403 Best of ACCA '00 Successful Partnering Between Inside & Outside Counsel

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Vice President, General Counsel & Secretary
Computer Sciences Corporation

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George W. Madison
Executive Vice President, General Counsel & Corporate Secretary
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Gloria Santona
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Faculty Biographies

Jay A. Brozost

Jay A. Brozost is corporate deputy general counsel of Lockheed Martin Corporation, and vice president and general counsel of Lockheed Martin Aeronautics Company. Lockheed Martin Aeronautics Company is a multi-billion dollar operation with three separate production sites responsible for a wide range of products and services including the development, design, manufacture, systems integration and modification of tactical fighter aircraft, cargo transports, surveillance, and maritime patrol aircraft.

Before assuming his current position, Mr. Brozost was vice president and associate general counsel for Martin Marietta Corporation and was responsible for litigation, international operations, compliance and integrity programs, and the securities and benefit law functions. Prior to joining Martin Marietta, Mr. Brozost was a senior trial attorney with the Criminal Division of the United States Department of Justice, where he prosecuted a number of defense contractors for such violations as supplying defective and inadequately tested products and cost mischarging. While at the Justice Department, Mr. Brozost was detailed to the White House for 18 months to work as the legal advisor to an executive task force that was established to investigate methods of combating fraud, waste, and abuse in government contracting.

In addition to his frequent lectures and writings on the role of corporate counsel, Mr. Brozost is the past president and a former member of the Board of Directors of ACCA's Washington Metropolitan Area Chapter. He currently serves on ACCA's Board of Directors.

Mr. Brozost received his bachelor's degree from Cornell University and his law degree from George Washington University Law School.

Hayward D. Fisk

Hayward D. Fisk has served Computer Sciences Corporation as its vice president, general counsel and secretary for over 10 years.

He previously was vice president and associate general counsel for Sprint Corporation, where he held various legal and executive positions for over 20 years.

Mr. Fisk currently serves on the Boards of ACCA and the American Society of Corporate Secretaries, as well as the editorial Board of *The Computer & Internet Lawyer*. He is a long-term member of the Legal Advisory Council of the National Legal Center for the Public Interest, and is chairman of the Atlantic Legal Foundation in New York City. Recently, he was appointed to serve on the Civil Justice Reform Committee of The Business Roundtable. He has served on a number of business, professional and civic boards, including: the Pennsylvania Chamber of Commerce; the Carlisle Chamber of Commerce (president); Newville Builders Supply & Manufacturing, Inc.; Dickinson College and the Hospital (vice chairman); the United States Chamber of Commerce Government and Regulatory Affairs Committee; and the editorial board of Prentice Hall's *Telematics.* Mr. Fisk has served, by Commission appointment, on advisory councils to the Federal Communications Commission. Also, he served with Solicitor General Ted Olson on Vice President Quayle's/Attorney

General Barr's Steering Committee for Civil Justice Reform. Early in his professional career, he served pro bono as a City Councilman in Merriam, Kansas, a major suburb of Kansas City, and as chairman of its Planning Commission.

Mr. Fisk holds a BS and a JD from the University of Kansas, and a master of laws in corporate law from the University of Missouri at Kansas City.

Robert L. Haig

Robert L. Haig is a partner in the law firm of Kelley Drye & Warren LLP in New York. His practice includes commercial, products liability, and other types of civil litigation.

Mr. Haig is the editor-in-chief of *Business and Commercial Litigation in Federal Courts*, *Commercial Litigation in New York State Courts*, and *Successful Partnering Between Inside and Outside Counsel*. Mr. Haig is also the principal author of the *Corporate Counsel's Guide*. He is a member of the Board of Editors of Matthew Bender & Co., Inc.'s *Federal Litigation Guide Reporter*. He is also a member of the Board of Advisers to Business Laws, Inc.'s *Law Department Management Adviser.*

Mr. Haig was the president of the New York County Lawyers' Association. He was a member of the New York State Bar Association's Executive Committee and the founder and first chair of the association's Commercial and Federal Litigation Section and also chaired its Committee on Federal Courts and its Committee on Multi-Disciplinary Practice and the Legal Profession. Mr. Haig was the Chair of the Committee on the Judiciary of the Association of the Bar of the City of New York and also chaired the association's Council on Judicial Administration. He is a member of the House of Delegates of the ABA, a member of the American Law Institute, a Life Fellow of both the American Bar Foundation and the New York Bar Foundation, a member of the Departmental Disciplinary Committee of the Appellate Division, First Judicial Department, a member of the New York State Judicial Salary Commission, and a director of the Committee for Modern Courts.

Mr. Haig is a cochair of the Commercial Courts Task Force to create and refine the Commercial Division of the Supreme Court of the State of New York. Mr. Haig has also been active in efforts to create business courts in many other states and countries. In 1991, Mr. Haig became the only New York lawyer to receive the Award For Excellence in Continuing Legal Education from the Association of Continuing Legal Education Administrators. In 1995, the New York State Bar Association's Commercial and Federal Litigation Section presented Mr. Haig with the Section's first annual Robert L. Haig Award for Distinguished Public Service.

Mr. Haig graduated from Yale College and from the Harvard Law School.

George W. Madison

George W. Madison is executive vice president, general counsel and corporate secretary (and a member of the Management Council) of Comerica Incorporated, a $50 billion bank holding company headquartered in Detroit. He supervises a 75-person legal department.

Prior to joining Comerica, Mr. Madison was a partner in the New York office of the Chicago-based firm of Mayer, Brown & Platt where he specialized in banking and structured finance law and was associated with Shearman & Sterling in New York.

Mr. Madison is a member of ACCA, the American Judicature Society, the American Law Institute, the Conference Board's Council of Chief Legal Officers, the Lawyers Council of The Financial Services Roundtable, the Minority Corporate Counsel Association, the Michigan General Counsel's Association, the ABA's Business Law Section and its Corporate General Counsel Committee, the State Bar of Michigan, the Detroit Metropolitan Bar Association, and the Association of the Bar for the City of New York. He serves as chairman of the board of directors of Health Alliance Plan of Michigan (HAP), one of Michigan's largest health maintenance organizations, and is a trustee of Henry Ford Health System, the parent of HAP. He also was appointed by the Mayor of the City of Detroit to serve as vice chairman of the board of directors of the Detroit Economic Growth Corporation.

Mr. Madison received a BS from New York University, an MBA from Columbia Business School, and a JD from Columbia Law School.

Gloria Santona

Gloria Santona is senior vice president, general counsel and secretary of McDonald's Corporation. She is also a member of the company's senior management team. In her capacity as general counsel, Ms. Santona provides oversight to McDonald's global legal function, which includes 62 lawyers in the United States and 49 lawyers in 19 countries around the world. She is responsible for all aspects of legal compliance and policy for the global enterprise. Ms. Santona also serves as secretary to the board of directors and, in that capacity, provides advice and counsel regarding matters of corporate governance.

Ms. Santona joined McDonald's as an attorney after her graduation from law school. Since then she has held positions of increasing responsibility in the company's legal department, serving most recently as U.S. general counsel.

Ms. Santona is a member of the American and Chicago Bar Associations and serves on ACCA's Board of Directors. She is a former member of the Board of Directors of the American Society of Corporate Secretaries and currently serves as a member of its Audit Committee. Ms. Santona was formerly chair of the Corporate Board of Advisors of the National Hispana Leadership Institute. She is a governing member of the Board of Trustees of the Chicago Zoological Society.

Ms. Santona received a BS from Michigan State University and is a cum laude graduate of the University of Michigan Law School.

Jerome J. Shestack

Jerome J. Shestack is chairman of Wolf, Block, Schorr and Solis-Cohen LLP's litigation department. He is a former president of the ABA and is a nationally renowned trial lawyer who is cited by the *National Law Journal* as one of the "100 Most Influential Lawyers" in the United States.

Mr. Shestack has handled complex litigation for ABC, NBC, CBS, Westinghouse, GAF, Hertz, RCA, Advanta, and Comcast. Prior to his election as president of the American Bar Association, Mr. Shestack served on the Board of Governors and the Executive Committee of the ABA and chaired its

Program and Planning Committee. He was a member of the Nominating Committee and Pennsylvania's state delegate to the ABA. For six years Mr. Shestack served on the ABA's Standing Committee on the Federal Judiciary, which makes recommendations to the President and the United States Senate on the qualifications of all prospective federal judges. He has served as chair of the ABA's Section of Individual Rights and chaired the first ABA Commission on the Mentally Disabled. Mr. Shestack also chaired the ABA's Standing Committee on Legal Aid and was a founder of the ABA's Pro Bono Center.

A world leader in the international human rights movement, Mr. Shestack chaired the International League for Human Rights for the past twenty years. He served as U.S. Ambassador to the United Nations Commission on Human Rights under President Jimmy Carter and also served as a member of the Conference on Security and Cooperation in Europe and as a Commissioner of the United States Presidential Congressional Commission to Improve the Effectiveness of the United Nations under President Bush. Mr. Shestack has chaired the International Bar Association Standing Committee on Human Rights. He founded, and was the first chair, of the New York-based Lawyers Committee for Human Rights, was one of the founders of the Helsinki Watch Committee, and served as general counsel of Amnesty International in the U.S. Mr. Shestack serves as counselor to the American Society of International Law and is currently on the Executive Committee of the International Commission of Jurists and is on the Board of the American Arbitration Society.

Mr. Shestack was a founding member of The Lawyers Committee for Civil Rights. He was also a founder of PILCOP, a Philadelphia public interest law program, and was on the Executive Committee of the National Legal Aid and Defender Association.

Mr. Shestack graduated from the University of Pennsylvania and received his LLB from Harvard Law School where he was editor-in-chief of the *Harvard Law School Record*. He clerked in the U.S. Court of Appeals for the Third Circuit and has taught at Northwestern Law School and the University of Pennsylvania Law School, which awarded him an Honorary Fellowship. Mr. Shestack is also an Honorary Fellow of Columbia Law School and has three honorary doctor of laws degrees. He is a life member of the American Law Institute, a member of the Order of the Coif, and a Fellow of the American Bar Foundation, the American College of Trial Lawyers, and the American Academy of Appellate Lawyers.

Lisa A. Whitney
Vice President & General Counsel
Nautica Enterprises, Inc.

SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL: ADVICE FROM THE EXPERTS

2002 ACCA Annual Meeting

Grand Hyatt Washington

Tuesday, October 22, 2002
9:00 A.M. – 10:30 A.M.

The speakers are authors of

Successful Partnering Between Inside and Outside Counsel

(Robert L. Haig ed.) (West Group & ACCA 2000)

Topics for Discussion: Selection of Outside Counsel – Fee Arrangements and Billing Procedures – Ethics and Professionalism – Litigation - Transactions

Table of Contents

All excerpts are taken from *Successful Partnering Between Inside and Outside Counsel* (Robert L. Haig ed.) (West Group & ACCA 2000)

1. Excerpts from the following Chapters

   Chapter 2 Pre-Litigation Management and Avoidance by William H. Trachsel, Joseph A. Santos and Curtiss L. Isler

   Chapter 5 Requests for Proposals, Bidding, and Presentations by S.T. Jack Brigham, III, Laurence Coit, William H. MacAllister and Peter D. Zeughauser

   Chapter 6 Marketing to Potential Corporate Clients by Louis J. Briskman, James W. Quinn and Peter A. Antonucci

   Chapter 40 Operating a Small Law Department by Bart R. Schwartz and Lynn E. Pollan

   Chapter 50 Joint Ventures by Peter M. Kreindler, Ellen S. Friedenberg, Alan G. Kashdan, James B. Kobak, Jr. and Daniel H. Weiner

2. List of Authors and Chapters of Successful Partnering Between Inside and Outside Counsel

Successful Partnering Between Inside and Outside Counsel: Advice from the Experts

This program discusses key issues covered in **SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL** a new four volume, 6,032 page treatise and practice guide published by West Group under the auspices of the American Corporate Counsel Association. The moderator of the program is Robert L. Haig of Kelley Drye & Warren LLP and the speakers include prominent inside and outside counsel who wrote chapters in the set. The program focuses on practical advice.

ACCA and West Group formed a strategic alliance to publish this set. In 80 chapters, the publication covers all phases of the relationships between inside and outside counsel from pre-engagement planning to post-engagement evaluation with respect to litigation, transactions, counseling, legal opinions and other matters. Coverage proceeds chronologically through the relationship focusing on enhancing the quality of performance of both in-house and outside counsel, improving the outcome of the relationship as well as increasing the cost-effectiveness of engagements for both sides.

SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL offers analysis, practical advice, detailed checklists and forms on all aspects of the relationships including selection of outside counsel, the allocation of work and responsibility, fee arrangements and billing procedures, management of the law department, staffing of engagements, benchmarking, compliance, dispute avoidance and resolution, conflicts of interest, the use of technology, etc. Other chapters focus on the successful handling of particular kinds of legal matters.

The Editor-in-Chief of the treatise is Robert L. Haig. Among the authors are the General Counsel of 80 FORTUNE 500 companies (including more than 40 of the largest 100 companies) and the chairs or senior partners of many major law firms.

Below are the tables of sections, scope notes and practice checklists from selected chapters of *Successful Partnering Between Inside and Outside Counsel*

Chapter 2

PRE-LITIGATION MANAGEMENT AND AVOIDANCE

by
William H. Trachsel
Joseph A. Santos
and
*Curtiss L. Isler**

§ 2:1 Scope note
§ 2:2 The need for management and avoidance
§ 2:3 The goals of pre-litigation management and avoidance and the strategies to meet them
§ 2:4 "Get inside your client's head!"
§ 2:5 — Learn the client's business
§ 2:6 — Maintain regular contact with management and operating personnel
§ 2:7 — Assist with training exercises
§ 2:8 — Counsel and the client's customers
§ 2:9 — Keep an eye on the sales and marketing departments
§ 2:10 Draft and negotiate contracts that avoid disputes and reduce exposure
§ 2:11 — Role of counsel
§ 2:12 Contract drafting checklist
§ 2:13 Avoiding bad documents
§ 2:14 — What is a document?
§ 2:15 — The scope of discovery

* The authors gratefully acknowledge the research and input of Samir Mehta, Esq. and Mark Thompson, Esq., Assistant Counsels at Otis Elevator Company, and Lisa Atty, Esq. of the Los Angeles office of Arter & Hadden LLP.

The views, opinions, and advice in this Chapter are a compilation of ideas about the subject of pre-litigation management and avoidance. Some of these ideas may be appropriate in some situations and companies, but each needs to be considered in its proper context. They are not, and should not be, in any way interpreted as policies of United Technologies Corporation, any of its divisions or subsidiaries, or any client of Arter & Hadden LLP.

§ 2:16 — Concentrate on prevention
§ 2:17 — Prevention is a function of training
§ 2:18 — About e-mail
§ 2:19 Implement a product integrity program
§ 2:20 — PIP goals
§ 2:21 — Management commitment
§ 2:22 — Proper organizational structure
§ 2:23 —— Align management and operations
§ 2:24 —— Integrate product integrity into each phase of a product's life-cycle
§ 2:25 —— Make information and knowledge work for the company
§ 2:26 —— Conclusion: PIP benefits
§ 2:27 Early investigation and assessment
§ 2:28 — Pre-investigation tools
§ 2:29 — Investigation tools
§ 2:30 — The inspection
§ 2:31 — Participate
§ 2:32 Manage crises to avoid litigation
§ 2:33 — Establishing a CMT
§ 2:34 — Announcing the CMT
§ 2:35 — Identifying a crisis
§ 2:36 — Investigating a crisis
§ 2:37 — Crisis control
§ 2:38 — Crisis resolution
§ 2:39 Accelerating claim resolution
§ 2:40 — Mock trials
§ 2:41 Alternative dispute resolution
§ 2:42 The use of technology in pre-litigation management and avoidance
§ 2:43 — Case management software
§ 2:44 — Resolution of pre-litigation disputes
§ 2:45 Lessons learned
§ 2:46 Practice checklist

§ 2:1 Scope note

While realizing that litigation is appropriate and necessary in many circumstances, this Chapter focuses on methods to resolve disputes prior to litigation. Companies today increasingly view legal matters, and litigation in particular, as another expense of doing business. As such, litigation is subject—as it should be—to attempts to first, predict its costs and second, reduce costs when possible and appropriate. One of the most effective means of cost control and

reduction is the management and avoidance of disputes *before* they arise and, when they do arise, *before* they metamorphose into full blown litigation.

Such methods are applicable to all categories of legal practice. Because of our own experiences, we focus primarily on the areas of products liability, negligence, employment, commercial, and contract litigation. The strategies employed in these areas also can apply to real estate, environmental law, intellectual property, corporate shareholder disputes, securities litigation, and even criminal law.

