103 Lunch & Program: Communicating Effectively with Your In-house Client

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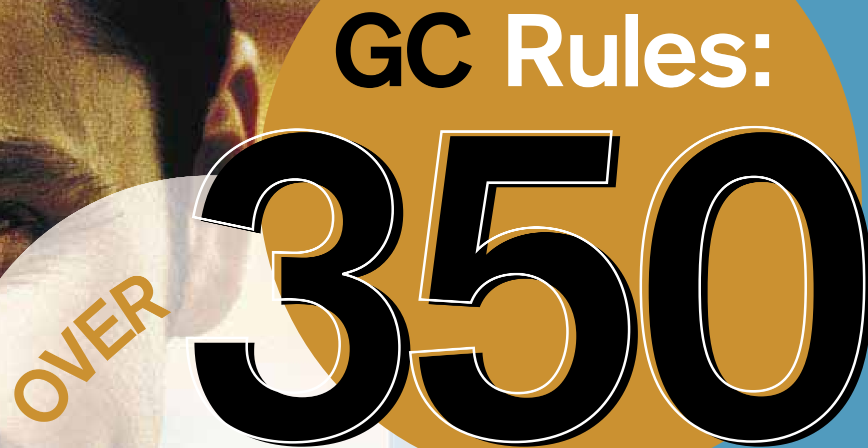

GC Rules: OVER 350

Things I Wish I'd Known My First Year as General Counsel

It's been four years since the original draft of this article appeared in what was then the *ACCA Docket*. Fastforward a bit, the association has a new name and an increased focus on the global aspects of in-house lawyering. And the legal landscape for in-house counsel now has a large and looming new fixture, called the Sarbanes-Oxley Act of 2002.

Yet nearly all of the original advice we offered to new GCs in 2001 remains relevant and useful. What should you do to get up to speed? What do you need to know about contracts? How do you handle employment matters? Where are the traps for the unwary in intellectual property? What about for securities filings? How do you correctly assess corporate dynamics? These are only some of the topics that we hit on last time, and (dare we say it) those tips have stood the test of time.

With the help of several new contributors, we have added dozens more tips and from-the-street wisdom. Surprisingly, while many contributions covered Sarbanes-Oxley, most focused on how best to build the right relationships within the company and to be more effective at all aspects of the job.

Of course, even those who aren't GCs can benefit from the wisdom we've collected here. And we hope you do.

We would be delighted to hear from you when you want to add your own wisdom from the trenches for the next update. Please send them to D. C. Toedt at *dc.toedt@bindview.com* (with a copy to *dc@toedt. com*). We will try to use all contributions, but we can't make any promises. If you don't indicate otherwise, we will assume that you are willing to have your name listed as a contributor.

Any views expressed here are the present, personal views of the respective contributors and not

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GETTING UP TO SPEED

Documents to Review

1. Read the following documents to the extent they are applicable to your company (use a site such as *www.10kwizard.com* to retrieve/download SEC filings easily). If you can do so before your first day on the job, it can help you hit the ground running. Also, your questions about the documents can serve as the basis for introductory meetings with the important people who can answer those questions.

- the articles of incorporation and any amendments thereto
- the audit-committee charter
- the by-laws and amendments thereto
- the company's last few 10-K, 10-Q, and 8-K reports
- the S-1 registration statement (if the company did an IPO within the past few years)
- the description of the business and of risk factors in the above documents
- employment contracts, stock-option agreements, and change-of-control agreements for key executives
- the last few proxy statements
- the exhibits to your SEC filings (are they up to date?)
- press releases from the last year or so (available at, e.g., *www.yahoo.com*)
- the legal-matters responses to the auditors in the last couple of audits.
- pension plans
- stock-option plans
- separation agreements for recently-departed executives

2. Consider creating a rough timeline/document index for some of the significant events described in the above documents—product releases, personnel changes, etc. It can be a valuable learning exercise, and the timeline/index can be a useful tool.

3. Make yourself a crib sheet of significant corporate data such as:

- current estimates for quarterly and annual revenue and earnings-per-share (EPS)
- historical numbers for revenue and EPS for the past quarter and year
- number of shares of stock issued and outstanding
- number of shares available for employee/executive stock options
- board meeting and audit-committee meeting schedules
- contact information for board members

4. Look at competitors' proxy statements, 10-Ks, 10-Qs, etc., to see what *they* are disclosing/discussing. This also helps you get more familiar with your company's market environment.

5. Review your company's public website, including the investor relations and corporate governance sections. If yours does not have a corporate governance section, make sure one is added that contains your corporate governance guidelines, committee charters, and code of conduct.

6. Review the most recent management letters delivered by the auditors to management.

Digging In

7. Revenue recognition: Learn the basics. Ask your accounting people what the revenue-recognition hot buttons are for your industry segment.

8. For those who did not pick up some basic accounting courses along the way, try to do it soon. Learning how to read a balance sheet and understanding Generally Accepted Accounting Principles (GAAP) will help you immensely.

