

LITIGATION MANAGEMENT & ECONOMICS

AMERICAN BAR ASSOCIATION

SECTION OF LITIGATION

Issue 4

Volume 2

Summer 2001

Litigation is a Team Sport – Draft Your Players Carefully

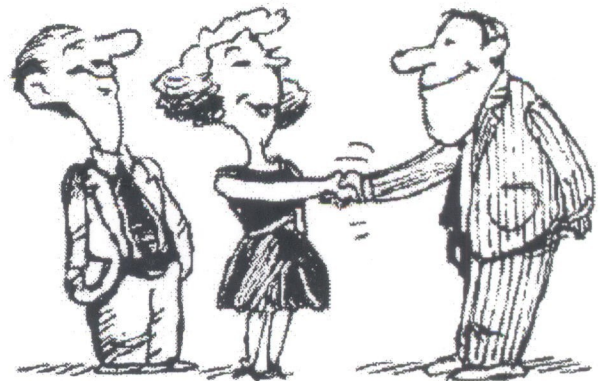
By Steven A. Lauer © 2001 *

Litigation is a team sport. Rare is the case that can be handled entirely by a single individual. Even the best trial attorney must rely on some support most, if not all, of the time. This truism has significance for in-house counsel who must assemble the legal expertise to represent the company in a matter.

The Team Should Have at Least Three Members

Every case in which a company is involved has implications for the business. Either it arose in a business deal gone awry or its resolution will have an impact on the company's business in the future. That impact can be positive or negative, and how the company manages that case can have a direct bearing on which way it goes.

The conclusion of litigation will have significant implications for the company's business, also. Whether by settlement or otherwise, a party might



have to abandon a course of action that it had pursued prior to the litigation. It might have to provide some benefit to the opponent that it had resisted previously.

For those reasons and more, there are at least three members of the team that should share the responsibility to manage litigation: the inside attorney, the outside attorney and the business unit representative. (For a particularly complex case, it might be appropriate to have multiple inside or outside attorneys, or even several business unit representatives, of course.) There are some natural alignments of responsibilities and roles for those team members, alignments that will reveal themselves if the needs of the case are reviewed.

Continued on Page 3

* Steven A. Lauer is a consultant in Maplewood, New Jersey. He works with corporate law departments and law firms on issues related to the delivery of legal service to corporate clients, on strategic cost-control initiatives for law departments and on relations between corporate clients and law firms. He was an in-house counsel for over thirteen years and in private practice for six years prior to his in-house tenure. He can be reached by phone at (973) 763-6340 and by e-mail at steven.a.lauer@home.com.

Inside This Issue . . .

Litigation is a Team Sport- Draft Your Players Carefully	1
Chairs' Column	2
Should You Use the Web to Deliver Legal Guidance to Your Clients	6
Case Management for the Litigator	9

Litigation is a Team Sport – Draft Your Players Carefully
Continued From Page 1

Assigning Tasks –

A Strategic Strengths Analysis

In order best to select the different members of the team, include as candidates both the inside and outside staffs. Some law departments have considerable talents and experience to handle litigation-related tasks solely with in-house resources. Others prefer to rely on outside counsel completely to fulfill all litigation-related roles. Neither of these approaches is inherently wrong. So long as the choice between them is a conscious decision, either may be entirely appropriate. If, on the other hand, you select one or the other alternative without considering the issues, your decision may be a symptom of a problem – the abdication of responsibility for litigation management.

Let's examine some specific tasks necessary in the litigation context and who might best complete them. Inside counsel's familiarity with business personnel, office locations and the structure of files can be very useful in planning the company's litigation posture and in responding to discovery demands from the adversary. The in-house attorney is typically more sensitive to the expectations of corporate management as to the sorts of reports necessary to provide the executives with the information they need to perform their jobs. These strengths are relevant to assigning litigation-related tasks or responsibilities.

