



Litigation by the Corporate Generalist: A Necessary Skill

by John H. Ogden

Introduction

In many, if not most, respects corporate counsel are much the same as our non-legal business colleagues. Our colleagues specialize in marketing, finance, or engineering; we specialize in law or a particular facet of the law. The major difference between corporate counsel and our business colleagues is that corporate counsel are licensed to represent clients before the court. There is a growing trend for corporations to utilize employed counsel for litigation.¹ Indeed, more and more corporate counsel have a practice almost entirely devoted to litigation.² This article will advance the proposition that most corporate counsel should litigate or engage in some portion of the litigation process even if litigation is not their specialty. The premise of this article applies to companies with or without in-house litigators. Just as corporate generalists can participate in the process with retained counsel, there is value to the corporation if in-house litigators also involve their generalist colleagues in litigation. Indeed, in-house litigators may find their practice somewhat easier if their generalist colleagues' exposure to litigation leads them to draft agreements and counsel clients with a more realistic view of the potential end result.

Before going further, a brief note on the author's perspective may be worthwhile. I litigate on behalf of my corporation. I do not do it because I enjoy litigation. As primarily a commercial attorney, I consider it to be a failure in most instances to have a dispute reach the courthouse. For the most part, I find litigation tedious and

counterproductive. Much of the current litigation process in the United States is an unfortunate waste of resources which could be better applied elsewhere. ACCA and other organizations have been active in programs to improve this situation. Until it is improved, however, litigation as it exists today with its delays, discovery abuses, and so forth, is a fact of life with which corporate counsel must contend. The ultimate test of the advice we provide to our corporations and the other measures we take on behalf of our corporations is in the court system (or an ADR equivalent which, while frequently preferable, will not be addressed in this article). Simply put, therefore, a corporate counsel who involves him- or herself directly in the litigation process is more valuable when performing his or her primary functions because it is that litigation process which can ultimately determine the effectiveness of those primary functions.

Two events led me to develop the foregoing hypothesis. I attended oral arguments on the amicus curiae brief filed on behalf of ACCA and its New Jersey Chapter challenging the proposition that in-house counsel cannot represent their employer in court.³ While waiting for oral arguments to begin and listening to several motions on other matters, I reflected on the high percentage of my time that had recently been spent (wasted?) on drafting, filing, and arguing such motions as well as taking and defending depositions, handling interrogatories, and the other tiresome but often crucial minutiae of litigation. For a fleeting moment I thought how much more satisfying corporate practice might be if my license to practice law were in some way limited and I could, without the pangs of conscience which would afflict me today, avoid becoming attorney of record in those cases which are appropriate. The thought soon passed, the amicus brief was skillfully argued, and the judge ruled in favor of corporate counsel. Of course the situation about which I was daydreaming in court exists in the United Kingdom and other commonwealth countries with solicitors (who cannot represent clients in court) and barristers (who only represent clients in court).

I was reflecting on these differences several months after the amicus curiae argument while having lunch in London with a leader of the

U.K.'s in-house barrister's association, who was describing their--as yet unsuccessful--attempts to secure for in-house barristers the right to fully represent their companies before the court. Other countries in which I have conducted business differentiate among lawyers in other ways. In Germany, I know many in-house counsel who are jurists (one trained in the law) but not attorneys (rechtsanwalten) because they have not taken the German bar exam. Even rechtsanwalten, however, despite having passed the bar exam and being authorized to represent other clients in court, cannot appear in court on behalf of the company of which they are employees. In the People's Republic of China, one's license to practice law is tied to affiliation with a law firm. While it is theoretically possible for a company to establish an "in-house law firm," it is extremely rare.

Certainly it seems clear that a corporation is better served if its in-house lawyers are authorized to represent it in court. This is because in-house attorneys' familiarity with corporate matters frequently allows them to provide the most effective--including the most cost-effective--representation of a corporation when the corporation is involved in litigation. In order for the corporation to choose such representation, its in-house attorneys must have the full authority granted by their licenses to practice law. This authority must extend to the right to appear in court.⁴ It is the premise of this article that to some extent all in-house counsel must make use of that authority if they are to effectively perform their overall legal role in the organization.