9. Learn the business of the company, including gross margins of products, the technology, and the position of the company in the industry.

10. Learn as much as you can about the business and business drivers of your client. There are no stupid questions when it comes to learning about the business.

11. Learn how the company's products are made, inventoried, distributed, and sold.

12. Spend some time on the assembly line or factory floor (if applicable).

13. Learn how the shifts rotate, how breaks are administered, how employees get their information, and how management practices what it preaches.

People To Talk to First

14. Talk to the CEO. Understand what his/her and the company's goals are, and what the key issues are facing the company. Start to think about how you can help the company meet its goals.

15. Talk to the heads of departments. Find out what they would like to see by way of legal support. Ask whether there are any immediate issues or problems they would like to have addressed, and whether any are already being worked on. Ask if they see any issues or problems on the horizon.

16. Ask your accounting people whether there are any accounting or tax issues that are especially relevant to your company, your business segment, or your industry.

17. Get to know the audit partner and audit manager at your company's outside accounting firm.

18. Establish a good relationship with your predecessor (in-house or outside, lawyer or non-lawyer). Find out whether that person still has the confidence of upper management. Pick that person's brain as often as he or she will let you.

19. Know who your business client is. There are a lot of constituencies and agendas out there in your company. Remember that as you formulate your advice.

CONTRACTING ISSUES

20. In one sense, a contract is simply a business plan. Its purpose is to address the likely "what-ifs" that can arise in a business relationship. A long-term business relationship will have more potential what-ifs, and therefore will need a more detailed business plan, than a short-term relationship.

21. The most useful function of a letter of intent—arguably its *only* proper function—is to establish that the parties do *not* intend to enter into a contract at that time.

22. The fewer physical pages a contract has, the more aesthetically acceptable it will be to your management and to the other side. This is true even if you crowd in a lot of text with a small font. (Microsoft's contracts are usually done in 9-point Times Roman, a fairly small font.)

23. In contract negotiations, no matter what your substantive differences, always be unfailingly courteous to the people on the other side. You never know what the future holds; the negotiation

adversary whom you offend today may later be in a position to tell a prospective customer that your company can't be dealt with—or to tell a prospective future employer that you're a real jerk and shouldn't be hired.

Sales Contracts

24. Never underestimate the importance of sales contracts. You may enjoy the high-level legal work, but its importance pales in comparison with that of keeping revenue flowing.

25. Try to engineer your sales-contracting processes so that sales reps don't derisively refer to Legal as the "Sales Prevention Department." If you don't get a contract (or a markup of the other side's contract) to the sales people on time (or before), the train may well leave without you, regardless of how bad the draft was.

26. Remember that in a sales negotiation, every customer request is a marketing opportunity. If one customer wants a particular concession, it follows others might want the same thing—and if you can figure out how to give it to them, you may achieve a competitive advantage and maybe even generate extra revenue from it.

27. When responding to a customer demand letter, always temper your defensive posture with some form of offer to address the disgruntled customer's issue. This will make your company look much more reasonable when your response becomes Exhibit A in a lawsuit.

Contract Drafting

28. Understand what your client's objectives are. Then try to ensure that the proposed contract achieves those objectives.

29. How long should a contract be? The usual answer is "long enough."

30. When drafting a contract, try to stick to standard contract architectures and language to speed up the other side's contract review and thus the negotiation. On the other hand, *think*—don't necessarily use archaic forms or language just because "that's the way it's always been done."

31. Try to anticipate problems in contract performance, and put in some "outs" for your client.

32. Alternative remedies should be included in the contract, in addition to the "outs," whenever possible. For example, liquidated damages are OK when you can get them but are usually hard for the other side to agree to; they also don't assure that you will get the performance being bargained for. Consider providing for alternative ways of getting the job done. For example, in a system procurement contract, consider negotiating for upgraded or extra equipment for free or at discounted prices if the system doesn't meet performance metrics; or for free or discounted services to resolve issues with system capabilities or performance that are related to software development or other areas that can't be solved by throwing more hardware at the problem.

33. Sunset clauses are important—most rights and obligations should come to an end at a time certain (or at least a time determinable). In some circumstances, the absence of a sunset clause for particular rights or obligations can cause your auditors to refuse to allow you to recognize revenue.

34. Consider including illustrative examples in your contracts. Example: If a contract requires a complex calculation to be made, provide a hypothetical example to walk the reader through the calculation.

35. Consider using charts and tables instead of long, complicated narrative language.

Example

Awkward:

"If it rains less than 6 inches on Sunday, then Party A will pay $3.00 per share. If, however, it rains at least 6 inches but less than 12 inches on Sunday, then Party A will pay $4.00 per share. [etc., etc.]"

Amount of Rain on Sunday	Payment Due
Less than 6 inches	$3.00 per share
At least 6 inches but less than 12 inches	$4.00 per share
Etc., etc.	etc., etc.

Better:

36. Consider explaining *why* certain contract provisions are included, or why they are drafted in a certain way (for example, because of a compromise between the parties).