Outside counsel has different strengths. He or she usually is more familiar with the rules of discovery and the preferences of local courts and, sometimes, the adversary's counsel. That familiarity should enable outside counsel effectively to advise inside counsel on the scope of discovery demands and the company's obligations in response to those demands. The initial screening of files and the location of witnesses, information and other material can be completed by inside counsel and outside counsel can then review that material for production. By dividing between them the discovery-related tasks in such a way as to maximize their respective strengths, inside and outside counsel will be able to complete that operation most effectively and with the least likelihood of duplicative efforts or missed assignments.

The different perspectives of inside and outside counsel can be useful in other ways as well. Outside counsel in litigation is a "hired gun." Her or his repu-

tation should be associated with an aggressive adversarial posture. An opponent might perceive as inconsistent with or as undercutting that posture settlement overtures made by that attorney. If inside counsel makes such overtures, however, a company can preserve the outside attorney's "bulldog" reputation. The inside counsel can appear as the more business-like representative of the company. This dichotomy can be useful if effectively wielded.

Another important (and often under-appreciated) member of the team is the business unit representative. Too often, lawyers include a business executive in their discussions about a case only when they need to make a major decision, such as whether to settle. If they follow that pattern, they fail to take advantage of that executive's promise. This approach also sends a message to that executive that the attorneys want him or her to play a passive role in the management of litigation. This reinforces the belief, which is common among business staff, that their job is to do deals while litigation is the "business" of the law department and that the two are unrelated. There are many ways in which the nonlawyer professionals in a company can improve its litigation prognosis – or they can inadvertently hurt that prognosis.

Just having the right persons involved is not enough. They must communicate with each other about the case in order to coordinate their efforts.

In the litigation context, the team members must establish clearly defined communications channels among them. In litigation, you often must respond quickly to unanticipated developments. In those situations, it can be critical to avoid delays in getting the information to the appropriate person, for consideration of a position to take or for some other purpose.

What are examples of the strategic strengths and comparative weaknesses of inside counsel? Inside counsel generally works closely with a company's business executives and managers on a day-to-day basis. In the course of that daily toil, a staff attorney develops a strong appreciation of the business's needs. That understanding enables that attorney to anticipate how the company's legal position (in litigation or otherwise) might later impact the company's operations. He or she will have a sense of which cases might be problematic for the corporation because they might have a very adverse precedential impact on those

operations. An outside attorney might not be as well positioned to make that determination.

Inside counsel generally enjoys greater proximity to the operational personnel of a company. That can be a strong advantage in completing certain tasks. One important responsibility of inside counsel is to counsel the business executives and managers on risk. This counseling is best administered over time, in large and small doses as the opportunities arise, often unexpectedly; as a rule, it is not as effectively accomplished merely by infrequent, formal presentations by outside counsel. Gardens respond to continuing, low-volume watering better than they do to infrequent gully washers. A due appreciation for legal concerns should be similarly nurtured.

Generally speaking, the attorneys who are on the staff of a company acquire over time experience representing the company in a variety of contexts and in connection with a variety of initiatives of the company. Whereas outside counsel are typically retained for discrete assignments (e.g., to handle the sale of a property, to represent a company in connection with a corporate acquisition, to represent the company in a particular case, etc.), the role of inside counsel spans all the situations that might confront the firm. This creates two distinct strengths of inside counsel: the development of "institutional memory" over time that provides some context and foundation for subsequent situations; and the opportunity to measure the company's responses in those varying contexts, providing a more "textured" understanding of the company's needs and preferences. All this animates the inside attorney's representation of the firm. It allows that attorney to view each problem and situation in relation to other situations in which the company has found itself in the past, in which it finds itself at present and in which it might find itself in the future.

Another strength of inside counsel, which is related to several already mentioned, is that he or she typically has or acquires a greater commonality of perspective with the business client than does outside counsel. This often manifests itself in a greater appreciation for cost effectiveness or as a sharing of the business goals with the internal clients. By virtue of this shared perspective, inside counsel develops an attitude that is usually different than that of outside lawyers (this is not a criticism of the latter, merely an observation).

