

INSIDE LITIGATION

Innovative Strategies for In-House Counsel

Spring 2005

www.aretellegal.com

Reprinted with Permission from Areté Legal Publishing, LLC, *Inside Litigation* (Spring 2005). Copyright © 2005 Areté Legal Publishing, LLC. All Rights Reserved.

Corporate Counsel Prove Essential to Legal Reform

By being proactive and involved, corporate counsel can have a big impact on the civil justice system. Just look at what in-house lawyers achieved in California.

By John H. Sullivan



John H. Sullivan

The virus was indiscriminate. It infected a lawsuit that shifted half a million dollars from a major energy company to an “environmental protection” group that won no more than the company’s pledge to continue to abide by government clean-up rules.

It spawned extortion letters giving minority-owned, mom and pop auto repair shops a choice. They could pay a thousand bucks to disreputable lawyers or face a lawsuit for failure to get a customer to sign a repair estimate, even though that omission was several years old, never caused a customer complaint and was discovered only when the lawyers surfed government agency websites.

California voters eradicated the virus last November, when they approved Proposition 64 by 59 percent. The initiative stopped private lawyers, who had neither real clients nor evidence of harm, from using the state’s “unfair competition law” to wrench settlements from firms of all kinds and sizes doing business in California.

Corporate counsel made this win happen, in two stages.

Stage 1

The Wall Street Journal identified Stage 1 in an editorial about the Proposition 64 victory. According to the *Journal*, “Credit for this bit of sanity goes to the Civil Justice Association of California, a nonprofit group that’s been urging change for nearly a decade...”

Our urging took the form of intense, consistent legislative lobbying. While not directly successful, that lobbying accumulated evidence and built the case for change year by year. Our urging also took place in the courts, where our amicus briefs highlighted both the legal travesty and economic harm flowing from a law that let private lawyers transform themselves into public prosecutors *cum* bounty hunters.

We couldn’t have even existed, let alone laid this groundwork, without corporate counsel authorizing the contributions that sustained our effort to restore balance to the California civil justice system.

Stage 2

Supporting the “Yes on 64” campaign itself was Stage 2. Contributions from hundreds of

companies of all sizes built the \$14.5 million winning budget. But the campaign was anchored by dollars directly traceable to corporate legal leaders who decided that victory was possible and worth the cost.

Plaintiffs' lawyers, through their front groups, tried to make the cost more than just monetary. They launched a letter-writing campaign and picketing skirmish to single out large corporate donors, a prelude to their campaign that Proposition 64 was a plot hatched by "greedy corporations" to hurt "the little guy." Companies were not deterred, and Californians didn't buy it.

In the end, the voters delivered the message our polling told us they would. They saw no benefit in these "shakedown" lawsuits against any businesses and wanted them stopped. They were reinforced by Gov. Arnold Schwarzenegger, who made a clear connection between legal reform and a re-energized state economy.

Fortunately for the civil justice system and the nation's economic health, versions of the California experience have been playing out in several states. In every situation, corporate counsel have been a key to success.

Fighting "Litigation Taxes"

While funding for communication and political activity are central to achieving reform, the personal involvement of general counsel is the yeast for both plan and execution. Within corporate counsel's offices are smart lawyers whose litigation and substantive law expertise can help improve the civil justice system.

Civil justice reform needs more corporate lawyers applying their expertise to improving liability and business laws in every state. These are the lawyers who work upstream with ideas to head off problems, rather than wrestle with them each time these problems show up in a complaint. Early involvement can produce incremental changes to improve laws. It is also invaluable when it comes to stopping bad ideas that would tilt the legal system even further against businesses.

Many corporate counsel, working with their government affairs people, have developed a

**Within corporate
counsel offices are
smart lawyers whose
litigation and
substantive law
expertise can help
improve the
civil justice system.**

template on how to respond to bad civil justice proposals. Those companies are capable of communicating opposition in any state within days of a bill's introduction. The benefits of weighing in before the other side develops momentum are enormous.

Organizations usually decide whether to engage in an activity by weighing the importance of the desired result against the resources needed to produce it. This makes sense when deciding whether to develop a new product or market in a new region.

But when it comes to achieving legal reform, the decision is more complicated. A single company cannot achieve the change on its own. A critical mass of advocates is essential. Corporate counsel are vital to working with government affairs people in setting corporate priorities and helping to create a critical mass.

I unscientifically estimate that an entity will work seven times harder to protect its revenue than to reduce an expense. That explains the high level of plaintiffs' lawyer political contributions.

How many corporate counsel have presented management with a comprehensive evaluation of current liability costs that are occurring, despite the company's best effort to perform responsibly? This information is essential to enable management to determine where legal reform fits as a cost-reduction priority—and where fighting the proposals sponsored by plaintiffs' lawyers is a priority to keep costs from increasing.

Corporate counsel must, and do, ask themselves and their corporations whether it makes better economic sense to continue acquiescing to "litigation taxes" or to dedicate more resources to reducing that tax and blocking attempts to increase it.

John H. Sullivan is president of the Civil Justice Association of California. E-mail him at jsullivan@cjac.org.

We couldn't have even existed, let alone laid this groundwork, without corporate counsel authorizing the contributions that sustained our effort to restore balance to the California civil justice system.