37. Items 34 through 36 can be very helpful in litigation. They can provide your trial counsel with ready-made exhibits as well as raw material for briefs and/or expert testimony.

38. If you can't specify *outcome* in a contract (for example, because the parties don't know what the desired outcome is), consider specifying an agreed *process* for deciding later what the outcome should be. One party to the contract should be responsible for making sure the process happens and does the job it was intended to do. General cooperation clauses or joint responsibility often lead to slipped schedules and finger-pointing.

39. Be careful about evergreen automatic renewals—they can also cause revenue-recognition problems. Consider calendaring the non-renewal notice deadline(s).

40. Date every page of every draft that you send to the other side. Put the date (and even the time) into a running header on every page. Don't use a date code that automatically updates—that likely will make it more difficult to associate printed copies with specific electronic drafts.

Contract Review

41. (Intentionally repeated from #28) Understand what your client's objectives are. Then try to ensure that the proposed contract achieves those objectives.

42. Most-favored-customer clauses can be problematic for a vendor. Avoid them if possible—do you *really* want to have to start cross-checking deals against every other past and future deal to ensure you're not violating an MFC clause?

43. As a vendor, if you must include a most-favored-customer clause, *(a)* try to limit it to deals of the same size and product configuration and for customers in the same industry, and *(b)* consider putting the administrative burden onto the customer—rather than you taking on an obligation to report better deals to the customer, instead give the customer the right to have an outside auditor periodically review your other deals (at its expense and under a nondisclosure agreement) and report back to the customer whether the MFC clause comes into play.

44. No-assignment clauses can be problematic for both vendors and customers. So can exclusivity, non-compete, and non-solicit clauses.

45. Licenses and other grants of rights need to be considered *very* carefully, including thinking through retained rights.

Contract Markups

46. Redline all markups with Word revision marks (or equivalent).

47. A corollary to # 40: Date every page of every markup, to help avoid phone conferences where the parties are inadvertently working from different drafts.

48. Use footnotes to explain to your opposite number your reasons for making particular changes—it may help speed up the negotiation. (Don't use Word comments for this, because they have to be tediously deleted one at a time, whereas footnotes can easily be deleted with a single global search-and-replace operation.)

49. If you follow # 48, keep around some representative markups with their explanatory footnotes—they make wonderful training tools to help teach your business to your new lawyers, contract negotiators, and outside counsel.

50. Strongly discourage your business people from keeping private stashes of form contracts on their computer. It's frustrating to find that a sales rep has put together a contract from an outdated form—and even more frustrating to encounter a signed contract, in which you weren't involved, that contains outdated commitments that your company no longer is willing to make.

General Services Administration Contracts

51. A GSA contract is an umbrella agreement between the General Services Administration (GSA) and a vendor, with pre-negotiated prices (or discounts) and agreed terms and conditions, to facilitate purchases by government agencies. The existence of a GSA contract allows government agencies to buy goods/services from the vendor quickly and easily.

52. If your company has a GSA contract, review it.

53. Is the GSA contract up to date, i.e., does it reflect your company's current practices? If not, consider filing an amendment to the business-practices disclosure.

54. Have there been any audits of the GSA contract by the Office of Federal Contract Compliance Programs (OFCCP)?

E-commerce Issues in Traditional Contracting

55. Periodically do an inventory/fresh review of standard contract terms in light of e-commerce issues, including:

- Force majeure (man-made events, hacking,

September 11th, internet transmission failures);
- Intellectual property (source code access/escrow, background and foreground ownership, non-competes);
- Privacy (lack of uniform law in the United States; consider also international privacy issues even for transfer of corporate data among offices);
- Security (encryption, firewalls);
- Payment (special internet terms such as impressions, unique user fees, referrals; payment security terms and consumer protection laws)
- Warranties/indemnification (ownership of technology is especially important in internet linking and cobranding; obscenity, privacy, publicity)
- Choice of law and forum (position on e-commerce issues such as digital signature enforceability; arbitration to head off class action; limit risk and exposure in distant courts)
- Export controls (erect measure to prevent unauthorized exports; internet transmission increases risks)
- Signatures/password identification (to ensure enforceability and validity both domestic and international; require "affirmative act"/click by user to assent/reject transaction)
- Insurance policies (to cover cyberspace and multimedia risk for libel, slander, and defamation; IP infringement; internet security, crime, kidnap and ransom policies, viruses, employee error, theft of credit data; IP loss risks)
- Internet advertising (federal regulation, including consumer as well as international restrictions; SPAM; unsolicited email)
- Standard contract terms (simple and reasonable, consistent with off-line sales to further enforceability; material terms prominently disclosed and displayed)
- Consider downside risk (consider in this economy the downside risks in the contract)

56. Remember that virtually every company has to think about applying e-commerce/internet issues to their day-to-day practices, above and beyond contracting issues:
- Human Resources (internet and email usage; new issues for sexual harassment and discrimination claims, including hostile work environment)
- Chatrooms (and related liabilities for employee participation)
- Securities law (internet significantly changes securities law and insider trading review; and you must exercise caution in applying existing principles to website content, postings (in general and during an offering), hyperlinks, chatrooms, etc.)

