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Listening to Inside Counsel

By Robert N. Sayler

Some years ago, the rhetoric in articles about inside-outside counsel relations got so heated that the American Bar Association's Litigation Section, which I then chaired, decided to do something—organize a task force to see what in the world was going on. Had some sort of class warfare broken out? Were those most necessary of allies heading into nonstop screaming matches? Was mutual destruction just around the corner?

So it was that the "Big Chill" task force did some homework a few years ago. After cataloging the literature of the time about the fraying tensions and digesting scores of toughly worded pieces, members set about conducting original research, including videotaped focus-group interviews of dozens of general counsels of large outfits. The results suggested that the rhetoric was overblown. There were concerns about excesses in the way some counsel went about plying their trade. There were suggestions galore about more useful ways that outside counsel could accommodate their work to changing business climates and practices. But our work on the task force suggested that inside counsel usually found their own relationships with outside counsel satisfactory -- it was those other lawyers (perhaps the ones they had just discharged) who were giving the rest a black eye.

That's where it seems we are today. Inside counsel recite myriad suggestions for improvement in the way outside counsel behave, but there is no pervasive rage about the practices of most outside lawyers. It is also not uncommon to hear outside counsel complain about abusive treatment at the hands of inside counsel, intrusive micromanagement, and integrity-challenging dissection of bills. Still, judging from articles on the subject and the anecdotal grapevine, it seems fair to conclude that the level of anger was either substantially overstated some years ago or has appreciably dropped off more recently.

Having said that, there are a handful of commandments that bear keeping in mind for establishing and maintaining good outside-inside counsel relationships. Here are a few, with special focus on that partnership as it confronts big-scale litigation. (The comments from the general counsel are quoted from the Focus Group Study Report on Corporate Client Concerns.)

Commandment 1. For heaven's sake, communicate early and often. Especially in this age of e-mail, voice mail, and faxes, it ought to be an easy matter to keep inside counsel fully up to speed on the whole ball of wax: what's being done on the case, who is doing it, what's coming up near term, your strategic brainstorm, drafts of briefs and oral arguments, and all the rest. Few things matter more to inside counsel, yet they contend that far too often it just doesn't happen. The biggest thorn of all is the phone call that goes unanswered for several days.

Commandment 2. Inside counsel get to play in the game. Richard Jones, then senior vice president and general counsel of Carolina Power and Light, made the point that we hear often: "Some law firms and some lawyers have not wanted to let inside counsel play in the game, but they are making a mistake." Especially on major matters, the supervising inside counsel has a lot riding on the case and, typically, very much to contribute to it. And outside counsel has much to gain by engendering a high level of satisfaction. As one general counsel told us, "What I need is somebody who can work well in partnership with the in-house group ... and there is a good chemistry there, and they work well together. ... If [outside counsel] can't do that and the relationship doesn't work, then you probably don't have good communication and you are probably going to make the change."

Commandment 3. Exercise sound case management. In a major matter, company counsel cares a good deal about the quality of the work product and the superiority of trial and appellate lawyering skills, but they have to be just as concerned about the cost efficiency of the operation. Indeed, inside counsel's performance may be graded on the basis of that consideration. This means that outside counsel must demonstrate real skills here, and that inside counsel should be involved in outside counsel's case management in a major way. Inside counsel is entitled to be satisfied that the right number of lawyers are unleashed on the project, at the right seniority mix, with the least possible duplication; that tasks are sensibly delegated; and that appropriate steps are being taken to maximize prospects for an early resolution. Jones left no doubt as to the importance of this: "There aren't a lot of firms that I found have really good skills of managing complex litigation. ... Those that can manage it well and work well with all people inside the firm and with in-house counsel are sort of rare."

Commandment 4. Avoid the reflexive no-stone-unturned mentality. Time and again, inside counsel referred to a disconnect between the company's needs and outside counsel's instinct to give every task the 110 percent treatment. Judith Dart, general counsel of Comerica Inc., explained it this way: "I find that outside counsel tends to be risk averse, and so they want to do every motion and write every brief and cover every issue and research every particular issue, no matter how insignificant it might be to the bigger picture. And sometimes that gets your bills up very high." This represents no plea from inside counsel for slipshod lawyering. What inside counsel want, and are entitled to, is legal advice and research that affords them a choice between not asking for the advice at all (for fear of horrendous delays or expense) and the whole-hog response to every inquiry.

