DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL: A DIALOGUE AMONG AMERICA'S LEGAL LEADERS

Monday October 2, 2000

10:30 AM-Noon

Grand Hyatt Hotel, Washington, D.C.

This program discusses **Successful Partnering Between Inside and Outside Counsel**, the subject of a new multi-volume treatise, practice and drafting guide published by West Group in a joint venture with the American Corporate Counsel Association. The moderators of the program are William B. Lytton, Senior Vice President and General Counsel of International Paper Company, and Robert L. Haig of Kelley Drye & Warren LLP. The speakers are Paula E. Boggs, Esq., Vice President and Senior Deputy General Counsel, Dell Computer Corporation, H. Ward Classen, Esq., General Counsel, CSC Intelicom, Inc., Jan F. Constantine, Esq., Senior Vice President and General Counsel, News America Publishing and Marketing Groups, Anastasia D. Kelly, Esq., Executive Vice President, General Counsel and Corporate Secretary, Sears Roebuck & Company, Thomas L. Sager, Esq., Associate General Counsel, E.I. du Pont de Nemours and Company, and Jerome J. Shestack, Esq., Wolf, Block, Schorr & Solis - Cohen LLP. All of the speakers wrote chapters in the set. The program focuses on practical advice.

ACCA and West Group have 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, counselling, 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 outcomes 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, models and examples, detailed checklists and forms on all aspects of the relationship including selection of outside counsel, planning and budgeting, the allocation of work and responsibility between inside and outside counsel, 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, transactions, and phases

of litigation. Finally, six chapters contain detailed case studies.

The Editor-in-Chief of the treatise is Robert L. Haig. Among the authors are the General Counsel of more than 75 FORTUNE 500 companies (including more than 40 of the largest 100 companies) and the chairmen or senior partners of many major law firms.

Corporations spend many billions of dollars every year on legal services. Some individual companies have legal budgets approaching one billion dollars. Nevertheless, until now, no book had ever been published which comprehensively advises these corporations and their law firms how to spend their legal budgets cost-effectively. In fact, almost all of the literature on this immensely important subject consisted of brief, anecdotal articles.

This publication contains literally thousands upon thousands of specific suggestions about partnering and concrete advice which will be immediately useful to readers. The publication will be helpful to corporate law departments throughout the United States. It will enable all lawyers with corporate clients to improve the quality and efficiency of their legal services. In-house counsel can use this book to operate their law departments more effectively and to do all of their work better and faster.

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

BIOGRAPHIES OF MODERATORS

William B. Lytton (*Chapter 59, Determination of Litigation Forum*) is Senior Vice President and General Counsel of International Paper Company. Bill came to International Paper from Lockheed Martin Corporation, where he served as Vice President and General Counsel for the Electronics Sector. He also held a similar position with G.E. Aerospace in Valley Forge, Pennsylvania.

Before joining the corporate world, he was a federal prosecutor in Chicago and in Philadelphia and a trial lawyer in private practice in Philadelphia. He also counseled both President Reagan and President Bush in

matters arising out of the Iran Contra investigation.

He graduated from Georgetown University and received his J.D. in 1973 from the American University School of Law.

Robert L. Haig is a partner in the law firm of Kelley Drye & Warren LLP in New York City. His practice includes commercial, products liability, and other types of civil litigation in New York State and Federal trial and appellate courts. He graduated from Yale College and from the Harvard Law School.

Mr. Haig was the President of the New York County Lawyers' Association from 1992 to 1994. He was a member of the New York State Bar Association's Executive Committee from 1991 to 1994. He was the founder and first Chair of that 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 from 1989 to 1992 and also chaired that Association's Council on Judicial Administration from 1996 to 1999. He is a member of the House of Delegates of the American Bar Association, 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.

In February, 1995, Chief Judge of the State of New York Judith S. Kaye and Chief Administrative Judge E. Leo Milonas established a Commercial Courts Task Force to create and refine the Commercial Division of the Supreme Court of the State of New York. The Co-Chairs of that Task Force are Mr. Haig and Judge Milonas. Mr. Haig has also been active in efforts to create business courts in many other states and countries.

Mr. Haig has written and lectured extensively on various litigation topics. He is the Editor-in-Chief of a six volume, 6,700 page book, published by West Group in 1998 in a joint venture with the American Bar Association Section of Litigation, entitled Business and Commercial Litigation in Federal Courts. He is also the Editor-in-Chief of a three volume, 3,600 page book, published by West Group in 1995, entitled Commercial Litigation in New York State Courts. He is the principal author of the Corporate Counsel's Guide, published by the New York State Bar Association as well as of numerous articles and book chapters. Mr. Haig 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.

BIOGRAPHIES OF PANELISTS

Paula E. Boggs (*Chapter 17, Law Department Management*) has served as Vice President and Senior Deputy General Counsel for Dell Computer Corporation since June 1997, where she oversees litigation and intellectual property matters worldwide and provides counseling to Dell's Americas Home and Small Business Group. Prior to joining Dell, Ms. Boggs was a partner at the law firm of Preston Gates & Ellis from 1995 to 1997. Her previous background includes 10 years' experience with the U.S. Government in such roles as U.S. Army Captain, staff attorney on the White House Iran-Contra Legal Task Force, Assistant U.S. Attorney for the Western District of Washington (Seattle), and most recently, Staff Director of the Tailhook-driven Advisory Board on the Investigative Capability of the Department of Defense. Ms. Boggs has a B.A. from The Johns Hopkins University (where she now serves on the Board of Trustees), and a J.D. from the University of California at Berkeley (Boalt Hall).

H. Ward Classen (*Chapter 22, Counsel for International Legal Work*) has been Assistant General Counsel of Computer Sciences Corporation since November 1996 and was General Counsel of CSC Intelicom, Inc. from December 1990 to November 1996. He was previously Associate General Counsel and Assistant Secretary for International Mobile Machines Corporation (now Interdigital Corporation) from 1987 to 1990,

and an Associate with Weinberg & Green from 1985 to 1987. He has a Bachelor of Arts in economics from Trinity College (Connecticut); a Juris Doctor of law from Catholic University; and a Master of Business Administration from the Wharton School of The University of Pennsylvania.

