# Maybe Humpty Dumpty Was a Lawyer

by

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# MAYBE HUMPTY DUMPTY WAS A LAWYER*

***Steven A. Lauer*****

*"When I use a word, it means just what I choose it to mean neither more nor less."*
— Humpty Dumpty in *Through the Looking Glass and What Alice Found There* by Lewis Carroll.

## I. Introduction

Lawyers are trained to use words carefully. Whether negotiating a complex transaction or representing a client in hard-fought business litigation, attorneys must be in command of their language, respond directly to their opponents' arguments, and lay out their clients' positions very specifically and accurately. In other words, attorneys depend on their command of language and their ability to communicate precisely in their professional lives.

This renders particularly ironic the evidence that there is a crisis in communication between outside counsel and their clients. Moreover, that evidence appears in several different contexts, suggesting that the possibility of misunderstanding between attorneys and their clients is rife.

In some cases, it appears that outside counsel and their clients use words to mean disparate things. In other instances, the evidence suggests that they may not be listening to each other closely. In either event, the "communication gap" is widespread. In some respects, it is widening. Perhaps Humpty Dumpty was correct and words mean only what the speaker intends, even if that meaning is different from what the listener hears.

The evidence emerges from a variety of sources. Annual, profession-wide surveys have identified discrepancies in how in-house and outside lawyers view various aspects of their relationships. Recent research highlighted how different attorneys use the same word in very different ways. Some words that are critical to the relationship between law firms and corporate clients have diametrically opposed meanings for in-house and outside lawyers. Some anecdotal evidence suggests that the inside and outside lawyers have such different perspectives that they almost think differently. All this has significant implications for client/firm relations. Unless lawyers acknowledge these issues, however, they cannot begin to remedy the problem.

That business is increasingly global in scope makes the situation of greater concern. If the communication problems outlined above exist in the legal profession in America, where you would expect

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that lawyers speak the same language, how much more difficult is clear communication when the lawyers reside in different countries and apply very divergent cultural norms and societal perspectives in their communication styles? If gaps of understanding arise between attorneys (inside and outside), the gaps might be even broader between outside attorneys and business professionals who do not share the attorneys' legal training and perspective.

Good communication is critical to an effective relationship between client and counsel. While a client's ultimate legal goals can be clear to its outside counsel, there are many nuances possible that can affect the means to achieve those goals. Misinterpretations between client and counsel can create an impediment to the task and even create an insurmountable barrier.

## II. How Do Lawyers Work Together?

Annual surveys reveal that inside and outside attorneys have very different opinions about how the latter serve the formers' employers. As to some aspects of the client/firm relationships, that opinion gap has widened over time. It exists even in respect of some surprisingly basic aspects.

A monthly periodical for the legal profession has conducted annual surveys for ten years regarding the opinions of corporate general counsel about how law firms service their companies and how outside lawyers think that they service those clients. There has been a consistent gap in the two groups' views on those issues. On some issues, that gap has even widened from year to year.

In the 1998 survey, law firms awarded themselves a grade of B+/A- in response to the question of whether they provide effective and creative preventive legal advice. The surveyed general counsel awarded only a C+ on that point. In 1997, general counsel had rated the firms as deserving a score of 3.3 (on a scale of 1 to 5, with 5 being the highest score), while law firms felt that they deserved a 4.2. In 1999, law firms earned only a 2.1 score from the general counsel (in the 1999 survey, the scale was 1 to 5 again, but 1 was the highest grade available and 5 was the lowest), while firms awarded themselves a 1.8.

As to whether firms share risk with their clients, general counsel felt in 1997 that the firms deserved a 2.6, while the firms felt that they deserved a 3.4. In 1998, the respective scores were C- from the general counsel and C+ from the firms. In 1999, general counsel awarded only a 2.9 (the highest score available was 1 and the lowest was 5), while firms felt entitled to a 2.2.

In respect of whether firms' charges are commensurate with the value of the services provided, general counsel graded firms at 3.4 in 1997 (5 was the highest score available), a C in 1998, and a 2.6 (1 was the highest available score) in 1999. The firms awarded themselves 4.3 in 1997, a B+ in 1998, and 1.8 in 1999.

On most service criteria rated in those surveys, self-grading by the firms resulted in grades that have been consistently higher than the grades that they earn from their clients. Clearly, there has been a considerable difference of opinion between law firms and the chief legal officers of their clients as to how well the firms serve those clients.

The 1999 survey demonstrates a more puzzling dichotomy between the views of inside counsel and the views of the outside lawyers with whom they work. The surveyed general counsel were asked to select a descriptor for the working relationship between their law departments and the outside law firms in various

substantive practice areas. The outside lawyers were asked to make a parallel selection. The available labels were "In-house Only," "Outsource," "Case Management," "Co-counsel," and "Temps."

