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CLAIMS AND LITIGATION MANAGEMENT

MAKING THE BEST OF THE ATTORNEY-CLIENT RELATIONSHIP

By: Eric L. Probst, Esq.

Effective in-house counsel management of outside counsel starts and ends with collaboration—a teamwork approach to defending and resolving lawsuits, managing and closing transactions, and coordinating responses to cyber and physical security threats. Like all relationships, the in-house and outside counsel one thrives on communication. In-house counsel must communicate expectations to their outside counterparts. They must share their corporate reporting responsibilities and the company’s approach to and tolerance levels for litigation and risk. They should demand that their outside attorneys provide the information they want and need, but understand that outside factors often influence the legal advice they receive, and these factors, unfortunately, are sometimes immutable. Cost efficient and reliable legal service is an attainable relationship goal achievable through open dialogue and discussion.

One hallmark of effective communication is **listening**. To provide sound and timely legal service, the outside lawyer must heed the advice and guidance their inside counterparts share—listen and digest the nuggets of wisdom the corporate lawyer provides on how the company approaches risk, litigation, and corporate transactions. Learn by listening. Sounds simple, but outside lawyers must invest more time “getting to know” who the client is and why they are who they are.

The opposite is also true—communication is a two-way street. The in-house attorney must set corporate expectations on deadlines, communication format (e-mail, memos, phone calls), responsiveness, budgeting, adherence to guidelines, fees, and staffing. Further, and just as important, the inside lawyer must share “who the

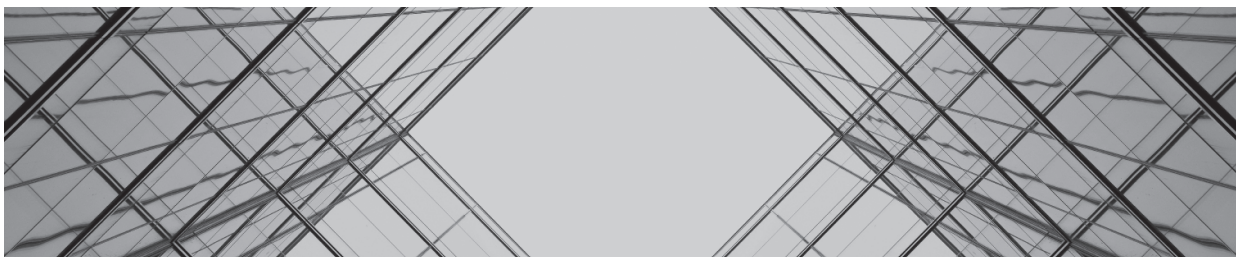
company is” and how it approaches risk and litigation with the trial lawyer.

I. “Mia San Mia”¹

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

1. The Client:

Outside attorneys rarely spend enough—or no—time learning who the client is beyond what they must understand to defend the lawsuit. More is required. No two commercial motor carriers are the same even though many run similar routes and deliver similar goods. Trucking companies value their drivers, are proud of their hard work under difficult driving conditions and federal and state regulations. The in-house attorney must share this “corporate pride” with the trial lawyer so the lawyer can relate to company witnesses during investigations and deposition preparation, and ultimately share this feeling and convey the company’s position to opposing counsel, the court and the jury. The outside lawyer cannot obtain the client’s ethos from its website,



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¹“Mia San Mia” is a Bavarian phrase that loosely translates to “We Are Who We Are.”



its mission statement, or its code of ethics and conducts. While these documents shed light on who company is and what it stands for, only the employees can communicate to the trial attorney what it means to “drive for the company.”

2. The Client’s Culture:

Every company, small and large, has a unique culture. Some small companies operate as “Mom and Pops,” as do some larger companies; smaller companies, however, depending on management, can be quiet structured. While larger companies can be more organized (and more rigid), with policies and procedures, some business units can be less organized. In closely-held companies, where Board members more actively manage and oversee litigation decisions, the outside attorney must know the players, who the player is, and what issues most plague the majority shareholders about the company’s litigation portfolio. A lawsuit’s impact on a company’s litigation portfolio is important if the issue is precedential or reputational. For example, is the majority shareholder concerned about the impact of legacy litigation on the future market value of the

company for the shareholder’s heirs? While the outside attorney strives to provide legal counsel divorced from these potentially complicating influences, the attorney must appreciate them. Insight into such corporate subtleties can only come from the in-house counterpart.

The corporate approach to risk is arguably the most important aspect of the culture the in-house attorney must share with the trial lawyer. No two companies approach litigation the same. Tied to corporate pride, risk aversion is critical information for the outside attorney. It guides not only how the attorney approaches the litigation, deals with adversaries, mediators and judges, but is the undercurrent for corporate communications. The outside lawyer wants to know how the client’s decision makers will approach the lawsuit and litigation generally. Outside lawyers are sensitive to how their recommendations are received. If the client is generally litigation averse, in-house counsel must share this apprehension to allow the outside lawyer understand how this anti-litigation culture might affect a decision to settle or try a case.

