

BUSINESS LITIGATION

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IN THIS ISSUE

Sandy Wunderlich provides sage advice on when to disagree with your client and how to do it constructively.

The Art of Disagreeing with Your Client

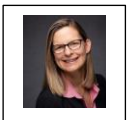
ABOUT THE AUTHOR



Sandra Wunderlich is a partner in the St. Louis office of Tucker Ellis LLP. She has a diverse litigation background, with a particular emphasis on intellectual property consulting and litigation. An experienced trial lawyer, Sandy has been lead trial counsel in more than a dozen jury and bench trials. Over the past 25 years, she has litigated intellectual property matters from the cease-and-desist stage through appeal. Sandy has also represented large pharmaceutical manufacturers, agricultural and industrial manufacturers, a Fortune 50 company, and large national banks and credit arms of Fortune 100 companies in complex litigation matters. She is the incoming chair of DRI's Women in the Law Committee, and actively speaks and writes for organizations including IADC, DRI, IPO, and INTA. She can be reached at Sandra.Wunderlich@tuckerellis.com.

ABOUT THE COMMITTEE

The Business Litigation Committee consists of members involved in business and commercial litigation including business torts, contract and other commercial disputes, e-commerce, antitrust issues, trade secrets and intellectual property, unfair competition and business defamation and disparagement. The Business Litigation Committee helps connect members involved in these areas around the world through networking and referral opportunities; developing and keeping current in the substantive, strategic and procedural aspects of business litigation; and affords members an international forum for sharing current developments and strategies with colleagues. Among the committee's planned activities are newsletters, publications, sponsorship of internal CLEs, and Webinars. Learn more about the Committee at www.iadclaw.org.



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Clients hire attorneys to provide advice regarding the risks and the likelihood of those risks occurring, and then the client decides how to proceed in light of those risks. Although that seems like a straightforward concept, it is a complicated dynamic between the attorney and client. The attorney serves as both an advocate and a counselor, charged with assisting the client in achieving its goals, while also helping it avoid missteps. The challenge comes when these two objectives conflict with each other. This may require the attorney to disagree with his or her client. This takes on an entirely new dimension when the attorney delivering the advice is in house and must disagree with the boss.

When asked about the role of each in the decision-making process, clients and attorneys surprisingly have differing views. Clients report that their expectation is that the attorney will not only communicate the risks, and the likelihood of their occurrence, but also that the attorney will raise a further protest if the attorney disagrees with the client's ultimate decision in light of those risks. On the other end of the spectrum, attorneys believe their role is to provide the client with information about the risks, and from there it is the client's job to make decisions, and it is not the role of the attorney to question the decision made by the client. This disconnect can cause damage to the attorney-client relationship and may result in disaster for the client.

This article explores the most common reasons that an attorney may not articulate his or her disagreement with management's decisions, the reasons why speaking up is critical to the long-term success of the organization as well as the attorney-client relationship and offers strategies for expressing disagreement with the decisions of the client without causing damage to the relationship.

Reasons Attorneys Avoid Expressing Disagreement with the Client

1. Deference to the Client. As noted above, many lawyers see their role as identifying and communicating the risks, and then letting the client make its own decisions. While there is no doubt that the ultimate decision rests with the client, it is important that the deference does not go so far that disagreements are not voiced and vetted.
2. Conflict Avoidance. Lawyers are risk adverse. Although this trait makes them good at their job, it also makes them hesitant to take the risk of disagreeing with the client. In personality profile tests, lawyers score very high on risk aversion, and they score low on resiliency. This results in people who prefer not to take chances, and who want to be liked by others. Ironically, this personality profile can lead them to avoid difficult conversations when a difficult

conversation may be exactly what is needed.

3. Fear of Negative Repercussions. The lawyer may fear being labeled as difficult or being an impediment to the business rather than a partner seeking the best path forward. If the client resists challenges, and disagreements are not welcome, it can be particularly risky to raise concerns.

4. The Path of Least Resistance. Life is much easier when you are in harmony with your client, and you agree on the decision reached. But, when that does not occur, it is important not to be agreeable just to avoid having a difficult conversation.

5. Lack of Confidence. If the lawyer does not feel confident that his or her opinions will be received in the spirit in which they are intended—for the good of the client—then they are hesitant to share their reservations about the decision and will be tempted to limit their advice to the communication of the risks and no more.