Other Contract Issues

57. A fable, a.k.a. "Toedt's Mack-Truck Rule of Contract Drafting": Once upon a time there were two companies that negotiated a very important contract. Each company was represented in the negotiations by a smart, experienced executive who understood the business and also understood the other company's needs. During the discussions, the executives hit it off on a personal level. Under pressure to get the deal done, they agreed that they didn't need to waste time on picky details, because they were developing a good working relationship and would surely be able to work out any problems that might arise. The executives signed the contract and marched off, in great good spirits, to a celebratory dinner. While crossing the street to the restaurant, they were hit by a truck. Their successors turned out to be idiots who hated each other. Imagine how much fun *they* had in dealing with the picky details that the faithful departed had left out of the contract.

58. Set up a working database for contracts. Include the party's name, address (and its address for notice if different), dollar amount, termination provisions, whether the contract is assignable, any clauses to watch out for that are different than your company's standard provisions, etc. *[The contributor of this item reported, "This is the most critical thing that I do and have done, I feel pretty clear about that."]*

59. Consider setting up a system where Accounting does not pay on any contract—and does not pay commission on any sales contract—until Legal has signed off that it has a copy of the contract.

60. If a contract deals with a third party providing services, be careful about how much of your company's proprietary information they will have access to and see if you can keep that bounded. If possible have non-compete language included that covers them and anyone they provide similar services to, since you don't want to pay for a service—such as a design—that they can turn around and sell to your competitor.

61. Your company's auditors may want to review a representative sales contract for revenue-recognition purposes. Make sure to give them a reasonably representative contract so that they won't be basing their opinion on a "one-off" deal.

EMPLOYMENT MATTERS

Recruiting

62. The law governing your recruiting activities may well turn out to be that of the site of employment. Even the choice-of-law clause in your employment contract might not matter.

63. Inquire whether HR has an interview and hiring procedure established. If it doesn't, you can help them generate one and see that it is implemented.

64. Your recruiting practices should take into account the Americans with Disabilities Act. See generally:
- *www.eeoc.gov/facts/fs-ada.html* (an overview by the Equal Employment Opportunity Commission [EEOC]); and
- *www.smartagreements.com/bltopics/Bltopi31.html* (a brief overview).

65. Comply with the Fair Credit Reporting Act (FCRA) in doing credit checks on recruits. Two useful (government) websites are:
- FCRA consumer rights: *www.ftc.gov/bcp/conline/pubs/credit/freereports.htm*; and
- FCRA employer responsibilities: *www.ftc.gov/bcp/conline/pubs/buspubs/credempl.htm*.

66. Background checks: Determine whether you are *required* to do background checks—some states have laws requiring them for some categories of workers (e.g., health care and child care). See generally:
- *www.privacyrights.org/fs/fs16-bck.htm*.

67. Review your company's new-employee intake process. HR should have new-employee orientations that cover various legal issues, including sexual harassment policy, use of company equipment and time for viewing pornography, and the handling of proprietary information and material.

68. Periodically sit in on new-hire orientation sessions—find out what your supervisors and HR people are actually telling people.

69. Employment contract form: Review your company's forms and policies periodically (consider calendaring it on a regular basis). Pay particular attention to:
- Invention-assignment clauses,
- Confidentiality clauses, and
- Non-competition, non-solicitation clauses.

70. Change of control contracts—review them. Which executives get them? Is there a policy?

71. Stock options: For general information, see *www.nceo.org/options/index.html*.

Terminations and Layoffs

72. Age discrimination: Specific age-discrimination disclosures are required for people over 40 in the event of a layoff. See generally:
- *www.eeoc.gov/types/age.html*.

73. When doing layoffs, check whether the federal "plant closing law" applies, i.e., the Worker Adjustment and Retraining Notification Act (WARN). For a general discussion of WARN, see *www.smartagreements.com/bltopics/Bltopi32.html*.

74. Severance benefits—make any offered benefits contingent on signing a release (unless the benefits are required by a contract or by law). The EEOC has taken the position, however, that such releases are not binding in age-discrimination cases even if the employee has cashed the check.

75. Foreign employee-termination law is different—it can be very difficult to fire an employee in Europe without paying several months worth of severance.

Exit Interviews

76. See *http://sacramento.bcentral.com/sacramento/stories/1997/08/04/smallb6.html* for an overview of exit interview procedures.

77. Consider putting in your employment contract a requirement that the employee is obligated to participate in an exit interview upon request unless specifically excused. If the employee refuses to participate, and you end up having to sue him for breaching a non-competition clause, it's nice to have an obvious breach of contract to put in front of the judge and/or jury.

78. Exit interviews: Have a friendly witness there to avoid later "he said/she said" controversies.

References for Former Employees

79. Be careful in giving references for former employees. See generally:
- *www.nolo.com/article.cfm/objectID/97BCA0D9-5222-4019-8672595419DA6AAE/catID/62C89F2D-3064-4440-BB0EAF183A66D240/111/259/188/ART*.