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Benefits to the Client Providing Counsel

One of the primary areas which is enhanced when a generalist litigates is the provision of advice and counsel to the corporation. Attorneys are employed to, inter alia, provide expert legal advice. In-house counsel are particularly valuable to the corporation due to their intimate knowledge of corporate operations. Because of this knowledge, when advice is solicited from corporate counsel, the advice provided should

be particularly suited to that corporation, its goals, culture, and methods of operation. Being in-house also allows an attorney to practice pro-active law by involving him- or herself in corporate matters as and when appropriate rather than being retained after a problem arises. None of these advantages should, however, be a substitute for maintaining excellent legal skills.

Whatever the corporate counsel's primary role, to a large extent it will consist of applying the law to the corporation's specific facts. Litigation in its purest form, without the unfortunate extraneous trappings which have accumulated over the years, consists of attorneys for two or more parties applying the law to specific facts in an adversarial setting. As was pointed out in the introduction, this adversarial setting truly tests the efficacy of advice rendered by an attorney. Wouldn't a corporation, therefore, be better served by an attorney who, in addition to providing counsel, negotiating, reviewing documents, and so forth, is also regularly put to that "test" by drafting a complaint or an answer and even more so by researching the law, then writing, filing, and arguing a summary judgment motion or pretrial brief? Unless the corporate counsel specializes in a specific area of the law and litigates in that specialty, there may not be a total match between the advice being provided and legal analysis skills recently honed and updated by litigation. Nevertheless, the skills demanded by the adversarial process of litigation--clarity of thought, precision in legal analysis, and effectiveness in advocacy--make an attorney better able to advise a client. If a corporate counsel (or any attorney) spends the majority of his or her time advising clients or negotiating with third parties, certain aspects of his or her legal skills may diminish if they have not been "tested" since law school.

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The Best Choice

In addition to situations in which litigation improves counseling skills, there may be times when a corporate generalist is simply the best

attorney to handle a given matter due to his or her knowledge of the business. By way of example, the author has been involved in several trade secret injunction actions. Because of the speed required, and procedural complexity of orders to show cause, temporary restraining orders (TRO), preliminary injunctions, and so forth, retained counsel generally (but not always) served as lead counsel rather than the author "learning on the job" while trade secrets continued to be misused. Once a TRO is secured (which restricts activities by a competitor), an antitrust counterclaim frequently follows. At this stage, the author decided it would be more efficient and effective to prepare and brief the motion to dismiss (naturally with significant input from lead counsel). Further, the author conducted the oral argument himself.

This is a situation in which corporate counsel is the best available attorney for a specific task. What corporate counsel can provide in such a situation is knowledge in depth and in detail of the corporation's market(s). This is particularly important in the instant example since it cannot be accurately predicted what questions the judge may have during oral argument.

Additionally, the judge may refuse to dissolve a TRO once it's in place, but may be willing to limit or revise it. Only if the attorney on his or her feet in front of the judge is intimately familiar with the corporation's operations and future plans can a potentially damaging modification be avoided. By way of an example, a suggestion by the judge during colloquy which appears reasonable to even the most skilled retained counsel may in fact work to the detriment of the corporation.⁵ Since the TRO has already been granted, it has been established that the corporation is entitled to at least interim relief. If counsel is aware of factors which can immediately be applied to the judge's suggestion, the judge may very well agree that the proposed modification of the TRO, in fact, vitiates the protection to which the corporation has preliminarily been judged entitled. It may be that in-house counsel sitting second chair can convey the necessary information to the attorney arguing the motion or perhaps the issue could be briefed later. However, with the first option, miscommunication may result or lead counsel may miss

an important portion of the judge's dialog with opposing counsel. The second option is feasible, but would require having the judge change his or her mind after the fact rather than influencing his or her thought process in the formative stage. Additionally, the second option would involve the daunting task of having the judge reinstate or modify a TRO yet again. (Other situations which particularly lend themselves to full or partial participation by corporate generalists will be addressed in "Effective Approaches to Litigation," below.)