"In-house Only" was defined as "in-house counsel performs all work internally and only uses outside counsel for overflow or when unique specialty is required." "Outsource" described a situation in which "[o]utside counsel is responsible for entire practice or block of work with little in-house management." "Case Management" would apply where "[o]utside counsel performs the work; in-house counsel manages" that work. "Co-counsel" was to be selected if "in-house counsel and outside counsel share substantive work responsibilities." "Temps" was to signify that "[u]se on-site contract lawyers and paralegals from a service."

The charts below/1/ contain the percentages of general counsel and outside lawyers who selected each of the five labels in five practice areas during surveys conducted in 1999 and 2001. (Seventeen practice areas were included in the survey.) Each practice area is reflected in two rows; the first row contains the responses of general counsel while the second row contains the responses of outside lawyers. The 2001 survey demonstrated a similar gap in the views of corporate general counsel and the law firms that work with them. The need for improved communication persists.

**1999**

| Area of Law | In-house Only | Outsource | Case Management | Co-counsel | Temps |
|---|---|---|---|---|---|
| Acquisitions | 20.0% | 5.0% | 20.0% | 45.0% | 10.0% |
| Acquisitions | 21.5% | 60.0% | 1.5% | 11.0% | 0.0% |
| Contracts | 81.1% | 1.6% | 3.3% | 9.8% | 4.1% |
| Contracts | 12.5% | 47.3% | 10.0% | 12.2% | 0.0% |
| General Corporate | 81.5% | 0.8% | 4.0% | 10.5% | 3.2% |
| General Corporate | 11.5% | 58.2% | 14.0% | 9.0% | 1.5% |
| Real Estate | 51.3% | 13.7% | 12.8% | 17.9% | 4.3% |
| Real Estate | 10.0% | 77.7% | 12.5% | 1.1% | 0.0% |
| Regulatory | 40.2% | 11.6% | 17.0% | 24.1% | 7.1% |
| Regulatory | 6.7% | 63.8% | 3.3% | 5.0% | 0.0% |

**2001**

| Area of Law | In-house Only | Outsource | Case Management | Co-counsel | Temps |
|---|---|---|---|---|---|
| Acquisitions | 33.3% | 7.8% | 15.7% | 43.1% | 0.0% |
| Acquisitions | 24.5% | 63.5% | 5.5% | 6.0% | 0.5% |

| | | | | | |
|---|---|---|---|---|---|
| Contracts | 89.4% | 0.0% | 1.5% | 9.1% | 0.0% |
| Contracts | 27.8% | 52.8% | 6.7% | 12.2% | 0.6% |
| General Corporate | 82.6% | 2.9% | 1.4% | 13.0% | 0.0% |
| General Corporate | 28.6% | 54.5% | 4.1% | 11.8% | 0.9% |
| Real Estate | 43.1% | 13.8% | 17.2% | 25.9% | 0.0% |
| Real Estate | 32.5% | 50.0% | 5.8% | 10.8% | 0.8% |
| Regulatory | 50.9% | 8.8% | 14.0% | 24.6% | 1.8% |
| Regulatory | 16.4% | 55.0% | 22.1% | 5.7% | 0.7% |

There are two striking features about the data displayed above. (The results of the surveys illuminate other issues as well, but for purposes of this discussion, I will focus on only two.) First, they reveal starkly that outside and inside lawyers do not agree even on how they work together! There may very well be disagreement on specific details as to how attorneys will work together: the allocation of responsibility for individual tasks and assignments might be confused on account of inadequate specificity at the start. To differ so dramatically on whether work is completed by only one of the parties, with little supervision, or by both of the parties sharing responsibility equally, however, leads to a natural question. Do inside and outside attorneys attempt to coordinate their actions in respect of their common clients at all? Are the clients as well served as they deserve to be?

A second conclusion that leaps off the pages of the two surveys is that the two groups are remarkably consistent over time in their views on the question. They simply disagree between themselves tremendously. That such disparity of perception should persist seems to prove that communication between in-house and outside counsel, to the extent it exists, does not include discussion of what appears to be a basic and seminal issue: how in-house and outside counsel for one client will work together!