Mr. Classen serves on a number of business, professional and civic boards, including the Editorial Board of *Business Law Today*, the Board of Advisors of *The Intellectual Property Counselor*, as well as *The Commercial Law Advisor*, and is an Adjunct Professor at the University of Baltimore Law School. He is the author of the three volume *Classen's Commercial Forms and Classen's Mergers and Acquisitions Forms*. Mr. Classen has written and spoken extensively in legal journals and before professional groups. His recent articles address technology licensing, law department management and managing inside/outside counsel relationships.

Jan Friedman Constantine (*Chapter 70, Copyright Litigation*) is Senior Vice President for The News Corporation Limited, Senior Vice President and Senior Deputy General Counsel for News America Incorporated, and General Counsel for News America Marketing Group and News America Publishing Group, in New York, New York. She was formerly Deputy General Counsel to Macmillan, Inc. and was also Deputy Chief of Civil Division for the United States Attorneys Office for the Eastern District of New York.

In her positions with the various News Corporation and News America entities, Ms. Constantine is responsible for the legal affairs for the United States operations in the areas of litigation, intellectual property, mergers and acquisitions, corporate financings, bankruptcy, antitrust and trade regulation, labor and employment. She participates in all aspects of the business as a legal advisor to client companies such as TV Guide, The New York Post, The Weekly Standard, HarperCollins, News Digital Media, News America Marketing group and various other technology companies. Ms. Constantine has extensive experience with regulatory agencies (e.g. FTC, FCC, Department of Justice, State Tax Authorities, State Attorneys General). She frequently lectures on topics relating to intellectual property, employment law and the Internet. As a member of the Bar of the City of New York, Ms. Constantine has served on the Special Committee on Electronic Fund Transfers, Consumer Affairs Committee, Corporate Law Departments Committee, and is the current Chair of the Committee on Communications and Media Law. In addition, Ms. Constantine serves on the Media Law Committee for the New York State Bar Association and is a member of the Board of Directors for The Feminist Press at CUNY.

Anastasia D. Kelly (*Chapter 71, Employment Law*) is Eecutive Vice President and General Counsel for Sears, Roebuck and Co. She reports to Chairman and Chief Executive Officer Arthur C. Martinez.

Previously, Kelly was Senior Vice President, General Counsel and Secretary for Fannie Mae. Prior to joining Fannie Mae, she was a partner at Wilmer, Cutler & Pickering in Washington, D.C., which she joined in 1985, where she practiced in the area of corporate and securities law. From 1981 to 1985, she was with the law firm of Carrington, Coleman, Sloman & Blumenthal in Dallas, Texas.

Kelly was graduated cum laude from Trinity College and received her law degree magna cum laude from George Washington University National Law Center. Kelly is on the board of directors of the International Human Rights Law Group. She co-chairs the Litigation Section - Committee on Commercial and Business Litigation of the American Bar Association. She also is a member of the D.C. Lawyers Committee for Civil Rights, the Chicago Economic Club and the Woodrow Wilson International Center for Scholars.

Thomas L. Sager (*Chapter 75, Case Study: DuPont's Legal Model for Strategic Partnering*) serves as Associate General Counsel and Chief Litigation Counsel within the DuPont Company's Legal Function. Mr. Sager helped pioneer DuPont's Convergence and Law Firm Partnering Program and continues to have oversight responsibility. Through his leadership, this program has become a benchmark in the industry and has received national acclaim for its innovative approach to the business of practicing law. In addition, his responsibilities include oversight of all litigation and IS support for the entire Function. He received his J.D.

from Wake Forest University School of Law in 1976 and began his career with DuPont in August of the same year. He is a Board member, American Corporate Counsel Association (ACCA), Board member, of the Minority Corporate Counsel Association, Delaware Law Related Education Center and American Red Cross in Delaware. Mr. Sager served as Chairman of the Delaware Chapter of the American Red Cross from June 1995 through June 1997. In addition, he received the Lammot duPont, Jr. Memorial Award in March of 1997 for outstanding and devoted service to the community through Red Cross. This is the highest honor the American Red Cross in Delaware can bestow on a volunteer.

Mr. Sager is Editor-in-Chief of *The DuPont Legal Model…A New Era*, a publication relating to the new innovative approach to the business of practicing law, and is the author of numerous articles. In 1998, Mr. Sager received the following recognition: American Corporate Counsel Association Award. This award was presented for his article that appeared in the September/October 1997 ACCA Docket, "*DuPont's Performance Metrics*". The Thomas L. Sager Award from the Minority Corporate Counsel Association. This award was established in his name and given in recognition of his individual efforts and achievements to promote diversity in the legal profession and will be presented annually. The 1998 Brundage Award, presented by the Wallace Law Registry. This award is given annually in honor of the late Peggy Brundage, an employee of the staffing firm, and acknowledges outstanding energy, commitment and dedication to improving the legal profession. "Recognition of Excellence" from the American Corporate Counsel Association for professional accomplishments in corporate practice, personal integrity and commitment to the advancement of the in-house practice of law.

Jerome J. Shestack (*Chapter 37, Professionalism*) chairs the Litigation Department of Wolf, Block, Schorr and Solis-Cohen, LLP, based in Philadelphia. He was President of the American Bar Association during 1997-1998. As President of the ABA, he wrote and lectured widely on professionalism and means to enhance it. Clients that he has represented in trial and appellate litigation include ABC, CBS, NBC, RCA, Hertz, Westinghouse, Comcast, Advanta, Lazar Freres, GAF, Crown Cork and Seal, and the Commonwealth of Pennsylvania. He has been regularly listed by the National Law Journal as among America's 100 most influential lawyers. He has written more than 40 articles in law journals and some 200 op-ed articles. He is a former U.S. Ambassador to the U.N. Commission on Human Rights and serves as a Counselor to the American Society of International Law. He was the founder and first chair of the Lawyers' Committee on Human Rights and a founder of the Lawyers' Committee on Civil Rights and of the federal Legal Services Program.