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Management of Outside Counsel

A further benefit of litigation by corporate generalists is that it makes them more effective managers of retained counsel. Despite, or perhaps because of, such necessary developments as alternative fee structures and legal audits, there is no better foundation for effective management of retained counsel than knowledge of the work product and process. Litigation is one of the most important areas in which corporations expect in-house counsel to provide effective and economical management of retained counsel. An in-house counsel who has decided whom to depose and for how long, whether to file an evidentiary motion, how extensive a search of precedents is required, and myriad other decisions to be made during litigation, is in a substantially better position to manage outside counsel performing those functions than one who has not. Those experiences⁶ give an in-house generalist the tools to effectively define, in conjunction with retained counsel, the optimum scope of activities. A corporate generalist who also litigates is in a stronger position to involve him- or herself in key decisions regarding the work product. This is frequently more effective than focusing solely on costs or auditing those costs after the fact.

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Litigation as Audit

Litigation can serve an audit function with regard to corporate activities. As previously stated herein, the author considers many lawsuits to be-- at least partially--a failure no matter what the outcome. Corporate counsel practicing pro-active law should avoid much litigation by counseling employees to avoid certain conduct in efforts to comply with law and regulations, drafting agreements which withstand unreasonable challenge, effective negotiation of disputes, and so forth. In that sense, therefore, many lawsuits result because corporate controls have failed and the methods of dealing with such failure have also failed. Therefore, the resulting litigation, and, particularly, the discovery process, can serve as a means of diagnosing those failures. If the attorney litigating all or part of the case is a corporate generalist, that corporate generalist should, based on the intimate firsthand knowledge acquired during discovery and drafting and/or arguing pleadings, be in a very strong position to do what is necessary to avoid similar situations in the future.

Auditing of corporate compliance programs and exercises to determine their effectiveness have become commonplace. By way of analogy, a company can and should drill extensively how to respond when hazardous material spills. This is a very valuable lesson, but nothing can replace an actual incident as a test and opportunity for review and improvement. However, just as no one would intentionally spill hazardous material in order to confirm the company's ability to respond, no one would commence or invite litigation as a means of reviewing the company activity being litigated. To complete the analogy, a careful review of the company's actions with regard to the actual hazardous material spill would certainly take place; a similar review should take place with regard to activity giving rise to litigation. In many respects, the corporate generalist is the ideal candidate to conduct that review since he or she can bring a broad general perspective to the matter. Litigating all or part of the matter is an excellent first step in that review.

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Pro Bono

The benefits derived from litigation as described above, to a large extent, also accrue to the corporation from pro bono activities by its in-house counsel. Although the issues being litigated rarely touch on matters directly relevant to the corporation, the development and maintenance of lawyerly skills make the corporate generalist a better attorney and therefore more valuable to the corporation. Even if a corporation does not recognize the value of providing pro bono representation (to the extent these obligations are not mandatory in a given jurisdiction), a pro bono program has a business justification (over and above any public relations value) for all the reasons set forth in this article with regard to the value of litigation by corporate generalists.

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Choosing Appropriate Matters to Litigate

The previous section addressed how litigation by corporate generalists can benefit their clients. Naturally, this is true only if the attorney makes appropriate choices as to which matters to handle and the extent to be involved.

Note: This suggested selection process applies only to corporate generalists. Full time in-house litigators can and do handle virtually all cases faced by corporations.

