



THE REVERSE COMMUTE: GENERAL COUNSEL TO PRIVATE PRACTICE—WHAT I LEARNED IN-HOUSE AND HOW IT TRANSLATES BACK TO PRIVATE PRACTICE

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I recently returned to private practice after a dozen years as general counsel (GC) for a medium-sized worldwide corporation. I have dubbed the transition my “reverse commute.” Transitioning from a GC to my own private practice has brought an additional perspective to private practice that has helped me to better understand the needs, desires, and requirements of my in-house clients. This transition has prompted me to evaluate some of the important things I learned in my role as GC and how to utilize these on the “other side” of the equation.

The company I worked for had a worldwide footprint and several hundred employees, so this article is not written from the perspective of a Fortune 500 corporation with a large legal department. That being said, there are certainly points and lessons contained herein that are meaningful regardless of the size of the corporation or its legal department.

Over my dozen years as GC, some of the vital and valuable things I learned are set forth below, as well as how these things can help translate into being an effective and value-add lawyer in private practice.

GCs Want Outside Counsel Who Truly Understand Their Business

In today's corporate world, the GC is not only in charge of all legal as-

pects of the corporation but is wholly submersed into the business side as well. This allows the GC to better identify areas of risk and liability for the company before they surface. As all of you in federal practice know, there are areas of federal law that require tremendous expertise and knowledge. This is where the GC particularly relies on outside counsel.

Accordingly, what is sought is an outside counsel who ... *learns the business!* Outside counsel must slow down, especially early on in a relationship, and take the time up front to understand and learn the business and business objectives. They must invest in the relationship at the beginning. This will help outside counsel twofold. They will (1) be able to more effectively counsel the business when issues do arise in their areas of expertise; and (2), just as importantly, assist the GC in identifying those areas of risk and liability before they arise. Issue spotting is rather easy once the issues present themselves. It is the ability to stay ahead of the unforeseen and complex issues in that respective area of expertise that will be highly valued by the GC. So, while it may take time and effort at the beginning of a relationship to do so, learning the business beyond surface level as outside counsel will greatly enhance the value you bring down the road.

GCs Want Outside Counsel Who Provide Real-World, Practical Solutions

When issues do arise, outside counsel needs to come with practical solutions. A GC is not merely looking for outside counsel to recite the current case law in a complicated area of practice. While outside counsel do need to be experts in their respective areas, effective, value-adding counsel goes beyond that.

Crucially, outside counsel's ability to come to the table with real-world, practical advice on how to solve issues and reach business

objectives is important. When GCs are overseeing businesses dealing in many areas of law, and in unfamiliar and/or foreign jurisdictions, they need outside counsel who can help provide and articulate practical solutions. Outside counsel is even more heavily relied upon when the issues are in a very complex, specialized area of law.

GCs Want Outside Counsel They Know and Trust Will Be There When Needed

Being an expert on the recent case law does not separate an outside counsel from his or her peers. What will set you apart is knowing your client's business, helping to identify areas of risk before the issues arise, and providing real-world solutions to issues once they do. Another key to this dynamic is establishing a reliable relationship.

A GC wants to be ensured that (1) he or she can rely on you in difficult times and that (2) you will make the business a priority when needed. The GC should understand that the company does not always have to be the priority, but outside counsel should understand that there are times when that particular client must be the priority. If this relationship and mutual understanding can be established, it

will go a long way toward forming a win-win long-term relationship between attorney and client.

In conclusion, in my recent transition back to private practice, it was important to me to partner with a firm that believes in these principles and realizes the need for those strong relationships. Too often, the pressure for billable hours does not allow outside counsel to take the time to build those relationships, learn the business, and then ultimately be a long-term, trusted adviser to the corporation. ☉



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Views From the Bench *continued from page 25*

"I have met people who can't afford to pay their restitution," Judge Wake notes. "However, even as little as \$25 per month shows me a defendant is committed to rehabilitation. I don't understand why a defendant who has the ability to pay something doesn't. I try looking into a defendant's heart to see whether in fact he owned his mistake and [has] taken steps toward rehabilitation. I want to see if an offender has internalized his crime and owns his mistake."

A former defense lawyer, U.S. District Judge Robert Scola of the Southern District of Florida in Miami, avows that he "would rather have 50 character witnesses pay \$100 each toward the defendant's restitution than to provide 50 character letters. If family and friends truly love him, they should help him. Making reasonable efforts to pay restitution is one indication of sincere remorse."

Judge Scola further states that if the defendant is ordered to pay a large amount of restitution, he may not be able to pay the full amount. "If the loss in the case is \$1 million, but defendant only received \$10,000 for his participation, he should pay that amount back or offer to do so with arrangements. For example, if he has equity in a home, he should get a home equity loan. If there are victims out there and, for example, they want to be made whole and prison won't help, that can be a powerful mitigating factor if a defendant makes arrangements to do so."

Judge Scola suggests that we lawyers take a page out of the book from our death penalty defender colleagues: "Don't wait to think about sentencing advocacy. Since 99 percent of your federal criminal clients will be facing sentencing, start preparing the case for sentencing early on."

Observations

I am often asked how soon I prepare for sentencing. My answer is, "As soon as the check clears." According to the U.S. Sentencing Commission, 93 percent of federal criminal defendants wind up pleading guilty. Of the remaining 7 percent who go to trial, the government prevails in anywhere from two-thirds to three-quarters

of the cases depending the year. That means that a federal defendant has a 99 percent chance of winding up in front of a sentencing judge and, according to statistics from the Commission, has an 86 percent chance of being sentenced to prison.

While judges say they can be moved by an allocution, I think it's dicey to wait until the sentencing hearing. First, develop a theory of the sentencing in which your client owns his mistake and demonstrates sincere remorse. The best place to start is with the probation officer. Many judges have told me that they start thinking about the sentence they are going to impose in the case where a defendant has pled guilty when they first receive the Presentence Report. Having your client step up to the plate at his initial meeting with the probation officer can be critical. As I like to say, "If the law is against you, argue the facts; if the facts are against you, argue the law; and if both the law and the facts are against you, take the probation officer out to lunch."

Counsel should prepare their client for allocution. Do a mock question-and-answer session with them. If your client then goes off the rails at the hearing, don't forget you can always ask the judge for a time out to take him aside and get him back on track.

Many judges have told me that after submitting a solid sentencing memorandum *without boilerplate Booker and its progeny citations*, and being prepared to argue against the government's position on disputed guidelines and other legal issues and responding to any questions the court may have, there is not much more defense counsel can do at the sentencing hearing. Nonetheless, one of the best things you can say at sentencing is: "Your Honor, you're right. I am tendering the clerk a check in full payment of restitution." ☉