Section 2:2 addresses the need for litigation management and avoidance. Section 2:3 outlines the goals and strategies for a litigation management and avoidance program. The next sections, 2:4 through 2:26, discuss preventative strategies, *i.e.*, processes that can be implemented to reduce incidents which generate litigation. These sections focus on actions which lawyers can take to prevent future litigation, such as understanding the client's business goals, contract drafting strategies, avoiding "bad" documents, and a product integrity program. Sections 2:27 through 2:44 discuss actions which lawyers can take after a potential litigation-generating incident has occurred, and focus on early investigation and assessment, effectively managing crises, early case evaluation, alternative dispute resolution, and other proactive innovations. Finally, Section 2:45 returns to prevention, with a discussion of actions lawyers can take to help the client benefit from lessons learned.

§ 2:2 The need for management and avoidance

> In my country we ask the lawyer how long a case will last. The lawyer says "2 years, 3 years, 4 years, maybe 5 years; I don't know; I cannot say." In the meantime, we must pay him.[1]

This statement describes litigation in Japan, where the paucity of lawyers often leads us to believe non-Americans do not have litigation challenges. But the problem is worse in North America. With an ever larger number of cases being filed,[2] many judicial positions

[Section 2:2]

[1] From a June 2, 1999 conversation between one of the authors and a Japanese in-house lawyer, regarding the frustration of litigants in Japan with the length and expense of litigation.

[2] Stephen O. Kline, *Judicial Independence: Rebuffing Congressional Attacks on the Third Branch*, 87 Ky. L.J. 679, 776 (1999).

unfilled,[3] and American lawyers' zeal for the use of liberal discovery rules to turn over every stone,[4] it is no wonder that litigation often takes too long. And typically costs too much. For many years, increases in the cost of legal services has exceeded increases in the consumer price index ("CPI") and the cost of professional services in general.[5] The typical minimum cost of litigating through trial a case in federal court is $250,000, and figures of more than $1 million are common.[6] Moreover, there is no guarantee of success for plaintiffs or defendants. Why, then, do individuals in general, and companies in particular, so often rush to litigation as the first and primary process to resolve a dispute?

First, let us be clear about one thing: the authors believe that litigation *is* an appropriate dispute resolution process in many instances. For example, where the company desires to set a precedent, in "bet the company" situations (although arguably those situations may be too risky to permit them to be resolved in what can be an "all or nothing" forum), where a claimant is clearly unreasonable, and, of course, where other methods have failed to resolve the dispute. A company must always be prepared to litigate and try cases, and do so vigorously, through trial and appeals, if necessary.

Too often, however, each side in a dispute takes a position, fails to communicate with others in the dispute, becomes increasingly convinced of the merits of its own position, and rushes to the courthouse expecting that a judge or jury will agree with its own perception of the case. Often the process is controlled by powerful clients who insist they are right and insist on proving it. Often, too, it is inflamed by overconfident lawyers desiring to please their clients' egos by providing legal foundations and arguments for the clients' positions without sufficient analysis and evaluation of opposing positions and cost factors. Sometimes it is not until well into discovery, or worse, just before trial, that many lawyers begin to give the client a realistic

[3] Panel Discussion in Honor of Judge Thomas F. Murphy, *Judicial Efficiency: Is There a Vacancy Crisis Threatening the Nation's Judicial System?*, 26 Fordham Urb. L.J. 7, 35 (1998).

[4] P.J. Friedenthal, et al., Civil Procedure 420–21 (1985).

[5] Carlos Lapuerta, Gayle Koch, Kenneth Wise & Vincent Gallogly, *Controlling Costs and Improving Performance: Strategic Analysis of Litigation*, ACCA Docket Feature, Summer 1994, at 1, citing *Excessive Litigation—Negative Force in the Economy*, 27 Business Economics No. 4, Oct. 1992, at 9.

[6] *Id.*

assessment of the case.[7] Of course, even careful analysis cannot predict the outcome of every case. The failure in the process to which we speak, however, is the knee jerk decision to litigate without first exploring other solutions. "What's worse than the money wasted on the court system," stated PG&E's General Counsel Howard Golub, "is the lost opportunity to find solutions. Our energies should not be spent on recreational litigation."[8]

§ 2:3 The goals of pre-litigation management and avoidance and the strategies to meet them

This Chapter seeks to provide and discuss ideas, methods, and processes lawyers may employ to minimize the likelihood of litigation. The goals are:

- to avoid litigation when possible and appropriate;[1]
- to minimize expense exposure when litigation is appropriate or unavoidable; and
- to glean and use "lessons learned" for future situations.

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[7] Some might argue that this behavior occurs because litigation lawyers are greedy or simply unrealistic about the case. While that may be true in some instances, there usually are more subtle factors at work. It is a normal and understandable human desire on the part of a client to want to hear supportive statements from the lawyer, and likewise on the part of the lawyer to want to support the client. What is more often needed, however, is the professional maturity of both the client and the lawyer to rationally, and as unemotionally as possible, assess the dispute. These are some of the reasons companies need good in-house lawyers and why clients, in any case, may want a second opinion about a claim.

Moreover, "realistic" assessment of a dispute does not mean a "guarantee" of its outcome. Many disputes involve great uncertainties, such as a case with tenuous liability but large damages and a sympathetic claimant. "Realistic" means a full discussion and appreciation, by both the lawyer and the client, of the positives and negatives of the claim or dispute *including* the costs of litigating it versus resolving it by other means.

[8] M. Galen, A. Cuneo & D. Greising, *Guilty! Too Many Lawyers and Too Much Litigation. Here's a Better Way*, Bus. Wk., Apr. 13, 1992.

[Section 2:3]

[1] The difference between "possible" and "appropriate" is significant. When focusing on avoidance and cost reduction, it is important to keep in mind that in some instances, such as defending a product line or setting a precedent, litigation is appropriate. Likewise, there are occasions when avoidance is appropriate but not possible, such as when an opposing party is unrealistic or overly demanding in resolving the disputes.

The benefits of the achievement of these goals are so great that they should loom large in any manager's agenda. Imagine a large corporation that could reduce its litigation costs and exposure by 5 percent or 10 percent. How about 25 percent or even 50 percent? Depending on the product or service, such percentage reductions are attainable. How to achieve them is a product of hundreds, even thousands, of decisions and good practices involving energy, teamwork, organization, corporate culture, technology, relationships, presentation skills, and various subsets of each of these actions. We can, however, organize the major factors and methods into several categories.

First, the lawyer (both in-house and outside counsel) must understand the client's needs and desires regarding the specific dispute, the type of dispute, dispute resolution in general, the client's business goals, and how the dispute fits within those goals. We can colloquially, but effectively, term this "getting inside the client's head" or "understanding the client." Unless the lawyer understands what the client desires, the lawyer may achieve what he believes to be an excellent result, but fail miserably to meet the client's needs. It is important to remember that lawyering is a service. To succeed with the client, and effectively resolve disputes, the in-house and outside lawyer must develop positive working relationships with many individuals. In a large corporation, this usually means relationships with business managers, from the president and CEO to their direct reports (and in turn their direct reports), etc. It also requires good relationships with engineers, middle managers, mechanics, supervisors, and others. Some personnel control the company's business plan and purse strings. Others know the facts and influence when and how facts are presented. Both are critical to the lawyer's work. Staying in touch with the sales department is also important to understand where the company is headed and what new potential disputes need to be addressed. As part of understanding the client, counsel also must understand the product or service, the industry, and the business context in which the client works.

Second, counsel need to draft contracts and internal documents which seek to avoid litigation. Thus, internal HR documents, for example, should not provide rights to employees not intended to be given by the company. Likewise, documents setting forth criteria to select employees for a reduction in force should be drafted neutrally and without bias. Sales contracts should be structured to limit liabilities when appropriate. Purchasing documents, likewise, must

extend liability to product and service suppliers for the suppliers' full scope of work and quality responsibilities. Consideration should be given to standard dispute resolution provisions, such as mediation, arbitration, agreed apportionment of fault, or joint defense clauses. Counsel should periodically review and update standard contract forms to take advantage of business changes and legal developments.

Third, counsel should attempt to prevent creation of bad documents. "Killer documents" are the litigation Achilles' heel of many big companies. Unfortunately, there is not much counsel can do about documents which already have been created. There is, however, a great deal that counsel can do to prevent creation of future "bad" documents. Counsel, both in-house and trusted outside counsel, through communication and training, can significantly reduce the future creation of bad documents.

Fourth, a Product Integrity Program, commonly referred to as a PIP, should be implemented. PIPs provide the means to design and implement policies to review and increase the quality and safety of products throughout the design, manufacturing, packaging, marketing, and use stages. Essentially, they can be the formal processes by which to implement and measure effectiveness of many of the suggestions discussed in this Chapter.

Fifth, once an incident occurs, information/data gathering is critical. Investigations are the life-blood of dispute management. They are especially key in products liability and commercial litigation arising out of failed physical materials or commercial expectations. The only way to know how or whether to respond to the claimant is to find out what happened, what caused it, and the extent of the injuries or damages, if any. Of course, investigations need not all be conducted to the same depth. Sometimes a limited investigation is sufficient. Usually, however, and especially with serious accidents, an immediate and in-depth evaluation is needed to assess the exposure and determine whether and how to respond to the claimants or potential claimants. Occasionally, a response should not be made, such as when liability is tenuous and doing so might result in misunderstanding by the potential claimant that the contact signifies a willingness to pay. But even when liability is questionable, it may be appropriate to contact the claimant to explain what happened, express sympathy, and also explain why the company was not at fault. How do we know when and when not to make the contact? The answer is in what is learned from the investigation—not simply in

what the facts reveal but also in the emotions expressed by the potential claimant and witnesses. Moreover, when liability clearly exists, it is almost always to the company's—and to the claimant's—benefit to make contact and begin a dialogue toward resolution. The importance of a thorough investigation is equally important when done by a potential plaintiff in a commercial dispute. Without it, that company may find itself learning that it never had a serious case to begin with only in the discovery phase of the litigation, which may be hundreds of thousands of dollars in expenses later.

Sixth, a plan should be established to manage crises effectively. This includes the establishment of a Crisis Management Team, so that specific persons are designated to take the response lead. It also includes tips on defining and identifying a crisis, investigating, controlling, and resolving crises.

Seventh, is early claim assessment. The early stages of claims, and also cases, are integrally connected with this topic. That is true of all claims, and also of cases filed without prior notice to the company. The concept here is to quickly and aggressively investigate, assess, and form a strategy for early and successful resolutions. This is the single strategy that offers the greatest opportunity for rapid expense reduction.

The eighth method is alternative dispute resolution ("ADR"). The benefits of ADR and the types of cases in which it may be particularly helpful are discussed.

Ninth, litigation can also be avoided, or exposure reduced, by wise use of technology. Media monitoring can be used for gathering information about events of which companies might not otherwise learn until a formal claim is made or a lawsuit filed. Case management software also can be used for claims management and assessment. New Web-based tools can now be used for "virtual" settlements that, in appropriate situations, can result in early matter resolution.

Finally, "lessons learned," or improvement opportunities, may be the most important aspect of litigation avoidance and management. Frequently, companies spend large sums litigating the same or similar preventable problems. This may be because one side of the company sees the litigation as a law department problem and the law department acquiesces to that view. The result is that the law department defends the case, either winning or losing, and the litigation experience is not used as a training tool to improve future performance. A key function of the law department should be to

claims and lawsuits and increased expense. On the other hand, energetic and proactive management of these elements will result in lower numbers of claims and lawsuits and likewise, lower expenses. The whole concept of training the business people with lessons learned from claims and lawsuits is the prevention of future incidents that can give rise to litigation.

Much wisdom resides in a company's in-house, but also outside, counsel. Such "lessons" should be communicated to appropriate company personnel for discussion and building of awareness among those personnel of behavior that should be avoided. But not all lessons are based upon defects or mistakes. Some of the most valuable lessons are of good, positive, beneficial actions taken by corporate personnel which came to light during a claim or a lawsuit and which helped counsel defend the company. Those actions should be highlighted to others so that, again, they may be discussed as good examples and awareness developed of the kinds of behavior that should be replicated. The persons responsible also should be thanked.

Negative actions or product qualities should likewise be noted and publicized in training presentations. Persons who identify these should also be thanked. All lessons learned—positive or negative—are golden opportunities for the company to increase the quality of its products, processes and procedures. Those who ignore such lessons will surely repeat the negatives and only randomly benefit from the positives. By harnessing them into training programs, companies can prevent the negatives and systematically repeat the positives.

Despite the extremely liberal liability laws in the United States, companies and their managers need not give up. In fact, the tools discussed here show that many companies can have at least partial control over liability events by studying them and correcting them. Of course, despite a company's best intentions, some accidents will still occur.

§ 2:46 Practice checklist

1. "Get inside the client's head." A problem can only be effectively understood from the client's viewpoint. Learn the client's business. (*See* § 2:4)

2. Maintain regular contact with the management and operating personnel of the client. Learn about the client's business, how the

client operates that business, and the client's plans and goals. (*See* § 2:6)

3. Have outside counsel provide a 30 to 45-minute training session, approximately once a quarter, for selected management and operating personnel. Concentrate on examples of litigation avoided or successfully concluded. (*See* § 2:7)

4. Avoid suing customers in personal injury litigation. In most personal injury lawsuits, such as product liability litigation, it is to the mutual benefit of the product manufacturer, and the customer, to cooperate in the defense of the litigation. Litigation expense can be significantly reduced and potential damage to the customer relationship avoided. (*See* § 2:8)

5. Keep an eye on the sales and marketing departments. They are generally the first to know what's happening in the field, what your competitors are doing, and what representations and warranties your sales force is really making. Regularly consult with the sales and marketing departments to learn what they know. (*See* § 2:9)

6. Do not let the sales department draft documents concerning product safety. When they do, the effectiveness of the warnings tends to be diluted. The documents become sales pieces as opposed to warnings. (*See* § 2:9)

7. Draft and negotiate contracts that further your goals. Prevent ambiguity that may be misconstrued by a judge or misunderstood by a jury. Use clear, concise and uniform language. (*See* § 2:10)

8. When appropriate, negotiate and draft contracts to avoid cross-complaints. Consider: (1) joint defense agreements with pre-negotiated apportionment of fault; (2) contract clauses which eliminate elements of liability; and (3) contract limitation on arbitration hearing length. (*See* § 2:10)

9. Oversee and control the contract drafting process for all substantial contracts. Substantial contracts should only be executed on behalf of the client by authorized signers, and authorized signers should never vary from the contract forms prepared by the legal department, unless and until the variances are approved by the legal department. (*See* § 2:11)

10. Participate in the negotiation process. Recognize the difference between negotiating the deal points (the job of the business people) and drafting language to accurately memorialize the deal points (the job of inside counsel). (*See* § 2:11)

11. Regularly participate in training the client's business and sales personnel about contracts. Periodically train and retrain the operating personnel about why the contract is in writing, why there are a limited number of authorized signers, the purpose for choice of law, jurisdiction and venue provisions, why the client will not provide indemnification to the customer, and the purposes for other required causes. (*See* § 2:11)

12. Regularly review and update the client's contract forms. (*See* §§ 2:11–2:12)

13. Avoid bad documents. Concentrate on prevention, which is a function of training. Written communication should be confined to factual data only. Any writing should be only concerned with the client's interest, not the personal interest of the author. (*See* § 2:13)

14. Minimize the potential for creation of bad documents via e-mail by training. E-mail communication, like any other writing, should be confined to the facts, and the client's interest, as opposed to the author's interest. (*See* § 2:13)

15. Any company that designs, manufactures, packages, stores, markets, distributes, services or disposes of products should implement a product integrity program ("PIP"). (*See* §§ 2:19–2:26)

16. A key to success of a PIP is the commitment of senior and middle management to PIP goals. (*See* § 2:21)

17. To successfully implement a PIP the client must: (1) align management and operations to support and be accountable for the product integrity initiative; (2) integrate product integrity into each phase of a product's life cycle; and (3) make product integrity information available to the entire organization. (*See* §§ 2:19–2:26)

18. Engage in early investigation and assessment of accidents, supplier deficiencies, employee complaints, or other events that can lead to potential claims. (*See* § 2:27)

19. Train the client's employees to effectively respond to initial complaints about the client's products or services. (*See* § 2:28)

20. Investigate and assess claims about the clients' products or service as soon as possible. Time is of the essence and expired time translates into lost opportunity. (*See* §§ 2:27–2:31)

21. Be prepared to manage a crisis before the crisis occurs. Establish a Crisis Management Team whose primary purpose is to identify, investigate, control, and resolve crises. (*See* §§ 2:32–2:38)

22. Once the Crisis Management Team has been established, announce its existence and composition to the entire organization. (*See* § 2:34)

23. Promptly identify a crisis when it occurs. Recognize the type of events which can create a crisis. After a crisis is identified, advise the Crisis Management Team. (*See* § 2:35)

24. Assume the primary responsibility for coordinating, conducting and controlling the client's investigation of a crisis and reporting the results of the investigation to other Crisis Management Team members. Investigate promptly, investigate thoroughly, preserve evidence and documents, preserve the attorney-client privilege, and utilize outside resources. (*See* §§ 2:31, 2:36)

25. Control the crisis by being prepared to deal with the media, the government, and the general public. Adopt a media strategy as early as possible and communicate the media strategy to all necessary employees. (*See* § 2:37)