Shestack serves by appointment of President Clinton on the U.S. Holocaust Memorial Council and chairs its Committee on Conscience. He is a director of the American Arbitration Society and on the Executive Committee of the International Commission of Jurists. He is a Fellow of the American College of Trial Lawyers, the American Academy of Appellate Lawyers, and the International Academy of Trial Lawyers.

CHAPTER 4

SELECTION OF OUTSIDE COUNSEL

by

Thomas A. Decker

Lawrence T. Hoyle, Jr.

and

Arlene Fickler

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§ 4:1 Scope note

Selection of counsel requires the exercise of good judgment and the good faith of the participants; there is no single "best" method that always will result in selecting the right counsel for the right task at the right time. However, this Chapter discusses many of the factors and the variety of methods that can be used in an effort to obtain the best possible counsel for the task at hand.

Starting from the premise that the relationship between inside and outside counsel should be one of mutual respect and joint effort to resolve the corporate client's problem, this Chapter addresses processes to follow for the selection of outside counsel based on their ability to provide appropriate legal services for a particular engagement at a reasonable cost. After general comments about the potential impact of the selection process on the relationship between inside and outside counsel, the discussion of the selection process is divided into four principal steps.

First, we recommend that, before any potential outside counsel are contacted, a planning process be followed, including analysis of the nature of the legal services required, the client's objectives vis-à-vis the problem that precipitates the engagement, and the amount of money that the company is willing to devote to the project. Also included in this planning process is the consideration of a variety of factors that influence the process, such as the company's overall strategy with respect to the engagement of outside counsel (*e.g.*, whether the company has adopted policies concerning convergence or partnering), the desirability of hiring one lawyer to

be responsible for the work, the availability of insurance to pay the legal fees for the engagement, and any corporate policies that need to be considered in the selection process (*e.g.*, the encouragement of diversity or pro bono activity by outside counsel or use of alternative dispute resolution processes).

Second, we discuss how the company should go about the process of identifying candidates who might serve as outside counsel, including especially sources of information both inside and outside the company.

Third, we discuss techniques for obtaining information from the candidates, including interviewing several candidates in a "beauty contest" approach, formal requests for proposal, and competitive bidding. When you are considering hiring counsel with whom you have not previously worked, or counsel with whom you have not previously worked on the same type of matter, we recommend that, in addition to obtaining information directly from the candidates, you also obtain information from other companies that have utilized the firm's services in comparable matters -- *i.e.*, "check their references."

Fourth, we conclude by discussing the decision making process for selection of a lawyer or firm from among the candidates, including who from the company should be involved, criteria for evaluating candidates, and actual retention of outside counsel.

Each of these four steps are examined with a view to developing a process which will assist a corporation in selecting counsel best qualified under all the circumstances to provide the required legal services to the company.

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§ 4:37 Practice checklist

1. The company should design the selection process to identify lawyers who not only are best qualified under all the circumstances to provide the required legal services but with whom a relationship of mutual respect and joint effort to resolve the corporate client's problem can established. *(See* § 4:2)
2. Before contacting potential outside counsel, the company should engage in a planning process that analyzes the nature of the legal services required, the client's objectives vis-à-vis the problem that gives rise to the engagement, as well as any other factors that will be critical to the company's selection decision. *(See* §§ 4:4—4:15)
3. When the company has insurance coverage for a matter, the corporation's inside counsel should participate, whenever possible, in the selection of outside counsel to represent the company in that matter. *(See* § 4:14)
4. No single selection process or technique is appropriate in every situation in which counsel is to be selected; one must recognize that an effective selection process requires the exercise of good judgment and good faith by all participants. *(See* § 4:3)
5. The selection process should be structured to provide an open exchange of information between the corporation and the candidates on all of the issues that will be critical to the decision concerning who will be selected as outside counsel. *(See* § 4:2)
6. Although hourly billing rates should not be the sole determining factor in employing outside counsel, costs should be considered in light of the objectives and significance to the corporation of the matter. *(See* §§ 4:8, 4:31).
7. The company's past experience is probably the most important source of information about potential outside counsel. When no such information is available, it is all the more important to utilize interviews, references, and research to obtain accurate information about the candidates. *(See* §§ 4:16—4:21)
8. When the final candidate is a firm with which the company has not previously worked or when the company has utilized a firm in one subject matter but is proposing to utilize the firm for a different type of engagement, it is advisable to consult with other companies that have retained the candidate in matters similar to the proposed engagement. *(See* §§ 4:21 and 4:26)

9. When counsel is selected, obtain the commitment from an individual lawyer to be responsible for the corporation's relationship with the law firm. *(See* § 4:11)
10. Care should be taken to making sure that the chemistry is satisfactory between outside counsel and the representatives of the company with whom they will be working, both legal and non-legal. *(See* § 4:32)
11. In major matters, it may be appropriate to include the business client in the outside counsel selection process to determine the company's objectives and to assure that the client understands the complexities presented by the engagement and therefore can be an effective participant throughout the course of the representation; however, hiring recommendations from management need to be carefully considered in light of the knowledge and experience of the person making the recommendation. *(See* § 4:35)
12. When new counsel is retained, the decision should be made in the legal department and communicated by the general counsel or another senior counsel in the legal department. *(See* § 4:35)
13. Before retention occurs, the corporation and the law firm should agree on at least three matters: who from the law firm will be responsible for the work, what are the billing arrangements and rates to be applied, and what are the nature and extent of the services to be provided. *(See* § 4:36)
14. Even if local professional rules do not require an engagement letter between the corporation and the law firm, it is wise to utilize one to set forth the key terms of the engagement. *(See* § 4:36)

CHAPTER 5

REQUESTS FOR PROPOSALS, BIDDING, PRESENTATIONS,

AND BEAUTY CONTESTS

by

S.T. Jack Brigham, III

Larry Coit

William H. MacAllister

and

Peter D. Zeughauser

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§ 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. 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 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.

