

# The Metropolitan Corporate Counsel

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## At The Beginning Of A Litigation, Mapping Its Course Has Its Merits!

*The Editor interviews Richard W. Smith, Partner in Wiley Rein LLP's Litigation Department.*

**Editor:** Please describe your practice areas as a commercial litigator.

**Smith:** I specialize in complex commercial litigation, involving novel issues of law and facts often in matters that are high profile because of either the nature of the case itself or the parties involved. My expertise lies in being able to manage those cases efficiently and intelligently so that the clients' legal and business goals are both met. In terms of substantive practice areas, I have substantial expertise in commercial contracts, antitrust, securities fraud, products liability, regulatory disputes and intellectual property, primarily trademark infringement. I've also developed fairly unique niche areas in dram shop litigation, banking and campaign finance.

**Editor:** What is the nature of dram shop litigation?

**Smith:** Dram shop litigation involves a claim by a victim of an intoxicated individual against the tavern or bar who assisted him in getting drunk. My first case in the dram shop area was representing the NFL and Commissioner Paul Tagliabue in a very significant matter at New Jersey's Giant Stadium, where an individual had allegedly consumed significant amounts of alcohol and became intoxicated, drove home, and on the way crashed into another vehicle, severely injuring a two-year-old girl. Our defense was successful, but a co-defendant, Aramark, took the case to trial and lost an initial verdict of more than \$100 million. This quickly became a significant practice area for me, and, since then, I have

advised several professional sports leagues, venues, and alcohol distributors and retailers on alcohol sales policy issues and represented several sports and entertainment arenas in dram shop litigation.



**Richard W. Smith**

**Editor:** In what areas of litigation do you anticipate the largest area of activity in the next few years?

**Smith:** Without question, already hot areas such as financial litigation and regulatory disputes will be ramping up significantly in the next few years. In many ways, especially given the economic conditions that we've endured over the last four years and the expanding role of the federal government, Washington, DC is the center of American economic and legal activity. With an empowered chief executive emerging from this most recent election, I see that trend only getting more pronounced.

In many ways corporate America is under siege right now, and legal compliance and litigation issues of all kinds will flow from the battles that are being waged. At the same time, despite the concerning economic and regulatory conditions, competition has never been more fierce, and consumers are requiring corporate America to continue to push forward with new technologies and product offerings to remain competitive. There are emerging technologies such as mobile banking, mobile point-of-sale payments, cloud computing and similar technologies that are being rolled out to consumers. Regulators are playing an ever-increasing role, and that, of course, is a recipe for future

compliance issues and litigations.

**Editor:** Electronic discovery has been an important factor in all litigation. Would you say that is a major area of cost in many of your cases?

**Smith:** Certainly, if you were to chart the fees that are being expended in the litigation process and divide those fees among the various stages of litigation, discovery would be the most expensive. I saw a statistic recently that more data is being created now every two days than was created in all the years combined from the dawn of man until 2003.

Unfortunately, our court rules and procedures largely have not kept up with the changing technologies and the resulting data explosion. That may eventually change, and I would certainly support rule changes that reduce that burden, but you still have to ensure critical disclosures. To deliver the kind of efficiencies and value that sophisticated clients demand from their outside counsel, the onus is on outside counsel to find creative, low-risk, high-reward methods for reducing the discovery burden while still maintaining winning legal strategies.

**Editor:** Would you suggest that anyone involved in litigation use such tools as project management and predictive coding for e-discovery?

**Smith:** The jury is still out on predictive coding. In my experience, it has a lot of promise but thus far is still in its infancy. Smart outside counsel need to consider it for their cases, using it in matters in which it can be valuable. Other tools such as project management and similar techniques can really drive efficiency and should also be employed as appropriate.

The real problem driving inefficiency

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in litigation, however, is litigators who are not litigating intelligently or with the end game in mind. They treat the federal rules as “one size fits all.” Starting with Rule 26 initial disclosures, they mindlessly push through to Rule 56 summary judgment. Then, at that point, they often for the first time consider how to win the case, and by that time it’s too late. In the discovery process they pursued options that if they had considered them at the outset with a strategy in mind, they never would have pursued, and expended fees in chasing tangential points that never should have been expended.

To be efficient, counsel have to practice “intelligent litigation” by doing their homework early, starting with reviewing important documents and interviewing critical witnesses in the first 60 days after being retained, and, in that same period, developing a winning strategy. Counsel should come up with a play-by-play handbook for the litigation, all in close consultation with the client. That handbook then should become the guidebook for everything that is done in the litigation, so counsel is not distracted by discovery traps.

