

The Challenges & Risks Chief Litigation Officers Should Address Today



Interview with: Ellen Cappellanti, Managing Member, Jackson Kelly PLLC

With the COVID-19 pandemic, legal departments today have even more responsibilities with fewer resources than before and a tight budget, says Ellen Cappellanti, Managing Member, **Jackson Kelly PLLC**. However, the most successful general counsel do not wait for a discovery request to gather facts and assess risks, she adds.

Jackson Kelly PLLC is a law firm at the **marcus evans Chief Litigation Officer Summit March 2021** and the **Chief Litigation Officer Summit June 2021**.

What are the biggest challenges in-house counsel are facing today?

Our clients must do more with less. In-house counsel must manage legal departments with fewer resources, especially in industries negatively impacted by COVID, and yet, they have more responsibilities. One of our clients in an industry with a complex and technical issues commented that she has had to hire lawyers who know a lot about a little, e.g. highly specialized attorneys to support key business units. This specialized hiring puts additional stress on already tight budgets. This trend towards specialization offers unique opportunities for outside firms

that can pool resources to provide these services to the client at a lower cost point than the client's cost to employ multiple specialized lawyers.

What risks, vulnerabilities or mistakes have become apparent due to the pandemic? How can in-house counsel address them?

The pandemic has caused many general counsels to focus on force majeure clauses. Because the concept of a pandemic was remote, these provisions received little attention but are now relevant. In-house attorneys should focus on these provisions as well as related "boiler plate" provisions in both drafting contracts and prosecuting claims.

Another vulnerability is that working remotely hampers collaboration. Casual "hallway" conversations wherein co-workers identified problems early, or during which they conceived brilliant strategies cannot happen. All leaders should schedule routine working group meetings to fill in communication gaps, even if these are short check-in sessions.

What steps should in-house counsel take to ensure litigation success?

Our most successful general counsel clients do not wait for a discovery request to gather facts. Once a claim is asserted, either formally or informally, they gather facts and relevant documents, identify witnesses and chart desired outcomes. They determine the proper level of involvement of the matter, e.g. is it more effective for them to be involved in interactions with employee witnesses or let outside counsel handle those by themselves? They reach out to experienced litigators to assess risk early in the process. To the extent outside counsel is required, they should be required to provide realistic budgeting, assistance in

analyzing risk and a case strategy that is consistent with the budget and the level of risk.

What trends should they prepare their organizations for? How?

The combination of COVID and the political divide in our country has created myriad human resource/employment issues. Employees with strong opinions regarding politics or employment situations can sound off on social media or at the workplace, often to the consternation of fellow employees and the employer. Attention needs to be given to sound social media policies that recognize the rights of all constituents, but which protect the employer's reputation. Some employers are bracing for class action suits relating to COVID exposure and return to work issues. Efforts taken by the employer to mitigate risk such as compliance with CDC and governmental protocols, and encouraging remote work, should be documented and preserved.

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