Perhaps the most important decision to make is which matters not to handle. Obviously if the fate of the company or other high stakes are involved, the best attorney to represent the company would be the one with the most relevant experience and skills. Most likely this will be a full-time litigator either employed or retained. Frequently, however, such litigation will be managed by a corporate generalist. Having maintained the skills discussed in this article is most useful in performing that role. Another type of case which should be avoided by the corporate generalist is one which is expected to be very time consuming, even if it

is otherwise appropriate. Since the main thesis of this article is that litigation by corporate generalists maintains lawyerly skills which apply in the primary area of his or her practice, it would be an inappropriate allocation of time and resources if the corporate generalist found him- or herself so busy with litigation for an extended period of time that attention to his or her primary function suffered.⁷ A corporate generalist should consider litigating all or part of any civil case which does not fall within the foregoing two categories.

Having identified the cases not to handle, the corporate generalist can then consider which cases to handle and the extent of involvement. (See "Effective Approaches to Litigation," below, for a discussion of the appropriate extent of involvement.) Following are some types of cases which a corporate generalist may wish to consider, always keeping in mind that the case load should not grow to a level which affects his or her primary duties.

Nuisance suits brought against the company are prime candidates, particularly if based on the plaintiff's thinking that rather than paying to defend, the company will offer a settlement. Having the first responsive pleading signed by in-house counsel sends a signal that differential costs will not be a significant factor in deciding whether or not to settle.⁸ It has been the author's experience that even judges who exert a great deal of pressure in conference to settle recognize and respect the different dynamics of in-house rather than retained counsel representing the defendant in an action in which the plaintiff's case is obviously weak.⁹ In addition to the other benefits of litigation by the corporate generalist, it's possible that word will get out within the industries and jurisdictions in which the corporation does business that the company is unlikely to settle cases with little or no merit. In the long run, this will reduce costs to the corporation.¹⁰ Over time, the relatively small settlements which, singly, made sense rather than diverting company time and resources to defend, can add up to significant expenditures.

A type of case which is the flip side of defending the nuisance suit is one in which the corporate generalist is counsel for plaintiff with a very

strong case but with a financial value which may preclude retaining counsel. In fact the defendant, in refusing to settle prior to litigation, may have cynically concluded that the plaintiff would do a cost/benefit analysis and decide not to sue. As with defending the nuisance suit, pursuing these cases can have long-term benefits when it becomes known to the industry and/or the local bar that the company will enforce its rights. Additionally, not enforcing those rights can cost the company a significant amount of money over time.¹¹ In a way, these cases may be the ideal type of case for the corporate generalist. He or she can (and should) be attorney of record for the same incremental cost reasons addressed in the nuisance suit discussion. In the final analysis, if the generalist was unable to devote enough time to the case to be successful (or perhaps turned out not to be as effective an advocate as hoped--in which case mistakes should be analyzed for future cases), then the company may be no worse off than if it had not pursued the matter at all. Additionally, the time invested will make the generalist a better attorney in his or her primary role, and the company will reap future benefits as described above.

A related type of case is one in which a principal should be established even if monetary damages are not significant. For example, a sub-supplier which provides a service uses the corporation's proprietary information to do so under the terms of a secrecy/non-compete agreement. The sub-supplier may wrongfully offer the service directly to a very limited segment of the aftermarket. The actual damage to the corporation may be de minimis.¹² In such a case, retaining outside counsel may be too expensive, but doing nothing to redress known violations of the secrecy/non-compete agreement may be ultimately more expensive if it leads to a perception that the company isn't serious about the agreement or even worse, a waiver and estoppel defense used by the sub-supplier or other potentially more serious violators. This may be an appropriate case for the corporate generalist, perhaps augmented by advice on the nuances of equity practice in the appropriate jurisdiction.¹³

Once a corporate generalist has been successful at trial, he or she

should seriously consider handling the appeal. If the trial was unsuccessful, a generalist may not be the appropriate appellate counsel since the appellant has a greater burden than the respondent. However, a corporate generalist who tried the case would be the most likely candidate to be counsel for respondent. He or she best knows the facts and the law. To the extent specific appellate expertise is required, it can be secured similarly to trial assistance as discussed below.