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

3. The Client's Product or Service:

Before serving as the outside general counsel for a national construction company, I served as its outside counsel in New Jersey, handling construction defect, breach of contract, product liability, and consumer fraud disputes for over 15 years. Defending these matters involved working with operations personnel as much as the legal department. Over time, as a young associate, I learned how it constructed the home improvement it sold, to where I could have served on one of its crews. When I assumed the outside general counsel role, it surprised me that none of the outside attorneys took the time to understand the client's business, construction practices and methods, and sales strategies, unless prompted. Legal department personnel should connect outside attorneys to operations personnel so outside lawyers can "talk the talk and walk the walk." Some companies and claims personnel have required their outside legal teams to attend "legal days" or boot camps during which the outside litigators are educated on the company's equipment, technology, rules, regulations, and corporate atmosphere, history, and tolerance for litigation. If their course of study is not rigorous to the company's standards, the in-house attorney should not be shy about addressing the learning curve—and, if it cannot be corrected, finding new counsel.







This “education” is more important now than ever because representing commercial motor carriers has become more difficult with the advances in technology. ECMs, inward and outward-facing dash cams, electronic logs, GPS devices, side guards, etc., and technology in cars and first responder vehicles add to the complexities of managing and resolving claims in the 21st Century, . How many news reports show videos of crashes, fires, police brutality scenes etc.? The legal and claims team need this information ASAP to evaluate how bad the injuries might be, whether the driver is at fault, vehicles involved, and road and weather conditions to devise a potential resolution exit strategy. The in-house legal team requires outside lawyers who know the technology and the first action steps to take to obtain the information needed to make an early case assessment. The outside lawyer needs to learn which systems the client uses to understand how to defend claims.

II. “So tell me what you want, what you really really want...”²

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

²Lyrics from Wannabe, Spice Girls (Virgin – EMI Records, 1996).

These expectations include deadlines. Too often “Wednesday” turns into “Friday” or “early next week.” Make the outside attorney meet deadlines. If they do not, discuss the reasons to ensure it will not happen again.

To promote the effective and timely delivery of legal service, the in-house lawyers and claims personnel share a significant amount of the burden. They need to explain their and the company’s risk tolerance, where the claim fits in the company’s litigation portfolio, and if outside factors (e.g., lack of insurance coverage or self-insured retention obligations) exist that could influence litigation strategy. They also must share why they need the information they are requesting. Outside lawyers generally lack a sufficient understanding of the reporting obligations of an in-house lawyer or risk manager; they cannot comprehend the true value behind updates, budgets, and case assessments. Reporting obligations to Boards, CEOs, CFO, business unit leaders, auditors, and regulators likely is very foreign to them. Defense lawyers serving as local counsel typically lack an appreciation for the client’s multi-jurisdiction pressure points and how an answer or motion in their case could affect the client’s cases in other states. This information has to be shared by the in-house legal teams when the matter is assigned. Armed with this information, outside counsel can better provide timely and valuable legal advice.

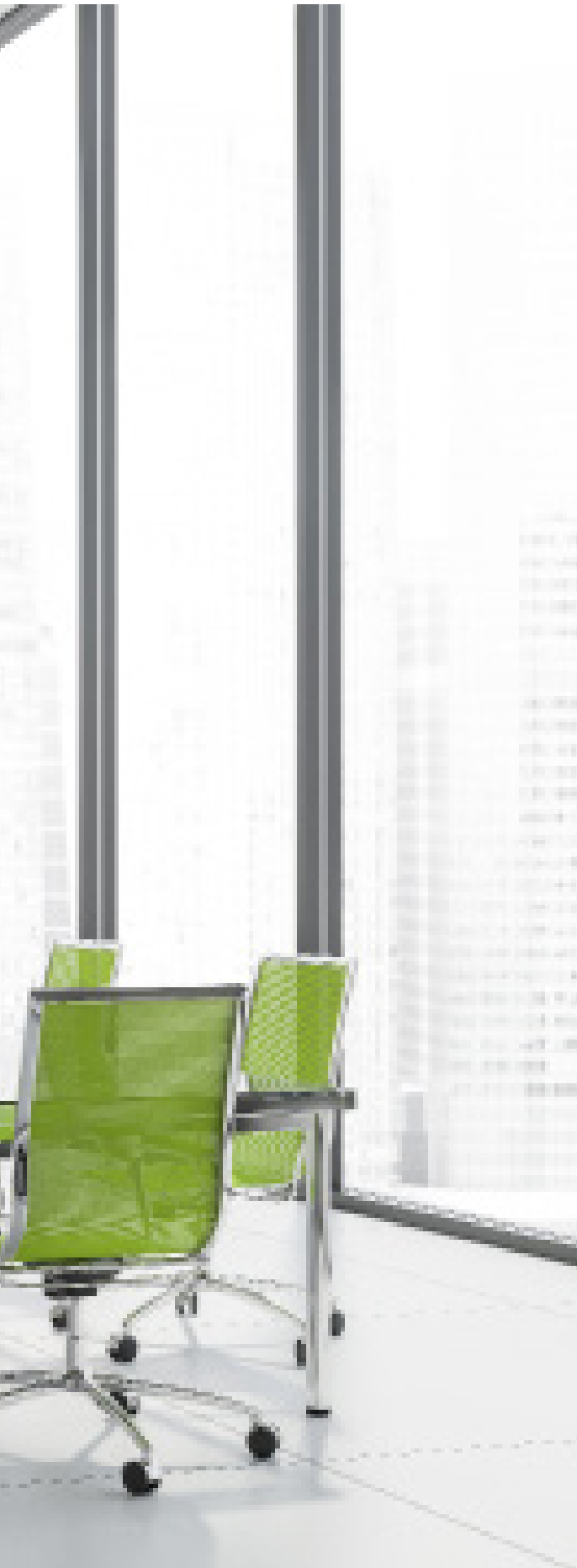
Not that the outside lawyer has no obligation to ask for this insight. Proactive defense counsel are the most treasured and receive additional assignments and referrals. Whether receiving a new case or discrete research assignment, or managing a portfolio of regional matters, the lawyer

