

## **BUSINESS LITIGATION**

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## **The Lawyer as Counselor**

### **ABOUT THE AUTHOR**



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### **ABOUT THE COMMITTEE**

The Business Litigation Committee consists of members involved in business and commercial litigation including business torts, contract and other commercial disputes, e-commerce, antitrust and other distribution issues, trade secrets and intellectual property, unfair competition, and business defamation and disparagement. The Committee helps connect members involved in these areas around the world through networking and referral opportunities; developing and keeping current in the substantive, strategic and procedural aspects of business litigation; and affords members an international forum for sharing current developments and strategies with colleagues. Among the Committee's planned activities are newsletters, publications, sponsorship of additional programs at conferences and the execution of membership initiatives.

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## In an age when Lawyers are more specialized and task focused, do clients truly receive legal counsel?

It is said that the environment for legal services today is the most challenging at any time in recent history. The world economy is only intensifying an ever increasing client demand for control over billable rates (the call for alternative fee arrangements); law firms have become more and more segmented (choices range from global firms to local boutiques); lawyers are more technical and specialized, (e-discovery managers, Intellectual Property litigators); and client management over its attorneys is more rigorous and more specific. Yet despite this modernization of the legal profession there is a need for what some may call a traditional role for the attorney, one which can provide broad and even “bottom line” value to the client, though this role is often overlooked by clients and is not practiced in most law firms or by most lawyers: the role of Counselor. Use of an attorney as Counselor by the business client, particularly those with a portfolio of legal needs, issues or cases, can positively impact how the client responds to and profits from the legal challenges its business faces.

To “counsel” is to provide wisdom and advice regarding the judgment and conduct of another. For the attorney, to counsel is to advise the client on the decisions or course of conduct the client will follow in response to the legal issues confronting its business like lawsuits, regulatory issues and employment matters. Unlike task-based legal activities, such as preparing a brief or taking a deposition, to counsel is to apply intelligence, experience and forethought to the client’s legal challenges resulting in guidance, opinion, suggestion, creativity, ingenuity and assurance as the client decides how to manage

these business matters (and thus determines which tasks to perform). Counseling and decision making should precede action, but in the modern legal market clients too often rush to engage lawyers to act or to do “something” in response to lawsuits, etc., and fail to retain lawyers to counsel. As a result, most lawyers have become legal technicians and specialists; skillful and talented in the performance of tasks for specific legal problems and cases. But for many companies, the Counselor is a fundamental and valuable advisor, when the role for this Counselor is understood to be separate from the multiple specialists a company may retain to perform its legal tasks. The right Counselor can enhance the ability of the client to manage its legal issues in a way which contributes to rather than detracts from the economic goals of the client.

Who is the right Counselor? An experienced Counselor will be an attorney with certain personal and professional characteristics that can be identified, and thus discerned, by the client. Intellectual capacity, broad professional experience, honest dedication to the best interest of the client, strength of conviction and the ability to communicate with and personally relate to the client are essential, personal components of the Counselor’s profile. Independence from any professional or financial benefit in advising the pursuit of any one particular strategy, tactic, decision or outcome and the ability to render her best advice independent of any competing personal business concerns (e.g. loss of firm business) are important business characteristics in the Counselor. It is not true that many lawyers, or even law firms, have this combination of characteristics despite “years of experience” listed in

biographical marketing material. It is also not true that one Counselor fits all needs. A merger and acquisition Counselor may not be the correct choice for a business which primarily consumes litigation services and *vice versa*. Any business which is continually buying legal services will benefit from employing the right Counselor for his independent professional judgment and guidance.

A Counselor provides her service separate from the tasks performed by the technicians and specialists; i.e., she does not handle the case. This separation of advice and management from task allows clarity and insight into the best decisions for the client free from the consumption and investment in the actual performance of any case specific task.

A sport's analogy helps explain this role. The owner of a professional football team will typically have two goals for the franchise: to win every game and to be profitable while doing so. To achieve these goals, the person he relies on "first" is not the quarterback, the defensive end, the running back, the corner back or even the head coach. The first person the owner relies on is the General Manager. Why? Because only the General Manager sees the entire portfolio of team goals, costs and resources. No other team member can or should attend to all aspects of the business, and no other team member has the responsibility to advise the owner on how all these areas work together in a balanced fashion, even though all of the others have responsibility for specific tasks to make the team successful: not the head coach – who moves the players and determines the strategy needed to "win" but who has little or no responsibility for the profitability of the team; not the quarterback – whose job it is to implement the strategy devised by the head

coach strictly focused on scoring points; and not the middle linebacker – whose role is the mirror opposite of the quarterback, to implement the defensive strategy devised by the head coach strictly focused on stopping points from being scored. I suggest that not even the President of the football club has the responsibilities of the General Manager because he is more focused on selling, marketing and revenue. While all of these skilled players and specialists are critical to the performance of the tasks necessary to win and to generate profit, they would be disconnected from the totality of the owner's goals and perhaps operate at cross purposes if there was no General Manager with responsibility for the broad view and to ensure all the specialists and assets are coordinated to the owner's best advantage. It is the advice, counsel and insight of the General Manager on which the owner relies to make it all work.