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Effective Approaches to Litigation

Naturally the most complete way for an attorney to litigate is to be attorney of record and handle all matters pertaining to the case. Corporate generalists must ensure a colleague can serve as a back-up to answer calendar calls or attend mandatory conferences in the event of scheduling conflicts. While any attorney can have scheduling conflicts, judges frequently will accept only an appearance in another court as sufficient reason for not attending an important conference or hearing. From the corporation's point of view, however, it may in fact be substantially more important that corporate counsel attend a board meeting or contract negotiation. Therefore, someone, either a colleague at the corporation (who may face the same conflict of priorities if he or she is not a full time litigator), or retained counsel, should be familiar enough with the file to appear on short notice.

Additionally, a corporate generalist may not be conversant enough with civil procedure or the rules of evidence to operate entirely unassisted. He or she should feel free to seek specific guidance on key issues. It is recommended, for instance, that an experienced litigator whose judgment you trust be available to review pleadings and briefs before filing to ensure the generalist's lack of total familiarity with the process has not resulted in an error. In the author's experience, it is also useful for that litigator to review work product from an advocate's point of view. Corporate counsel tend to develop a certain writing style which, while appropriate in a corporate setting, may not be persuasive in an

adversarial setting. Frequently the main points are unchanged (except perhaps for the order of presentation) and only a few changes are made to "punch up" the writing, making it more forceful than might be appropriate in a corporate setting.

Although corporate generalists with the proper preparation should have no qualms about arguing motions before a judge or even trying a non-jury case, presenting a case before a jury, as well as the direct and cross examination of witnesses along with the associated objections, may be too much of a reach for one who doesn't try cases frequently. This doesn't mean that the corporate generalist cannot handle the case.¹⁴ A full time in-house litigator or retained counsel with whom there is an ongoing relationship should be willing to handle witnesses with the corporate generalist handling motions as well as opening and closing arguments.

There are myriad other ways for the corporate generalist to participate in litigation. He or she may be second chair, responsible for certain aspects of the case. For example, based on knowledge of the corporation and its products and services, corporate counsel may be the strongest candidate to do direct and even cross examination of expert witnesses (this must be preceded by a thorough review of the relevant jurisdiction's rules of evidence regarding experts.)

Again based on his or her knowledge of the company, corporate counsel might effectively prepare a first draft of the pleadings. He or she would not sign the pleadings in this situation, but undergoing the discipline to marshal the facts, then decide which cases, regulations, restatements, or other authority(ies) to cite would help maintain the necessary level of legal skills.

"Benefits to the Client," above discussed the value brought by in-house counsel to a specific type of motion. Motion practice in general may be a useful way for the corporate generalist to participate in the litigation process and achieve many of the benefits being discussed herein. Depending on their complexity, the writing and arguing of motions

maintains a certain level of advocacy skills. Performing those functions while complying with the procedural rules also gives a corporate generalist a sense of the overall litigation process. This contributes to the litigation management skills discussed herein.

Discovery is another possibility for the corporate generalist to take a role in the litigation process.¹⁵ This could be in the form of taking or defending depositions which would maintain fact-finding skills. In-house counsel could prepare interrogatories or answers to interrogatories which can be a valuable (albeit rarely interesting) way of interacting with corporate officials at various levels in a manner which offers a different perspective from the corporate generalist's normal perspective. It also is a useful test of how well the corporation complies with any document retention program and can be effective in convincing corporate officials of the need to maintain the attorney-client privilege by, inter alia, limited distribution of appropriate documents.¹⁶

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Conclusion

A corporate generalist should maintain a carefully chosen litigation practice. The author believes it is the best (perhaps only) way to keep lawyerly skills intact and effectively perform his or her primary role(s) such as advising the corporate client, negotiating agreements which will withstand a challenge in court, reviewing or drafting corporate policies which comply with the myriad regulations extant today, managing retained counsel, or whatever other roles are performed.