must ask the inside counterpart: “what do you need?” “why do you need it?” “how does this information fit into your responsibilities?” “is the information needed for reporting purposes?” The more effective outside attorneys I worked with as outside general counsel asked this question and then delivered a response tailored to that request. Outside counsel sometimes do not appreciate that their deliverable might be turned into a Board report or submission to an insurance carrier for coverage. In-house attorneys can promote the effectiveness of the deliverable by defining, up front, for the outside lawyer what written product they need and why.

With in-house budgets tight, strategic litigation can save the client money. Outside counsel can better assist attempts to manage legal spend when inside legal department personnel







communicate the form of the deliverable they need. Are brief e-mail summaries sufficient compared to full blown reports? Does the client want to pursue limited, strategically-targeted discovery instead of traditional, overbroad discovery requests that often result in little to any information. What role will in-house attorneys play defending the case? Billing guidelines do not cover these more subtle issues so the in-house attorney should set the parameters of the representation from Day One.

In-house legal and claims teams demand straight answers. They understand outside factors—judges, juries, venues, and other case developments beyond their lawyers' control—impact a case's value and cannot be controlled by their outside legal team. The inside team, however, see these outside factors as the exception and expect the trial lawyers to stick to their case assessments. The lawyer who adjusts case values as trial dates approach absent justifiable factors may jeopardize the attorney-client relationship. The trusted outside advisor runs down all issues and leads during discovery to arrive at a solid and credible case value the in-house litigation team can use to set reserves, report to business units, and settle cases.



III. “WHO ARE YOU”³

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

Until I served as outside general counsel, I did not appreciate the many roles general counsel play. Their job responsibilities extend beyond litigation management, and often include budgeting, operations, compliance, safety, risk management, insurance, licensing, contract review, and board reporting. Outside lawyers may hear these words but not understand them. The size and business type of the company

influence the in-house lawyer’s day-to-day obligations. When the outside legal team—partners, associates and paralegals—understand the hats the in-house counsel wears, and when they wear the hats, they can better provide legal advice and service to the client.

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

³“Who Are You” off of the album Who Are You, The Who (Polydor

IV. CONCLUSION

Building a solid relationship between in-house and outside attorneys—becoming partners in defending the lawsuit—is key to managing litigation, whether the claim involves a commercial motor carrier crash or business-to-business contract dispute. Trust is the core of the relationship, which has to be earned on both sides. Varied factors impact the management of the lawsuit—the industry, the availability of insurance coverage, and the potential ramifications of an adverse result—requiring in-house and outside counsel to collaborate and flexibly approach and evaluate the case’s strengths and weaknesses to achieve the client’s litigation goals.

About the Author



Eric L. Probst, Esq.
Principal
Porzio, Bromberg & Newman, P.C.
973.889.4320

Understanding the business impact of litigation is critical when a company is contemplating filing or defending a lawsuit. Eric Probst examines the ramifications, the process, and the range of possible outcomes before counseling clients on whether to file a complaint or a responsive pleading, or to engage in pre-suit settlement discussions. With a constant eye towards his clients’ bottom line, Eric leverages his varied litigation experience, which includes handling multi-million dollar, complex commercial litigation matters; the defense of design professionals, owners, builders, general contractors, subcontractors, and suppliers in commercial, industrial, and residential construction defect, breach of contract, and consumer fraud disputes; commercial transportation companies in catastrophic personal injury cases; and manufacturing defendants in mass tort and one-off product liability personal injury and class action matters. His approach to litigation is not a “one size fits all,” but rather a client-specific approach based on the client’s pressure points. When a case is venued in New Jersey, Eric is often selected as local counsel due to his solid grasp of the nuances of New Jersey law and federal and state court procedures. He is co-chair of the firm’s Litigation Practice Group.

