halt. Imagine if a physician had to stop in the middle of surgery to answer his email as it was arriving. Pretend you are a surgeon during tasks that require your complete attention. Your business associates and clients will appreciate your intense focus, and your patient will have a better chance of surviving.
5. **Stop Multitasking.** Multitasking is extremely counterproductive. When we multitask, we lose our concentration, and we fail to comprehend one or more of the tasks at hand. Remember that the supposed time saved from juggling multiple tasks is often far outweighed by the time reviewing important documents for a second or third time or correcting mistakes caused by miscommunication.
4. **Stop the Drive By.** A "drive by" occurs when, at an inopportune moment, a coworker or associate visits your office to exchange pleasantries, check on the status of an item, or, even worse, seek an answer to a question that supposedly needs immediate attention. To prevent yourself from being the casualty of a drive by when work requires your deep concentration, you may need to (1) keep your door shut; (2) post a sign on your door or on your office cube that basically explains that you are unavailable, unless it is an emergency; and (3) establish with your coworkers how your open-door policy works, explaining why and when your door will be closed and why and when it will be open.
3. **Evaluate Real-Time Communication Versus Email.** Talking to someone in real time can be significantly more efficient and effective for several reasons. First, during a telephone conversation, video conference, or personal meeting, you can evaluate another person's emotions through that person's tone or, in the latter two instances, their facial expressions. Second, real-time communication provides the opportunity for instantaneous feedback. Third, the initiation of a real-time communication conveys a sense of urgency and importance that may not be apparent in an email. Reserve email for less important matters that do not require an immediate response.
2. **Sort Email: Folders and Subject Lines.** First, by clarifying that the subject line of emails be used to clearly delineate the topic of the email, you'll be able to sort through your email quicker and avoid searching through those emails that simply respond "Thanks" or "OK" Second, by establishing and using folders for email that are identified either by sender or by topics, you will be able to efficiently search for relevant emails.

And the number one way to manage your time and attention as general counsel:

- 1. Use Electronic Devices Effectively.** Own your electronic communication devices; don't let them own you. To improve your concentration time, turn off your electronic communication devices, including your instant messaging, cell phone, personal digital assistant (PDA), phones, and pager. Time spent receiving and responding to individual calls and messages wastes a significant amount of time, distracts you, and distracts others around you.

If you are on the inside and would like to submit your own Top 10, please contact Christopher Akin, Assistant Editor, at (214) 855-3081 or by email at cakin@ccsb.com. Topics can be instructive, humorous, or anything of interest to the Committee's membership.

MESSAGE FROM THE COCHAIRS

(Continued from page 2)

in-house lawyer was fairly insulated from company-wide management initiatives. Along with the limited function within the company, the responsibility and liability of the in-house lawyer were limited. Now legal departments are evaluated like any other department of the corporation. General counsel are held accountable for not only quality legal service, but also for costs and effective management, and if things go awry, as we have seen with increasing intensity in the past year, they face criminal liability. With the heightened scrutiny arising from the Sarbanes-Oxley Act, e-discovery rules, and expansion of global economy and accompanying regulations, the importance of the in-house lawyer has never been greater. As companies continue to adapt to the new dynamic business environment in the coming years, the role of the in-house lawyer is certain to evolve.

Along with that, the role of the outside lawyer also must evolve. According to BTI Consulting Group's 2006 annual survey of in-house counsel, only about 30 percent of in-house counsel of large and Fortune 1000 companies were satisfied with their primary law firms. This is a 13.5 percent drop from the previous year. In fact, an astonishing 53.7 percent of the in-house clients surveyed reported that they ousted their primary law firms, and more than 50 percent reported that they plan to try at least one new law firm for substantive matters in 2007. BTI attributes this to law firms' failure to keep up with

general counsel's changing needs, an inability to articulate the value of services delivered, and poor communication.

So what can outside and in-house counsel do to improve the statistics? The Committee is unique in that it provides a forum where these issues and potential solutions can be discussed in an open dialogue between in-house and outside counsel. As a regular part of the annual CLE seminar, the Committee presents the General Counsel Forum and the Litigation Roundtable. At the General Counsel Forum, general counsel share what keeps them up at night, explore innovative methods for controlling costs and risks, and discuss what they expect—but do not often get—from their outside lawyers. The Litigation Roundtable provides an opportunity for in-house and outside lawyers to roll up their sleeves and brainstorm about best practices and how they can best work together. In short, the Committee on Corporate Counsel provides "one of the best conferences around," as commented by one of our new members Countess Price, Assistant General Counsel of Litigation of Monsanto Company.

