

MANAGING THE LIONS AND ELEPHANTS: WORKING WITH EXECUTIVES AND IN-HOUSE COUNSEL DURING THE LITIGATION PROCESS

ACC National Capital Region
July 11, 2018

SPEAKERS



Anthony H. "Tony" Anikeeff
Partner & Co-Chair, Government
Contracts Practice, and Member,
White Collar & Investigations Team
Williams Mullen
Tel. 703.760.5206
aanikeeff@williamsmullen.com



Scott P. Boylan
Corporate Strategy Consultant
and former Senior Vice President
and General Counsel,
MorphoTrust USA LLC
Tel. 202.251.6393
Scottpboylan@gmail.com



Lance J. Lerman
Senior Vice President, General
Counsel and Corporate
Secretary
Iron Bow Technologies
Tel. 703.279.3018
lance.lerman@ironbow.com

OVERVIEW



- > **Managing your executive team's expectations**
- > **Corporate polices/guidance regarding litigation**
- > **Dispute avoidance and role of alternative dispute resolution**
- > **Preparing executives for deposition and trial testimony**
- > **Wrap-up**
- > **Q&A**

MANAGING EXPECTATIONS – WHAT MATTERS, TO WHOM & WHY

MANAGING EXPECTATIONS – WHAT MATTERS, TO WHOM & WHY



> **Corporate policies/guidance regarding litigation**

- Are there/should there be corporate policies/guidance regarding litigation?
 - Generally/specific types of litigation?

> **What comprises management?**

- C-level?
- General counsel?
- Remote office managing directors?
- Supervisory staff?
- Board?

MANAGING EXPECTATIONS – WHAT MATTERS, TO WHOM & WHY



> **Nature of matter**

- Threatens company existence
- Significant contract, IP and regulatory matters
- Defense against annoyance suits
- Criminal matters
- Affirmative litigation to achieve important goals or to protect valuable assets

> **Nature of company**

- Multi-national company
- Multifaceted national company
 - Multiple offices, divisions and/or subsidiaries
- Single office company

MANAGING EXPECTATIONS – WHAT MATTERS, TO WHOM & WHY



> **What is role of management regarding litigation?**

- Who establishes policy, guidance, strategy and budgets?
- How much is/should management be involved in litigation?
 - What are the drivers?
 - Different types of cases?
- Who manages/decides settlement?
- Who manages public relations and who is spokesperson?
- Dealing with challenging management or board?

MANAGING EXPECTATIONS – WHAT MATTERS, TO WHOM & WHY



> **What is role of in-house and outside counsel in litigation?**

- How does/should in-house counsel engage with management?
- How does/should outside counsel engage with management?
- Direct engagement cases vs. insurance cases?
- Handling litigation in-house versus through outside counsel?

MANAGING EXPECTATIONS – WHAT MATTERS, TO WHOM & WHY



> **How to manage what management needs/wants to know about litigation**

- Nature of case
- Details of case
- Public relations
- Status
- Problems/issues
- Expense vs. budget
- Case gone wrong
- Involved executive
- Board involvement
- Results
- Settlement
- Appeal of adverse ruling

MANAGING EXPECTATIONS – WHAT MATTERS, TO WHOM & WHY



> Addressing the problem situations

- Adverse rulings
- Adverse facts
- Adverse testimony
- Problem witnesses
- Executive involvement – target, involved in acts
- Blown budget
- Intra-company litigation
- Criminal matters

MANAGING EXPECTATIONS – WHAT MATTERS, TO WHOM & WHY



> Are there/should there be lessons learned sessions resulting from litigation?

- What circumstances?
- Who involved?
- Formal process/informal process?

DISPUTE AVOIDANCE & ALTERNATIVE DISPUTE RESOLUTION

DISPUTE AVOIDANCE & ALTERNATIVE DISPUTE RESOLUTION



> **Does/should company undertake dispute avoidance efforts?**

- Per policy/ad hoc?
- How is management involved?
- In what context and if so how?
 - Regulatory compliance
 - Employment
 - Contracts/agreements
 - Customer relations
 - Other
- When do these efforts make a difference, if ever?