Non-competition Clauses and Inevitable Disclosure Rule

80. For a general discussion of non-competition clauses, see:

- *www.lucaslaw.com/NONCOMPETITION percent20CLAUSES.htm.*

81. In some jurisdictions, non-competes can be hard or (as in California) virtually impossible to enforce. Courts are often reluctant to prevent someone from earning a living and will sometimes bend over backwards to avoid enforcing a noncompete. In the *Earthweb* case, the district judge refused to grant a preliminary injunction even though the departed employee was a senior manager who went to work for a company that seemed to pose a grave competitive threat; the judge brushed off the competitive threat as "speculative." *See Earthweb, Inc. v. Schlack*, 71 F. Supp. 2d 299 (S.D.N.Y. 1999) (denying preliminary injunction), *aff'd after remand*, 2000 WL 1093320 (2d Cir. May 18, 2000).

82. On the other hand, non-competition clauses are alive and well in many jurisdictions if the clause is reasonable and the factual circumstances are right.

83. The inevitable disclosure doctrine can sometimes be used as a substitute for a non-competition clause, but that can be tough. (This doctrine, followed in some but by no means all jurisdictions, holds that if a departing employee, in his new job, will inevitably make improper use of the former employer's confidential information, then he can be enjoined from working at the new job.) *See Earthweb, Inc. v. Schlack*, 71 F. Supp. 2d 299 (S.D.N.Y. 1999) (denying preliminary injunction), *aff'd after remand*, 2000 WL 1093320 (2d Cir. May 18, 2000).

84. If you're not a California company, but one of your former employees goes to work in your state for a California-based competitor, the competitor might try to file a declaratory-judgment action against you in California, claiming that California's non-compete law applies (in which case you will have a very difficult time). *See Application Group, Inc. v. Hunter Group, Inc.*, 61 Cal. App. 4th 881, 72 Cal. Rptr. 2d 73 (Cal. App. 1st Dist. 1998) (affirming refusal to enforce noncompete clause).

Other Employment Issues

85. Employee handbooks: Be careful not to create implied contracts; where it makes sense to do so, refer to "guidelines" and not "policies." Explicitly state that management reserves the right to change the handbook and its guidelines/policies.

86. Drug-Free Workplace Act—see generally:

- *http://www4.law.cornell.edu/uscode/41/ch10.html#PC10* (text of statutory requirements); and
- *www.elaws.dol.gov/asp/index.asp* (Justice Department FAQ file, plus an "Advisor"—a simple Web-based decision tree to help companies determine whether they are covered by the Act).

87. Family Medical Leave Act—see generally:

- *www.dol.gov/dol/esa/regs/compliance/whd/1421.htm* (Labor Dept. guide);
- *www.west.net/~bpbooks/fmla.html*;
- *www.unlv.edu/Human_Resources/Benefits/fmlasum.html.*

88. Immigration—H1B visas—see generally, *www.myvisa.com/.*

89. Fair Labor Standards Act overtime pay requirements—see generally:

- *http://www.dol.gov/dol/topic/wages/overtimepay.htm* (Labor Dept. guide).

90. Train your management and HR people. Outside counsel will be delighted to help, possibly for free.

91. See if your insurance carrier (especially your employment-practices liability carrier) will give you free HR training for management (such as online training).

92. The company should have an established sexual harassment policy that is included in the employee handbook.

93. Sexual harassment training and equal-opportunity training can be a good idea. They can also be counterproductive if they waste time and/or create a suspicious atmosphere.

94. Don't set a policy that employees must do X unless you are prepared (a) to follow the policy as a matter of routine, and (b) to deal with the inevitable cases where you find out that someone didn't do X and now it's too late to do anything about it. Example: If you want employees to sign a statement that they have read the employee handbook, Murphy's Law says that the employee who doesn't sign the statement will be the one whom you want to sue for misappropriation of confidential information....

95. In establishing employment policies, do a cost-benefit analysis—for example, will setting up a hot line for employee complaints provide enough benefit to justify the (hard and soft) costs?

MARKETING

96. Saying things like "new" on a sales slick may not be a good idea, because printed marketing materials can stay around for years. One way around this is to make sure that marketing materials have a very small "mouseprint" date in the trademarks/copyright section.

97. Consider including, in all marketing materials, a reasonably prominent section that says something like the following: "These specifications are not intended as a warranty. In the interest of product improvement, these specifications may be changed from time to time without notice. Please consult your sales representative for details."

98. Review as much marketing material as you can. Stay friendly with the marketing/sales/collateral people; tell them you'd like to help with the process earlier. It's far better to find out about potential problems this way than by having a process server show up in your office with a complaint for copyright infringement or unfair competition.