26. In resolving a crisis, propose various strategies to utilize and preserve the client's financial resources. Focus on preventing the client from being exposed to the uncertainties associated with litigation. (*See* § 2:38)

27. In dealing with routine claims, accelerate the process. Typically, the longer a claim is pending, the more it costs in dollars, employee down time, potential adverse publicity, and dissatisfied customers and consumers. Large savings are achievable as a result of accelerated claim evaluation and disposition. (*See* § 2:39)

28. Be creative and courageous in the use of new methodologies to accelerate claim resolution. Hire outside counsel who are part of the solution and not part of the problem. Utilize "focus group/mock jury" assessments of liability and damages. Make aggressive use of alternative dispute resolution. (*See* §§ 2:39–2:41)

29. Utilize technology to accelerate claim resolution. Implement a media monitoring program. Utilize video surveillance. Use case management software. (*See* §§ 2:42–2:44)

30. Insure that lessons learned from the investigation and assessment of claims and litigation are communicated to the client's managers and engineers. Such "lessons learned" should be communicated to client personnel so that the client's products and services are improved. Teach the employees what works, and doesn't work. (*See* § 2:45)

Chapter 5

REQUESTS FOR PROPOSALS, BIDDING, AND PRESENTATIONS

by
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Laurence Coit
William H. MacAllister
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§ 5:1 Scope note
§ 5:2 Preliminary considerations
§ 5:3 — Goals, objectives and pitfalls of the selection process
§ 5:4 — Identifying potential counsel
§ 5:5 — Right sizing of the selection process and time allotted
§ 5:6 Requests for proposals
§ 5:7 — Cost-effective RFPs
§ 5:8 — Selecting the firms to participate
§ 5:9 —— The initial list
§ 5:10 —— Paring the initial list
§ 5:11 —— Conflicts
§ 5:12 —— Number of firms participating
§ 5:13 — Developing the RFP
§ 5:14 —— Format of the request
§ 5:15 —— Information requested
§ 5:16 —— Format of proposals
§ 5:17 —— Schedule
§ 5:18 —— Technology
§ 5:19 — Evaluation
§ 5:20 —— Team
§ 5:21 —— Process
§ 5:22 —— Weighting criteria
§ 5:23 — Selection and notification
§ 5:24 — Agreement
§ 5:25 Advanced concepts
§ 5:26 — Project management
§ 5:27 — Earned-value

§ 5:28 — Fixed profit
§ 5:29 — Buyer-driven transaction systems
§ 5:30 Bidding: Hewlett-Packard's RFQ procedure
§ 5:31 Presentations
§ 5:32 — Objectives
§ 5:33 — Discovering the client's needs
§ 5:34 — Ensuring effective presentations
§ 5:35 — Assembling the right presentation team
§ 5:36 — Making the presentation
§ 5:37 — Using technology
§ 5:38 — After the presentation
§ 5:39 Monitoring performance
§ 5:40 — Tracking objective performance criteria
§ 5:41 — Measuring the success of the relationship
§ 5:42 — Reciprocal performance evaluations
§ 5:43 Practice checklist
§ 5:44 Form: Sample letter requesting a proposal
§ 5:45 Form: Microsoft Project® sample plan for litigation
§ 5:46 Form: Sample outside counsel procedures for filing patent applications or responses
§ 5:47 Form: Performance evaluation with outside counsel

§ 5:1 Scope note

The purpose of this Chapter is to provide insights into certain formal processes for finding and selecting outside counsel to provide legal services including litigation. These formal processes include requests for proposals, bidding, presentations and so-called beauty contests. In particular, in the section dealing with requests for proposals, the selection of firms for participation will be described as well as the development of formats for requests and responding proposals.[1] The evaluation of proposals and the selection and notification procedures will also be covered. Hewlett-Packard's RFQ procedure for bids will be discussed in Section 5:30 and in Section 5:31 a number of aspects regarding presentations by law firms will be covered. The Chapter includes a description of some advanced

[Section 5:1]

[1] The law firm perspective in responding to RFPs is also discussed in Chapter 6 "Marketing to Potential Corporate Clients" at *infra* § 6:22. A sample response is set forth at *infra* § 6:47. *See also* Chapter 49 "Corporate Information Technology Transactions" at *infra* § 49:12 on the use of the RFP process to select information technology vendors.

concepts in managing outside counsel, such as project management using specialized software, and various incentive, cost-controlling systems and procedures. The Chapter concludes with recommendations on how to monitor the cooperative relationship between the client and outside counsel in order to assure that the goals of the selection process are achieved.

§ 5:2 Preliminary considerations

Preliminary considerations in the selection process include setting a goal, developing alternatives for the selection and "right sizing" the selection process to assure economic application of resources. In the case of litigation, time is usually a critical factor. A plaintiff, being the initiator of litigation, generally has much more time to identify and retain the best trial counsel available for its representation. A defendant, on the other hand, usually has 20 days after service of a complaint to respond to the complaint, so a defendant must act expeditiously to retain trial counsel. Some of the processes described in this Chapter may be more acceptable than others depending on the time available to a party.

§ 5:3 — Goals, objectives and pitfalls of the selection process

Clearly the goal is to select that outside counsel who will render the best service and give the best advice and counsel for his party's case at the most reasonable cost. Large corporations, with established and sophisticated legal departments, usually have a large bank of knowledge of and experience with appropriate law firms. In many cases, the selection of counsel may almost be automatic. Smaller companies or those fortunate enough to have had little or no prior experience with litigation or need for extensive or specialized legal services, may find the prospects of finding suitable counsel baffling and overwhelming, and certainly challenging. In this Chapter we will explore various routes to the selection of appropriate outside counsel best calculated to lead to victory or satisfactory solutions to the client's problems at the most affordable cost. It is also possible for clients, unfamiliar with law firms having the requisite skills and experience, to conduct a computer-based survey of law firms specializing in the area or areas of interest or need.

One of the principal pitfalls is to become enamored by a skilled and artistic presentation of a firm's capabilities and personnel. Large firms almost always have impressive senior partners who are good

at selling their firms. These are usually lawyers who have been and are successful in persuading judges and juries to buy their viewpoints and conclusions. The client must, from the beginning of the selection process, make sure that he is interfacing with the firm's lawyers who will actually be assigned to represent and advise the client. One of the drawbacks of relying solely on the presentation process in selecting counsel is the "canned" or staged performance by the presenter so that it is difficult to separate the performance from reality. What you see is not always what you get. Likewise, as in many other situations, going for price alone may also not be in the client's best interests. Having said that, one must remember that successful lawyers are in great demand, and demand drives the price.

§ 5:4 — Identifying potential counsel

The processes of selecting the proper counsel which are discussed in this section range all the way from acting on the simple recommendation of a trusted business associate to a sophisticated competitive bidding process with a number of law firms vying for your business.

No matter what procedure may ultimately be utilized to select outside counsel, at some point a personal interview is recommended, especially with heretofore unknown counsel. At least one advantage of conducting an early interview is to avoid the waste of time and money in following a selection process only to eventually decide that a particular counsel will not be acceptable for reasons that could have been discerned immediately. One often can ascertain that a particular law firm or trial counsel will be not palatable to the client's management and its in-house legal staff by an interview or even an informal meeting. The relationship between the client and its counsel is all-important if there is to be meaningful and productive interaction between the two and a successful representation. Both must feel free to communicate. If nothing else is determined at an early interview except that the counsel under consideration is personable and congenial and likely to work well with the client and its employees, this initial interview will have served its purpose. In sum, there is no point in pursuing the possibility of retention further by any procedure when the client is not likely to be comfortable with the firm or its members, where the "chemistry" is not positive. Of course this interview may be characterized as a "beauty contest" but

it should not be the sole basis for selecting counsel. Rather, it is a consideration that must be explored before finally making a selection.

No matter whether an interview is scheduled initially or later, it is best done at the law firm's premises where the client's personnel have an opportunity to meet other members of the firm and to see first-hand what the firm's tools and physical resources are. This often may be less expensive than requiring the firm to make available its legal staff at some distant location requiring extensive traveling. No matter where or when the interview takes place it is imperative that the client meet the firm's lawyers and support staff who actually will be working on the matter for which the firm is being hired. As to the client's attendees, certainly the in-house lawyer or lawyers who will be interfacing with the firm must be present. Similarly, non-legal members of the client's organization who will likely be involved directly with the law firm should attend. Also, those client employees who have particular knowledge of the matter or subject (and therefore likely to be ongoing sources of information to the law firm) should be included.

After an identification of potentially suitable law firms by any means,[1] at least three to four law firms should be nominated for further consideration. The client will be best able to make an informed selection if there are alternatives, not only dollar-wise but tactically or strategically as well. At this point, a decision must be made as to whether to proceed with more formal presentations by the candidates as to the make-up of their firms and their capabilities if this has not been done previously. As indicated earlier, it is critical that the client knows who is being proposed by the firm as their team. What is the experience of this team? How familiar are they with the law applicable to the issues or the prospective case? How do they propose to deal with the particular legal issues and facts of the situation?

To make these presentations productive, the client must preliminarily supply the candidates with as much background information as is available and with enough advance time for the firms to absorb the salient aspects of the prospective litigation or area of concern and formulate an initial approach as to how the matter might best be dealt with. Obviously all the firms under consideration must be given the same set of facts and objectives by the client. As noted

[Section 5:4]

[1] *See infra* §§ 5:8–5:9.

earlier, time may be of the essence, especially where the client is the defendant in a lawsuit, and may only have 20 days to respond to a complaint. In such instances, it may be well to have an established understanding with an unrelated law firm or even with an attorney within the corporation to immediately request an extension of time for filing an answer or otherwise respond so as to provide adequate time to find and select trial counsel and draft an appropriate response.

§ 5:5 — Right sizing of the selection process and time allotted

Whether outside counsel is being sought for litigation or other services, time is a factor that limits the field of candidate law firms. In general, it is suggested that no more than four firms can be properly and meaningfully evaluated in the selection process. However, it may be appropriate to invite more than four law firms to participate if the engagement is likely to be very substantial or involve a variety of issues that may be beyond the resources of any one law firm. Thus, if the matter may involve complex scientific or technological aspects as well as sophisticated banking or investment procedures, it may be necessary to include firms having the requisite or specialized knowledge and skills not likely to be found in any one law firm. Fewer than three firms may not provide reliable or significant comparative data.

The firms must be given adequate time to receive and digest the facts and background of the case or matter for which they may be retained as well as to conduct meaningful legal research so as to understand the issues framed by the facts. In technologically intensive cases, there is also the necessity of allowing time for the firms to come up to speed on what may be wholly new ground for the firm. Thus, even a firm adequately staffed with attorneys having an electrical engineering background must have time to permit these attorneys to grasp and understand the principles of transmitting color television signals, for example. Finally, time must be allotted to developing a rational financial analysis of the matter and the services needed so that a proposed budget will be reasonably sound. The financial analysis may also include an estimate of the possible exposure of or risks to the client including the extent of prospective damages that may be awarded. This analysis may be performed completely separately by organizations that specialize in litigation

the new firm will just adopt the work done to date in the matter or case by the first firm. In effect, the client may well end up paying twice for the same thing. In the event that such change becomes imperative, every effort should be made to keep the first law firm involved in the matter in some capacity. Hence, the relational aspects of the representation by two firms becomes challenging and perhaps unacceptable.

In such an eventuality, should the selection process be repeated from the beginning? Time may be a limiting factor here since the matter may not permit delay or the lawsuit is not going to stop while the client searches for new counsel. This therefore suggests that the best course for the client is to return to the roster of the firms originally considered and select the runner-up. Even so, the successor law firm will need time and assistance to come up to speed, which emphasizes the high desirability of keeping the first firm on board as a part of the team. Such a mid-course change can be disastrous and demonstrates the importance of client and counsel working out their differences by regular case reviews and reciprocal performance evaluations to make it unnecessary to ever bring new counsel on board once the case has gotten underway.

§ 5:43 Practice checklist

A. *Requests for Proposal*

1. Determine the right size for the selection process for the amount of exposure. (*See* § 5:7)
2. Develop the long list of qualified firms to be considered for selection. (*See* §§ 5:8 and 5:9)
3. Pare the initial list to select which firms should be considered for participation in the RFP process. (*See* § 5:10)
4. Carefully consider the conflict of interest situation and ramifications to determine if some of the firms should be eliminated from the RFP process because of conflicts. (*See* § 5:11)
5. Determine the number of firms that will participate in the RFP process in order to obtain competition and to get an adequate choice. (*See* § 5:12)
6. Develop the request for proposal. (*See* § 5:13)
7. Establish the compensation scheme for the legal services that will be provided. (*See* § 5:13)

8. Set the evaluation criteria and determine if weighting factors will be used. (*See* § 5:14)
9. Determine the information to request in the RFP. (*See* § 5:15)
10. Establish the format and the limits for the proposals submitted by the firms. (*See* § 5:16)
11. Establish the schedule for the RFP process. (*See* § 5:17)
12. Determine the evaluators and notify them of the criteria and schedule. (*See* §§ 5:19 and 5:20)
13. Evaluate the proposals. (*See* § 5:22)
14. Select the winning firm and notify all participants of the results. (*See* § 5:23)
15. Enter an engagement agreement. (*See* § 5:24)

B. *Presentations*

1. Establish the objectives of the presentation. (*See* § 5:32)
2. Determine the client's needs. (*See* § 5:33)
3. Assemble the right team to give the presentation. (*See* § 5:35)
4. Make an effective presentation. (*See* § 5:36)
5. Learn from the outcome. (*See* § 5:38)

C. *Monitoring Performance*

1. Track objective performance criteria. (*See* § 5:40)
2. The client and the law firm should meet monthly to monitor performance and expectations. (*See* § 5:40)
3. Prepare and share reciprocal performance evaluations. (*See* § 5:42)

§ 5:44 Form: Sample letter requesting a proposal

Date
Partner
Law Firm
Address
Subject: Request for Proposal
Dear _____:

As we have recently discussed, _____ Company is interested in selecting an additional intellectual property law firm to assist us on litigation related matters. Toward that goal, we invite

your firm to submit a proposal to us and then to give us a presentation about your firm's capabilities.

Your written proposal should address the evaluation factors listed in Attachment A, Request for Proposal Evaluation Criteria. Those evaluation factors in Attachment A followed by an asterisk require a numeric response and should be listed in Attachment B, Quantitative Evaluation Factor Table. The proposal should not exceed 20 pages, one-sided, exclusive of both the cover letter and the completed Attachment B. Three copies of the proposal must be submitted by close of business on September 6, 2000 to receive consideration.

In regard to the presentation, we have scheduled 10 AM to 1 PM on September 17, 2000 in our Palo Alto offices. We would expect an hour presentation by members of your firm on your firm's capabilities, an hour of question/answer/clarification on your proposal and presentation, and an hour for lunch and informal discussion.

We look forward to receiving your proposal and meeting with you on September 17, 2000. We plan to complete hearing presentations by September 20, 2000 and evaluation of proposals by October 1, 2000. We will notify all law firms submitting a proposal of the outcome on October 7, 2000. If you have any questions about the evaluation process or criteria, please contact me at -[phone number].

Sincerely,

_____

Manager of Litigation
Corporate Legal Department
cc:

Chapter 6

MARKETING TO POTENTIAL CORPORATE CLIENTS

by
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James W. Quinn
and
*Peter A. Antonucci**

§ 6:1 Scope note
§ 6:2 Preliminary considerations
§ 6:3 — The role of marketing in today's marketplace for legal services
§ 6:4 — Cost considerations and effective marketing
§ 6:5 — Ethical considerations
§ 6:6 — Identifying and targeting the corporate decision maker
§ 6:7 The marketing players: Their roles and commitments
§ 6:8 — Inside counsel and the modern corporate client
§ 6:9 — Outside counsel
§ 6:10 —— Firm management and the partnership at-large
§ 6:11 —— The firm's associates
§ 6:12 —— The firm's marketing director and other non-legal staff
§ 6:13 The how-to of legal marketing
§ 6:14 — Self-analysis
§ 6:15 — Evaluation of the competition
§ 6:16 — Definition of target audience
§ 6:17 — Cost-benefit analysis
§ 6:18 — Alternative fee arrangements
§ 6:19 — Other considerations
§ 6:20 Marketing tools
§ 6:21 — Requests for proposals ("RFPs")
§ 6:22 —— How to respond to a request for proposal
§ 6:23 —— RFPs from a corporate client's perspective

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§ 6:24 — Pitch books
§ 6:25 —— How to create and utilize persuasive pitch books
§ 6:26 —— A corporate client's perspective on pitch books
§ 6:27 — Internet Web sites
§ 6:28 —— Successful marketing through a firm's Web site
§ 6:29 —— A corporate client's view of the Internet from a marketing perspective
§ 6:29.1 ——— Other new technologies
§ 6:29.2 ——— Online Client Relationship Management Systems (OCRMs)
§ 6:29.3 ——— Video conferencing
§ 6:30 — Newsletters
§ 6:31 —— How to create and utilize effective newsletters
§ 6:32 —— A corporate client's perspective on newsletters
§ 6:32.1 —— Annual reports
§ 6:33 — Law firm seminars
§ 6:34 —— How to effectively utilize seminars
§ 6:35 —— Seminars from a corporate client's perspective
§ 6:36 — Firm brochures
§ 6:37 —— How to create and utilize effective firm brochures
§ 6:38 —— A corporate client's perspective on firm brochures
§ 6:39 — Beauty contests
§ 6:40 —— How to prepare for and win a beauty contest
§ 6:41 —— A corporate client's perspective on beauty contests
§ 6:42 — Bar association activities
§ 6:43 — Secondments
§ 6:44 —— How to build client relationships through secondments
§ 6:45 —— What the corporate client seeks to obtain through a secondment
§ 6:46 Practice checklist
§ 6:47 Form: Sample response to a request for proposal
§ 6:48 Form: Sample pitch book
§ 6:49 Form: Sample Internet Web site

§ 6:1 Scope note

Over the past decade, and consistent with "value chain" economic principles, modern corporations have developed substantial legal departments that are filled with sophisticated, skilled and experienced in-house lawyers.[1] Yet, for a variety of reasons, ranging from

[Section 6:1]

[1] *See, e.g., In-house Legal Staffing Trends: Skills in Demand for 2000*, The Metropolitan Corporate Counsel, Nov. 1999, at 34 (discussing the "considerable growth among corpo-

the need to retain legal specialists who possess particular expertise in a given area of the law to the sheer size, complexity and novelty of the issues with which they are confronted, modern corporations continue to find themselves in need of outside counsel. At the same time, both the cost of legal services and the number of skilled lawyers and reputable law firms have continued to grow at an exponential rate.[2] Faced with such rapid expansion and a simultaneous emphasis on cost-cutting, corporate clients are confronted with an increasingly difficult task when faced with legal matters that call for outside counsel: how to select among the qualified lawyers bidding for their business, while at the same time keeping costs down.