DISPUTE AVOIDANCE & ALTERNATIVE DISPUTE RESOLUTION



- > **Does/should company have policy/practice regarding ADR**
 - How developed?
 - What circumstances?
 - Who decides?
 - Types?
 - Mediation
 - Arbitration
 - Management involvement in ADR process

PREPARING EXECUTIVES FOR DEPOSITION & TRIAL TESTIMONY

PREPARING EXECUTIVES FOR DEPOSITION & TRIAL TESTIMONY



- > **Litigation training for executives?**
- > **When to involve the executive?**
 - Investigation
 - Interrogatories
 - Document production
 - Trial

PREPARING EXECUTIVES FOR DEPOSITION & TRIAL TESTIMONY



> **Fact investigation – interviews**

- Before or during deposition preparation?
- Who conducts?
- *Upjohn* admonition approach
- Separate counsel
- Reports to management
 - How much information?
 - Problem executive
 - Investigated executive
 - Former executive

PREPARING EXECUTIVES FOR DEPOSITION & TRIAL TESTIMONY



> **Management involvement in case strategy**

- Message
- Company representative
- 30(b)(6) witnesses

PREPARING EXECUTIVES FOR DEPOSITION & TRIAL TESTIMONY



> Deposition preparation and deposition of company executives

- Roles of in-house and outside counsel
- Who conducts preparation?
- Training an executive to be a good witness
- Senior executive in the hot seat
- Former executives
- Reports to management
 - Who needs to know and what do they need to know?
 - Problem witness
 - Adverse facts

PREPARING EXECUTIVES FOR DEPOSITION & TRIAL TESTIMONY



> Trial preparation and trial

- Management role in deciding to go to trial
- Management role in trial strategy
- Company representative
- Preparing the executive
- Preparing management
- Reports to management
- Role of in-house counsel vs. outside counsel
- Controlling public relations
- Settlement

> Criminal matters

- Avoiding the traps

FINAL THOUGHTS

FINAL THOUGHTS



- > At the end of day, what matters to management?**
- > Lessons and advice to colleagues about what works best**

QUESTIONS?

REFERENCES



> Slide 3: Overview

Jeff Levinson,
[Managing the Corporate Legal Department: How to Create Plans, Develop Processes, and Lead the In-House Legal Team](#), 95 Corporate Practice Series (BNA).

[A LITIGATION MANAGEMENT MODEL FOR CORPORATE COUNSEL](#), 41 No. 8 Prac. Law. 55 (1995).

> Slide 5: Managing expectations - corporate policies/guidance regarding litigation and what comprises management

Robert L. Nelson & Laura Beth Nielsen,
[COPS, COUNSEL, AND ENTREPRENEURS: CONSTRUCTING THE ROLE OF INSIDE COUNSEL IN LARGE CORPORATIONS](#), 34 Law & Soc'y Rev. 457 (2000)

E. Norman Veasey,
[SEPARATE AND CONTINUING COUNSEL FOR INDEPENDENT DIRECTORS: AN IDEA WHOSE TIME HAS NOT COME AS A GENERAL PRACTICE](#), 59 Bus. Law. 1413 (2004).

Omari Scott Simmons & James D. Dinnage,
[INNKEEPERS: A UNIFYING THEORY OF THE IN-HOUSE COUNSEL ROLE](#), 41 Seton Hall L. Rev. 77 (2011).

REFERENCES



> Slide 6: Managing expectations – nature of company

[Classification and Kinds of Corporations](#), 1 Fletcher Cyc. Corp. § 49 (2017).

> Slide 7: Managing expectations – what matters, to whom and why

Jerry M. Custis, Esq., [Litigation Management Handbook § 10:1](#), (2017). This chapter covers the management of settlement negotiations in litigation cases. What happens in the negotiation arena can be strongly bolstered by thoughtful advanced planning.

