

## LexisNexis® Emerging Issues Analysis

*Mr. Steven A. Lauer Esq. on*

### **If You Don't Speak the Same Language, How Can You Work Together?**

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Lawyers live and die (at least, professionally) with language. The law creates a form of "combat" in the form of the clash of ideas waged with words, to replace earlier forms of conflict resolution. Those earlier forms included jousting, person-to-person fighting and trial by combat. The criminal law no longer leads to a defendant being lowered into a body of water to determine, by whether he or she sinks or floats, guilt or innocence.

Law school training inculcates its students into this practice. They spend their time studying prior practitioners and the decisions of courts in order to understand how the use of words and intangible concepts can create, change and otherwise affect individuals' rights in many contexts.

In the context of the relationship between clients and their counsel, though, lawyers seem to forget or fail often to apply those lessons. This failure is particularly surprising and ironic when the client is represented by an in-house law department staffed by lawyers often as capable as those in the law firms that represent those businesses.

For example, a series of annual surveys several years ago probed the type of relationship that businesses had with their outside counsel. The responses of the in-house participants and the outside participants varied quite significantly. The outside attorneys routinely believed that they received considerably greater autonomy in the relationship than did their in-house counterparts at the client business organizations. In 2000 lawyers in law firms described their relationships with clients using the label "outsource" 63.5% of the time for acquisitions work, whereas in-house lawyers chose that descriptor only 7.8% of the time. (The survey defined an "outsource" relationship as one in which "[o]utside counsel is responsible for entire practice or block of work with little in-house management.") For that same area of law, the in-house respondents described the relationship with law firms as "co-counsel" ("in-house and outside counsel share substantive work responsibilities") 43.1% of the time, whereas outside counsel thought that term applied only 6.0% of the time. Such disparities existed in many, if not all, substantive areas of law covered in the survey. Outside counsel consistently viewed their autonomy as much greater than did the in-house respondents, by wide margins.

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Another example of a "failure to communicate" is the situation where in-house and outside attorneys use the same words but with different meanings in mind without realizing and adjusting for that discrepancy. Several years ago, during a panel discussion of relationships between in-house and outside attorneys, the managing partner of a national law firm referred to the "productivity" of the associates of that firm. While an in-house attorney (or, probably, almost any employee of a for-profit corporation) in the audience would think of productivity as a trait that would lead to lower cost or more efficient processes, that managing partner meant that more productive associates bill more hours than their less-productive colleagues, leading to more revenue for the firm. In the mind of an in-house attorney charged with serving his or her employer's legal interests in the most cost-effective manner, higher billings for a law firm do not represent a desired outcome. The audience may have taken away (at least, those audience members from corporate law departments) a far different message than that managing partner intended.

While researching the subject of communication between in-house and outside counsel, an in-house lawyer told me that a basic problem, in his view, was that in-house lawyers think strategically by training and due to the expectations of their internal clients. Outside lawyers, on the other hand, tend to approach challenges, and their clients' assignments, from a tactical perspective, focusing on what steps to take to accomplish the task identified. If they do not really understand the task that the client wants done, though (due to a communication failure like those described here), they may take unnecessary steps. Or they might pursue counterproductive tactics, such as by pursuing "scorched earth" tactics relative to a business dispute and spoiling a business relationship that the client wanted to salvage by simply delaying a judicial determination.

To what can you attribute such communication failures? Since the attorneys on both sides are educated and have taken similar (if not identical) training in law school, I suspect that the "failure to communicate" stems from inattention on both sides rather than an inability to do so. If inattention lies at the base of the problem, that constitutes both good and bad news. Good because it is easily remediable. Bad because, in light of attorneys' capabilities vis-à-vis communication, it shouldn't have happened in the first place.

The remedy would consist of more attention to expressing and sharing expectations and devoting effort to uncovering communication lapses or gaps that can undermine the parties' ability to reach a common understanding. Make sure that when you use words, your listener receives the message through those words that you intend. When an in-

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house attorney calls outside counsel and expresses the need to "win" a dispute, that outside attorney easily could interpret that to mean "beat the opponent into submission" when the company wants only to avoid an adverse result in court long enough to enable the parties to explore possible business solutions (as opposed to judicial solutions) to their conflict. A litigator who leaves a meeting with his or her client's in-house attorney with (perceived) instructions to "win" likely will begin immediately to prepare to take tactics that could prevent a non-judicial resolution so litigation becomes self-fulfilling and self-perpetuating. Avoiding such an outcome requires that the in-house attorney express the client's goals very clearly and secure the outside attorney's confirmation of that understanding.

Miscommunication or lack of communication can lead to failure in the representation and failure to reach the client's goals. The value of the legal service will decline, perhaps entirely, if the lawyers inside and outside the company do not see eye to eye and they do not have a common understanding of what they want to achieve for the company and how they expect to do so.

When lawyers for a common client cannot understand each other because they use the same words with different meanings in mind and never resolve that discrepancy, all of their subsequent dealings will be adversely affected. Suffice it to say that their ability to work together will be compromised and achievement of the client's goals will depend on happenstance rather than planning.

With care and attention on both sides, however, miscommunication can be reduced, if not eliminated. Success in that endeavor should rebound to the benefit of both in-house and outside counsel.

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Integrity Interactive Corporation, in which capacity he conducted research, wrote white papers and otherwise worked with clients and potential clients of the company on issues related to corporate ethics and compliance programs. He also spent over two years as Executive Vice President, Deputy Editor and Deputy Publisher of The Metropolitan Corporate Counsel, a monthly journal for in-house attorneys. He received a B.A. from the State University of New York at Buffalo and a J.D. from Georgetown University Law Center.

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