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§ 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)

CHAPTER 8

FEE ARRANGEMENTS

by

Richard J. Rawson

Lee S. Cutcliff

William F. Alderman

and

Richard E. Donovan

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§ 8:1 Scope note

This Chapter discusses the kinds of fee arrangements inside and outside counsel may wish to consider in connection with the various types of matters on which they collaborate. For each common variety of legal work, the Chapter focuses on how the properly selected fee arrangement can most closely align the interests of inside and outside counsel, providing win-win solutions in which outside counsel is motivated to meet inside counsel's needs and is appropriately rewarded for doing so. The Chapter does not attempt to cover those related considerations that are discussed in-depth in other chapters. See, e.g., Chapter 5 "Requests for Proposals, Bidding, Presentations, and Beauty Contests," Chapter 9 documenting the fee arrangement in "Engagement Letters," Chapter 11 "Budgeting and Controlling Costs," Chapter 14 "Billing" and Chapter 15 "Expenses and Disbursements."

Following a brief history of fee arrangements in Section 8:2, Section 8:3 discusses the overall perspectives and goals of inside and outside counsel in selecting the most appropriate type of fee arrangement for a given engagement and reveals that they share a great deal of common ground.

Sections 8:4-8:9 catalog various types of fee arrangements falling into four major groups: (1) hours times rates ("HTR") and numerous modifications of HTR; (2) fees that are fixed in advance and do not vary with time spent or results achieved; (3) fees that vary with value created or results achieved for the client; and (4) other types of arrangements such as lawyer investment in the client or lawyers loaned between law firm and client

that can have compensation-related consequences. Sections 8:10-8:19 then explore the factors that influence the selection of an appropriate fee arrangement in general and for specific types of engagements, often recommending a hybrid arrangement that combines features of several menu selections.

Finally, Sections 8:20-8:28 examine the ethical and regulatory constraints on fee arrangements. Section 8:29 offers a checklist of practical considerations in selecting and negotiating an appropriate fee arrangement. Sections 8:30-8:50 conclude with a sampling of fee agreement forms reflecting the selection of particular options for specific types of matters.

§ 8:29 Practice checklist

A. Identify Objectives

1. Inside counsel should consider whether a proposed fee arrangement controls overall legal expense; maximizes value received; creates incentives for efficiency and quality; and promotes the continued availability of needed outside expertise. *(See* § 8:3)
2. Outside counsel should consider whether a proposed fee arrangement achieves desired levels of revenue and profit margin; provides a return on the law firm's investment in training, technology and intellectual property; differentiates the firm from competitors; and promotes a predictable revenue stream. *(See* § 8:3)
3. Both inside and outside counsel should consider whether a proposed fee arrangement aligns their interests; promotes a long-term working relationship; avoids surprise or embarrassment; achieves the optimum mix of thoroughness and cost-effectiveness; utilizes technology to reduce costs and improve results; advances the diversity, career development and training of their respective staffs; and promotes increased understanding of their mutual client's business and needs. *(See* § 8:3)

B. Consider Alternatives

1. Does the traditional hours times rates ("HTR") model, along with regular budgeting and monitoring, adequately address your needs? *(See* § 8:5)
2. Does one of the modified forms of HTR provide a better alternative? *(See* § 8:6) Consider the following:

    - Fee caps
    - Budgetary constraints
    - Phased billing
    - Target fees
    - Blended rates
    - Partner-based rates
    - Discounted or premium rates
    - Volume discounts
    - Frozen rates
    - Per diem rates
    - Cost-plus

1. Is a flat fee appropriate as a means of capping both the upside and the downside? *(See* § 8:7) Consider the following:

    - Fixed fees
    - Unit pricing
    - Retainers
    - Percentage fees

1. Would your matter benefit from a form of value billing? *(See* § 8:8) Consider the following:

    - Contingent fees (including defense or negative contingencies)
    - Success fees or bonuses
    - Result-based billing
    - Min-max

1. Is there another form of arrangement that would better align inside and outside objectives? *(See* § 8:9) Consider the following:

    - Investments in clients
    - Teaming arrangements
    - Loaned or seconded lawyers
    - Unbundling

C. Select an Appropriate Fee Arrangement

1. Consider the characteristic advantages and disadvantages of each alternative. *(See* § 8:10)
2. Consider the dozen general principles that apply to most analyses of alternative fee arrangements. *(See* § 8:11) These include:

    - Customization——one size doesn't necessarily fit all.
    - Goal setting——don't lose sight of the big picture.
    - Alignment——what fee arrangement will align inside and outside interests in a win-win solution?
    - Risk sharing——does a proposed arrangement cause outside counsel to share in the client's upside opportunity for great results and downside exposure for poor results or cost management?
    - Predictability——does the arrangement help inside and outside counsel predict satisfactory results and costs/revenues?
    - Evaluation——examine the fee arrangement's compatability with inside and outside goals throughout the engagement
    - Re-openers——should the fee arrangement be made subject to reconsideration if circumstances change or one side's expectations are seriously disappointed?
    - Sensitivity——put yourself in your counterpart's shoes.
    - Continuity——does the fee arrangement promote the long-term benefits of an inside-outside counsel relationship and contribute to the satisfaction of its participants?
    - Clarity——has the fee arrangement been adequately documented, especially in the case of contingencies that trigger fee consequences?
    - Customer service——is the fee arrangement conceived and implemented in a manner designed to promote the client's expectation of receiving, and the law firm's desire to provide, high quality customer service throughout the engagement?

1. Work toward a fee arrangement using a win-win negotiation style, unafraid to raise the prospect of a non-HTR solution, make the first proposal, candidly confront potential conflicts of interest, or suggest that your counterpart read this Chapter. *(See* § 8:12)
2. Recognize that different types of engagements (e.g., complex or high-stakes litigation, routine litigation, transactions, counseling, lobbying or regulatory work, or volume business) have characteristics that render particular types of fee arrangements more suitable than others. *(See* §§ 8:13-8:18)
3. Consider whether the prospect of recovering "other people's money" (e.g., insurance coverage, joint representation arrangements, fee-shifting opportunities, indemnification or contribution prospects or transactional allocations) should influence the selection of a fee arrangement. *(See* § 8:19).