> Slide 8: Managing expectations – what is role of in-house and outside counsel in litigation

Robert L. Haig, [PARTNERING AT TRIAL BETWEEN IN-HOUSE AND OUTSIDE COUNSEL](#), 66-DEC N.Y. St. B.J. 27 (1994).

Scott D. Nader, [MANAGING LITIGATION FROM THE INSIDE OUT](#), 26 No. 4 ACC Docket 14 (2008).

Jerry M. Custis, Esq., [Litigation Management Handbook § 7:1](#), (2017). This chapter deals with managing active litigation cases, both from the standpoint of outside lead counsel and in-house counsel.

REFERENCES



> Slide 9: Managing expectations – how to manage what management needs

E. Norman Veasey & Christine T. Di Guglielmo,
[The Tensions, Stresses and Professional Responsibilities of the Lawyer for the Corporation](#), 62
Bus. Law. 1 (2006).

> Slide 10: Managing expectations – addressing the problem situations

Source: [Corporate Counsel Guidelines](#) by John K. Villa, Chapter 5. Overseeing Corporate Criminal Investigations and Litigation

Section: [§ 5:7. Retaining outside counsel—Counsel for the corporation](#)
Cite: 2 Corporate Counsel Guidelines § 5:7 (2017)

> Slide 14: Dispute avoidance and Alternative Dispute Resolution

[Corporate Counsel's Guide to Alternative Dispute Resolution Techniques](#) (2017).

Todd B. Carver, [ADR – A Competitive Imperative for Business](#), 59-OCT Disp. Resol. J. 67 (2004).

REFERENCES



> Slide 17: Preparing executives for deposition and trial testimony – fact investigation

Article: [A Renewed Emphasis on Upjohn Warnings](#), by Lee G. Dunst, Esq., and Daniel J. Chirlin, Esq.

Source: The Lawyer's Brief -- March 25, 2010

Cite: 40-06 The Lawyer's Brief Article II

> Slide 18: Preparing executives for deposition and trial testimony – management involvement in case strategy

Taking and Defending Rule 30(b)(6) Depositions for Young Lawyers, Carlton Fields, <https://www.carltonfields.com/taking-and-defending-rule-30b6-depositions-for-young-lawyers-03-30-2012/> (last visited Jul. 10, 2018).

[Fed. R. Civ.P. 30\(b\)\(6\)](#)

REFERENCES



> Slide 19: Preparing executives for deposition and trial testimony – deposition preparation and deposition of company executives

Treatise: Successful Partnering Between Inside and Outside Counsel by Christopher J. Pardi and Brian S. Westenberg

Section: [§ 61:30 Legal issues regarding apex depositions](#)

Cite: 4 Successful Partnering Between Inside and Outside Counsel § 61:30

Article:

[Use Apex Doctrine to Protect High-Level Corporate Execs from Unnecessary Depositions](#) by Christopher M. Tauro, Esq., and Kip J. Adams, Esq.

Publication: Federal Discovery New -- February 2013 – Volume 19, Issue 3

Cite: 19 No. 3 Fed. Discovery News 1

Working Papers (sample language for counsel) : [Upjohn Warning Examples](#)

Source: BNA

[Portfolio 95: Managing the Corporate Legal Department: How to Create Plans, Develop Processes, and Lead the In-House Legal Team](#)

Cite: Jeff Levinson, *Managing the Corporate Legal Department: How to Create Plans, Develop Processes, and Lead the In-House Legal Team*, 95 Corporate Practice Series (BNA).

REFERENCES



> Slide 20: Preparing executives for deposition and trial testimony – trial preparation and trial

Article:

[Avoiding Traps for the Unwary: Corporate Representative Depositions and Proportionality](#) by

Carter E. Strang and Giuseppe W. Pappalardo

Source: In-House Defense Quarterly – Winter 2017

Cite: 12 No. 1 In-House Def. Q. 44