99. Tell your marketing people about the *Pizza Hut v. Papa John's* case. Papa John's, in a "pizza war" with Pizza Hut, ran a series of advertisements containing the slogan, "Better Ingredients. Better Pizza." Pizza Hut sued for false advertising. The jury found in favor of Pizza Hut, and the court awarded over $469,000 in damages for corrective advertising. Papa John's appealed; the Fifth Circuit reversed on grounds too complicated to go into here. *Question*: Was the slogan "Better Ingredients. Better Pizza" *so* good for Papa John's as to justify putting the company through the expense and hassle of the pre-trial proceedings, the trial, and the appeal? (Of course, the nationwide publicity generated by the case was no doubt worth something!) *See Pizza Hut, Inc. v. Papa John's Intern., Inc.*, 80 F. Supp. 2d 600 (N.D. Tex.), *rev'd*, 227 F.3d 489 (5th Cir. 2000), *cert. denied*, 532 U.S. 920 (2001).

100. Avoid superlatives about your product or service that you can't back up. It might be non-actionable puffery, but even so it might lead to a false-advertising claim by a competitor or by the FTC—and you might be forced to defend the claim and perhaps even to try the case. EXAMPLES: "We are *the* market leader in X" (which can also raise antitrust issues; see # 191). "Our product does the *best* job of doing X." "Our product *ensures* that this good thing will happen."

101. All categorical statements are bad—including this one.

102. Consider selectively using tailored forward-looking-statement language in press releases and other public documents (like websites)—see also # 145 et seq.

INTELLECTUAL PROPERTY

103. Be careful about ownership of IP rights outside the United States. *[The contributor of this item commented:* "Here in the U.S., we expect anything developed by an employee on company time to belong to the company. Not so overseas (as I learned to my great chagrin upon becoming corporate counsel here). In some European countries (Germany and Italy, to name two), employees may have a right to share in the sales revenue generated by their inventions (patented or unpatented). Imagine having to pay 2 to 5 percent of your sales revenue on a major new product to one of your rank-and-file employees, who invented the new gadget on company time, as part of his job, using company resources. The rules are complex and not easily applied, and ignorance of these rules has I'm sure caught many American companies unawares (to their financial detriment). Forewarned is forearmed, as the saying goes."]

Trade Secrets

104. Know the Three Rules for protecting trade secret information:

- Lock it Up—use reasonable precautions to maintain secrecy;
- Label It—make judicious use of confidentiality legends (but don't stamp confidential on the lunch menu from the local deli unless you want to be branded as the boy who cried wolf); and
- "Safe Sex"—be careful whom you give confidential information to, and from whom you receive it.

105. Review the company's standard nondisclosure agreement form(s) (NDAs). Consider making them available on the company intranet.

106. Strongly encourage company personnel to get a signed NDA in hand before disclosing company confidential information.

107. Make it clear that all NDAs that are not on an approved form should be approved by you before being signed.

108. For a brief frequently-asked questions file concerning trade-secret law, see *www.lawguru.com/faq/19.html*.

Patents

109. If your company becomes aware of a third-party patent that it might infringe, it has a duty to use due care to ensure that it is not infringing any valid claim of the patent. If your company fails to use due care, and later is found to infringe, the infringement is likely to be adjudged "willful" because of the lack of due care—which can mean treble damages and an award of the patent owner's attorneys' fees. (That's counterintuitive, but that's the way the courts have ruled.)

110. Due care in assessing a third-party patent often (but not always) means obtaining a facially competent *written* opinion of *patent* counsel that the patent claims either are not infringed or are invalid.

111. Make all personnel aware that if an issue comes up concerning a third-party patent, they should *not* make any statement or respond to any third party, but instead they should immediately contact you. In particular, tell your technical people *not* to say, in an email or otherwise, anything like, "well, it sure looks like we infringe this baby!" That will be almost guaranteed to be a key plaintiff's exhibit, and the jury likely will give it considerable weight.

112. Set up a procedure to notify you before a new or upgraded product is released for sale. Review the prior procedures to avoid on-sale bars, which may cause a loss of potential patent rights. See generally *www.northwestern.edu/ttp/investigators/patent_deadlines.html* (deadlines for filing a patent application).

113. Review/create a patent disclosure form for inventors to fill out when submitting an idea for patenting. It may be a good idea to establish some kind of patent disclosure review practice.

114. Review/establish a patent incentive program if intellectual property and talented scientists/engineers are important to your company's business.

115. Ask your patent counsel whether the claims of your company's patents actually cover what the company is in fact shipping—it's surprising how often a company's expensive patent coverage offers little real-world protection for its products.

116. For general information about patents, see: *www.uspto.gov/main/patents.htm*.

Copyrights

117. Copyright happens *automatically* when an "original work of authorship" is "fixed in a tangible medium of expression."

118. To increase your leverage against copyright infringers, file copyright registration applications for key copyrightable works early. If you fail to register a copyright before a particular infringement begins (or, if the work is a published work, within a grace period of three months after publication), you almost surely will lose your right to recover attorneys' fees and/or "statutory damages" from that particular infringer.

119. Modifying someone else's copyrighted material can be just as much an infringement as slavishly copying it. (See also # 117.)