D. Examine Ethical Considerations

1. Recognizing that all fee arrangements inherently pose conflicts of interest between outside law firms and corporate clients, be aware of the ethical constraints imposed by the ABA Model Rules of Professional Conduct and, if applicable in your jurisdiction, the Ethical Considerations and Disciplinary Rules under the older ABA Code of Professional Responsibility. (See § 8:21)
2. Pay particular heed to the ethical implications of arrangements such as fixed fees, contingent fees, discounted and blended rates, success fees or bonuses, loaned or seconded lawyers, and investments in clients. *(See* §§ 8:22-8:28)
3. In examining the ethical issues that attend a proposed fee arrangement, ask yourself:

    - Why is an alternative fee arrangement preferable to HTR?
    - What economic incentives does the arrangement give outside counsel?
    - Have all possible adverse interests of outside counsel been disclosed to the client so as to insure informed consent?
    - Is an arrangement's potential for diminished objectivity acceptable to both inside and outside counsel and hedged where possible?
    - Have all possible outcomes to a matter and related fee consequences been considered and deemed acceptable by both inside and outside counsel?
    - Is a re-opener appropriate?
    - What long-term impact on the law firm-client relationship can be expected?
    - Has the fee agreement been adequately documented, including clarity as to calculation methodology, contingencies, expense allocation, and foreseeable scenarios that could affect the fee or its fairness? *(See* § 8:28)

E. Document the Agreement

1. Carefully reduce the agreement to writing in a manner designed to avoid future disputes, especially in the event a non-HTR arrangement turns out to disproportionately benefit one side. *(See* §§ 8:30-8:50).

CHAPTER 2

PRE-LITIGATION MANAGEMENT AND AVOIDANCE

by

William H. Trachsel

Joseph A. Santos

and

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§ 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.

§ 2:46 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* § 2:5)

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* § 2:1)
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* §§ 2:14-2:15)
16. A key to success of a PIP is the commitment of senior and middle management to PIP goals. *(See* § 2:16)
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* §§ 2:17-2:21)
18. Engage in early investigation and assessment of accidents, supplier deficiencies, employee complaints, or other events that can lead to potential claims. *(See* § 2:22)

19. Train the client's employees to effectively respond to initial complaints about the client's products or services. *(See* § 2:23).
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* §§ 2:24-2:26)
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* §§ 2:27-2:28)
22. Once the Crisis Management Team has been established, announce its existence and composition to the entire organization. *(See* § 2:29)
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* § 2:30)
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)
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* § 2:32)
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* § 2:33)
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* § 2:34)
28. Be creative and courageous in the use of new methodologies to accelerate claim resolution. Hire outside counsel that 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* §§ 2:34-2:36)
29. Utilize technology to accelerate claim resolution. Implement a media monitoring program. Utilize video surveillance. Use case management software. *(See* §§ 2:38-2:39)
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* § 2:41)

CHAPTER 40

OPERATING A SMALL LAW DEPARTMENT

by

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and

Lynn E. Pollan

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§ 40:28 Form: Memorandum from CEO on use of legal department [Disk Icon]

§ 40:29 Form: Standard retention guidelines [Disk Icon]

§ 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.

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 ten 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.

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.
- 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, *infra*), this Chapter will turn to the specific subject of partnering between small law departments and outside firms (in Sections 40:16 through 40:26, *infra*).

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§ 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, 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)

1. 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)
2. 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)
3. Inclusive decision making about policies, procedures and staffing usually works well in small law departments. *(See* § 40:10)
4. 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 routine work assignments. *(See* § 40:12)
5. Collaborative, informal communication serves to keep workloads relatively even. *(See* § 40:12)
6. 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)
7. 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)
8. 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)

1. 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)
2. What kind of legal work should a small law department buy, rather than make?

   - Work requiring specialized expertise.
   - Occasional transactions
   - Cases involving peak volume litigation. *(See* § 40:18)

1. 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)
2. 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)
3. In most small law department engagements of outside counsel, the standard hourly fee arrangement prevails. *(See* § 40:21)
4. 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)
5. Small law departments may be willing to experiment with alternative fee arrangements. *(See* § 40:22)
6. 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)
7. 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)
8. 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)
9. 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* § 40:29)

CHAPTER 60

PLEADINGS AND PRE-TRIAL MOTIONS IN

COMPLEX COMMERCIAL CASES

by

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Richard A. Rothman

and

Lori L. Pines

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§ 60:45 Form: Reply to motion for case management order (insert disk icon)

§ 60:46 Form: Memorandum of law in support of defendants' motion to dismiss (insert disk icon)

§ 60:1 Scope note

This Chapter examines significant developments that have occurred in recent years concerning pleadings and motions in complex commercial cases. After exploring the changes that have occurred, the Chapter will consider strategies for proceeding in the new environment in which the importance of pleadings has diminished, and where there are new and important opportunities to use motion practice to (1) focus a

complex case, (2) control its scope and cost, and (3) win motions that can produce a complete victory or place your client in a position either to achieve a good settlement or to maximize the chances of success at trial.

Pleadings. Following the discussion of the history, function and role of pleadings, the Chapter addresses how counsel can draft effective pleadings in an environment in which pleadings now have a relatively minimal role in limiting case issues. The drafter of effective pleadings must keep in mind the audience to which the pleadings are directed. This includes not only the judge who may be influenced by his or her personal preferences and the local customs of the state or district in which the court is located, but also (depending on the profile of your case) other potential audiences — the client, the client's employees, the press, and the public at large. Effective drafting demands that counsel tailor pleadings to the expectations of the different audiences.

