

## Managing The Case Can Mean Managing The Client

Anthony J. Carriuolo

July 07, 2008



Anthony J. Carriuolo  
Berger Singerman  
350 E. Las Olas Blvv.  
Fort Lauderdale, FL 33301  
954-713-5146  
acarriuolo@bergersingerman.com

The challenges of the business environment today are complicating the way in which clients and their litigation counsel interact. These trying economic times have encouraged parties to become more predatory and, as a result, more inclined to take risks in pursuing factual or legal arguments. The risks normally associated with litigation have become even more critical for clients whose livelihood literally may rest on the expense or results of a legal action.

Businesses have been inundated with myriad pressures, including emerging technologies that may render their existing way of doing things obsolete; aggressive new competitors or existing foes seeking to grab market share; and regulatory or investor pressures. Litigation counsel need to remain acutely aware of how these forces affect the client's views and objectives and the attorney's professional responsibilities. This article identifies some practices that counsel might employ to manage client expectations through the litigation process, and to protect against later scrutiny by clients dissatisfied with the expenses and/or results of litigation.

In the final analysis, the times require a refreshed approach toward clients, their opponents and the system of dispute resolution, both to protect counsel's professional and business interests as a purveyor of services, and to preserve the role and value of the dispute resolution systems.

Litigation counsel's primary obligations toward business clients are to thoroughly investigate and assess relevant facts and legal principles affecting the client's current and future positions; to identify the client's dispute-resolution goals; and to vigorously advocate positions and execute

steps designed to achieve those goals. Experience has revealed, however, many circumstances in which clients seek to achieve an end without considering whether the means genuinely exists to support that objective. Litigation counsel cannot afford to make the same mistake.

### Frank, early assessment

One of the most important roles litigation counsel must play is that of business counsel, rather than simply blind advocate. Many times, a frank, early assessment by litigation counsel is the best medicine when an emotionally charged client ignores the shortcomings or risks in its litigation objectives. Although it can be a difficult task, settling down that aggrieved business owner — getting him or her to think more rationally about the risks and probable outcomes of a long litigation process — can mean the difference between a satisfactory resolution and a costly litigation disaster. Time spent here also could protect the attorney from a subsequent dispute with the client, spurred by misguided expectations and goals on the client's part that counsel failed to reign in early in the process.

This injection of reality is perhaps the most overlooked value that experienced litigation counsel can provide to clients. Litigation counsel must be as realistic and direct as possible when assessing legal options and communicating those to clients. The earlier in the litigation process this exercise occurs, the better. That said, the exercise must never cease. As new facts and circumstances come to light, candid reassessments may be required on the attorney's part. These assessments and reassessments will provide the best value to the client, and will best protect counsel from a disgruntled (and possibly uninformed) client who later might demand fee discounts or extended payouts of accounts receivable or who, worse, threaten malpractice claims.

This focus on realistic risk and cost assessments, and candid communications of the results of that scrutiny, is key not only to a favorable outcome for the client, but also to ensuring a positive attorney-client relationship (regard-

less of outcome). The last place litigation counsel should find himself at the end of a very costly litigation experience is having achieved less than stellar results for the client, whose memory of prior admonitions of risk by counsel is foggy at best, and who owes the firm a tidy sum to boot. Legal malpractice insurers regularly cite bad client management as a prime cause of costly malpractice claims.

### **Managing expectations**

For these reasons, managing client expectations early, and throughout the representation, is a vital task for litigation counsel to perform — both to provide quality legal services to the client and to protect against client claims if hoped-for outcomes don't result. The importance of giving client management due attention is greatly complicated when working with business clients' in-house general counsel; the insertion of general counsel provides a second, distinct layer of client expectations to manage.

In healthy attorney-client relationships, in-house and outside counsel communicate freely, collaborate on the development of case themes and strategies, and cooperate in fact-gathering efforts, including electronic discovery due-diligence. In a perfect world, the case assessments expressed by outside counsel to inside counsel will equate with what the general counsel is telling his or her board of directors or chief operating officer. Litigation counsel must remain mindful, however, that a seemingly healthy attorney-client relationship with the general counsel may later morph into an awkward and costly dispute with the client and/or the general counsel. A balanced level of self-protection is in order, for the unwary counsel may pay the price later in troubled times.

Attorney-client relationships can quickly degrade into the same adversarial posture that led to the need for counsel's engagement in the first instance. How many times have attorneys, in their relationships with their clients, not done those simple tasks they chastise their clients for not doing in their business dealings — taking notes of oral conversations, documenting agreements and expectations, and remembering that the relationship at some level must remain business-like? If critical communications with clients are not documented, counsel can become open to claims from a dissatisfied client that the risks attendant to litigation were not fully explained. That "CYA" e-mail may be the difference between discarding a trumped-up malpractice claim at its infancy, or paying through the nose because one trusted one's client.