On the flip side of the coin, one of the most serious issues facing outside counsel and law firms today is how to understand, reach and retain not only the corporate clients they serve today, but those they would like to serve tomorrow. This problem, though relatively new to the legal profession by comparison to other areas of professional practice, now looms large in the practice of every law firm, large or small. In addition to the unparalleled growth of lawyers in the United States, the market for legal service providers has become flooded in recent years by non-traditional competitors of domestic law firms such as foreign law firms, banks, insurance companies, and accounting and consulting firms. Now more than ever, law firms must not only possess good lawyers, savvy management and clear strategic thinking, but they must excel at developing smart, cost-effective marketing strategies if they are to realize their potential in today's dynamic legal environment.

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rate legal departments nationwide"); *What Your Clients Really Want and How Partners Can Meet These Needs*, Partner's Report for Law Firm Owners, June 1999, at 1 ("Industry data also now show that a majority of companies have increased the number of in-house lawyers.").

[2] *See, e.g.*, Dorothy Hughes, *New York Firms and Market Robust, Many Report Double-Digit Growth*, N.Y.L.J., Dec. 13, 1999, at S4 (noting the overall "healthy growth" of law firms in New York); Rocco Cammarere, *1992–97 Golden Years; Firms Earned a Mint*, N.J. Lawyer, Mar. 29, 1999, at 1 (noting that newly-released figures from the U.S. census bureau indicate that the number of law firms across the United States has increased from 153,462 in 1992 to 168,206 in 1997, an increase of 9.6 percent); R. Scott Rogers, *Robust Economy Accelerated Firm Growth in '99*, Illinois Legal Times, July 1999, at 1 (observing that 55 firms in the "Top 100 List" added attorneys, that two new firms were added to the "Top 100 List," and that the total number of attorneys in the "Top 100" firms has increased by just over one percent a year for most of the decade).

This Chapter examines the modern corporate client and the modern outside counsel, and the role that marketing plays in today's legal marketplace. It then discusses some of the best and most commonly used marketing tools that are available to outside counsel today. It addresses marketing in general, and each of the marketing tools explored, from the perspective of outside counsel, and explains how each of the various marketing tools can best be used to lead to referrals, repeat business and new clients. It then offers a glimpse into each of the marketing tools discussed from the experienced and pragmatic perspective of a prospective corporate client.

§ 6:2 Preliminary considerations

Before engaging in any meaningful marketing activities, the lawyers in any firm must really take a moment to consider a few seemingly innocuous, but truly significant, threshold issues. For instance, why should the firm go to the expense and trouble of marketing its services? After all, the firm—particularly if it's a small one—may already have an adequate client base, and a marketing campaign will no doubt drain certain resources (*i.e.*, time and money) that could otherwise be put to other, perhaps more productive uses. Furthermore, assuming that marketing *is* in fact necessary, does this mean that the firm must retain an outside consulting firm and engage in a full-blown campaign complete with expensive advertisements? Does the firm *have* to publish brochures? How about newsletters? How much money does the firm *have to* devote to its marketing efforts? How much money can the firm *afford* to devote to marketing efforts? Are there ways in which the firm can effectively market its services with a modest budget? If so, through what methods? Moreover, to whom exactly should these marketing efforts be directed? Finally, are there particular ethical constraints which must be observed in marketing the firm's services? How can the firm avoid falling into common, but serious, pitfalls?

The following four sections address each of these preliminary considerations.

§ 6:3 — The role of marketing in today's marketplace for legal services

Until recently, lawyers and law firms did not focus on the need to market their services in the modern sense of the term. The practice of law was considered a specialized service, which relatively few

people were qualified to provide, and clients were extremely loyal, tending to view their lawyers as lifetime business advisors and confidantes. To put it in economic terms, "competition" was low and "demand" was relatively high. Lawyers—and large law firms, in particular—tended to "sit back" and practice their skills, and were "sought out" by clients in need of legal services.

Over the course of the last decade, however, a great deal has changed in the marketing of legal services. Throughout the 1990s, competition for legal work increased substantially as the number of lawyers—and the number, and size, of reputable national and regional law firms—multiplied exponentially.[1] In addition, large corporate clients were hiring more inside lawyers to handle more complex legal work including litigation and corporate transactional work.[2] Taken in combination, this had the effect of limiting the supply of legal work available, while simultaneously reducing the demand for outside counsel. Law firms began to take notice of missed opportunities as favorite clients, and would-be clients, were retaining competitive law firms to do business that they thought should come to them. Often, they simply failed to make the client aware of the scope of their practice or depth of their expertise, and missed an opportunity to develop or expand their client relationships. It did not take long before even the most formal and traditional firms began to recognize that legal marketing had a place in their practices.

Today, even with a prospering economy that is replete with large-scale corporate transactions and litigation, these trends are continuing. Not only has the number of lawyers and law firms in every major city across the country continued to grow, but most large corporations now possess full, in-house legal departments that handle not only the routine corporate work, but large, sophisticated matters as well. In addition, non-traditional players including the huge, well-financed international accounting and consulting firms—each of which have become sizeable law firms in their own right—have begun making inroads into the legal arena. Proposals aimed at easing current restrictions on the practice of law, so as to permit multi-disciplinary firms to exist in this country, threaten to enhance the competition for legal services even further. Moreover, with the renewed emphasis in today's corporate climate on budgeting, corporate governance and "partnering," corporations are increasingly consolidating legal work that was previously spread

[Section 6:3]

[1] *See supra* § 6:1 note 2.

[2] *See supra* § 6:1 note 1.

among several firms into a much smaller number of firms, with whom a "partnering" relationship is then developed. Thus, it is becoming increasingly apparent that clear and well-developed marketing strategies—and savvy marketing skills—are essential ingredients for success in today's legal market.

From the buyer's perspective, *i.e.*, the client's point of view, legal services marketing has also become increasingly important. As litigation and transactions become both more complex and more global, clients need tools to make sure they are selecting the right firm for the right job. Information and communication are key. Marketing tools of the type discussed in this Chapter can be an important (and in some cases the only) way for a client in Austria to know who to select for legal work to be done in New York City, Phoenix, Arizona or Bangkok, Thailand.

Unfortunately, many lawyers and law firms are unaccustomed to the modern marketing methods that prove most successful in today's dynamic professional environment. Gone are the days of "marketing" oneself, or one's firm, over "three-martini lunches" at the "old boys' club." Lawyers these days must be proficient in the art of winning beauty contests, preparing persuasive pitch books, responding quickly to requests for proposals, hosting seminars, and drafting and disseminating effective written and visual materials. Outside counsel and their internal marketing staffs must be fully fluent with such traditional marketing concepts as branding, product analysis, product segregation, developing core competencies and creating targeted promotions (all of which are discussed later in this Chapter). And, of course, no lawyer can afford to be unfamiliar with the high-tech world of the Internet, Web sites and e-mail.

§ 6:4 — Cost considerations and effective marketing

To succeed in today's ever-evolving and increasingly competitive legal market, lawyers and their firms must be committed to allocating sufficient resources to implement a successful marketing plan. To be sure, marketing campaigns in the modern professional world can consume significant resources in terms of both time and money. Smaller firms that possess less manpower and fewer financial resources, however, need not feel at a disadvantage when it comes to business development. As explained in more detail below, there exists a variety of relatively inexpensive, yet highly effective, mar-

sought out, by outside counsel.[1]

§ 6:45 —— What the corporate client seeks to obtain through a secondment

CBS has used various forms of secondments over the years. Usually, they are excellent examples of the flexibility of a law firm and its willingness to go the extra mile for the company. It is a service which we greatly value.

The most obvious arrangement is to have a lawyer from the firm actually have an office in the law department and be accessible to work on assigned tasks for the company. This has been done when hiring a new employee is not appropriate or when a project has a finite but intense period of activity. For instance, when we announced the sale of a division and the legal activity of that division increased during the period of time prior to the closing, we made arrangements to have an associate of a law firm work alongside our in-house lawyers for three months. This turned out to be a good learning opportunity for the young associate, kept our divisional lawyers' heads above water and was put together for a cost far less than an hourly rate. The firm's willingness to assist us and make reasonable fee arrangements for this three-month period further cemented a good relationship.

Also, on occasion we have seen the secondments, such as the one described above, lead to an offer of employment. Generally, the company, the individual and the law firm have had good experiences in these relationships.

The type and degree of flexibility and cooperation at the law firm which are necessary to make secondments work are tremendously valuable to the company and engender a deep appreciation at the company for the firm's help.

§ 6:46 Practice checklist

A. *Preparing to Market a Firm's Legal Services*

1. Before engaging in any marketing activities, conduct a critical self-analysis. Candidly evaluate all of the firm's strengths and weaknesses, and perform a frank product assessment—*i.e.*, deter-

[Section 6:44]

[1] *See* discussion of ethical issues arising from secondment in *infra* §§ 8:26, 26:27, and 40:22. *See also infra* § 31:14 on the duty to supervise.

mine what services the firm currently offers and what additional services the firm can realistically offer. (*See* § 6:14)

2. Based on a critical self-analysis of the firm, identify the firm's target audience—*i.e.*, a realistic universe of potential clients which the firm can pragmatically pursue. Establish parameters that define the type of client the firm wishes to attract, and consider, among other things, the economic feasibility of accepting certain types of clients and/or representations. (*See* §§ 6:16, 6:17)

3. Based on the foregoing, ascertain the relevant market in which the firm competes and identify the firm's leading competitors in that market. The market definition should extend to all firms that offer the same services to the same general client bases and should make distinctions, as appropriate, based on geographic considerations and the like. (*See* § 6:15)

4. Evaluate the competition and determine how and why the firm can offer particular services better than other firms in the same competitive set. Consistent with the results of such an evaluation, develop a unique identity that the firm would like to portray and implement strategies designed to perpetuate that identity. (*See* §§ 6:10, 6:12, 6:15)

5. Integrate technology into the firm's everyday practice. Consider investing in a versatile, integrated computer platform that offers e-mail and Internet access as well as the ability to interact with the applications most frequently used by the firm's clientele. Consider also investing in technology that enables the firm to scan and electronically store documents, send and receive information online, monitor the status of pending litigations and transactional matters, create effective audio and visual trial aids, and comply with electronic filing rules now prevalent in many jurisdictions. (*See* § 6:10)

B. *Marketing a Firm's Services in General*

1. Actively engage in "trend-spotting" and dedicate ample time to other activities designed to identify nascent areas of the law. When developments in the business and legal worlds suggest new and potentially profitable opportunities for the firm, management should consider developing within the firm corresponding finite, specialized practice areas that will enable the firm to effectively provide valuable legal services in emerging areas of the law to existing and future clients. (*See* §§ 6:10, 6:19)

2. Devote significant time and resources to measures designed to retain existing clients and expand the services provided to them. Client surveys, routine follow-up and periodic entertainment events ought to be considered, and serious thought should be given to designating a single partner who can serve as "relationship manager" for each of the firm's principal clients. (*See* § 6:10)

3. Consider how the firm might utilize marketing materials to influence existing and potential corporate clients to "buy" certain legal services they might otherwise "make" in-house. For instance, consider disseminating marketing materials which compare: (1) the proficiency of inside and outside counsel in certain select fields of law; (2) the proficiency of inside and outside counsel in performing certain tasks or functions; (3) the capacity and operating level of the client's corporate legal department with the capacity and operating ability of outside counsel; (4) the in-house availability of multi-disciplinary expertise and support services and the ability of outside counsel to provide such expertise and/or services; (5) access to, and responsiveness of, inside and outside counsel; (6) partnering prospects of outside counsel; and (7) the cost of in-house legal services with the cost of outside counsel. (*See* § 6:8)

4. Stay abreast of recent industry and legal developments and become familiar enough with clients' operations that the firm can understand how such developments might impact its clients' interests. A firm's attorneys, including junior and senior associates, should become intimately involved in all facets of the representations in which they are involved, and should be present at client-related meetings, conferences, negotiations and court appearances so that they not only are well-equipped to contribute to their clients' causes and to respond competently to client inquiries, but so that they begin to develop a rapport with clients and other contacts. (*See* § 6:11)

5. Consider attending bar association seminars, workshops and other organized training programs that are designed to educate on industry and legal topics and cultivate lawyering skills. (*See* § 6:11)

6. Consider undertaking significant pro bono activities which, aside from providing public relations benefits, provide fertile ground for realistic, on-the-job training for a firm's young lawyers. (*See* § 6:11)

7. Consider becoming involved with bar associations and other professional associations. Such involvement allows a firm's law-

yers to develop relationships and meaningful contacts with jurists and other practitioners, while simultaneously enabling them to develop their professional reputation, and that of their firm, through publications and legislative involvement. (*See* § 6:42)

8. Consider hosting in-house seminars devoted to timely industry or legal topics. Be certain to highlight the cross-disciplinary aspects of the topics that form the nucleus of the seminar, since doing so offers the firm an opportunity to underscore valuable legal services which clients may have overlooked and to display the breadth, diversity and synergies of its own practice. Provide attendees with meaningful takeaway materials that serve not only as a valuable resource for attendees, but as a reminder to potential clients of the firm's expertise on the subjects covered. If possible, offer CLE credits to those in attendance. (*See* § 6:34)

9. Create, and periodically update, a firm brochure that contains an overview of the firm, highlights of the firm's practice, a detailed description of the firm's practice areas, descriptions of the firm's various offices, representative clients, and the like. Because brochures have long "shelf lives," however, when deciding what to include in a brochure, be sure to distinguish between information that is of passing appeal or is likely to become obsolete in the near future and information that is of lasting value. In addition, be certain that the brochure complements the firm's image or identity. "Cutting edge" firms that specialize in technology-related fields, for instance, should seriously consider modern alternatives to the traditional paper brochure such as "video brochures" that utilize CD-ROM or DVD technology. (*See* § 6:37)

10. Design and maintain a "user-friendly" Internet Web site that contains detailed background information about the firm and its lawyers and a "virtual library" containing newsletters, speeches, white papers, and articles authored by the firm's lawyers. (*See* § 6:28)

11. Publish and disseminate periodic newsletters that contain timely, topical information on subjects of current interest to potential and existing clients. Be certain that such newsletters contain not just "hard facts" or summaries of current issues or recent developments, but perceptive analysis of those matters as well. (*See* § 6:31)

12. In all marketing materials, be certain to refrain from making any statement that might be construed as "false" or

"misleading." Under the ethical rules of most jurisdictions, a communication may be considered "false" or "misleading" if it: (1) contains an omission of material fact or law, or omits a fact necessary to make the communication, when considered as a whole, not materially misleading; (2) creates, or is likely to create, an unjustified expectation about the results a lawyer or law firm can achieve, or states or implies that the firm can achieve results by means that violate relevant rules of professional conduct or other laws; or (3) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated. (*See* § 6:5)

13. If including the names of clients in marketing materials, be certain to obtain their prior written consent. Ethical rules in most jurisdictions prohibit dissemination of the names of clients absent their prior written consent. Be certain, too, not to divulge confidential information concerning representations undertaken on behalf of other clients. (*See* § 6:5)