Commandment 5. Avoid Rambo litigation tactics. Time was when many outside litigators believed that in-house counsel placed a premium on the bellicose-gladiator approach to litigation: Conduct lots of discovery to make life miserable for the adversary, make no accommodations on discovery or other matters, defer settlement discussions until late in the day so as not to betray weakness, and steer away from alternative dispute resolution, a device for wimps, not warlords. It is not clear that this view was ever widely held by inside counsel. Today, most inside counsel would reserve the scorched-earth approach for the aberrational case and resist it hammer-and-tong in the garden-variety case. What inside counsel want is less acrimony; less cost; settlement, where sensible and early; and that litigation move right along. That is not to say that inside counsel always expect quick settlement -- or any settlement at all. Harold Barren, senior vice president and general counsel of the Unisys Corp., noted, "If there is a big principle involved or there is a lot of money involved, or a precedent involved, then we can't settle quickly."

The point is that inside counsel recognize that protracted litigation may sometimes be necessary, but few seem prepared to pay for the acrimonious litigation protracted by lawyer-engendered delays. "Some outside counsel consider it a sign of weakness to stop fighting, and they will pick a fight ... for something that doesn't mean a damn thing -- no one cares," said L. Gene Lemmon, then vice president and general counsel of the Dial

Corp. (Now the company is the Viad Corp. and Lemmon is vice president/ administration.) We have often heard that outside counsel were not getting the message seriously to consider alternative dispute resolution. Richard Paul, general counsel of the Xerox Corp., said "that outside counsel talk a lot about ADR but they don't do it. ... The only time you get any serious work on ADR or business risk taking is when we push it. They should be pushing it."

Commandment 6. Fee discussion should be welcomed, not dreaded. There is nothing sinister about inside counsel's abiding interest in fees. What they want is receptivity to considering alternatives to hourly rates and the best possible early cost projections (and they are usually quite willing to allow for plenty of fudge room to account for unexpected developments). Yet reports are legion of outside counsel walking the last mile to avoid detailed discussion of fees and resisting any probing into that area as something akin to an invasion of their privacy. As William J. Bogaard, then executive vice president and general counsel of First Interstate Bancorp, explained: "Outside lawyers should understand that budget is a tool and not an absolute maximum amount that can be spent for the case. It is a tool by which inside and outside counsel can discuss explicitly what the problems are, what the issues are, what the questions are, what the tactics ought to be."

As outside counsel, I have neither the courage nor expertise to lay down any "commandments" for in-house counsel. But I do offer a few suggestions that seem to me conducive to an effective and harmonious relationship between lawyers inside and outside the company:

- **Designate an in-house point person.** In a major case, it is essential that one able inside counsel be delegated to spend considerable time on the case and serve as the "glue" of the whole operation. Outside counsel needs that person to help figure out how best to get at important company documents; ascertain who are the most important company witnesses or sources of information and get access to them; keep the general counsel and corporate executives up-to-date on the litigation; ensure efficient relations between outside trial counsel and local counsel; and bring company practices, policies, and goals to bear on the prosecution of the case.

- **The general counsel must be involved.** On a major case, the general counsel needs to have sufficient involvement to get the attention of and direction from senior management on the progress of the case and to help shape the strategic planning of the case.

- **Don't overmonitor.** Several general counsels noted the importance of avoiding overmonitoring of outside counsel and of being overly critical of them. Paul of Xerox said: "We can't just always be directive. ... We've hired these people, they're expensive, they're talented, we need to get their ideas back, and I think to an extent we're guilty of stifling that." The most pernicious form of this excessive direction is to insist that trial counsel extreme positions that he or she believes risks a loss of credibility, for that is any counsel's most valuable asset. Trust the trial counsel when she says you are asking her to cross the credibility line.

- **Give praise where due.** If outside counsel is doing a good job, inside counsel are wise to say so and to be supportive of them within the company. As much as we hate to admit it, outside counsel need what everybody else does -- some assurance that their work is of considerable value to the companies they strive so mightily for.

The report of the Big Chill task force ended with comments that lay it out pretty clearly. Paul summarized much of the sentiment of the general counsels as to the type of partnership they seek: "What we are looking for are firms that are willing to make a good

living but don't have to squeeze every dime out of the system they can -- who want to work with you on the project and get good results, and understand that their future well-being is tied in with the corporation's well-being." In building this partnership, corporate counsel stressed the need for outside firms to adopt a client-centered view of legal services. Outside counsel need to focus more on the needs of the customer, rather than their own.

That's what it seems to come down to. The partnership usually works well -- there is no occasion for any Big Chill -- if outside counsel heed what the in-house lawyers are saying.

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