A benefit of the Committee, which took me by surprise and which may not be evident to those who have not yet had an opportunity to meet some of our members, is the tremendous opportunity to network with preeminent lawyers from every sector and industry across the country. At the Committee on Corporate

Counsel seminars, I have met some of my dearest friends and mentors, who have tangibly contributed to my personal and professional growth over the years.

The Committee on Corporate Counsel offers many opportunities in which you can participate. We are always looking to recruit exceptional individuals for leadership positions within the Committee and its subcommittees. The Committee has subcommittees in the following areas: ADR/Settlement, Billing and Budgeting, Complex Toxic Torts, In-house Governance, Insurance Coverage, Intellectual Property, Labor and Employment, Legal Ethics, Litigation Management, Litigation Technology, Newsletter, Pro Bono, and Special Programming. If you are interested in joining any of our subcommittees or submitting program proposals or newsletter articles, or have ideas on additional ways we can meet your needs, please contact Hob Jordan (hjordan@kingsbridgeholdings.com), Robert Simpson (rsimpson@goodwin.com), or me (mikulkay@howrey.com).

We look forward to meeting you, hearing from you, and actively addressing your professional needs and the needs of your in-house clients as we blast into our second 25 years—with a BlackBerry, cell phone, and iPod securely strapped to our waists. ■

—Yuri Mikulka, Cochair

WHO IS THE CUSTOMER?

(Continued from page 1)

through a publication, marketing materials, or an impersonal referral. Because of this, I genuinely pity those law firm attorneys who think that new work will

During this age of process improvement and metrics, understanding how an in-house counsel is trying to improve his or her efficiency or coverage of issues is vitally important.

find its way to them if they quietly develop excellent knowledge in a practice area. In the competitive environment of

MESSAGE FROM THE EDITORIAL BOARD

(Continued from page 3)

Of course, you also will find our standard features: In-House Decisions, the In-House Top 10 List, and a Practice Tip. We hope this issue helps you to pursue whatever “in-house” opportunities catch your eye.

Finally, there’s something else that might have caught your eye: We’ve changed our title, masthead, and layout. We are now the *In-House Litigator*—a title better reflecting our focus on the litigation and litigation-management issues of particular interest to in-house attorneys and the outside counsel who serve them. To go with our new title, a new masthead and layout seemed in order, as well. We’re proud of our new name and look, and we hope you enjoy this and future issues of *In-House Litigator*. ■

—Steve Siegel, Associate Editor

the modern legal marketplace, developing personal relationships is crucial to developing business. And the relationships you build give you a platform to educate the company attorney about what you can do for them. Establishing a relationship with one attorney at a company can also open doors to other in-house lawyers in the same company. In larger companies, in-house attorneys often discuss their outside lawyers and sometimes formally rate them and catalog their firms’ capabilities. In-house databases provide an easy source of referral for in-house counsel, and company lawyers regularly walk down the hall or pick up the phone to consult with their colleagues about whether a counsel is the right choice for a particular project.

This general advice about taking the initiative is the most important insight that I can offer. With that in mind, there are a number of other important considerations in developing and maintaining business.

How the In-House Attorney’s Practice Fits in the Company

Savvy outside counsel have learned that company attorneys are affected by company initiatives just as surely as company stores or line units are affected by them. Cost-cutting initiatives, travel restrictions, process improvement plans, and goals for growth all impact the in-house attorney and his or her practice. For this reason, an outside attorney who wants to win or retain business should strive to understand the potential client’s goals and business plans. If in-house counsel tells you that legal fees must be reduced in some area or that the speed with which he or she responds to legal questions from internal customers must be increased, then you should listen carefully and adjust the services you are offering to support the in-house counsel’s goals. During this age of process improvement and metrics, understanding how an in-house counsel is trying to improve his or her efficiency or coverage of issues is vitally important. Some ways that outside counsel can support company initiatives include negotiating fee

arrangements, providing assistance with company benchmarking efforts, and sending alerts to in-house counsel of changes to key laws or regulations affecting an area of company interest. Partnering with in-house counsel by helping them meet their personal practice challenges can establish you as an invaluable part of their team.

Doing an Excellent Job

Once your foot is in the door with a company, it is important to do an excellent job. Nothing will make your name mud in a company more quickly than sending it poor work product. And, frankly, it is not the attorneys who will do the most talking. Business-side employees at client companies are likely to spot poor work product or sniff out bad advice. When they do, they will broadcast their disgust—both with you and with the in-house counsel who hired you. Simple mistakes such as misspellings or insertion of incorrect corporate names (such as the name of another client) are dreadful, but more serious mistakes have longer life spans, and recovering from them is much more difficult. How you react as outside counsel to complaints about work product is very important to maintaining the relationship. And the knowledge you have about the relationship will give you insight into how best to fix the mistake. If you discover a mistake before your client does, always confess early and take appropriate steps to adjust the bill.