120. Warn your software developers not to use open source software without consulting with the legal department—open-source software often comes with a license agreement requiring any derivative software to itself be released for open-source distribution.

121. For a general survey of copyright law, see *http://corporate.findlaw.com/industry/copyrights/index.html*.

Trademarks

122. Before rolling out a new trademark, do appropriate U.S. and foreign clearance searches. Don't be caught like Microsoft with its Xbox trademark, finding itself having to settle with a tiny company that owned superior rights in the mark. See *www.theregister.co.uk/content/50/16640.html* for an entertaining account of that particular match-up.

123. Trademark searching:

- *www.uspto.gov/main/trademarks.htm*—USPTO site for *preliminary* U.S. searches (covers only registered marks and registration applications, not unregistered uses or state registrations); and
- *www.thomson-thomson.com/*—Thomson & Thomson commercial search agency (you must have an account with them).

124. Once your company is reasonably sure it intends to use a new trademark, file an "intent to use" federal registration application. If you think you know what you're doing in trademark law (sometimes a dangerous assumption), you can file a registration application yourself at the U.S. Patent and Trademark Office's website, *www.uspto.gov/teas/index.html*. (Note: intent-to-use applications are generally not assignable without losing their benefits except as part of the transfer of the business.)

125. Don't assume that a U.S. trademark registration application will protect you in foreign countries.

126. Pay attention to the six-month deadline for filing a foreign trademark registration application with the same priority date as your U.S. application.

127. Trademark registrations in multiple countries can get expensive. Get together with the marketing folks to plan out just which trademarks you will attempt to register in which countries (and fight it out with them about whose budget will have to cover it).

128. For a brief overview of some key points of trademark law, see generally *http://corporate.findlaw.com/industry/trademarks/index.html*.

Internet Domain Names

129. Get with Marketing to figure out which domain names you want to register in which countries.

130. Keep in mind that a lot of different new top-level domain names have come online (e.g., .biz, .info, etc.) See generally *www.internic.net/faqs/domain-names.html*.

IP Enforcement Considerations

131. Figure out what your branding and patent protection strategy really is, and which trademarks and patents you intend to enforce, and against whom.

132. For trademarks: There is nothing more wasteful than an internal legal department that responds *ad hoc* to every potential infringement situation, without having an overall plan of exactly what services or good the brand is intended to cover (including areas of natural expansion).

133. For patents, figure out which patents are core to your product and market share, and which have less core value. Adopt a rigorous plan for enforcement of the former, and rigorously enforce only when the amount you stand to lose (judged by market share, sales, dollars, or any other legitimate criteria) exceeds the cost of enforcement—keeping in mind that by failing to enforce a patent, in some circumstances you may be jeopardizing your right to enforce it against anyone.

CORPORATE LAW ISSUES

134. If you are the corporate secretary, you should have the books, minutes of board and shareholder meetings, and corporate seal. If you are not the secretary, you should have access to these things.

135. Become familiar with each of the earlier major corporate transactions, qualifications to do business in different states, resolutions, etc.

136. Docket key dates so that you are not blindsided, e.g., by a franchise tax deadline.

SECURITIES LAW ISSUES FOR PUBLIC COMPANIES

137. See *www.seclaw.com/secrules.htm* for an online version of many securities-law statutes, regulations, and forms.

138. Perform a line-by-line audit of Sarbanes-Oxley requirements, starting with each of the board level requirements, and work down from there.

139. Review and understand the listing requirements of the exchange(s) your company is listed on.

140. Prepare a list of the quarterly and annual certifications that must be delivered by the CEO and CFO (and others) pursuant to SEC and exchange rules.

Insider Trading

141. Review—or draft—your company's written insider-trading policy.

142. Sample insider-trading policy: *www.genesismanagers.com/GUM_Cl.nsf/Doc/PolicyIT.html.*

143. Require D&Os to obtain your pre-approval before any transactions in company securities. This will help ensure compliance with your insider trading policy, and also allow you to make timely § 16 reports.

144. Get a Power of Attorney from all D&Os enabling § 16 filings on their behalf. In the 2-day filing environment, this can mean the difference between a timely and a late filing.

Regulation FD (prohibiting "selective disclosure")

145. Text of Regulation FD: *www.sec.gov/rules/final/33-7881.htm*.

146. Selected SEC interpretations of Regulation FD, in frequently-asked-questions format: *www.sec.gov/interps/telephone/phonesupplement4.htm.*

Press Releases and Other Public Disclosures

147. Include appropriately tailored, forward-looking-statement language in your press releases and other public disclosures.

148. See *www.bassberry.com/resources/corp/012099/5.html* for general suggestions about forecasts, projections, and other forward-looking statements.

149. Avoid boilerplate in drafting cautionary language for forward-looking statements. Tailor the cautionary language to be reasonably specific.

150. Familiarize yourself with the kinds of information that might be deemed material for your company or your industry segment.

151. Get familiar with the different judicial views concerning *when* updated material information must be disclosed to the market. See *www.bassberry.com/resources/corp/012099/3.html* for a compilation of selected cases involving the duty to update and the duty to correct prior statements.