**Editor: I assume that early case assessment is something that you would advocate as well.**

**Smith:** Absolutely. The early case assessment process, which is something that I’ve employed for 15 years, is an absolutely essential component to “intelligent litigation.” Of course, “early” case assessment is a misnomer; one should have “continuing” case assessment. I provide my clients with early case assessment in the first 60 days and then follow up every quarter with a continuing assessment, so that everyone understands what progress has been made against our initial plan. This includes a budget review, so the client can maximize financial predictability. Through this process, we partner to ensure that the end game for winning the litigation is being achieved and that resources are being spent wisely. Often in that process, I find that the client’s goals are not necessarily perfectly aligned with outside counsel’s view of litigation victory. Unless outside counsel consults openly with the client, counsel can be surprised that the client’s goals may be centered on something other than winning. Timing, avoiding C-level depositions, or some similar goal may be more important. So I find the continuing case assessment process to be invaluable.

**Editor: Does ADR play a role in early case assessment?**

**Smith:** If the client’s goal is to resolve the case immediately and efficiently, then often early mediation makes sense. ADR should never be off the table for an efficient resolution, if that is the client’s desire. But true early case assessment is more than early case resolution. From time to time, I’ve used mock trials and focus groups in my early case assessments, along with limited document reviews and interviews, so that at the end of 60 days, I have not only a plan for winning the litigation but also have had a focus group or two with potential jurors to test that plan. To have that in your pocket before the discovery process has started is invaluable.

**Editor: Do you advise clients to map data to reduce the risk of employees inadvertently destroying some data that could be very important in litigation?**

**Smith:** Depending on the company and its litigation profile, it may make sense to undertake a data-mapping project. The front pages of the trade press these days often feature stories about companies facing sanctions for discovery failures, and frequently those discovery failures take the form of inadvertent data loss. That risk can be minimized when the company understands where its data is stored and what type of data it possesses.

**Editor: I guess *Morgan Stanley* was a classic case.**

**Smith:** It certainly was a well-watched discovery situation, and I think a lot of companies that are repeat litigants have determined – I think rightfully so – that it’s more efficient and less risky to undertake a project of mapping data in advance, so that you know where your data is and what you have.

Data mapping can have substantive benefits as well. For those practicing “intelligent litigation,” when you understand your data prior to litigation, you are at a strategic advantage. In your Rule 26 initial discovery planning conference, for example, you know where the bodies are buried, what type of data may be put at risk of disclosure through certain agreements, and what kind of burden would be imposed on you by various discovery devices. With a data mapping project already under your belt, you are freer in

the Rule 26 conference to make the kinds of arrangements with your opponent that are necessary to reduce those burdens.

**Editor: Another area that you’ve been very active in has to do with alternative fee arrangements. Please discuss your thoughts in this area.**

**Smith:** We’ve been hearing predictions of the death of the hourly rate for more than two decades. My first legal job was in an Atlanta law firm’s accounting department. The firm was one of the original DuPont convergence firms, and because of that relationship it was highly motivated to use alternative fees. While at that firm, I helped develop an approach to deriving alternative fees that was very popular with the firm and its clients. It featured a staged fixed fee with performance and timing bonuses built in, so that it was matched to the client’s business goals. To the extent the firm provided more value in an engagement, the client would pay additional fees for that value add, and to the extent the firm failed, the client was not forced to pay an enhanced fee. This process also provided predictability in budgeting; clients knew what they were getting into at the outset.

Now, 20 years later, those dual concepts of predictability and value are more important to corporations than ever before, and that’s why we are again hearing these refrains of the death of the hourly rate. Almost every RFP that we receive now has a question in it about alternative fee arrangements and about our experience with them. Firms typically punt on the question, indicating timid willingness to discuss the concept, but offering no plan. There still are very few lawyers who have true creativity and experience in developing and negotiating alternative fee arrangements that infuse into the rate structure a value concept. And at the same time, the client needs comfort in saying, “I’m willing to pay X for Y service, but I’m not willing to pay X, if I don’t get Y service.” With the types of alternative fees that I’ve had experience with, I think clients are very satisfied that they’re getting what they are paying for and, at the same time, have predictability in what their payments will be over the course of a litigation. It’s frankly very difficult in litigation because there are so many unpredictable events that happen, but those difficulties can be overcome so that some certainty can be achieved.