Responsiveness is an important part of doing an excellent job. Counsel who manage requests for their services in a courteous way signal that they understand that in-house counsel is busy and that their time is valuable. Recently, I have been impressed by counsel who email or call with a short message stating when and where they can meet for a longer conversation on the potential project. Newer communication technologies make this kind of message easy to send. On the other hand, it is probably better not to communicate with in-house counsel about a future project if your message will appear careless or cryptic.

Cryptic five-word emails from a handheld device with a bunch of misspellings do not impress anyone, no matter what they are intended to do. And the recipient might even be wondering what other client is being shortchanged by your messaging. While paperwork related to engagement and other administrative matters is not the highlight of being hired as outside counsel, they are important to the in-house counsel's practice. When you are not responsive to these types of requests, you risk being fired or never hired again. Often, these types of administrative matters are required by company policy, and the in-house counsel might even be evaluated on his or her ability to achieve efficient delivery of such information from outside counsel.

Gifts, Informal Socializing, and Community Involvement

No discussion of rainmaking would be complete without a comment on gift giving and socializing and whether such activities are worthwhile in obtaining in-house counsel's business. I truly do not believe that an in-house lawyer worth his or her salt would give business to a firm because of a gift that was sent during the holiday season. But such social niceties do have the effect of keeping a firm or an attorney in mind for the short term. When you decide as outside counsel to give a business gift, you need to remember that at some companies, there are rules about accepting gifts. Your safest bet is to send a gift that can be shared within the office. Hams, turkeys, and other items such as books that are not easily divided in an office setting do not always make the best gifts.

Personalized gifts can present difficulties because the recipient might have to have it approved by his or her superiors before being able to accept it. I have seen gifts returned to their sender because they did not meet company guidelines. This is embarrassing for everyone involved, and it drives home how well-intentioned but poorly conceived marketing efforts can backfire.

In the opening paragraph of this article, I described a partner who did most of his rainmaking through lunches. I believe that the best rainmakers focus on building relationships while doing things

that they enjoy doing. And, because that particular attorney loved lunch and the whole ritual of a business lunch, the lunch meeting was probably a pretty good choice for him for making rain. If involvement in a charity is your cup of tea, or participating in a running club is what you would enjoy the most, then I would recommend that you do that activity and build relationships with other participants or invite potential clients along. If your firm enjoys hosting cocktail receptions or other meet-and-greet activities, I would recommend that you invite the people you would like to meet and then wait to see how the chips fall. If you do not get takers from certain potential clients after several invitations, you can infer that their culture does not respond to that type of marketing, and you can decide at that point what to try next. The heavy sell does not work at every company, so be wary of overselling. You do not want to become a water cooler joke.

I Am Not Getting Business from My Target. Now What?

I enjoy working with intelligent, talented outside legal counsel, and I have the privilege of working with many fine lawyers from around the world nearly every day at my job. But that very opportunity makes me acutely aware of just how many wonderful attorneys are out there trying to build their book of business in addition to practicing law full-time. Often I will meet a great attorney with whom I would love to work, but because of our company's decision to use a particular firm for a category of business, or based on some other reason out of my control, I will not immediately have that opportunity. With this in mind, every law firm attorney should think of rainmaking as a long-term investment rather than a short-term beat on the rainmaking drum. The person you impress at a company, whether on the business side or in-house counsel, may very well move to a new company or a new position where he or she will be able to send you work. Or that person could send business your way by referring another company to you. In-house attorneys have their own industry groups,

bar subgroups, and networking opportunities through which they share resources, including the names of outside counsel. By making yourself and your firm known to as many in-house counsel as possible, you position yourself to be thought about in such settings.

Conclusion

When I moved in-house 10 years ago, it took me months to stop referring to "clients" and to start referring to my "customers," as in "internal customers." "Customer" was the acceptable company lingo. I realize now that the term "customer" is a much better term to evoke visions of relationship building and maintaining. It is not as impersonal a word as "client," because we can all relate to being a customer every day of our lives, whether at the grocery store or deli. How often have we each thought "the customer is always right"

Every law firm attorney should think of rainmaking as a long-term investment rather than a short term beat on the rainmaking drum.

when we were not receiving treatment that we thought commensurate to the amount a service was costing us? Customers have to be won, as the auto ads on television remind us every day. The rain will fall for any excellent lawyer who thinks of his client or potential client as a customer deserving of customer treatment. ■

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