## III. What Does a "High" Chance of Losing Mean?

With another consultant, the author conducted research on how trial attorneys evaluate cases. That research yielded some interesting insights into the need for greater clarity among attorneys on the language that they use in that effort. In order to examine how experienced trial attorneys reach a conclusion as to the relative risk posed by a dispute, that colleague and I asked a group of trial attorneys/2/ to complete several questionnaires. They completed the first questionnaire prior to reviewing a hypothetical controversy./3/ In that questionnaire, the respondents were asked to rate, in the abstract, the relative importance of fifteen distinct factors for purposes of assessing the risk of an adverse result were a dispute presented to a jury for decision. They were then to read a hypothetical fact pattern and then complete two other case-specific questionnaires. For purposes of this discussion, the relevant portion of the second questionnaire asked that they identify

(1) the probability that the defendant would defeat the plaintiff's claims;
(2) the risk that the defendant would lose the case (by selecting "high," "medium," or "low" as the appropriate descriptor of the defendant's chances of doing so); and

(3) the probability that the defendant would win its counterclaim.

Of the thirty respondents, fourteen characterized the defendant's chances of losing the case as "high." Though those fourteen trial attorneys used the same descriptor to rate the defendant's chances of losing, however, they may very well have had different concepts in mind for that term. When they were asked to estimate numerically the probability that the defendant would win, they expressed their estimates as 10 percent, 20 percent, 25 percent, 30 percent, 35 percent, 40 percent (four respondents selected that percentage), and 55 percent. In other words, the obverse of a high chance of losing equated with anywhere from a 10 percent to a 55 percent chance of winning. The same word expressed a wide range of odds of prevailing. Four attorneys who thought the defendant had a 60-65 percent chance of winning the case characterized that party's risk of losing as medium. A graphic display of the data is helpful to understand the disparity of word use.

| Risk of Losing | Odds of Winning | Number of Attorneys |
|---|---|---|
| High | 10% | 1 |
| High | 20% | 1 |
| High | 25% | 1 |
| High | 30% | 1 |
| High | 35% | 1 |
| High | 40% | 4 |
| High | 55% | 1 |

These results may reflect a number of factors. Certainly, the assessment of a litigant's chances of winning a case is an individual one, with little agreed-upon methodology. It is difficult to determine whether any one or more of the respondents are wrong in their assessments. It is clear, though, that there is no common lexicon in respect of litigation. Should there be one?

What lessons can one draw from that research? An obvious conclusion is that different lawyers will evaluate the risks of losing a dispute differently. That would appear to be no surprise revelation. The fact that experienced trial attorneys can hold such disparate concepts of a "high" chance of losing, though, suggests that a law department that relies totally on the law firms representing the company to evaluate the significance of each dispute, without providing any guidance as to the company's perspective on the issues subsumed within that conclusion, risks having widely different "scales" applied by different law firms and even different lawyers within one law firm. A law department that does so rely on its law firms does not have a case-evaluation methodology as much as a set of "methodologies" that may or may not bear any resemblance among them. In other words, the data suggest the need for a greater role for in-house counsel in establishing the dispute-management standards for the company.

## IV. Words Can Have Very Disparate Meanings for Different Groups

At a program on client/firm relations in April 1999, a managing partner of a national firm used the term "productivity" when discussing the number of billable hours of law firm attorneys. The more hours an attorney bills the firm's clients, the more productive that attorney is in the eyes of the firm. For a businessperson, however (and for many if not all inside attorneys), "productivity" connotes efficiency. The less time (*i.e., **fewer hours***) a specific task consumes of an attorney's time, the more productive that attorney is in the eyes of the client.

For the managing partner of that firm, use of the word "productivity" to reflect the number of hours billed (with more hours equaling greater productivity) is correct when used in the context of intra-firm considerations. To the extent that meaning applies or is used outside that context, however, it might constitute an impediment to understanding between the firm's lawyers and their business clients. When used in communications with a client, that word could easily lead to misunderstanding, since the communicants will take diametrically opposed meanings from the same word.

Another word that seems to have different meanings for inside and outside lawyers is "quality" when used in respect of legal work. Outside lawyers view the word as encompassing the quality of the brief, oral argument, or negotiation on a stand-alone basis. For an in-house lawyer, however, the concept of "quality" includes, as an integral and necessary constituent element, cost effectiveness. Inside lawyers sometimes believe that outside lawyers would continue researching an issue without end in an effort to foreclose any possibility that anything but the desired result will follow from the argument. For an in-house lawyer, however, the quality of that brief or argument can only be judged in relation to the value that it provides to the company in respect of supporting the company's legal position. Whereas inside lawyers must constantly balance cost and thoroughness, they often perceive that outside lawyers fail to understand the connection between the two.