On the other hand, in-house counsel are generally subject to staffing constraints. They are often geographically removed from the courts and agencies with which the company must deal. They may lack the bar admissions necessary to fully perform certain assignments, since corporate lawyers generally do not secure admission in all states in which their employers conduct business or in which they might have to avail themselves of the courts. In those situations, companies must retain outside firms whose members have the requisite admissions.

What are some of the strategic strengths and relative weaknesses of outside counsel? First and perhaps foremost, a law firm exists because of the attorneys who comprise it. As self-evident as this may seem, it is significant in this analysis. The attorneys of a firm direct its activities and its structure is designed to support their mission of providing legal service. In the case of litigation, for example, a law firm is configured to participate in the litigation process; a law department, on the other hand, is only part of a company, and the company's *raison d'être* is not defined so narrowly. The demands for the services called for in the practice of law are not outweighed in a law firm the way that they may be in a corporate environment. An inside attorney might have to grapple with corporate procedures and other concerns in order to secure appropriate contract assistance for litigation, for example. Such concerns are less significant in a law firm. The necessary end might be more easily achieved.

The more-singular focus of a firm creates other strategic strengths. Outside counsel is likely to be viewed as functioning solely as a lawyer in respect of corporate clients. Some courts view an inside attorney, on the other hand, as serving the company as a businessperson as well as a lawyer. This has implications for the availability of the attorney/client privilege and the attorney-work-product doctrine (even though the analysis as to the availability of the protection is the same). The commingling of functions can undercut the protection that some courts will accord communications and materials otherwise protectable.

On the other side of the ledger, the cost of in-house counsel is typically lower than that of outside attorneys. A law firm is a profit-seeking organization. Its client charges are intended to provide its owners and members with a return above their subsistence needs. On a purely comparable basis, then, a company

should be able to save money by having the same services performed in-house.

What is the role of the business client in this analysis? Too often, the legal needs of the company are analyzed in isolation from the business staff. In reality, the actions of that staff have great significance for the legal service. Many disputes arise in business relationships. Their resolution can be achieved effectively only by taking into account the business ramifications of the disputants' legal positions. Moreover, lessons are more easily learned and applied in the business (so as to avoid repeating actions that led to disputes) by those who have been involved in dealing with the aftermath of those mistakes or actions.

The potential business impacts of litigation suggest that the business unit representative should participate in strategic decisions about the litigation. In that way, the business implications of those decisions can be incorporated into the decisionmaking process. Even those decisions made during the course of a case that are not final can have serious implications that counsel in favor of providing the business representative an opportunity to voice his or her concerns and to participate in making the decisions.

There are some specific litigation-related tasks that can be performed most effectively by the business unit representative. The files that are relevant to litigation typically consist of material generated during the business operations. The business people are usually much more familiar with the contents of those files than are the attorneys, even the in-house attorneys. Under the direction of counsel (for purposes of attorney work product protection as well as for improved review), the business staff may be able to productively review those files for relevancy to the suit.

Another effective role for the business unit executive relates to the need for expert witnesses. A business professional is familiar with the industry experts by virtue of her or his day-to-day responsibilities and activities – much more so than attorneys can hope to be. Locating a well-qualified expert witness is often one of the most critical steps in preparing for litigation. The businessperson's familiarity with industry standards and experts should be brought to bear on the identification and retention of an expert to bolster a party's case. This is a very important benefit that the team can derive from active participation by the businessperson.

Litigation Management and Economics Committee Officers

Co-Chairs

William H. Baker

(847) 835-0562
(847) 835-0572 (fax)
210 Franklin Rd.
Glencoe, IL 60022
Whbaker2@home.com

Nicholas J. Wittner

Nissan North America Legal Department
(310) 768-1136
(310) 768-1199 (fax)
990 W. 190th
Torrance, CA 90502
Nick.wittner@nissan-usa.com

Subcommittees and Subcommittee Officers

Litigation and Expense Management

Chair: **Cynthia Adamson**

Merrill Corp.
(612) 752-2906
cynthia.adamson@merrillcorp.com

Litigation Technologies and Internet

Chair: **Christopher Wolf**

Proskauer, Rose LLP
(202) 416-6818
(202) 416-6899 (fax)
1233 20th St. N.W.
Suite 800
Washington, D.C. 20036
cwolf@proskauer.com