By carefully choosing the caseload (and particularly avoiding the wrong cases), litigation by the corporate generalist should also yield direct benefits such as cost avoidance and damage recovery which would have been unavailable if retained counsel were the only choice.

Footnotes

1 See, for instance, testimony by 1993 ACCA Chairman, Daniel S.

Hapke Jr. before the California Bar Futures Commission on October 8, 1993. As reported in the March 1994 issue of ACCA News, Mr. Hapke indicated that this is being done for purposes of cost cutting and responsiveness to the client. He indicated repetitive matters and matters subject only to federal law as being prime candidates for in-house litigation.

- 2 Indeed, as of May, 1994, more than 1,100 attorneys, or almost 12% of the entire membership of ACCA belong to ACCA's Litigation Committee. More than 100 attorneys nationwide attended a program presented by the Litigation Committee for in-house litigators in September, 1993.
- 3 *United Jersey Bank v. Valley Falls Food Products*, No. PAS-L-2059-92 (Super. Ct. of N.J. July 10, 1992).
- 4 See, ACCA's Admission to Practice policy statement which was passed by the Board of Directors on May 13, 1986, and reaffirmed on March 4, 1994. The first sentence of that policy statement reads as follows, "Corporate counsel must be able to represent their clients in all aspects of corporate legal affairs, including litigation, regardless of jurisdiction."
- 5 The author has observed situations in which opposing counsel retained by, for example, a foreign party who does not send a representative to court concurs with such modifications to the eventual detriment of the client.
- 6 In addition to others, such as participating in conferences with a judge or magistrate concerning the overall direction of a case, as well as negotiating with opposing counsel over contested discovery issues.
- 7 Of course, it must be recognized that any litigation is likely to have periods which are time consuming and demanding, and that such periods are often difficult to predict.
- 8 This should be done in such a way as to not prejudice a corporation's right to be awarded attorney fees as appropriate.
- 9 In certain cases the corporate generalist may argue to opposing counsel as well as the judge that since the defendant corporation is being represented by staff counsel, the costs of the suit are not at issue when deciding whether to settle and at what cost. Full-time

corporate litigators, as well as corporate generalists in certain cases, may not wish to take this stance should the defendant prevail and the award and valuation of legal fees become an issue. ACCA has taken the position that in-house counsel are entitled to attorneys' fees as provided by law.

- 10 See, W. Sanders Jr., Companies that Roll Over May End Up Dead, Nat. L.J., May 16, 1994, at A19.
- 11 See, author's statement regarding a successful summary judgment motion against the U.S. Customs Service (Werner & Pfleiderer Corporation v. United States, No. 93-166 (Ct. Int'l Trade)) in Robin Bulman, After 4 1/2 Years . . . , Journal of Commerce, Sept. 8, 1993, at 1A, "In terms of economic justification, surrendering rights in seemingly small matters accumulate over time and result in considerable excess cost or lost opportunity cost," at 3A.
- 12 Indeed, some in the company may argue it is easier to let the sub-supplier address that small market niche.
- 13 In the facts presented, corporate counsel, since his or her client is the customer, should have ensured a convenient jurisdiction in the original agreement through the governing law provision of the secrecy/non-compete agreement.
- 14 Remember also that a very small percentage of cases are actually tried, hence the term "litigation" defines primarily pleadings, motion practice, and discovery.
- 15 On April 5, 1994, the author attended a presentation to ACCA's New Jersey Chapter by Peter Giuliani of Altman Weil Pensa, who identified upcoming trends, including corporate legal departments bringing in-house all or part of litigation, particularly discovery. See, Management Trends, The Metropolitan Corporate Counsel, May, 1994, at 16.
- 16 The corporate generalist should be careful to maintain his or her status (and privileges) as an attorney without becoming the company representative with regard to corporate records and thus subject to discovery. Whatever work he or she performs with regard to interrogatories, subpoenas, and/or document requests, another corporate official should sign any required certification except those, such as certificate of service, typically signed by the attorney of

record.

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