14. In all marketing materials and communications, be certain not to offer general solutions to fact-intensive problems or to rely on results obtained on behalf of other clients. Absent reference to the specific legal and factual circumstances surrounding prior engagements, such statements may create unjustified expectations in the minds of prospective clients and run afoul of the general prohibition against "false" or "misleading" communications. (*See* § 6:5)

15. If identifying a particular area in which a firm specializes, be certain not to suggest that the firm or its lawyers are "specialists or "experts" in any given area unless the firm or its lawyers have in fact been certified as specialists by a bona fide authority possessing jurisdiction over the field of the purported expertise. (*See* § 6:5)

C. *Marketing in Response to Specific Client Inquiries*

1. *If the firm receives an RFP*:

- Review the RFP and determine whether it makes sense to prepare a response. Consider such things as: the identity of the prospective client and the nature of its business; the types of legal services required by the contemplated representation; the geographic locales in which such services will be required; the prospective client's inside legal staff and its objectives in outsourcing the work; and the prospective client's expectations and/or

demands regarding the timeframe of the contemplated representation, budgetary constraints and the like. (*See* § 6:22)

- Once it is determined that a response is in order, gather the information that will be required to prepare an effective response. Collect not only internal information and promotional materials, but specific information about the prospective client, its operations and business industry, and its expectations. (*See* § 6:22)
- Identify who at the prospective client ought to receive the firm's marketing materials, and tailor the firm's proposals to that individual or those individuals. If, for example, the corporate decision maker is not a member of the company's legal department, consider including fewer case citations and more general discussions (in layman's terms) about the topics at issue in the engagement. (*See* § 6:6)
- Follow the requested format and answer the specific questions contained in the RFP. Divide the response, however, into at least three clearly identifiable subparts—(1) a concise executive summary of the lawyer's or law firm's proposal, and (2) the formal responses to the inquiries presented in the RFP; and (3) an appendix containing relevant supplementary information and documentation. (*See* § 6:22)
- Consider including in every response: (1) specific information, from the firm's perspective, about the issues presented by the contemplated engagement; (2) a brief description of the firm's offices, attorneys, experience and expertise; (3) an explanation of the firm's customary billing practices and feasible, potential alternative fee arrangements; (4) contacts and references; and (5) a proposal for a live presentation. (*See* § 6:22)

2. *If the firm is invited to participate in a beauty contest*:

- "Scope" the invitation. Determine whether the "contest" is truly an open one that can realistically be "won," or whether the firm was instead invited by the prospective client with the hope that the contest would simply confirm its pre-disposition to retain another law firm. If the former, decide whether it is economically feasible and/or desirable for the firm to take on the contemplated representation and whether it makes practical sense, therefore, to participate. If the latter, consider whether participation in the contest is nonetheless likely to benefit the firm by, for example, leading to publicity, referrals, or future business. If so, consider

participating; if not, consider whether to politely decline the invitation. (*See* § 6:40)

- If a decision has been made to participate in the beauty contest, conduct due diligence on the scope of the representation. Consider investigating: (1) the precise nature of the client's "problem" giving rise to the beauty contest; (2) why the client sought out the firm in the first instance; (3) the names, titles, functions and backgrounds of the client representatives who will be interviewing the firm during the beauty contest; and (4) the client's business operations, its industry and its competition. (*See* § 6:40)
- Once sufficient due diligence has been conducted, gather the appropriate internal and external information necessary for an effective presentation. Internal information should focus on the firm's experience and expertise in engagements similar to the one being offered since the focus is on the firm's ability to service the particular needs of the client—not on the law firm's history. (*See* § 6:40)
- Consider staffing issues. Consider the magnitude of the potential engagement and the complexity and variety of practice areas implicated by the subject matter at issue. Be certain to staff the matter with enough individuals to expertly handle all of the potential issues that might arise in the course of the representation, but be careful not to staff so aggressively lest the firm appear as if it is trying to "milk a cash cow." (*See* § 6:40)
- Prepare a pitch book. Integrate existing materials about the firm with new material directly related to the prospective client and the matter that has given rise to the beauty contest. Be certain to include specific information about the practice areas of the firm that will be addressed in the firm's presentation, as well as the biographies of the attorneys who will be active on the engagement and their experiences in handling similar matters in related industries. Consider including typical and alternative pricing methods as well as some "teaser" suggested approaches to the client's current matter. Carefully draw the line, however, between demonstrating sufficient legal acumen to land the contemplated representation and giving away so much information that the firm's services are no longer required. Structure the pitch book as a means of promoting dialogue between the prospective client and the firm—not as an exhaustive exposition of the firm's abilities and strategies. (*See* §§ 6:18, 6:22, 6:24, 6:25, 6:40)

- Prepare and give a lively, well-orchestrated presentation. Rehearse the presentation to ensure the absence of glitches that could embarrass the firm and harm its chances of landing the business. Utilize technological media such as video and/or PowerPoint presentations that keep the presentation interesting and accentuate the firm's abilities with respect to technology. Above all else, however, be certain to emphasize the firm's experiences, expertise and capabilities in each practice area that may be implicated by the potential engagement and the depth of the firm's legal and non-legal support staff. Make sure that the "contact person" or lawyer who introduced the client to the firm attends the presentation and that at least one attorney from each relevant practice area is present. Consider designating one partner as the "relationship manager" for that client so that the prospective client has an easily identified contact at the firm. (*See* § 6:40)

§ 6:47 Form: Sample response to a request for proposal

Thank you for your letter of (DATE) concerning the provision of legal services to COMPANY for product alliance transactions. Weil, Gotshal & Manges LLP ("Weil Gotshal") is pleased to respond to your request for proposal to provide legal services in this area. We have, we believe, a wealth of experience in product alliance transactions, in general, and XXX alliance transactions, in particular. As is detailed below and as we can review at a future meeting, Weil Gotshal can provide the highest quality counsel in the most cost-effective manner.

We are enthusiastic about the opportunity to broaden our ongoing relationship with COMPANY. As a leading company in both your industry and the global business community, COMPANY is an important client of Weil Gotshal, and we are anxious to continue to develop further and expand our relationship with you.

We are a Preferred Provider to COMPANY in the area of advertising litigation, and we believe that we have the kind of "partnership" relationship with COMPANY in that area that you describe in your Request—a relationship about which we are very proud. Our own experience, both with COMPANY and with other clients with whom we have created that kind of relationship, confirms that the approach COMPANY is pursuing should yield the quality and cost efficiency gains that you seek.

Chapter 40

OPERATING A SMALL LAW DEPARTMENT

by
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§ 40:1 Scope note
§ 40:2 Principal considerations in operating a small law department
§ 40:3 Department centralization
§ 40:4 Department structure
§ 40:5 Department location
§ 40:6 Encouraging the use of the legal department
§ 40:7 Department composition
§ 40:8 Department size
§ 40:9 Recruiting staff for the small law department
§ 40:10 Decision making within the small law department
§ 40:11 — Factors that affect decision making
§ 40:12 — Work flow decisions
§ 40:13 — Make or buy decisions
§ 40:14 — Decisions regarding the handling of legal matters
§ 40:15 Required practices and procedures
§ 40:16 Successful partnering with outside counsel
§ 40:17 — The make or buy decision
§ 40:18 — Types of work that small law departments should send to outside counsel
§ 40:19 — The role of in-house counsel in matters entrusted to outside counsel: partnering versus “tossing the file over the wall”
§ 40:20 — Outside counsel selection
§ 40:21 — Budgeting
§ 40:22 — Fee arrangements
§ 40:23 — Engagement letters
§ 40:24 — Maintenance of a healthy partnering relationship
§ 40:25 — Integrating the client into the partnering relationship
§ 40:26 — Benchmarking and evaluating the relationship
§ 40:27 Practice checklist

§ 40:28 Form: Memorandum from CEO on use of legal department
§ 40:29 Form: Standard Retention Guidelines

§ 40:1 Scope note

This Chapter asks: What differentiates a small law department's operations and approach to partnering from that of a large department? What affects which approaches will succeed and which will fail in operating the small law department and in partnering? The Chapter delves into the impact of a law department's size on (1) the make or buy decision; (2) the selection of outside counsel; (3) fee arrangements; (4) engagement letters; (5) how to maintain the partnering relationship; (6) how to integrate clients into that relationship; and (7) how to benchmark and evaluate the relationship.[1]

A word about this Chapter's scope, before delving into its subject matter. Just what is a "small law department?" Attorneys who consider themselves small law department practitioners typically work in departments of 10 or less attorneys within corporations with capitalizations of $1.5 billion or less (referred to in this Chapter as "mid-size"). Nevertheless, this Chapter probably has more relevance to the eight attorneys of a Fortune 50 corporation who are assigned to a divisional headquarters than it does to the sole in-house attorney of a Fortune 500 corporation who has decided to rely on law firms to handle the vast majority of her client's legal affairs.[2]

Initially, this Chapter explores guiding considerations in structuring and operating a small law department. Many features of life in-house, such as the law department's goals, responsibilities and risks, and the tensions between ambitious objectives and limited resources, are similar regardless of size. But some facts of life are different for small law departments:

- Small law department practitioners have to be generalists; yet the practice of law is becoming increasingly specialized, as laws, like society, become increasingly complex.

[Section 40:1]

[1] The practice of law in a small law department is a vast subject. For more articles on the subject, see American Corporate Counsel Association Press, Small Law Department Practitioners' Desk Manual (1993).

[2] *See also* Chapter 41 "The Large Company with a Small Law Department," *infra*.

- The culture of most mid-size companies, where small law departments typically reside, tends to be more entrepreneurial and the environment less structured than the culture of most large corporations.
- Small law department practitioners tend to enjoy closer contact with key decision makers and a more comprehensive understanding of their corporations than do practitioners in larger legal departments.
- The margin of error in managing resources for a legal department with a budget of $5 million is substantially smaller than for one with a budget of $500 million.
- So is the purchasing clout.

These factors differentiate most small law departments from their larger cousins and have an important influence on the operations of small law departments and on the best approach to partnering between small law departments and outside counsel. After exploring the differentiating factors involved in operating a small law department (in Sections 40:2 through 40:15), this Chapter will turn to the specific subject of partnering between small law departments and outside firms (in Sections 40:16 through 40:26).

§ 40:2 Principal considerations in operating a small law department

The overriding consideration in structuring and operating a legal department, small or large, is the nature of its goal. By and large, the goal remains the same: to assist the corporation in achieving its objectives in a way that is legal and ethical, with due regard for expense and quality. The mere articulation of the goal, however, exposes the tension inherent in it: limited resources versus the breadth, depth and quality of legal services needed. How this tension is addressed gives rise to alternative ways to structure and operate a legal department, including different approaches to partnering with outside counsel.

Two factors determine the success of a small law department: (1) the abilities of the general counsel and staff, and (2) the department's environment, external and internal. Success is never fully achieved, however. The approach that works today may be woefully inadequate tomorrow, especially given the fast pace of change in mid-size (and, indeed, in large) corporations these days. How, then, does the small law department address the inherent tension between limited resources and the breadth, depth and quality of

legal services needed, while factoring in the environment, to determine and adjust its department structure and location, size, staffing, decision making procedures, work assignments and its approach to partnering with outside counsel?

Before exploring the answer, here are a few observations about the environment of small law departments. The same complex legal environment faces the small law department as the large department in most ways. For example, the legal work to register a $200 million corporate bond offering with the Securities Exchange Commission is as rigorous, time consuming, document intensive and expensive as the legal work involved in registering a $1 billion offering. Unless the small law department can cut corners or bring some of the work in-house, the legal costs associated with raising capital will be higher, in percentage terms, for the mid-size company. Yet the mid-size corporation's legal department will not handle enough bond offerings to justify hiring a bond expert or to enable it to negotiate a volume discount from a law firm.

Some other aspects of the environment are more benign for the small law department. The mid-size corporation often operates in fewer industries and has fewer locations. This means fewer areas of law with which to comply and less need for diversified local law expertise. The small- to mid-size company operates with fewer employees (fewer employment law headaches, but also fewer people resources for achieving its objectives) and tends to be less bureaucratic and thus more nimble than the larger corporation.

If there is any one overriding consequence of the myriad environmental factors affecting the small law department, it is the imperative to do more with less. Thus, in the tension between limited resources, on the one hand, and the breadth, depth and quality of legal services needed, on the other hand, small law departments tend to make more sacrifices in breadth, depth and quality of legal services than do large law departments because they have to.

§ 40:3 Department centralization

Most small law departments are centralized. Centralization generally enhances the small law department's economy, speed, efficiency and consistency. Perhaps the most important reason for centralizing the small law department is that lawyers who practice together, in close proximity to senior business managers, enjoy richer interactions with each other and with key executives. Given

have spent some of those years in law firms and understand law firm dynamics. By and large, they have well-honed instincts. If a particular matter seems to be taking too long or costing too much, it probably is.

The criticism that such casual benchmarking and subjective evaluations lack sufficient quality and objectivity to constitute best practices is probably valid. As noted in Section 40:2, *supra,* however, in the tension between limited resources, on the one hand, and the breadth, depth and quality of legal services needed, on the other hand, small law departments tend to make more sacrifices than do large law departments because they have to. Benchmarking and evaluating the partnering relationship are areas where such sacrifices are made by many small law departments due to their limited resources. When considering the areas where sacrifices would otherwise be made (such as hiring quality counsel (both in-house and outside), adequately staffing to cover the client's critical legal needs, offering preventive legal advice and implementing preventive programs), sacrifices made in these two areas seem relatively benign.

§ 40:27 Practice checklist

1. Centralization, including shared support staff, office equipment and research and training facilities; a centralized filing system, including forms and research files; and standardization of computers and software generally enhances the small law department's economy, speed, efficiency and consistency. (*See* § 40:3)
2. The drawbacks of decentralization include the diminished flexibility in the deployment of lawyers; the reduced economy, speed, efficiency and consistency of the law department; and the loneliness of being the sole practitioner. The most pernicious problem with decentralization, however, is the potential for divided loyalties. (*See* § 40:3)
3. Flat organizational structures are common in small law departments. Each attorney is akin to a partner, looking out for the other, for the good of the firm and, together, for their shared clients. (*See* § 40:4)
4. Attorneys have a high degree of professional autonomy in handling their matters. At the same time, they interact continually with their colleagues, giving and seeking advice, keeping one another apprised of the matters they are handling and pitching in to help each other. (*See* § 40:4)

5. Some law departments divide responsibility for clients along the lines of corporate divisions. Others divide responsibility for clients by geographical area. Work will also be divided, to some extent, along fields of concentration. The model to avoid is the collection of sole practitioners. (*See* § 40:4)
6. General counsel should hire people who are team players and lead them, and involve them, as a team in the work of the department, including administrative as well as legal work. (*See* § 40:4)
7. Most small law departments are comprised of generalists. The common exception is tax. Even while functioning largely as generalists, often small law department practitioners have one or more fields of concentration, such as M&A, securities, finance, employment and labor, litigation, intellectual property or regulatory compliance. (*See* § 40:7)
8. Paralegals can be quite useful in small law departments for reasons of economy, efficiency and versatility. (*See* § 40:7)
9. Among the issues that can usefully be used to evaluate the department numerically are:
    - whether the department's work has been increasing or decreasing and at what rate
    - the trend in the department's efficiency
    - the cost of making versus buying legal services. (*See* § 40:8)
10. Small law departments usually hire experienced lawyers. Because of the typically flat structure and the need for each lawyer to take immediate responsibility for a range of projects, small law departments rarely operate on the apprentice system. (*See* § 40:9)
11. A small law department that favors a rich, cordial, collegial environment over a hierarchical culture can be a rewarding place to work, even without the career ladder that larger departments can usually offer. (*See* § 40:9)
12. Inclusive decision making about policies, procedures and staffing usually works well in small law departments. (*See* § 40:10)
13. Most small law departments do not have a rigid protocol for work assignments. They remain nimble, flexible and informal, grouping attorneys, paralegals and other staff as necessary to work on bigger matters, but with each lawyer normally handling the work-flow that comes to her directly, without being funneled through an intake officer. The general counsel does not

regularly become involved in assigning routine work. (*See* § 40:12)

14. Collaborative, informal communication serves to keep workloads relatively even. (*See* § 40:12)
15. As to the retention of outside counsel, each attorney normally has the discretion in routine matters to make the decision whether, and from whom, to buy legal services, without consulting the general counsel or a list of approved counsel. (*See* § 40:13)
16. Once an attorney has demonstrated the requisite skill and judgment, the decisions,such as which matters to handle first, what strategies to pursue and positions to take and which decisions, issues and information to take to the general counsel and the client, are normally left to her judgment. (*See* § 40:14)
17. Reporting and record keeping should include:
    - the prompt entry of every new matter, and the regular updating of entries, in a department-wide, computerized tracking system
    - the budgeting of every significant matter by the in-house counsel responsible for it, in cooperation with any outside counsel retained
    - the preparation of periodic reports. (*See* § 40:15)
18. Small law department practitioners almost instinctively seek to handle matters in-house, rather than involve outside counsel. Their practical approach and more action-oriented role frequently makes it possible for them to size up a situation, assess legal and business risks and make a decision rapidly. (*See* § 40:17)
19. What kind of legal work should a small law department buy, rather than make?
    - Work requiring specialized expertise
    - Occasional transactions or cases involving peak volume
    - Litigation. (*See* § 40:18)
20. In any matter handled by outside counsel, in-house counsel should play a central role in coordinating with and counseling company employees and in giving outside counsel direction on the staffing and overall approach to the conduct of the matter. (*See* § 40:19)
21. Companies should to limit the number of vendors they deal with. Word-of-mouth recommendations are the most important

selection tools. If no selection results from the internal recommendations, the in-house counsel usually turns to a referral network, *i.e.*, in-house counsel in other corporations. (*See* § 40:20)