Motions. Motions are addressed in Sections 60:12 through 60:37, *infra*. These sections can be divided into two parts: the first part (Sections 60:12 through 60:18) addresses some of the unique issues that arise in deciding whether to file particular motions, including: motions attacking the pleadings; motions to dismiss; case management order motions; summary judgment motions; and motions to exclude expert testimony. In deciding to make any of these motions, counsel must assess not only whether the motion is likely to succeed, but whether a victory is likely to be worth the costs that will be incurred by the client. Although resolving such issues depends on the facts of the particular case, there are issues specific to each type of motion that must be considered regardless of the factual circumstances.

The second part (Sections 60:19 through 60:37, *infra*) suggests a number of structural and style guidelines that are generally applicable to all memoranda of law. Some of these points, while seemingly obvious, are often overlooked even by experienced drafters. They should be considered before beginning the writing process, and can serve as a checklist for inside counsel engaged in the process of reviewing drafts of briefs and ensuring the quality of the final product.

Finally, Sections 60:39 through 60:42 provide several examples of effectively written motions.

§ 60:38 Practice checklist

1. Consider from a detached perspective the likelihood of winning each claim or defense on the merits. Eliminate those claims or defenses which are not likely to be productive. Limit your legal research accordingly. *(See* § 60:2)
2. Consider the pleadings. Do not file so-called "shotgun pleadings," because of the risk of loss of credibility with the court and the possibility that your adversary will successfully attack the pleadings. *(See* § 60:11)
3. Make sure your pleadings will be understandable and persuasive to the various audiences who are likely to read them. *(See* § 60:10)
4. Pause before filing a motion to attack a pleading, and consider not only whether you are likely to win the motion, but the ultimate cost and likely outcome – particularly whether your adversary will likely be able to cure the defect in an amended pleading. *(See* § 60:12)
5. Consider whether to make a case management order. Such a motion can save time and money, particularly in complex cases. Ask whether a CMO can structure the case in such a way as to obtain an expedited ruling on a substantive issue that will either dispose of the entire case or lay the foundation for settlement. *(See* § 60:14)
6. In order to limit the issues for trial, or dispose of the case altogether, determine if any issues in your case are amenable to summary judgment. Keep in mind the advantages and disadvantages of making the motion early in the case. *(See* §§ 60:16-60:17)
7. In writing any brief, be conscious of the regional and personal styles of the court. Persuasive attacks in one district may be considered offensive in others. *(See* § 60:21)

8. Every brief should be based on unifying themes – marshalling the most powerful equitable, factual and legal points supporting your client's position. Consider the impact your arguments may have outside the confines of the current litigation. *(See* §§ 60:22-60:23)
9. Preliminary statements, often given superficial treatment by brief drafters, can often be the most potent section of a brief. Give it careful attention. *(See* § 60:27)
10. Make sure the fact statement of a brief is interesting and comprehensible, and that it emphasizes the facts that are relevant to the matter at hand. Different facts are relevant for different motions. *(See* § 60:30)
11. In drafting the legal argument, pay particular attention to the burden of proof for the various elements of the claim. The burden of proof can be the most effective tool in attacking your adversary's position. (*See* 60.33).

CHAPTER 63

TRIAL PREPARATION AND PRESENTATION

by

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and

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§ 63:1 Scope note

The primary objective of this Chapter is to describe how the partnership between inside counsel and outside trial counsel plays out at the tactical level of trial preparation and presentation and to offer insight into techniques for maximizing the effectiveness of that partnership so the client's strategic objectives are achieved. The final stages of litigation pre-trial conferences, final fact and expert witnesses preparation, and other trial preparation activities are critical processes that require inside counsel and trial counsel to work together seamlessly as a team to ensure that the client's case is presented to the fact-finder in the most effective and efficient manner possible. For this reason, inside counsel and outside trial counsel must establish, well in advance of trial, a framework for communication, as well as the processes which will govern their collaboration during the trial preparation and presentation stages of the litigation. This Chapter describes a number of techniques that have proven effective in establishing such frameworks and processes. In particular, we stress the importance of articulating and focusing on the client's goals; establishing clear chains of command and allocation of responsibilities through a litigation plan; and mobilizing the resources of the client firm in an effective way. In addition, we have provided lessons from our experience relating to specific matters and situations, such as dealing with pre-trial conferences, the final pre-trial order, demonstrative exhibits, paralegal support, and jury consultants.

Because this Chapter focuses primarily on the interaction between inside counsel and trial counsel, it is not intended to be a comprehensive manual on trial preparation or a guide to effective trial advocacy. Although the Chapter briefly discusses the development of the litigation strategy, we have assumed throughout that inside counsel, in conjunction with outside trial counsel, has already performed the fundamental litigation cost-benefit analysis and has determined, in consultation with the business client, that the most effective litigation strategy is to take the dispute to trial.

The Chapter is divided roughly into two separate but related sections. In the first section, we offer insights

into the dynamics of the partnership between inside and outside counsel within the context of trial preparation, while at the same time providing helpful techniques for maximizing the strategic and tactical effectiveness of the partnership. The remainder of the Chapter is devoted to the nuts and bolts of trial preparation and describes the ways in which inside counsel and outside counsel must work together during the implementation/execution stage of trial preparation and presentation.