Reasons Attorneys Should Express Disagreement

1. Increases Risks to the Organization. Stating the obvious, the organization is not receiving the full benefit of the attorney's advice if the attorney does not feel comfortable raising his or her discomfort with the client's decisions, which exposes the

organization to greater risk of problems.

2. It Has the Opposite of the Intended Effect. Companies hire lawyers to help them avoid missteps. When the lawyer does not express his or her reservations about a planned action, the lawyer misses the chance to bring real value to the organization and solidify their role as a trusted advisor. Raising concerns invites an opportunity for learning and growth on both sides and can result in a true partnership between the attorney and the business. By not speaking up, rather than being the safer alternative of avoiding conflict with the client, it can backfire, resulting in greater risk to the attorneys' position because the client may lose trust in the attorney's ability to guide the company.

3. Better Results. Multiple studies have shown that the magic of a diverse team lies in the different ideas and perspectives that comes with it. Where diverse team members feel safe expressing their views, the end-result is better. Raising concerns about a decision can provide a new angle not previously considered, and allow for greater vetting of the decision, which improves the results in the long run even if the decision is not changed. It leads to greater buy-in by the team but also increases the likelihood of success in implementing the decision.

4. Not Speaking Up Takes a Heavy Psychological Toll. The legal profession is stressful. Suppressing concerns that the client is making a mistake adds to the stress carried by the attorney. The unspoken issues fester and create even more anxiety weighing on the mind of the attorney. This results in burnout and job dissatisfaction, and when the attorney is in house, results in turnover and a lack of continuity in the legal department.

5. Creates a Culture of Inclusiveness. Attorneys should lead the way in creating a culture of inclusiveness among their team, and that extends to clients. By voicing their concerns, they invite others to voice theirs. Ironically, expressing disagreement and having a healthy debate about the points of disagreements improves relationships rather than harms them.

Strategies for Effectively Disagreeing with the Client

1. Give yourself time to think. When the client makes a decision that seems to underestimate or ignore the risks outlined by counsel, before expressing disagreement or reservations with the decision, it is important to take the time to think through the underlying reason for the concerns, consider alternative solutions to address the concerns, and the best way to communicate the issues to the client.

2. Seek to Understand. Acknowledge what you do not know and give due deference to that lack of knowledge by asking questions. Questions invite discussion and give both sides the opportunity to learn more about the other's position. It also creates the opportunity for the parties to come to a mutually acceptable resolution in a far less confrontational way.

3. Give thought to the timing and context. When the conversation has the potential to be difficult, it is always best to choose the timing and the location of the discussion carefully. Disagreeing with a client's decision in front of his or her direct reports, or perhaps even worse in front of his superiors, is not likely to end well even if the message is ultimately the right one and is delivered carefully. Consider a private conversation where there is not so much emotional involved, but don't wait until the last minute to raise the concerns either.

4. Focus on the impact on the organization. When the attorney's concern is voiced in terms of the interests of the organization, it limits the potential for the client's ego to be bruised and allows for a healthy discussion about the pros and cons of the decision for the good of the organization.

5. Choose your words carefully. Presenting the disagreement

objectively makes it more likely to be given appropriate consideration. Using critical words can be counterproductive words such as short-sighted, hasty, or disastrous will set the wrong tone from the outset.

6. Be direct and honest. It is important to ensure communication of the risks is direct and forthright, acknowledging the unknowns, the possibilities, and the likelihood of their occurrence. It does not serve either party to avoid directly confronting the issues. While documentation of the attorney's assessment and communication of the risks is essential, a CYA communication has the potential to be viewed as less than helpful, and possibly passive aggressive, if the risks have not been communicated directly and forthrightly at the outset.

7. Respect the final decision. Ultimately, if the attorney has communicated the risks, and expressed their concerns about the client's chosen path in the face of those risks, and the client opts to move forward, it is important to accept the client's decision and provide support for the decision as appropriate.

their occurrence, but fail to remain involved as a trusted advisor. The next challenge is that some attorneys are fearful of disagreeing with the client, which does not serve the client's best interests. Rather than dreading the difficult conversations, or worse yet, avoiding them altogether, recognize they are a normal part of a healthy relationship, and should actually strengthen the partnership through better collaboration. Finally, attorneys are not practiced in the art of disagreeing with the client in a productive way. Effective communication of concerns can open the door to better decision-making and provide the foundation for a lasting business relationship.

Conclusion

The challenges attorneys face when disagreeing with their clients is three-fold. One challenge is that attorneys present their assessment of the risks, and the likelihood of

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