22. In most small law department engagements of outside counsel, the standard hourly fee arrangement prevails. (*See* § 40:21)
23. Budgeting is clearly justified in the case of significant projects whose course is relatively predictable. Litigation is often too unpredictable to lend itself to accurate, comprehensive budgeting at the outset. Nevertheless, in a case of any consequence, in-house counsel should require a budget for the first phase of a lawsuit (such as the preparation of the complaint or answer and the initial round of discovery) and a rough budget for the litigation through trial. (*See* § 40:21)
24. Small law departments may be willing to experiment with alternative fee arrangements. (*See* § 40:22)
25. At the culmination of the selection process, in-house counsel SHOULD send a confirming letter to the law firm covering the terms of engagement. (*See* § 40:23)
26. Small departments rarely formalize their relationships with outside counsel with formal reports or regular face-to-face meetings. They rely on communication starting in the selection process and continuing throughout the engagement. They depend on a clear statement of the client's objectives; agreement over the strategies to be employed to achieve those objectives; a mutual understanding of the rules of engagement, preferably confirmed in an engagement letter; acceptance that the in-house counsel remains responsible for the matter; and continual dialogue between inside and outside counsel about the matter and the workings of the relationship. (*See* § 40:24)
27. Integrating the client into the partnering relationship makes good sense. It is more efficient to have three-way conversations among the client, outside counsel and in-house counsel whenever important discussions are held and important decisions are made. (*See* § 40:25)
28. Benchmarking and evaluation occur informally. The small law department practitioner does not usually need to conduct a formal post-mortem. If a particular matter seems to be taking too long or costing too much, it probably is. (*See* § 40:26)

Chapter 50

JOINT VENTURES

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§ 50:1 Scope note
§ 50:2 Preliminary considerations
§ 50:3 — Potential advantages and disadvantages of joint ventures
§ 50:4 — Special considerations affecting joint ventures involving U.S. and non-U.S. participants
§ 50:5 Effective partnering strategies between inside and outside counsel
§ 50:6 — To venture or not to venture
§ 50:7 — Planning for the long haul
§ 50:8 — Implementation
§ 50:9 — Post-closing administration
§ 50:10 — Organizing the team
§ 50:11 Getting in: Structuring the deal
§ 50:12 — Typical joint venture documentation
§ 50:13 Staying in: Operating the enterprise
§ 50:14 — Management structures
§ 50:15 — Resolving deadlocks
§ 50:16 — Conflicts of interest
§ 50:17 — — Non-competition
§ 50:18 — — Other potential conflicts of interest
§ 50:19 Getting out: Exit strategies and dissolution
§ 50:20 — Exit strategies
§ 50:21 — Dissolution
§ 50:22 Protecting proprietary information: Antitrust considerations

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§ 50:23 — Overview of U.S. antitrust law applicable to joint ventures
§ 50:24 — Information-sharing under the antitrust laws
§ 50:25 — Information-sharing during due diligence and negotiation periods
§ 50:26 — Information-sharing during the HSR review period
§ 50:27 — — HSR review 4(c) documents
§ 50:28 — — "Gun jumping"
§ 50:29 — Antitrust concerns during the existence of the venture
§ 50:30 Protecting proprietary information: Privilege concerns
§ 50:31 — Waiver of privilege and the common interest rule
§ 50:32 — Confidentiality agreements and other precautions
§ 50:33 Avoiding regulatory pitfalls in joint ventures involving U.S. and non-U.S. venturers
§ 50:34 — Export controls
§ 50:35 — — "Dual use" products and technology
§ 50:36 — — Defense industries
§ 50:37 — Exon-Florio
§ 50:38 — Foreign Corrupt Practices Act
§ 50:39 — U.S. economic embargoes
§ 50:40 — U.S. antiboycott rules
§ 50:41 Dispute resolution
§ 50:42 — Litigation as a "lose-lose" situation
§ 50:43 — Prior planning prevents poor performance
§ 50:44 — Your secrets are my secrets
§ 50:45 Practice checklist
§ 50:46 Form: Management provisions
§ 50:47 Form: Transfer restrictions/right of first refusal
§ 50:48 Form: "Texas shoot-out" provision
§ 50:49 Form: General partner waiver of voluntary withdrawal right
§ 50:50 Form: Confidentiality agreement

§ 50:1 Scope note

This Chapter explores some of the key legal issues affecting joint ventures. "Joint venture" is not a term of art, but refers generally to any jointly owned business regardless of its legal form. In this Chapter, we will focus on joint venture companies with two corporate parents, each having a 50 percent ownership interest ("50-50 joint ventures"). Equal ownership can produce legal and operational issues that are not present when one party possesses the ability to control the joint venture.

Our approach is intended to be practical rather than scholarly—real world issues and real world solutions based on our own experiences. Following an introductory section, the Chapter identifies strategies that inside and outside counsel can use to coordinate and facilitate the negotiation of a new joint venture. The Chapter then analyzes legal and business issues that corporate lawyers and other specialists may be called upon to address:

- Corporate law considerations, including the structure of the joint venture; management/deadlock issues; conflicts of interest; exit strategies and dissolution.
- Antitrust and business considerations affecting proprietary information generated by the venturers and by the joint venture before and during the course of the relationship.
- Regulatory considerations affecting joint ventures involving U.S. and non-U.S. venturers.
- Dispute resolution considerations unique to joint ventures.

Tax and accounting considerations are outside the scope of this Chapter and are not addressed in depth.

§ 50:2 Preliminary considerations

Although joint ventures take a variety of forms, they typically have a common underpinning: the desire to establish a business arrangement which is greater than the sum of its parts. When a company does not have access to all the resources it needs to exploit a new technology, market a new product or product line, or enter a new business or geographic territory, a joint venture can be the ideal means to share the risks (but also the rewards) of the new endeavor.

Joint venture transactions are often more complex than corporate acquisitions. The formation of the venture frequently involves an acquisition of sorts if at least one of the parties transfers assets to a newly-formed entity. Unlike a typical acquisition, however, where the parties may have limited dealings with each other after the closing, the parties to a joint venture (other than a venturer who is a passive investor) need to work closely with each other throughout the life of the enterprise. Moving beyond the joint venture's formation, there are a variety of issues which affect the operation of the venture, including management and financial arrangements. If, despite the best intentions, the parties discover that their attitudes on particular matters are not always in sync, they will need to know how to go about resolving disputes and, perhaps most important,

how and when a party may exit the venture, whether by selling its interest or by forcing a dissolution.

Since the venture documentation serves as the parties' roadmap, we recommend that it cover all stages of the joint venture relationship: (1) getting in (structuring the deal); (2) staying in (operating the enterprise); and (3) getting out (exit strategies and dissolution). We will discuss each of these stages in this Chapter. Moreover, a willingness to anticipate and resolve issues in the documentation, before they become actual problems, may contribute to a stronger (or, at the very least, a more certain) relationship later on.

Inside and outside counsel who are involved in the negotiation of a joint venture should keep in mind that many of the key legal issues discussed in this Chapter (*e.g.*, how will the venture be structured; how will the venture be managed; under what circumstances will the venture be dissolved) arise regardless of the size of the venture or the size of the respective participants in the venture. Although size may affect the dollar value of a particular issue, "small" joint ventures can prove to be as complicated to implement and operate as "large" ones.

§ 50:3 — Potential advantages and disadvantages of joint ventures

Joint venture activity, both inside and outside the United States, has increased in recent years.[1] Companies enter into joint ventures for a variety of reasons, such as:

1. The desire of Company A to combine its products with the marketing expertise of Company B, particularly as a means for Company A to enter a geographic market where it has no sales force or distribution system in place.
2. The desire of Company C and Company D to combine research and development capabilities where neither company controls all the intellectual property rights necessary to develop a new

[Section 50:3]

[1] Joint ventures announced or launched during the first calendar quarter of the year 2000 include a music joint venture between Time Warner and Britain's EMI Group; a joint venture between IBM and Qwest to build "CyberCenters" in the U.S. and Canada to service companies using the Internet for business transactions; a communications joint venture between AT&T and British Telecom; and a joint venture between Eastman Kodak and Hewlett-Packard to offer customers printing options for film developing.

product (for example, a new drug for which each company will supply different components).

3. The desire of Company E and Company F to combine similar product lines in order to achieve greater critical mass.
4. The desire of Company G and Company H to achieve improved manufacturing capabilities or economies of scale by jointly constructing a new manufacturing facility for their products.
5. The desire of Company I and Company J, whose businesses are complementary (for example, a book publisher and a music company), to expand their respective businesses into new fields (such as a joint venture to market audio books).
6. The desire of Company K, a small company with an innovative product, to benefit from the name recognition of Company L, a longstanding industry leader; and the desire of Company L to "modernize" itself by aligning with an emerging company.

As the foregoing list indicates, the parties to a joint venture are often motivated by strategic, not financial, objectives—that is, each owner is not interested in a purely financial arrangement, but in participating in a joint venture that will advance the owner's business objectives. A joint venture can serve as a vehicle for expanding a company's existing business (see the example of Company E and Company F above) or for entering a new or complementary business (see the example of Company I and Company J above). Joint ventures are particularly well-suited for today's "high tech" economy, where new products and technologies are constantly capturing the public's attention (and wallets). In industries such as telecommunications, computer hardware and software, cable television (and all aspects of the Internet), heightened consumer demand for the latest, fastest and "best" product means that many companies are under pressure to act quickly in order to remain competitive. If internal R&D or acquisition prospects do not yield an attractive product pipeline, then a joint venture may be a critical strategic alternative.

Other potential benefits of a joint venture include:

1. The ability to combine the complementary strengths of the parties in a manner which does not require that one company acquire the other.
2. Greater opportunity for a small company to preserve its "culture" and "entrepreneurial spirit"—in contrast to the situation that might exist if the company were to be acquired.

3. In the case of a joint venture established to market a product, greater control over marketing decisions than through a distributorship.
4. The ability to obtain a greater commitment of expertise and resources from a partner than might be possible through other cooperative or commercial arrangements.
5. The ability to share the financial risks of the new/combined business—in contrast to making an acquisition of a 100 percent owned business or starting a 100 percent owned business from scratch.

Of course, the ability to share risks means that each party, by virtue of owning less than 100 percent of the venture, must also be willing to share the financial benefits and, at least to some extent, forego the ability to operate the business unilaterally. Some other potential drawbacks of a joint venture include:

1. A potentially more difficult and expensive negotiating process, as compared to a 100 percent acquisition. Joint venture negotiation often involves, among other things, (1) one party's acquisition of a partial interest in an existing company or business or the formation of a new legal entity to which each venturer will contribute an existing business, cash and/or other assets, (2) ongoing management and other rights of the parties as co-owners of the joint venture, and (3) ancillary agreements with respect to ongoing operational matters such as licensing of technology to and from the joint venture, supply of goods and services to the joint venture, use of shared facilities, etc. (a further listing of common joint venture documentation is set forth in Section 50:12, *infra*).
2. The parties' need to reconcile possibly inconsistent financial goals. For example, suppose Company A wants the joint venture to distribute earnings to the parties, and Company B does not. If the issue arises at the outset, the parties might address it by agreeing that no distributions will be made during an initial start-up period.
3. The parties' need to reconcile possibly inconsistent strategic goals. For example, suppose Company C over time desires to expand the operations of the joint venture, and Company D does not. The issue may arise at the outset when the parties negotiate the joint venture's "territory" (*i.e.*, geographic scope) and "business" (*i.e.*, operational scope) and must decide how

In addition to mediation alternatives, one of the more effective mechanisms for informal dispute resolution in the joint venture context involves discussion and attempted compromise of the parties' differences by senior business executives from each side. A contractual provision for such "summit"-style negotiation typically mandates that the parties' discussion take place between previously-designated executives within X days of one joint venturer notifying the other of the dispute. Only if no resolution is reached does resolution of the dispute escalate to a more formal level, such as use of an outside mediator or institution of arbitration proceedings or litigation.

For this procedure to yield satisfactory results, experience suggests that the senior executives designated to discuss the parties' disputes be both (1) people responsible for their party's ongoing role in the joint venture, and (2) above the management or operational level at which disputes are most likely to arise initially. In other words, these individuals should, where possible, be personally committed to the health of the parties' continued working relationship and personally distanced from the genesis of the parties' dispute.

§ 50:44 — Your secrets are my secrets

The widespread exchange of closely-guarded proprietary business information is a conspicuous feature of the joint venture arrangement. It is vital, then, that the confidentiality of such shared information not be compromised in the process of dispute resolution between joint venture partners. While the need to maintain such confidentiality seems obvious, experience shows that its importance to one partner (at least as far as the other partner's proprietary information is concerned) often becomes less than paramount once the parties are at loggerheads.[1]

Accordingly, the confidentiality, trade secret and intellectual property provisions of the parties' joint venture agreement should be drafted to insure that such information remains strictly within the parties' control even where it becomes either the subject of, or relevant to, a dispute between them.

[Section 50:44]

[1] It is not uncommon, for example, to read detailed press accounts of confidential arbitration proceedings or results, where it is clear that the source of the account is one of the participants or its counsel.

§ 50:45 Practice checklist

A. *Preliminary Considerations*

1. The parties to a joint venture are often motivated by strategic, not financial, objectives. (*See* § 50:3)
2. Inside counsel should anticipate the various specialties of attorneys that will be needed throughout the stages of the formation of the joint venture and should delegate responsibilities appropriately. (*See* §§ 50:5–50:10)
3. Inside counsel should ensure that their knowledge of the working culture and procedures of the operational areas that are key to the joint venture are kept in mind and applied when drafting the contractual arrangements and controls governing the operational aspects of the joint venture. (*See* §§ 50:5–50:10)
4. Outside counsel can assist inside counsel by, among other things, bringing specialized knowledge to the table and by having experience in negotiating similar types of transactions. (*See* §§ 50:5–50:10)

B. *Structural Considerations*

1. Decide on the form of the joint venture. (*See* § 50:11)
   - The most common structures are: (1) corporation, (2) general partnership, (3) limited partnership, or (4) limited liability company.
   - Be aware of tax, financial and liability considerations, which often influence the structure of the joint venture.
2. Determine which types of agreements must be drafted. (*See* § 50:12 for a list)
3. Ensure that the joint venture documentation distinguishes between day-to-day business decisions which may be made by the joint venture's officers and strategic decisions which require approval of the venturers. (*See* § 50:14)
   - A management board is usually formed to make strategic decisions.
   - Designate officers to make day-to-day decisions.
4. Dispute resolution provisions are commonly inserted in the joint venture documentation. (*See* § 50:15)

5. The parties' fiduciary duties to one another are often addressed in the joint venture agreement. (*See* § 50:15)
    - Joint venture agreements often restrict the owners' right to compete with the joint venture. (*See* § 50:17 for a list of important considerations in drafting these provisions)
    - *See* § 50:18 for a list of issues that arise when dealing with business opportunities of one of the joint venturers.
    - Transactions between the joint venture and one of the venturers should require the approval of both venturers. (*See* § 50:18)
6. Joint venture documentation typically contains at least one, and often several, exit provisions. (*See* § 50:20 for examples)
    - Consider whether your client is a potential seller or would like to inhibit the other party's exit from the joint venture. (*See* §§ 50:19–50:20)
7. Address dissolution of the joint venture. (*See* § 50:21 for a list of possible dissolution triggers)
    - The treatment of specific assets of the joint venture upon dissolution can be specified in the joint venture documentation. (*See* § 50:21)
    - It is recommended that the terms of any post-dissolution contractual arrangements between the venturers be addressed at the outset. (*See* § 50:21)

C. *Antitrust and Privilege Considerations*

1. Review U.S. antitrust law applicable to joint ventures. (*See* § 50:23)
2. The sharing by competitors or potential competitors of proprietary information relevant to core competition concerns such as pricing, customer and introduction of new products can lead to criminal liability and treble damages unless carefully navigated. (*See* § 50:24)
3. If a competitive relationship exists, the sharing of sensitive information during due diligence, to say nothing of the coordination of activities to which information-sharing can lead, can itself implicate the antitrust laws. (*See* § 50:25)