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§ 63:56 Practice checklist

1. Does inside counsel have confidence in trial counsel's skill and trust trial counsel's judgment? *(See* § 63:2)
2. Identify the client's goals in going to trial and communicate these goals to outside counsel. Keep trial counsel informed of changes in the stakeholders' interests. *(See* §§ 63:5-63:10)
3. Clearly allocate responsibilities between inside counsel and outside counsel and between multiple outside firms. *(See* § 63:11-63:13)
4. Establish decision makers. Ascertain if inside counsel has the necessary experience to make decisions normally made by trial counsel. *(See* § 63:14)
5. Establish chains of command so that persons on the trial team will know when an instruction is given by someone with authority. *(See* § 63:15)
6. Start a contact list of telephone numbers and addresses and keep it up to date. *(See* § 63:16)
7. Appoint a "client ombudsman" who knows how to get things done within the corporation. *(See* § 63:17)
8. Involve inside counsel, trial counsel and the client's stakeholders in the development of the client's themes *(See* § 63:18-63:21)
9. Inside counsel and trial counsel must agree on a single strategy. *(See* § 63:22-63:24)
10. Trial counsel should identify procedural and evidentiary issues. These issues should be explained to the client's decision maker. *(See* § 63:25)
11. Inside counsel should secure availability of the client's employees and encourage them to become full participants in the process. *(See* § 63:16)
12. Inside counsel and trial counsel should discuss each upcoming pre-trial conference. Inside counsel attempts to attend pre-trial conferences. *(See* § 63:27-63:29)
13. Inside counsel and trial counsel should discuss dropping claims or defenses and involve the client's decision maker. *(See* § 63:31)
14. In preparing the final pre-trial order, trial counsel should identify for inside counsel the facts in dispute and the open issues of law. *(See* § 63:33-63:34)
15. Trial counsel should provide inside counsel with a set of the key exhibits. *(See* § 63:35-63:37)
16. Inside counsel and trial counsel should discuss the suitability of each witness to be called. *(See* § 63:38-63:42)
17. Inside counsel and outside counsel should have frequent discussions on where the case is and where it is going. *(See* § 63:43)
18. Frank discussion should be had between inside counsel, trial counsel and the client's decision maker about the merits of settlement. *(See* § 63:45)
19. Make sure that corporate purchasing policies do not control the selection of a graphics supplier to the detriment of effective presentation at trial. *(See* § 63:48)
20. Inside counsel and trial counsel should review proposed demonstrative exhibits before final materials are prepared. *(See* § 63:49)
21. Make plans to mobilize for trial. If the client will be making arrangements, trial counsel should give inside counsel a list of the trial team's requirements. *(See* § 63:51-63:55)
22. Any mock trial should be scheduled so that inside counsel and the client's decision makers can attend without distractions. A meeting to discuss the results of the mock trial should be scheduled soon but not immediately after the mock trial. *(See* § 63:50)

23. Inside counsel should attend the trial. *(See* § 63:52)
24. A private room within walking distance of the courtroom with a buffet lunch should be set up for discussions during lunch recesses during trial. The best time for regularly scheduled discussions during trial is shortly after the trial recesses for the day. *(See* § 63:53)
25. Inside counsel should assume responsibility for contact with the client during trial. *(See* § 63:54)
26. Inside counsel should participate in witness preparation, especially with anxious employees or employees who do not know trial counsel. *(See* § 63:55)

CHAPTER 79

CASE STUDY: THE WAL-MART APPROACH TO LITIGATION

by

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Ann Curry Cato

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§ 79:1 Scope note

This Chapter presents Wal-Mart's approach to litigation by its U.S. domestic operations. This section will provide an overall perspective to the structure of the Wal-Mart Legal Team. Relevant nomenclature will be defined for consistency throughout the discussion. Section 79:3, *infra*, describes the process by which attorney assignment is made. Wal-Mart's preferred approach to filing an answer to a complaint, including the issues of removal and jury trials will be discussed in Sections 79:4-79:9, *infra*. Wal-Mart's direction as to discovery issues is the subject of Section 79:10, *infra*. The very stringent reporting requirements Wal-Mart requires of its outside trial attorneys is described in detail in Section 79:11, *infra*. A discussion of motion practice is the subject of Sections 79:12-79:16, *infra*, with emphasis on summary judgment practice. Wal-Mart's long history of approaching arbitration with skepticism and mediation with caution is explained in Sections 79:17-79:25, *infra*. Issues of the trial itself, post-trial assessment and appeal posture are the subjects of Sections 79:26-79:36, *infra*. A jury survey checklist is set forth at Section 79:37. A practice checklist is provided at Section 79:38, *infra*, and forms are located at Sections 79:39-79:43, *infra*.

Wal-Mart's approach is shaped greatly by the Company's culture as developed by its founder, Samuel M. Walton. In deference to that culture, any reference to the Company's employees will use the routine moniker of "associates." Rather than referring to its small cadre of in-house attorneys as the legal "department." Wal-Mart calls them its "Legal Team," which designation will be used throughout this discussion.

The intent of the ensuing discussion is to allow the reader to understand the mind-set that defines how Wal-Mart deals with its vast litigation caseload. It is further hoped that the reader will gain insights from this limited exposure to Wal-Mart's culture and lessons learned in the litigation arena, which the reader can adapt to his or her own situation.

Initially it would seem helpful to know the structure of Wal-Mart's in-house Legal Team. It is divided into several distinct teams, each headed by an assistant general counsel. On the non-litigation side, these include a business team, a benefits, securities, tax and international team, and a real estate and construction team. On the litigation side, there is a tort and employment team and a commercial team. These teams are further divided as to whether the in-house lawyer acts as a case manager or as the actual trial attorney. Wal-Mart's Legal Team has both.

Throughout this Chapter, references to counsel are intended to provide a shorthand description of their primary function. Reference made herein to the corporate attorneys who act in the role of case manager is "in-house counsel." Whereas, reference to the corporate attorneys who act as trial counsel in the cases assigned to them, is "in-house trial attorney." Every Wal-Mart litigated case will have one or the other. Most cases will also have an outside attorney affiliated with it. The role of the outside attorney will of course depend on whether the case is being handled by one of Wal-Mart's in-house litigation attorneys. For the sake of clarity throughout this discussion, we will refer to the outside attorney as "local counsel" where he or she acts as a support for Wal-Mart's in-house trial attorney. Where the outside attorney acts as the trial attorney, our reference is "outside trial attorney." As the great bulk of Wal-Mart's litigation is handled by outside trial attorneys, this Chapter will be written with that emphasis as well.