Membership

Chair: **Jana Ames**

Power Brief, Inc.
(713) 586-4604
(713) 586-4790
5858 Westheimer
Suite 500
Houston, TX 77057
Jana_ames@powerbrief.com

Communications

Chair: **Ellenore Angelidis**

Sears Legal Department
(847) 286-7220
(847) 286-3363 (fax)
3333 Beverly Rd.
Hoffman Estates, IL 60179
eangeli@sears.com

Newsletter Editors:

To be appointed (*Ellenore Angelidis* is acting Editor.)

Webmaster: **Allison Williams**

Heenan, Althen & Roles
(304) 342-8960
(304) 342-5671 (fax)
300 Summers St.
Suite 1380
Charleston, W. Va. 25301
williams@harlaw.com

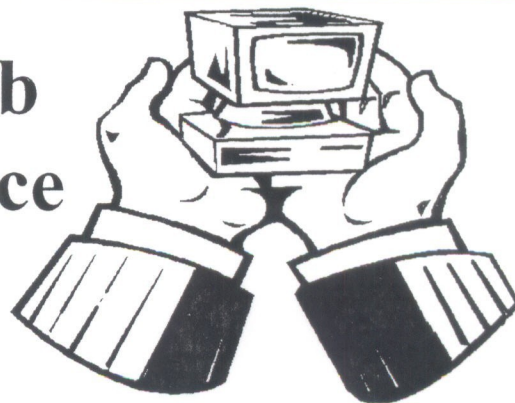
Summary

Litigation requires multiple talents and capabilities. Those varying tasks should be assigned to differing members of a team. The assembly of an effective team takes thought and careful consideration. Properly done, however, it can result in much more effective representation.

That team should include the personnel who can best perform the various tasks necessary for a complete job. The candidates for those roles might be in one or more law firms, in the law department or within the business units. A well-thought-out draft for the team will avail itself of all those resources.

Should You Use the Web to Deliver Legal Guidance to Your Clients?

by Ron Friedmann, Esq.



Introduction

The dot-com bubble has burst but the Internet is here to stay. Start-ups with unproven ideas and questionable business plans are out. Established organizations that use the Web to extend and enhance their traditional products and services are in.

To date, the Web has had a limited impact on how lawyers deliver their services to clients. For the most part, lawyers use the Internet to communicate with clients via e-mail, share documents using extranets, or provide information about their practice with a firm Web site.

The Internet has the potential to fundamentally change how lawyers deliver their services to clients. Law firms in the USA, England, and Australia have developed innovative Web-based services to deliver advice to clients. This article briefly surveys some of these innovative services and discusses some of the questions such services raise.

Brief Survey of Innovative Ways of Delivering High Quality Legal Advice Over the Web

Linklaters & Alliance, a top-5 London law firm, offers "Blue Flag," a Web-based service that consists of related advisory services including, for example, regulatory compliance advice for business managers in financial institutions, advice for derivatives profes-

sionals on making sure transactions are binding, summaries of shareholder disclosure rules by country with links to detailed information, and interpretive materials on the regulations governing fund managers. On its Web site, the firm extols the benefits of online advice:

"Using technology and the Internet the legal expertise of Linklaters can now be accessed at the touch of a button, wherever you are and whenever you need it... It is an innovative approach which brings the following key benefits:

- Instant access from your desk top
- 24 hour global availability, 7 days a week
- Continually updated
- Cost effective
- Improves your business process through technology
- Based on Linklaters legal expertise you can trust "

Lovells, another leading London law firm, announced in October 2000 a free Web site service offering guidance on arbitration matters. Quoting from the Web site:

- "This Website is made up of three principal parts:
- Guidance and information on the drafting of arbitration agreements for inclusion in international commercial contracts;
 - The text of arbitration laws (with summaries) and procedural rules; and
 - A drafting engine, which may be used to prepare an arbitration agreement"