



## **DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING**

### **Litigation Essentials for the Small Law Department**

#### **Preparing to Prevail: Preventive Programs and Approaches**

**Albert C. Peters II**

#### **Introduction**

A few years ago, there were a plethora of articles about litigation management. Three of the better, more thorough ones were:

Levenson, Irving B., 101 Ways to Control Outside Counsel Costs, *Corporate Legal Times*, August — November 1995.

Nagler, Barry, Reebok Rules, *ACCA Docket*, May/June 1997.

New York State Bar Association, Corporate Counsel Section, Cost Effective Management of Corporate Litigation, 59 Albany L. Rev. \_\_\_\_ (1995)

-

Basic topics addressed by these articles:

Preventive Programs and Approaches

Outside Counsel

Early Evaluation

Litigation Management

ADR

Settlement & Reconciliation

Perspectives for this program:

Managing litigation

Conducting litigation in-house

Sole attorney department

Sole attorney department

### **Preventive Programs and Approaches** ["Preparing to Win"]

A comprehensive preventive approach integrates compliance, training, dispute resolution, audits, drafting.

Importance of being early [or early preparation] — there are many examples in everyday life of this concept:

Baseball teams working on fundamentals in spring training

"You can pay me now or you can pay me later." [Fram commercial]

"The early bird catches the worm."

The preparation to win lawsuits begins before the complaint is filed. The best preparation involves undertaking activities to avoid and prevent them from even being filed. Even if lawsuits are filed, however, efforts should be made to resolve them early rather than later.

While implementing these efforts regarding prevention and early resolution is important, they may not be urgent, and thus could be overlooked. Nevertheless, if you have read The Seven Habits of Highly Effective People, you will recognize these as Quadrant II activities that need to be scheduled before you prioritize your urgencies.

Some possible projects for preventing disputes appear below. Based on your knowledge of your client's operations, you can prioritize these and stage their implementation.

Identify the biggest problems and create a procedure [i.e. form, handbook, checklist] for ensuring that a manager completes a proper and thorough analysis

Review forms, contracts, manuals, and other documents

Consider adding a "loser pays attorneys fees" provision

Executive/employee education and training

Risk reviews; insurance and indemnification

Compliance

Opinions from outside counsel

Work with other departments [e.g. HR and Risk Management]

Audits and investigations

Review current operations as well as previous transactions

Review current operations as well as previous transactions

Apply the lessons of litigation [your previous cases]

See excerpt of Ogden's article

Learning about the cases of others [e.g. Microsoft]

Media

Feldman's column [Contractually Speaking] in Corporate Legal Times

NEXIS

Devise and enforce policies that anticipate claims

Document retention policies

Incident reporting

Media relations and communications

P>

Coordinate the merits and presentation from the beginning

[Alternative phrasing: coordinate public relations, ADR, and trial strategy]

Limiting adverse publicity [standard example: Tylenol]

#### **EXCERPT FROM 1999 ANNUAL MEETING PROGRAM**

"Preventive Law for Small Law Departments and Generalists," Darity Wesley, Corporate Counsel, Acxiom-Dataquick Products Group

Educate Yourself/Know Your Company

Company or Division's Business Processes

Who Does What, How, and Why?

Analyze Exposure Areas

Strategies

Garner Support

Garner Support

Make a Plan

### Preventative Law Guidelines

Analyze exposure areas

Educate leaders, teams, departments about how to avoid creating problems

Get peripherally involved at all levels of your company

Convey information to all levels of your organization

Don't be shy — US?

Keep an open door

Be accessible

## EXCERPTS FROM ARTICLES IN ACCA'S VIRTUAL LIBRARY

From Harry N. Mazadoorian, Alternative Dispute Resolution: The Unique Role of Inside Counsel, ACCA Docket Winter 1988

### **Prevention of Disputes**


Clearly, the prevention of disputes is a major goal that inside counsel should be pursuing. If there is one single characteristic distinguishing the role of the inside lawyer from the outside lawyer, that characteristic is inside counsel's special role in the prevention of disputes. Being more familiar with the businesses of our clients than outside counsel, having an opportunity to participate in business plans and transactions at an earlier time, and serving as corporate counselor, we have a unique opportunity to detect potential disputes at an early time and to provide legal counsel to direct corporate actions away from litigation. While preventive "lawyering" may seem to some to be somewhat removed from alternative dispute resolution, it is actually a very important stage in the alternative dispute resolution process and has received increased attention lately.<sup>9</sup>

The preventive role in dispute resolution takes two basic forms, the first being dispute avoidance and the second being dispute anticipation—together with the development of dispute resolution mechanisms before the dispute occurs.

Two specific opportunities that are available to inside counsel for dispute avoidance and anticipation are the following:

- **Dispute Avoidance:** Utilization of the "legal audit" whereby corporate procedures and processes are analyzed for compliance with applicable case law, statutes, and regulatory requirements. In addition to the process-oriented legal audit, counsel also has an opportunity to assess potential for litigation on specific projects and transactions and to guide the course of corporate activity accordingly.
- **Dispute Anticipation:** Utilization of a contract clause, where permitted, to re-quire or encourage that disputes in connection with the contract be resolved by alternative means. Identifying the dispute resolution process before the dispute has actually arisen is far less difficult than trying to fashion a creative ADR procedure in the heat of battle when suspicions are high. These clauses may range from traditional clauses requiring binding arbitration to more recent varia-tions requiring mediation or advancing a two-tiered dispute resolution process. <sup>10</sup> Goldberg, Sander & Green point out that certain ADR models, (such as the mini-trial or mediation) may be especially attractive to business people because they are consistent with the traditional bargaining that usually takes place in business relationships.' Clauses calling for these types of dispute resolution procedures are, of course, much more likely to be acceptable than more unfamiliar "legally oriented" procedures.

From *Litigation by the Corporate Generalist: A Necessary Skill*

 by John H. Ogden

### **Litigation as Audit**



Litigation can serve an audit function with regard to corporate activities. As previously stated herein, the author considers many lawsuits to be--at least partially--a failure no matter what the outcome. Corporate counsel practicing pro-active law should avoid much litigation by counseling employees to avoid certain conduct in efforts to comply with law and regulations, drafting agreements which withstand unreasonable challenge, effective negotiation of disputes, and so forth. In that sense, therefore, many lawsuits result because corporate controls have failed and the methods of dealing with such failure have also failed. Therefore, the resulting litigation, and, particularly, the discovery process, can serve as a means of diagnosing those failures. If the attorney litigating all or part of the case is a corporate generalist, that corporate generalist should, based on the intimate firsthand knowledge acquired during discovery and drafting and/or arguing pleadings, be in a very strong position to do what is necessary to avoid similar situations in the future.

Auditing of corporate compliance programs and exercises to determine their effectiveness have become commonplace. By way of analogy, a company can and should drill extensively how to respond when hazardous material spills. This is a very valuable lesson, but nothing can replace an actual incident as a test and opportunity for review and improvement. However, just as no one would intentionally spill hazardous material in order to confirm the company's ability to respond, no one would commence or invite litigation as a means of reviewing the company activity being litigated. To complete the analogy, a careful review of the company's actions with regard to the actual hazardous material spill would certainly take place; a similar review should take place with regard to activity giving rise to litigation. In many respects, the corporate generalist is the ideal candidate to conduct that review since he or she can bring a broad general perspective to the matter. Litigating all or part of the matter is an excellent first step in that review.

This material is protected by copyright. Copyright © 2000 various authors and the American Corporate Counsel Association (ACCA).