§ 79:38 Practice checklist

1. Outside attorneys, whether serving as the lead trial attorney or local counsel to Wal-Mart's in-house trial attorney, need to keep in mind that Wal-Mart is a company whose culture is shaped in large measure by its founder, Sam Walton. If an attorney wants to maximize the professional relationship

with Wal-Mart, it will pay heed to the fact that this culture very directly impacts Wal-Mart's approach to litigation which emphasizes integrity, quality, breakneck speed, prevention and economy. *(See* §§79:1-79:2)

2. "Know your audience" applies to outside counsel when dealing with Wal-Mart's Legal Team. Be cognizant of how Wal-Mart's in-house attorneys are divided. Make sure you understand with what component of the team the in-house counsel you are communicating with is associated. Your role is determined accordingly, and if you are insensitive to the distinction, you will likely add unwelcome complexity to the relationship. *(See* §§ 79:1, 79:3)
3. Know and understand Wal-Mart's preferences for federal court jurisdiction and jury trials, and be well prepared to provide relevant considerations to support a contrary recommendation. Be willing to adapt your answer to Wal-Mart's suggested format that re-states the complaint allegation followed by the answer to that allegation, in the same way you typically respond to written discovery requests. And if you really want to impress Wal-Mart with your willingness to get on board with its desired approach to litigation, then surprise your in-house counsel with a set of proposed jury instructions in the early stages of the case. *(See* §§ 79:4-79:9)
4. Understand that the outside trial attorney has the ultimate responsibility of appropriately responding to discovery. Wal-Mart's in-house counsel and supporting paralegal are available to help, but it is the outside attorney who must clearly state what is needed. Remember that two of the most important discovery considerations to Wal-Mart is that (1) the plaintiff's deposition be taken very early in the case; and (2) the use of experts in general, and independent medical examinations in particular, will not be authorized in the absence of compelling rationale offered by the outside attorney. Be guided by Wal-Mart's belief that written discovery should be used sparingly. Despite what others may do, never use discovery requests in an effort to overburden the opponent with the hope of winning a concession. Finally, engage in every reasonable effort to professionally work through discovery disagreements. *(See* § 79:10)
5. It is a mistake for the successful outside trial attorney to give scant attention to Wal-Mart's reporting requirements. You must keep in mind that Wal-Mart has thousands of pending lawsuits, and the failure of outside attorneys to adapt to the uniform reporting requirements, do nothing but frustrate the in-house counsel's ability to do his or her job. Don't overlook this opportunity to build a good relationship with the client. You will be at your best if you will see the comprehensive reporting as an additional act of discipline that will aid in your ultimate satisfactory resolution of the case. *(See* § 79:11)
6. While never wanting to compromise on quality, know that Wal-Mart is a client obsessed with its need to control its expenses. The culture of Wal-Mart is that the single most important issue that drives its success, is its willingness to confront expense control more aggressively than the competition. The Legal Team shares this quest. Examine the flat fee approach. Or be willing to propose alternative fee arrangements. Be sensitive to the fact Wal-Mart feels the traditional hourly fee approach does a great disservice to the legal profession and the clients it serves. But don't mistakenly conclude that it does not understand and appreciate the need to make a profit. *(See* §§ 79:2, 79:11)
7. Wal-Mart hires trial attorneys, not litigators. Don't let motion practice overtake the case. Be intentional in your use of motions. File motions for the use intended by the rules. If your assessment is that the uncontroverted facts and applicable law, warrant a summary judgment, then ask for it. Do not if otherwise. *(See* §§ 79:12-79:16)
8. Keep in mind that Wal-Mart enjoys its reputation that it does not make "nuisance" settlements of cases. Yes, the costs of defense may well exceed an opportunity to settle. But Wal-Mart's culture is that it is not consistent with the concept of integrity, to pay money to a party that has no legal claim. As an outside attorney, you should be loath to recommend settlement unless you can answer appropriately Wal-Mart's question of, "What did we do wrong?" *(See* §§ 79:17-79:20)
9. Be willing to propose alternative ways to resolve cases. The outside attorney should know that Wal-Mart's less than enthusiastic approach to arbitration, results from what Wal-Mart perceives as the arbitrariness inherent in that process. The opportunity for judicial review is an important check in our

legal system. But know that where Wal-Mart understands that another party is entitled to compensation, then Wal-Mart is very agreeable to have a mediator facilitate the parties' efforts to settle the case. *(See* §§ 79:21-79:25)

10. Wal-Mart traditionally avoids settlements after a jury has been empanelled, feeling that any effort to evaluate the case should have been made prior to trial. *(See* § 79:25) Wal-Mart's in-house counsel nevertheless wants to be kept informed as to the makeup of the jury panel, especially as to high-risk cases. *(See* § 79:28).
11. The outside trial attorney is sending the wrong signal to Wal-Mart, if he or she fails to reflect a thoughtful and intentional selection of who will be Wal-Mart's corporate representative at trial. Make sure he or she is a witness, and have a reason for your particular selection. *(See* § 79:29)
12. Wal-Mart's culture is premised on the integrity of its business people. It expects no less of its Legal Team and the outside attorneys representing Wal-Mart. An award of punitive damages is not accepted as merely the cost of doing business. It says that on at least that occasion, the authorized fact-finders concluded Wal-Mart failed to measure up to its own high expectations. The outside attorney must be vigilant to help the in-house counsel understand what "facts" led the jury to its conclusion, what changes in business practice or conduct he or she would recommend going forward. *(See* § 79:32)
13. Wal-Mart's approach to appeals is to evaluate every adverse verdict, irrespective of the dollar amount, where the answer to "What did we do wrong?" is "nothing." Or if the dollar amount is believed to be legally inappropriate for conduct that Wal-Mart acknowledges merits compensation, an appeal evaluation will be made. Remember, Wal-Mart does not make nuisance settlements, and that posture does not change simply because the verdict was adverse to Wal-Mart. However, the outside attorney should strive to identify any trial issues that may show that Wal-Mart's pre-trial assessment of the case was skewed. That is, know that Wal-Mart is willing to make a candid re-assessment of its settlement posture, if the facts warrant it. *(See* §§ 79:34-79:36)

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Chapter 80 Case Study: Ford Motor Company Changing the Law of Punitive Damages Through Litigation

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