### **Managing client zeal**

One of the ways counsel may temper the eagerness of that emotional client to go for the jugular in litigation is a friendly but pointed cross-examination of the client. Nothing cures an overzealous view of entitlement better than a careful picking-apart of the client's slam-dunk presentation of the "facts" supporting its claim. Clients exaggerate, bend the truth or earnestly believe certain presumed facts that, upon further scrutiny, may not pass evidentiary muster. The sooner the client sees that its world view is not necessarily the one the judge or jury may adopt as true, the better.

This early client management tool is important in several respects. First, it emphasizes to the client that there are at least two sides to every story, and that it is at least within the realm of reasonable possibility that the client's version of the facts may not be accepted by the arbiter of the dispute. The attorney's job is to root out provable facts, overlay legal principles and determine appropriate and credible positions to pursue based on the attorney's experience and the client's goals. Second, this process might show the client that the attorney's experience and technical ability to elicit information are assets valuable to his interests (and that the attorney's hourly rate is quite reasonable). Finally, with any luck, the attorney will gain critical credibility with the client, which will pay dividends for both of sides of the attorney-client relationship later when assessing risks, expense concerns, probable outcomes and dispute-resolution terms.

This important devil's advocate role provides quality counsel to the client and, as a corollary, will provide the attorney with protection against later-contrived claims that he or she failed to explain litigation risks. It also might caution the client that its views of attainable goals were extreme and contrary to the attorney's valuable advice. Despite being a close confidant of the client and a keeper of its secrets, the attorney must remain independent enough to provide objective counsel, and to protect him- or herself. In fact, traditional rules of professional conduct recognize this careful balance between zealous advocacy and professional independence.

This healthy differential between the client's views and the attorney's frank assessment of the client's claims also helps resolve disputes. Counsel should offer insightful, creative business solutions to the client's disputes, guided by an assessment of attendant risks of success, expenses and business benefits. The last role the attorney should adopt is that of a parrot for the client's uncensored and untested views and arguments.

## Conflicting obligations

The tension between a litigator's charge to prosecute or defend the client energetically, and the obligation to maintain truth and professionalism, has been exacerbated by the ever-increasing strategic use of discovery (and discovery sanctions) in adversarial proceedings. Long ago, litigation was resolved much more frequently on the merits, following a trial before judge or jury. Discovery was far simpler then — produce one's hard-copy documents, carefully craft interrogatory answers, conduct (nonvideotaped) oral examinations and proceed to trial.

Today, discovery disputes at times become the primary means by which opponents flex muscle, seek to pull courts their way early in the case and gain leverage for settlement negotiations. The process at times is far removed from the strengths or weaknesses of the actual merits of the claims or defenses presented.

Electronic discovery has only multiplied these potential pitfalls and the opportunities for discovery disputes to play a central role in dispute resolution. As the risks attendant to e-discovery have increased, litigation counsel's vigilance must follow suit. Frank and documented consultations with clients on issues such as e-discovery compliance have taken on new importance.

Litigation counsel's proper role in the adversarial system of justice was recently scrutinized in a series of opinions issued by the U.S. District Court for the Southern District of California; see *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B, 2008 WL 66932 (S.D. Calif. Jan. 7, 2008), remanded in part, 2008 WL 638108 (S.D. Calif. March 5, 2008). The Qualcomm decisions highlight the court's appropriate oversight of what lawyers do, independent of what their clients may or may not do, and emphasize the critical buffer counsel must provide to the dispute resolution systems.

The court in Qualcomm was particularly incensed by the reported failure of certain Qualcomm attorneys to maintain the important parallel roles as advocates for clients and protectors of the sanctity of the judicial system; that failure led the court to refer a number of Qualcomm's litigation attorneys to the State Bar of California for possible discipline. It certainly appeared from the facts reported by the Qualcomm court that the attorneys under scrutiny had failed to maintain that basic level of professional independence that forms the foundation necessary for the adversarial system to work — that of seeking the truth.

## Do the right thing

So what is litigation counsel to do, when tiptoeing through this minefield? Counsel should do the "right thing," and maintain a healthy sense of self-protection.

Attorneys should develop a set of inquiries to investigate and understand the client's information and data systems. They should push clients to let them invest the time they need as attorneys to understand the clients' business systems, so that they can ensure discovery obligations (both the attorney's and the client's) are satisfied. They should document their diligent efforts, both to evidence clients' forthright approach to discovery compliance and to demonstrate their earnest efforts to educate themselves about their clients' business systems, so that their own positions on discovery compliance have substance and foundation.

Through these efforts, counsel will present the client with a keen sense of the importance of discovery compliance in today's litigation environment. The client will be better educated about the multiple risks and burdens of litigation; the attorney's role as counsel will be performed faithfully; and the vital role of the dispute-resolution systems will be protected.

In the end, it's all about professionalism. Attorneys are professionals with specific talents that businesses more frequently than ever seek out. To be true to the legal profession, attorneys must take seriously their dual roles as consumers and protectors of our judicial system. If attorneys perform their roles faithfully, their business clients will be better counseled, better satisfied and less inclined to scrutinize their counsel later, and the performance of the dispute-resolution systems will be maximized. ■