4. Parties to joint ventures (whether in corporate or LLC form) above a certain size-of-party and size-of-transaction threshold, must notify the DOJ and FTC prior to consummation of the transaction; a waiting period (during which the transaction may be reviewed) must then elapse before the transaction can be consummated. (*See* § 50:26)
    - HSR 4(c) documents, which may include documents prepared by or for officers or directors for the purposes of evaluating or analyzing the transaction for effects on competition, should be carefully reviewed by in-house and outside counsel. (*See* § 50:27)
    - Recognize and avoid "gun jumping" during the HSR review period. (*See* § 50:28)
5. The sharing of competitive information during the life of the joint venture should be limited to that necessary for the operation of the joint venture. (*See* § 50:29)
6. Privileged information is not protected when exchanged in a joint venture context unless it falls into the "common interest" exception. (*See* § 50:30)
7. Given the limits of the "common interest" doctrine, parties to a joint venture should put confidentiality agreements in place and take other precautions. (*See* § 50:32)

D. *Regulatory Pitfalls May Arise with Joint Ventures Involving U.S. and Non-U.S. Venturers*

1. Review U.S. regulatory schemes that may affect the operation of joint ventures.
    - Export controls on "dual use" and defense articles and technology: These controls may affect not only where the venture can do business, but may also impact the disclosure of technical information to non-U.S. nationals, including to employees of the venture, inside or outside the U.S. (*See* § 50:35)
    - Defense industry controls: Products and technology that are specifically designed for military application may be subject to more rigorous export controls, and rules relating to the protection of classified data and disclosures to non-U.S. persons may affect government contracting opportunities available to the venture. (*See* § 50:36)

- Exon-Florio: U.S. President may block or rescind formation of a joint venture controlled by foreign persons if the joint venture affects U.S. national security. (*See* § 50:37)
- Foreign Corrupt Practices Act: Joint ventures between U.S. and non-U.S. entities may give rise to issues under the Foreign Corrupt Practices Act and similar legislation in certain other countries. These laws may subject the joint venture and/or its parents to civil and criminal liability for acts by the venture or its partners outside the U.S. in furtherance of the venture's business activities in third countries, particularly in selling to foreign governments. (*See* § 50:38)
- U.S. economic embargoes: U.S. economic embargoes against a number of countries may restrict the ability of a joint venture between U.S. and non-U.S. companies to do business in those countries. (*See* § 50:39)
- U.S. antiboycott rules: These rules prohibit covered persons from acting to further a secondary boycott (*i.e.*, from agreeing not to do business with a company blacklisted by a foreign nation or group of nations as a condition of doing business with one of the boycotting countries). (*See* § 50:40)

E. *Dispute Resolution*

1. Litigation is not ideal in ongoing business concerns or where foreign partners are involved. (*See* § 50:42)
2. Dispute resolution clauses should be fully elaborated in the pertinent governing documents, and should include mechanisms for negotiations and "summit style" meetings. (*See* § 50:43)
3. Confidentiality and the control of a party's proprietary information should not be relinquished during dispute resolution. (*See* § 50:44)

§ 50:46 Form: Management provisions

[Excerpt from General Partnership Agreement]

ARTICLE ____

MANAGEMENT OF THE PARTNERSHIP

__.1 *Partnership Board.*

(a) *General.* The business and affairs of the Partnership shall be managed under the general direction of a Partnership Board (the "Board"). Among other things, the Board shall have responsibility for approving the Partnership's Strategic Plan, Long Range Operating Plan, annual sales and profit targets and capital forecasts. Unless otherwise determined by the Board, all matters not reserved to the Board shall be delegated to the President of the Partnership, subject to such direction as the Board may provide. All decisions with respect to the following matters shall be reserved to the Board:

- acquisitions of other companies, businesses or product lines,
- capital investments in excess of $_____,
- admission of a new Partner,
- amendment of the Partnership Agreement,
- authorization of a Partner to act on behalf of the Partnership,
- filing for bankruptcy, or any action in furtherance of, or indicating the Partnership's consent to, approval of or acquiescence in, any involuntary bankruptcy petition,
- annual budgets of the Partnership and its subsidiaries and any significant deviations therefrom (including capital, operating, research, development, membership and charitable and political contribution budgets),
- purchase and sale contracts in excess of $_____,
- capital and operating leases with aggregate payments with a present value as of the date thereof in excess of $_____ on a pre-tax basis,
- disposal, abandonment, reactivation or adjustment or carrying value of tangible or intangible assets in excess of $_____,

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REQUESTS FOR PROPOSALS, BIDDING, PRESENTATIONS, AND BEAUTY CONTESTS

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MARKETING TO POTENTIAL CORPORATE CLIENTS

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CHAPTER 7
OPTIMIZING THE NUMBER OF OUTSIDE COUNSEL THROUGH CONVERGENCE AND PARTNERING STRATEGIES

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ENGAGEMENT LETTERS (INCLUDING WRITTEN CORPORATE POLICIES AND PROCEDURES)

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CHAPTER 12
EVALUATING LEGAL RISKS AND COSTS WITH DECISION TREE ANALYSIS

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CHAPTER 15
EXPENSES AND DISBURSEMENTS

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CHAPTER 16
THE RELATIONSHIP BETWEEN THE LEGAL DEPARTMENT AND THE CORPORATION

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REPRESENTING EUROPEAN COMPANIES IN U.S. LITIGATION

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CHAPTER 25
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CHAPTER 26
SPECIALIZED APPROACHES TO OUTSOURCING LEGAL WORK

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SPECIALIZED APPROACHES TO INSOURCING LEGAL WORK

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CHAPTER 28
TECHNOLOGY

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MANAGEMENT OF CORPORATE DOCUMENTS

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CHAPTER 30
BENCHMARKING AND EVALUATION

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ETHICS

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CHAPTER 32
CONFLICTS OF INTEREST

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ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT PROTECTIONS

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INTERNAL INVESTIGATIONS

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LICENSURE AND ADMITTANCE TO PRACTICE

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Willis Corroon Corporation

CHAPTER 41
THE LARGE COMPANY WITH A SMALL LAW DEPARTMENT

Robert W. Webb
Vice President, Secretary and General Counsel
The Marmon Group, Inc.

Michael L. Rodburg
Lowenstein Sandler PC

CHAPTER 42
QUALITY MANAGEMENT, RE-ENGINEERING AND PROJECT MANAGEMENT

William D. Eggers
Senior Vice President and General Counsel
Corning Incorporated

Harry P. Trueheart, III
Nixon Peabody LLP

CHAPTER 43
CIVIL JUSTICE REFORM

Hugh Rice Kelly
Executive Vice President, General Counsel and Corporate Secretary
Reliant Energy

CHAPTER 44
JOINT LEGISLATIVE AND REGULATORY LOBBYING EFFORTS BY INSIDE AND OUTSIDE COUNSEL

Thomas S. Wagner

Executive Vice President and General Counsel
CIGNA

Ed K. Ota, Jr.
Vice President and Associate General Counsel
ACE USA

Paul M. Hummer
Patrick T. Beaty
Saul, Ewing, Remick & Saul LLP

CHAPTER 45
OPINION LETTERS

Gregg R. Narber
Senior Vice President and Counsel
Principal International, Inc.

Sarah J. Pitts
Counsel
Principal Life Insurance Company

CHAPTER 46
CORPORATE GOVERNANCE

Thomas A. Gottschalk
Vice President and General Counsel
General Motors Corporation

Warren G. Andersen
Group Counsel-Corporate
General Motors Corporation

R. Franklin Balotti
Lisa A. Schmidt
Richards, Layton & Finger, P.A.

CHAPTER 47
COMPLIANCE

Richard W. Blackburn
Executive Vice President, General Counsel and Secretary
Duke Energy Corporation

Jeffrey J. Binder
Dickstein, Shapiro, Morin & Oshinsky LLP

CHAPTER 48
TRANSACTIONS

Harold S. Barron
Senior Vice President, General Counsel and Secretary
UNISYS Corporation

Michael D. Goldman
Scott E. Waxman
Potter Anderson & Corroon LLP

CHAPTER 49
CORPORATE INFORMATION TECHNOLOGY TRANSACTIONS

Lester L. Coleman
Executive Vice President and General Counsel
Halliburton Company

William E. Shull
Assistant General Counsel
Halliburton Company

James W. Boeckman
Edward T. Stockbridge
Vinson & Elkins L.L.P.

Richard D. Marks
Davis Wright Tremaine LLP

CHAPTER 50
JOINT VENTURES

Peter M. Kreindler
Senior Vice President, General Counsel and Secretary
Honeywell International, Inc.

Ellen S. Friedenberg
Alan G. Kashdan
James B. Kobak, Jr.
Daniel H. Weiner
Hughes Hubbard & Reed LLP

CHAPTER 51
VALUATION OF A BUSINESS IN AN ACQUISITION CONTEXT

John L. Howard
Senior Vice President and General Counsel
W.W. Grainger, Inc.

Theodore R. Tetzlaff
Jenner & Block

J. Ericson Heyke, III
Dean L. Overman
Winston & Strawn

CHAPTER 52
SECURITIES

William J. Calise, Jr.
Senior Vice President, General Counsel and Secretary
Rockwell International Corporation

Peter R. Kolyer
Chadbourne & Parke LLP

CHAPTER 53
COMMERCIAL FINANCE

Ernest D. Stein
Executive Vice President, General Counsel and Secretary
The CIT Group

Michael J. Cleary
General Counsel
The CIT Group/Business Credit, Inc.

Maury B. Poscover
Husch & Eppenberger, LLC

CHAPTER 54
WORKOUTS AND BANKRUPTCY

Stanley S. Stroup
Executive Vice President, General Counsel
Wells Fargo & Company

David R. Garfield
Deputy General Counsel
Wells Fargo & Company

James P. Stephenson
Michael R. Stewart
Faegre & Benson LLP

CHAPTER 55
EMPLOYEE BENEFITS

M. Clayton Humphries, Jr.
Vice President and General Counsel
WestPoint Stevens, Inc.

Frederick A. Brodie
Susan P. Serota
Winthrop, Stimson, Putnam & Roberts

CHAPTER 56
ADVERTISING REVIEW, CLEARANCE AND CHALLENGES

Louise M. Parent
Executive Vice President and General Counsel
American Express Company

Ronald A. Gray
Managing Counsel
American Express Company

David H. Bernstein

Debevoise & Plimpton

CHAPTER 57
ALTERNATIVE DISPUTE RESOLUTION

Jack L. Foltz
Former Vice President and General Counsel
Sunoco,Inc.

Bennett G. Picker
Stradley Ronon Stevens & Young, LLP

CHAPTER 58
ARBITRATION OF INTERNATIONAL COMMERCIAL DISPUTES

Frank H. Menaker, Jr.
Senior Vice President and General Counsel
Lockheed Martin Corporation

Jay A. Brozost
Vice President and General Counsel
Aeronautics Sector
Lockheed Martin Corporation

Louis B. Kimmelman
Claudia E. Ray
O'Melveny & Myers LLP

CHAPTER 59
DETERMINATION OF LITIGATION FORUM

William B. Lytton
Senior Vice President and General Counsel
International Paper Company

Steven J. Harper
Kirkland & Ellis

CHAPTER 60
PLEADINGS AND PRE-TRIAL MOTIONS IN COMPLEX COMMERCIAL CASES

Anne H. McNamara
Senior Vice President and General Counsel
American Airlines, Inc.

Richard A. Rothman
Lori L. Pines
Weil, Gotshal & Manges LLP

CHAPTER 61
DISCOVERY AND INFORMATION GATHERING

William J. O'Brien
Senior Vice President, General Counsel and Secretary
DaimlerChrysler Corporation

Kenneth I. Gluckman
Assistant General Counsel
DaimlerChrysler Corporation

Stephen J. Ott
Miller, Canfield, Paddock and Stone, P.L.C.

CHAPTER 62
EXPERT WITNESSES

R. Rennie Atterbury III
Vice President, General Counsel and Secretary
Caterpillar, Inc.

James B. Buda
Associate General Counsel
Caterpillar, Inc.

Robert G. Abrams
Joanne E. Caruso
Howrey & Simon

CHAPTER 63
TRIAL PREPARATION AND PRESENTATION

Thomas C. Siekman

Senior Vice President and General Counsel
Compaq Computer Corporation

Herbert F. Schwartz
Fish & Neave

CHAPTER 64
USE OF JURY CONSULTANTS

Christine A. Edwards
Chief Legal Officer and Secretary
Bank One Corporation

Lynn A. Goldstein
Senior Vice President and National Litigation Practice Group Head
Bank One Corporation

Steven P. Handler
David F. Wentzel
McDermott, Will & Emery

CHAPTER 65
SETTLEMENT

James N. Roethe
Former General Counsel
BankAmerica Corporation

Charles E. Patterson
Morrison & Foerster LLP

CHAPTER 66
APPEALS

John J. Ursu
Senior Vice President, Legal Affairs and General Counsel
Minnesota Mining & Manufacturing Co.

Thomas A. Boardman
Deputy General Counsel
Minnesota Mining & Manufacturing Co.

David F. Herr
Maslon Edelman Borman & Brand, LLP

CHAPTER 67
HIGH PROFILE LITIGATION

Christopher P. Bogart
Executive Vice President, General Counsel and Secretary
Time Warner, Inc.

Robert D. Joffe
Cravath, Swaine & Moore

CHAPTER 68
PATENTS AND TRADE SECRETS

Theodore J. Collins
Senior Vice President of Law and Contracts
The Boeing Company

William C. Anderson
Assistant General Counsel
Intellectual Property, Aerospace Electronic Systems
Honeywell International, Inc.

Carlos M. Herrera
Intellectual Property Counsel
Thomson Consumer Electronics

Guy R. Gosnell
Alston & Bird, LLP

CHAPTER 69
TRADEMARKS

Robert W. Pike
Executive Vice President
Allstate Insurance Company

Joseph R. (Casey) Mangan, Jr.
Counsel
Allstate Insurance Company

Floyd A. Mandell
Katten Muchin & Zavis

CHAPTER 70
COPYRIGHT LITIGATION

Jan F. Constantine
Senior Vice President and General Counsel
News America Publishing and Marketing Groups

Daphne Gronich
Senior Vice President, Litigation and Intellectual Property
Fox Group

Dale M. Cendali
Rebecca C. Martin
O'Melveny & Myers LLP

CHAPTER 71
EMPLOYMENT LAW

Anastasia D. Kelly
Executive Vice President and General Counsel
Sears Roebuck & Company

Sarah E. Elder
Assistant General Counsel
Sears Roebuck & Company

The Honorable Barbara M.G. Lynn
United States District Judge
Northern District of Texas

Mike Birrer
Ann Marie Arcadi
Carrington, Coleman, Sloman & Blumenthal, L.L.P.

CHAPTER 72
ENVIRONMENTAL LAW

Ronald M. Soiefer
Vice President, General Counsel and Secretary
Unilever United States, Inc.

Andrew Shakalis
Assistant General Counsel - Environmental
Unilever United States, Inc.

Daniel M. Steinway
Kelley Drye & Warren LLP

CHAPTER 73
MASS TORTS

Roger S. Fine
Vice President and General Counsel
Johnson & Johnson

Theodore M. Grossman
Jones, Day, Reavis & Pogue

CHAPTER 74
REAL ESTATE LAW

William C. Mutterperl
Executive Vice President and General Counsel
FleetBoston Financial Corporation

Gabriel Miller
Senior Counsel
FleetBoston Financial Corporation

Patricia L. Kantor
Terrence M. Finn
Edwards & Angell, LLP

CHAPTER 75
CASE STUDY: DUPONT'S LEGAL MODEL FOR STRATEGIC PARTNERING

Howard J. Rudge
Former Senior Vice President and General Counsel
E.I. du Pont de Nemours and Company

Thomas L. Sager
Associate General Counsel
E.I. du Pont de Nemours and Company

Richard L. Horwitz
Potter Anderson & Corroon LLP

CHAPTER 76
CASE STUDY: FEDERATED'S ACQUISITION OF BROADWAYDEAL MAKING AT HIGH SPEED

Dennis J. Broderick
Senior Vice President, General Counsel and Secretary
Federated Department Stores, Inc.

Robert A. Profusek
Jones, Day, Reavis & Pogue

CHAPTER 77
CASE STUDY: OUTSOURCING OF THE TELCORDIA LEGAL CONTRACT FUNCTION

N. Michael Grove
Vice President and General Counsel
Telcordia Technologies

Jay G. Safer
LeBoeuf, Lamb, Greene & MacRae L.L.P.

CHAPTER 78
CASE STUDY: SERVICEMASTER'S NATIONAL LITIGATION PROGRAM

Vernon T. Squires
Senior Vice President and General Counsel
The ServiceMaster Company

Thomas E. Wilson
Vice President and General Counsel
ServiceMaster Management Services

Donald L. Mrozek
Dan L. Boho
Hinshaw & Culbertson

CHAPTER 79
CASE STUDY: THE WAL-MART APPROACH TO LITIGATION

Robert K. Rhoads
Senior Vice President, General Counsel and Secretary
Wal-Mart Stores, Inc.

Ronald A. Williams
Vice President and Assistant General Counsel
Wal-Mart Stores, Inc.

Jon B. Comstock
Senior Corporate Litigation Counsel
Wal-Mart Stores, Inc.

Ann Curry Cato
Senior Corporate Counsel
Wal-Mart Stores, Inc.

