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

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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
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?
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
> Are there/should there be lessons learned sessions resulting from litigation?
  – What circumstances?
  – Who involved?
  – Formal process/informal process?
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
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
Management involvement in case strategy
  - Message
  - Company representative
  - 30(b)(6) witnesses
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).


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


REFERENCES

> Slide 6: Managing expectations – nature of company


> 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


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


> 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


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


Fed. R. Civ.P. 30(b)(6)
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.
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).
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