A word often used in the context of litigation is "win." Though it is a simple, three-letter word that has a common dictionary definition, that simplicity may mask complexities when used in the context of analyzing corporate disputes. An in-house counsel recently related to the author an example of how a failure to understand the potential meanings of that word had profound impacts, both substantive and budgetary, on a company. The company was faced with a complaint that had the potential of permitting a court or jury to review and pass judgment on the company's operational procedures and its flexibility thereunder. In the course of discussing the dispute with counsel, the senior executive of the company expressed the view that the company "must win." The company's trial team took that comment as instruction to leave no stone unturned and to seek judicial validation of the company's actions. In fact, as events in the litigation proceeded, it became clear that the corporate officer had meant that the company could not afford to lose. Had the trial attorneys reviewed that individual's earlier comment and the company's position, they might have realized the true meaning of that remark. Instead, the company endured considerable litigation expense and dislocation until the executives of the litigants met and reached a creative, nonjudicial solution that avoided any court judgment in respect of those procedures. In fact, the negotiated resolution included a payment by the plaintiff to the defendant rather than the contrary result sought in the complaint, due to the restructured business relationship that the parties enjoyed. But for that misunderstanding, perhaps an alternative resolution might have been pursued much earlier by counsel.

## V. Do Inside and Outside Lawyers Think Differently?

An in-house attorney with whom the author recently spoke expressed the view that outside lawyers use "bottom up" thinking. Business professionals, and many inside attorneys, take a "top down" approach.

By those terms, he meant that outside lawyers think tactically, while those who are in-house counsel at companies think strategically. What does that mean? What are its implications?

Essentially, strategic thinking entails identifying the desired goal and planning the steps necessary to achieve that goal. Tactical thinking focuses much more on the individual steps in the process rather than the overriding objective. A tactical thinker may become so immersed in the moves of the chess game that other effects outweigh the gains that he or she achieves. Those other effects are often budgetary in nature. Essentially, the tactical thinker "can't see the forest for the trees." For example, a litigator who is a tactical thinker may see the possibility of winning a motion for summary judgment in defense of the client. Perhaps the client has an interest in delaying the final outcome of the litigation, however, almost without regard to the ultimate outcome. If the outside attorney prepares and files such a motion and wins, the client may lose the benefit that it might have secured by additional delay (such as the possibility of exploring a nonjudicial resolution of the dispute). If the motion is defeated, the client will have to bear the costs of preparing that unsuccessful motion and be no further along in achieving its goals. Moreover, the possibility of a nonjudicial resolution of the controversy may have disappeared on failure of the motion. The pursuit of tactical goals for their own sake has cost the client the strategic benefits of other outcomes while spending budgetary resources.

Just such a result almost flowed from the litigation tactics of a trial attorney. The dispute was between two companies that had an ongoing business relationship that could not be broken easily; one party managed the other's facility under a long-term, unbreakable agreement. The "scorched earth" tactics of both parties' trial lawyers nearly destroyed that relationship. In fact, it took years to repair the damage done in the course of the litigation. The trial lawyers did not hear the clients' signals *vis-à-vis* using reasonable litigation tactics rather than extreme ones.

## VI. What Is the Solution?

There is a simple answer to the question of what can be done to resolve these situations. Lawyers need to communicate with their clients. That involves much more than simply talking to them, but rather communicating with them.

First and foremost, however, clients and counsel need to make sure that they speak the same language. Most of the words that lawyers use have varying meanings and using a word with one intended meaning when the listener applies a very different one can lead to misunderstandings. "Productivity" is an example of a word that outside and inside lawyers use for very different purposes. Some of the words that lawyers use have common meanings but with some fine nuances. An excellent example is "win." See the discussion above regarding the likelihood of prevailing in litigation and what a high chance of losing means.

The misunderstandings as to how inside and outside counsel work together are easily addressed. They need to discuss their relationship apart from specific assignments. Most communication between inside and outside counsel is in the context of matter-specific concerns. In such a situation, the substance of the work predominates the topics addressed, yet the ways in which lawyers for a company work together should be consistent over time and over matters (by and large). Discussing how that relationship will be reflected in the day-to-day working interaction can be very helpful to the inside and outside attorneys and, ultimately, the client.

## ENDNOTES

/1/ The data were derived from the Tenth Annual Corporate Legal Times-PriceWaterhouseCoopers Survey of General Counsel, which appears in the July 1999 issue of *Corporate Legal Times* (vol. 9, no. 92), beginning at page 1, and the Corporate Legal Times-Andersen/Andersen Legal Twelfth Annual Survey of General Counsel, which appears in the July 2001 issue of *Corporate Legal Times* (vol. 11, no. 116), beginning at page 1.

/2/ We identified thirty trial attorneys around the country of varying experience, but all of whom had significant trial exposure.

/3/ While the facts represented a hypothetical dispute, they were drawn from an actual case with which one of us had experience.

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