CHAPTER 80
CASE STUDY: FORD MOTOR COMPANY CHANGING THE LAW OF PUNITIVE DAMAGES THROUGH LITIGATION

John M. Rintamaki
Vice President and General Counsel
Ford Motor Company

Theodore J. Boutrous, Jr.
Gibson, Dunn & Crutcher LLP

TOTAL QUALITY MANAGEMENT IN THE PROVISION OF LEGAL SERVICES

Hayward D. Fisk

June 7, 1993

TOTAL QUALITY MANAGEMENT

IN THE

PROVISION OF LEGAL SERVICES

I. .Introduction

II. The Opportunity

III. Practical Suggestions For Improving Quality and Controlling Costs

A. Avoid or minimize the risk of disputes and legal entanglements in the first place
B. Litigate or Conciliate
C. Develop a legal policy for guidance of inside and outside lawyers that requires justification for each litigation
D Check your insurance coverage
E Shop for outside counsel
F. Deploy innovative counsel and information systems
G. Consider unique alternatives/resources…in the engagement process
H. Implement a program for auditing outside counsel bills

IV. Manage the Inside/Outside Counsel Relationship…Cost Effectively

V. Adopt a Reengineering Perspective

I. INTRODUCTION

A Shaggy Dog

B. Analogy
   I. Questions & answers
   2. Constructive thoughts

II. THE OPPORTUNITY

A As government regulations and relations engender more and more entanglements, as employment related controversies escalate into litigious confrontations, and as businesses sue other businesses in record numbers - recession or expansion - litigation costs for businesses are rising more rapidly than ever. Cases are becoming more complex, lawyers are charging more and the time involved in bringing a case to trial is steadily increasing. As the costs of lawyers and litigation increase, America's business community, consumers, the global competitiveness of American business and our economy suffer accordingly.

B. Today, the single most significant component of total law department costs is outside counsel expenses. Nearly 60% of that cost is litigation related. The trend line is increasing. See the Twelfth Edition of the National Survey of Law Departments published by The Committee on Corporate Law Departments of The Association of the Bar of the City of New York

C. The filing of civil cases between 1970 and 1985 tripled. Major cases, involving millions of dollars, quadrupled. The high cost of civil justice and the consequent fear of lawsuits is increasingly affecting corporate decisions for 83% of America's corporate executives. A 62% majority says the legal system significantly hampers U.S. competitiveness. In the recently concluded Texaco/Pennzoil litigation, for example, legal fees were over $50 million.

D. The Commerce Department recently estimated that well over $100 billion is spent yearly for legal fees, mostly by U.S. businesses. This does not include in-house legal or insurance expenditures which mushroom the costs to over $300 billion or nearly 2% of the nation's Gross Domestic Product. Nor does it include actual damages awards which in product liability cases alone averaged $1.5 million per case last year.

E Business managers generally and the in-house General Counsel especially must recognize the need to make sure that legal decision-making in a business organization is company-driven rather than lawyer-driven. Business managers must MANAGE their legal resources and expenditures as they would manage any other company resource or aspect of doing business. See The Business Manager's Guide to Controlling Legal Costs by Carl S. Pavetto, Esq., Library of Congress Catalog Card No. 89-90688, CSP Associates 1989.

F. Business managers or the General Counsel as a business manager should, first, recognize that their roles in business decision-making include overseeing legal decision-making and managing lawyers, and, second, develop an organizational legal policy to guide the company's decision-making in legal matters including what the lawyers' roles will be, who will have overall responsibility for managing the company's legal affairs, how much the company is willing to spend in legal fees, and how and when to litigate. MPS 501.

G. Each time a business lawyer or manager succumbs to litigation rather than a less costly avenue for dispute resolution there is a risk, no matter how strong the case, of losing.

H. Predicting the predilections or ultimate judgments of a judge or jury is usually fools' play. The Rodney King trials are recent cases in point.

I. Even when you win, you may lose, when the direct and indirect costs of litigation are tallied. Examples.

J. It may seen "trendy" to say "I've turned the matter over to my lawyer"... but doing so may be unaffordable. Good lawyers have good legal skills but may fall short in business savvy. Better business managers and General Counsels manage their outside counsel to control legal costs.

III. PRACTICAL SUGGESTIONS FOR IMPROVING QUALITY AND CONTROLLING COSTS…

A. Avoid or minimize the risk of disputes and legal entanglements, giving rise to the need for extended retainers of outside counsel, in the first place.

1. Commit to high ethical standards and be proactive in assuring pervasive attention to those standards throughout your company.

2. Engage in preventive maintenance.

3. Develop a comprehensive legal compliance/audit program ... engage outside counsel in that process.

   a. See Clark Boardman's "The Legal Audit" recently released at $95.

   b. It covers litigation, antitrust, product safety, records retention, bankruptcy, employee relations, environmental matters and more.

4. This may obvia(e, from a business perspective, needless or unjustifiably costly disputes, entanglements and litigation.

5. Consider, albeit controversial, the implications of possible Rule II sanctions for frivolous litigation.

6. There may be more constructive solutions than litigation.

B. Litigate or Conciliate

1. ADR
2. Arbitration
3. Mediation
4. Negotiation
5. Rent-a-judge
6. Private dispute resolution companies
7. Mini-trials
8. Constructive business solutions

Former Vice President Quayle, in his widely publicized speech to the ABA developed through his Committee for Civil Justice Reform, on which I served, presented a 50-point agenda from which was drawn a reform bill released by the White House in February of 1992. The bill promoted ADR and, by a modification of the English rule, would deter frivolous litigation. We all need to be involved in reforming and improving our legal system, the process of civil justice.

C. Develop a legal policy for guidance of inside and outside lawyers that requires justification for each litigation. After legal wheels are set in motion, stopping them may be difficult. Motorola has slashed its litigation costs by as much as 75% since 1984

when its General Counsel, Richard H. Weise, started a new program emphasizing ADR by requiring all in-house lawyers to fill out a form estimating legal costs, likely damages and chances of victory…an onerous task obviated by ADR. See the cover story of Business Week's April 13,1992 issue.

D. Check your insurance coverage.

1. Current policies
2. Expired policies
3. The "Cumis" problem/opportunity

   a. San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc., 162 Cal. App. 3d 358, 369 (1984, Cal. Dist. Ct. of App.)
   b. The Cumis case raises the troublesome issue of conflicts of interest confronting outside counsel retained by the insurer to represent the insured and punctuates the importance of inside counsel's management of the insured's representation…in many instances by outside counsel rather than the insurer's counsel.

E. Shop for outside counsel

1. It's a buyer's market. See "How to Control Litigation Costs" in the January 1992 issue of the Corporate Legal Times.
2. Don't marry any firm…especially if you have not fully developed a relationship of mutual trust…limit the relationship to an engagement.
3. Maintain a cadre of alternatives.
4. The legal community is not immune to competition.

   a. See "For Law Firms, It's Dog v. Dog Out There," Business Week, August 6, 1990. See also the adversarial articles of (i) Ellis R. Mirsky, former Chief Counsel - Litigation Management of GAF Corporation in Wayne, New Jersey, who in the New Jersey Law Journal and in the July 1991 issue of the ABA Litigation Section Corporate Counsel Committee newsletter, extolls the buyers' market for discounted legal services, criticizes the institutionalization of relationships between in-house counsel and law firms while citing "hours-dumping," "people dumping" and failure to effect efficiencies as culprits; and (ii) Lawrence J. Fox, outside Philadelphia lawyer with Drinker, Biddle & Reith who, in a reply article in the September 1991 Corporate Counsel Committee newsletter of the ABA Section of Litigation, characterizes

Mirsky's perspective as an improper "adversarial view of outside counsel," and asserts that an assignment-specific approach to engagements diminishes the objective and independent counseling function of outside firms. Fox says "If general counsel spent as much time developing a comprehensive relationship with just one or two firms as apparently is now spent in shopping, switching, and engaging a dougle-digit number of firms, the clients would be far better served."

Mirsky in the February 1992 issue of the Corporate Counsel newsletter responds to the charges of diminished loyalty and professionalism by stating that "clients define the needs for the law firms, not the other way around." Indicating that servicing of clients involves people management as well as cost containment, he favors a firm where each “player on the tea m” has a defined, accountable role for the client.

b. See "Bidding and Budgeting: Controlling Costs at Chrysler" by its General Counsel Leroy C. Richie in The American Lawyer, November I 990. Mr. Richie describes how Chrysler subjects a handful of excellent firms to bidding against each other for a defined piece of Chrysler's litigation business.

c. Firms are becoming more responsive to the demands for cost containment. Latham & Watkins slashes overhead charges, which historically have run 15 to 20% of a bill, on disbursements e.g., photocopying (23¢/14¢), fax transmissions ($2/$1.25) and word processing. The firm also offered a unique unitary billing rate ($215/hour in NY, for example). December '91 issue of the Manhattan Lawyer. Gibson, Dunn & Crutcher no longer charges its clients for word processing. CSC's retainer agreements have disallowed such charges for some time. Motorola refuses to pay for outside counsels' travel, meals and other incidentals. Alternative billing, the norm in the corporate legal world of the 1950's, is making a comeback. Hourly billing came into vogue in the 1960's and took over. The pendulum is swinging back. This entails special responsibilities for the General Counsel. See "Alternative Billing Making a Comeback" in the April 1992 issue of Corporate Legal Times.

5. Consider engagement letters and retainer agreements.

   a. The most effective time to scrutinize and manage litigation costs is when the relationship is first established.

   b. Staffing strategy and responsibilities should be defined at the inception. Make sure in-house and outside lawyers are in sync and that in-house counsel is actively involved in supervising the case. Stop unnecessary work during delays in proceedings. The case should not "take on a life of its own."

   c. Ziegler Ross, consultants S.F., L.A., D.C. and Denver, Effective Practice Management.

   d. Other sources…Litigation Sciences (310) 544-0503 with offices in 8 major cities and William Webb & Associates of Chicago.

6. If and when a "bet the company" case arises, it is even more advisable to manage the case carefully.

   a. Plan strategies/manage discovery (often more than half the cost of the case).

   b. Allocate resources/organize the team. Provide outside counsel with a list of do's and don'ts. Optimize inside administration to minimize outside costs. Consider tying MIS systems together. Develop an inside/outside attorney partnership.

   c. Budget (and, without becoming a slave to the process, update it on a periodic basis if significant changes in the case occur); don't give your lawyer a blank check! See Gary Greenfield's article "Estimating the Cost of a Case" published in the January 1992 issue of the Corporate Legal Times. Mr. Greenfield quotes Peter Zeughauser, General Counsel of The Irvine Co. of Newport Beach, CA who has a proven accurate formula for estimating the cost of litigation: "Take the estimate provided by outside counsel and double it." The growing trend according to Greenfield, a former litigator and the founder of Oakland, CA based Litigation Cost Management, is for inside counsel to require outside counsel to present meaningful litigation plans and budgets; notwithstanding, the "outside lawyer's antipathy to providing them"

and such counsel's own conviction imposed upon clients that "the unknowns of litigation make providing budgets, as well as litigation plans, pointless." Try preparing the in-house Legal Department budget for a Fortune 500 company for an entire year when you know only a small percentage of the transactions and litigation likely to arise over the course of the year. Five hundred Fortune 500 General Counsels do it every year. Last year we came within 2% of our budget for the year. Greenfield asserts, and I concur, that budgets, combined with other effective management tools, result in reduced litigation expenses and better results. The elimination of just one round of depositions, through the process, more than compensates for the cost (which may often be gratis where a business relationship with the firm applies) of the analyses. Better and quicker settlements may result. Enormous savings can be realized.

d. Require monthly billings which show cumulative billings as well. The cumulative bill is an early attention-getter which inhibits excess.

e. Negotiate rates.

f. Keep executive management in formed. No one is going to be "penny wise and pound foolish" when the future of the company is at stake, but budgeting and managing the ease should extend better focus and discipline to the proceedings. Trial exhibits can be prepared with computer graphics and desktop publishing (saving on publishing expenses).

F. Deploy innovative counsel and in formation systems.

1. Effective
2. Efficient
3. Reliable
4. Examples
   a. Pillsbury, Madison & Sutro's case management and quality/cost control system
   b. Inslaw, lnc.

   1125 15th Street, N.W.
   Washington, DC 20005
   Telephone Nos. 1-800/221-3187
   202/828-8600
   714/643-2022

c. The Rust Consulting Group, lnc. Law firms must start training lawyers in effective litigation management, just as they train them in taking depositions, writing briefs, etc. Effective litigation management is as much a mental state as anything else. Until both inside and outside counsel view litigation as a manageable process and view effective litigation management as an essential part of the process, all of the techniques - the budgets, plans, reports, audits, etc. - will do little to fundamentally change the frustration with, and backlash against, the cost of litigation. Former litigator and founder of Litigation Cost Management (Oakland, CA), Gary Greenfield, so attests in his article on "Litigation Management. It's All in the Mind," in the ABA Litigation Section Committee on Corporate Counsel newsletter of February 1992.

5. Firms with higher partner rates but efficient computer systems are able to handle discovery more cost-effectively than firms with lower rates that marshal armies of paralegals to get through discovery.

G. Consider unique alternatives/resources in the engagement process

1. Hernand & Partners – a temporary service providing lawyers and paralegals
   770 Tamalpais Drive, Suite 204
   Corte Madera, CA 94925
   Telephone Nos. 415/927-7000
   310/203-0149

   a. Highly skilled and motivated professionals
   b. Substantial cost-reduction vis-à-vis outside counsel
   c. Specialized counsel
   d. Time tailored to demand
   e Serve largest companies in world
   f. Professional work from your offices and facilities; therefore, lower overhead

2. In-house counsel savings average 40%; see "How to Cut Your Legal Costs," by A B. Fisher, Fortune, April 23,1990 at p.185 et seq.

3. ABA Section of Litigation monthly "Litigation News," a useful source for innovative alternatives

4. Commonwealth Films Inc. of 223 Commonwealth Avenue, Boston, MA 02116 (Tel. No. 617/262-5634; Fax 617/262-6948), a leading producer of educational and awareness videos about business and the law, provides award winning videos on testifying in court, depositions, documents retention, etc….all of

which may significantly impact litigation costs, in both a narrow and broad sense.

5. Just Litigation
   209 Club Drive
   San Carlos, CA 94070
   Telephone No. 415/508-1833

   a. A new law office advertising "big firm" quality at "small firm" prices

   b. Three billing options
      1. Flat fee
      2. Binding budget
      3. Hourly rate

6. Corporate Counsel's Guide to Litigation Management published by Business Laws, Inc. of 11630 Chillicothe Road, Chesterland, Ohio 44026 (Telephone No. 216/729-7996) provides:

   a. Exam pies of practices of various legal departments;

   b. Useful forms of retention or engagement letters, policies, litigation budgets;

   c. Cost saving ideas; and

   d. Many incisive, useful articles on specific subjects endemic to controlling litigation costs.

7. Search for competent specialized outside counsel in smaller firms and/or lower cost geographic areas where firms are generally lower.

8. Prentice Hall Law & Business, 1nc.'s:

   a. Directory of Litigation Attorneys

   b. Effective Approaches to Settlement: A Handbook for Lawyers and Judges

H. Implement a program for auditing outside counsel bills.

1. See "I'm From Missouri. Show Me" by Peter Carbonara published in the July/August 1990 issue of The American Lawyer.

2.. Make sure you get what you pay for. Insist on a narrative description of work performed covering who, what, when, where and why. Look for the associate with the heavy pen. Criticize inefficient research. Carefully examine all pass-through costs.

3. Avoid the common trap of paying by the hour for inexperienced associates to learn their trade.

Or better, implement "EMP" (Effective Practice Management) promoted by Ziegler Ross consultants

1. Auditing explores for spilled milk
2. EPM prevents spills
3. Don't over or micro-manage…remember the old maxim "every question costs"... outside counsel need some latitude to work effectively and efficiently.

IV. MANAGE the Inside/Outside Counsel Relationship, your Transactions and Litigation . . . Cost Effectively . . . to WIN that's the bottom line! Think in terms of total quality management…for value!

V. Through reengineering the corporation, progressive corporations in the business community today are refocusing on how business should work. See the recently released book, titled Reengineering the Corporation, by Michael Hammer and James Champy. Endorscd by Peter Drucker, Apple's John Sculley, AT&T's Robert Allen and others and already in its third printing only weeks after its debut, the book has been acclaimed as the most visionary approach to structuring and managing work since Tom Peters and Robert Waterman's book, In Search of Excellence.

It is a manifesto for business revolution, a guide for reinventing the way work gets done. Formally defined, "reengineering" in this context, is "the fundamental rethinking and radical redesign of business processes to achieve dramatic improvements in critical, contemporary measures of performance, such as cost, quality, service, and speed." It is more than "total quality management" in the conventional sense. There priciples are not endemic only to the corporate entity. They apply to the delivery of professional legal services as well. I commend the book to your study and suggest it will inspire refreshing rethinking of the provision of legal services…TQM in the broadest sense from start to finish.