Like the General Manager on a sports team, a Counselor to any business which manages a portfolio of lawsuits and legal issues offers advice, creates ideas and anticipates challenges the client's business will face. You may have the best first chair trial lawyer (head coach) and even great witnesses and evidence (players and strategy) and perhaps even the best in house lawyers (the president), but none of these specialists has the responsibility and motivation to see and balance all of the client needs, assets, limitations and goals. The trial lawyer may excel at and take responsibility for the determination and implementation of the most successful strategy to pursue and win a lawsuit, but she is not the right lawyer to weigh that strategy against the risks inherent in the subject matter of the lawsuit to the company, the implication of the asset depletion to the company in paying for the trial, and the short and long term effect to the

company of the verdict (favorable or adverse). And if a trial lawyer or other task specialist is given or assumes these other responsibilities, she would be conflicted and one or the other of these roles, perhaps both, likely will suffer.

Why is the trial lawyer ineffective as the Counselor? Why, for that matter, would an in-house attorney be ineffective in this role? I believe the answer for both lawyers lies in Priority and Focus. The priority of the Counselor is the overall result to the client, defined by the goals and priorities the client sets weighing the entirety of its business purpose, assets and needs. He lends insight and advice to the client setting these goals and priorities, he weighs the assets available and counsels on their best use in accomplishing the goals and priorities, he takes day-to-day responsibility for creating ideas, having foresight and maintaining flexibility in the decision making necessary to accomplish the goals and priorities and advises the client honestly and without the interference of a separate, albeit honest and good faith focused, agenda.

A trial lawyer has, or should have, winning the trial or case as his first priority. Any decisions or advice based on asset use or risk must necessarily be colored and affected by the reality that his job is to win, and all other considerations hold a lower priority for him. While there can be no doubt it is necessary and desirable for the trial lawyer to have as his first priority winning the case, it is not true that with this first priority his decision making and counsel on the overall goals and priorities of that client are balanced and value added.

Likewise, at least one first priority for an in-house attorney is her job performance which carries the burden of making the

decisions that direct the outside attorneys and the concern for personal success, both professionally and financially, in the company. The decision making role of the in-house attorney necessarily limits her ability to counsel the client on best choices since, for the purpose of deciding which course to follow, the in-house attorney is often the client. To be both the Counselor to the client and the decision maker merges two roles and negates the benefits of independent judgment which the Counselor provides. Also, like the trial lawyer's focus is to win the case, the client wants its employees to focus on a successful career in the company as that employee moves up the corporate ladder and grows in her role and performance. For the employee, however, risk taking by the company then has two effects – one on the company and one on the employee – which necessarily impact how the in-house attorney advises the company on balancing its risks with the costs of the decisions to be made. More plainly said, true counsel to the company on risk taking decisions can be polluted by the personal effect, however appropriate or subconscious, the outcome has on the individual giving the counsel. The priority of the Counselor, however, is only the goals and priorities set by the client; he is not tasked with a specialized role which competes for his concern, he is not the decision maker and his personal career with the company is not competing with his evaluation of risk and benefit. His counsel, therefore, is true advice to the client, appropriately weighing all of the factors bearing on the legal issues the company faces.

This priority of the Counselor concentrates his focus only and always on accomplishing the client's goals and priorities. All factors impacting these goals and priorities – strategy, risks, costs – are continuously analyzed and evaluated for this



purpose. At no time should competing priorities, like those of the trial lawyer, take precedence over the ultimate solution for the client. Thus the advice of the Counselor is independent and focused only on client needs in managing the legal issues that affect its business.

The most effective Counselor has a special relationship to the client. In addition to a grasp of the intricate details of the client's business, the Counselor must bring a strong and deep professional background as well as a demeanor and style best suited for the culture of the business and persons in decision making roles. A Counselor will invest himself in the client seeing the client's success as part of his professional, and perhaps personal, life and not just a project, job or case to work on. Time, patience, dedication and honesty are needed by both the Counselor and client to realize the benefits a Counselor can provide, and with this

investment the client can see his business improve through better control and understanding of its legal issues.

The Counselor is a value added attorney for the client. In the face of today's challenging economy and complicated legal services market place, the Counselor can bring value to the business of the client by providing advice and ideas on how to maximize the client's business goals through the management of the client's portfolio of legal needs and efficient use of client resources. Both a deep knowledge of the business and a relationship of trust and confidence between the Counselor and the client are essential to realize this added value. The company that finds the right Counselor and invests in this relationship sufficiently to develop this knowledge and create this trust will see its business benefit at the bottom line.



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