152. See nos. 100-101 about the dangers of superlatives. If your press release (or other public document) says that "Our product *ensures* that this good thing will happen," someone might later try to enforce that as an express warranty.

153. Form a disclosure committee, with a written charter, and make sure it reviews or has oversight of all public disclosures made by the company. Make sure there are minutes of the disclosure committee meetings, as these will likely form part of your company-level controls for SOX 404 purposes.

154. Have a policy strictly limiting the persons who can speak to the public on behalf of the company. Ideally just the CEO, CFO, and head of Investor Relations should be the spokespersons. Train each of these people on Reg FD and Reg G.

155. Have the disclosure committee approve an "inadvertent disclosure" policy addressing the situation where your CEO or CFO selectively discloses material information. Have on hand a form of 8-K you can quickly dust off and file if necessary.

156. Determine whether you are the company's designated contact with the media for public crises. If so, cultivate a relationship with the local business reporters. It'll pay off in spades when a crisis hits.

EXCHANGE ACT REPORTING—FILING OF FORMS 10-K, 10-Q, 8-K, ETC.

157. SEC filings must be done on a timely basis, otherwise there can be repercussions. If you are not an expert in this area, make sure that an SEC lawyer is keeping track of dates and gives you ample notification of an impending filing date. Calendar the dates for:

- Quarterly 10-Q filings,
- Annual 10-K filing,
- Annual report to shareholders, and
- Annual shareholder meeting and its proxy statement.

158. *Schedule* sufficient blocks of time to work on the 10-K/10-Q/proxy statement, keeping in mind the new 30-day time limits for 10-Qs.

159. Set up detailed assignment lists for the work necessary for the 10-K/10-Q/proxy statement.

160. Periodically review the risk factors in your 10-K and 10-Q reports; update them as appropriate.

161. Remind each new member of the board of directors, and each new § 16 officer, to file a Form 3 report within *10 days* after he or she moves into the new position. See *www.sec.gov/about/forms/form3.pdf* for the SEC's instructions.

162. Set up a process with board members and section 16 officers and their brokers to ensure you know of trades in time to help file Form 4 reports. See *www.sec.gov/about/forms/form4.pdf* for the SEC's instructions.

163. Send out annual reminders to board members and section-16 officers to file Form 5 reports. See *www.sec.gov/about/forms/form5.pdf* for the SEC's instructions.

164. Set up an internal process for handling requests by pre-IPO investors to sell their restricted stock under Rule 144.

Regulation G

165. Make sure you read and understand Regulation G. Know whether your company uses any non-GAAP financial measures. If so, know what the most comparable U.S. GAAP measures are and how they reconcile to each other.

166. Make sure you know what non-GAAP financial measures are publicly referred to by the CEO, CFO, etc. outside of written filings (e.g., analyst calls, investor conferences, one-on-one meetings). Make sure the reconciliation of all such non-GAAP financial measures is properly publicly disclosed.

LITIGATION & OTHER DISPUTES

167. Don't let demand letters sit around unanswered. At a minimum, buy time by asking for more time to respond. There's nothing worse than finding yourself in the middle of a lawsuit because someone forgot to get back to the complainant in a timely manner—try explaining *that* to the CEO. It also doesn't look good to the judge (and the jury, if it comes to that).

168. Document retention: If litigation is threatened, contact the IT department about not destroying/recycling email backup tapes. Notify involved people not to destroy potentially relevant documents.

169. Maintain channels of communication with competitors' legal departments. Consider designating one person—preferably someone other than the general counsel—as a liaison to each competitor's legal department.

170. ADR: Know the differences between arbitration vs. mediation vs. early neutral evaluation.

171. Using standard AAA or similar arbitration clauses can sometimes result in unanticipated and very painful results. Where practicable, a better approach is to craft specific arbitration rules to attach to the contract to achieve the desired objectives, such as limited or broad discovery depending on what benefits the company the most; timelines to avoid gamesmanship and delays; venue for hearings and depositions.

172. Before going down the litigation path, make certain that you become well aware of what the costs of the litigation will be. Make certain that upper management is well aware of and approves the cost. Make certain that they know how it will affect your budget and the bottom line. Obviously, you have little control over the initiation of a suit as a defendant, but you can negotiate. When you are the plaintiff, you have control of whether or not you pull the trigger.

173. If you are inexperienced with litigation or a specific type of litigation, make sure that you select very experienced lawyers to work with you. Make sure that you agree in advance about costs, fees, and payments thereof.

174. Many trials are now like a *60 Minutes* documentary. During the pretrial phase, the "producers" (i.e., the lawyers) collect hours of potentially useful video footage (depositions and documents). Then for the trial, they pick and choose snippets to show the audience (the jury).

175. In a lawsuit, the plaintiff always "gets up to bat" first. By the time the defendant gets its turn, the plaintiff may well be 10 runs ahead with the jury. And unlike in baseball, the plaintiff not only bats first, but also bats last.

176. In a lawsuit, truth is the goal—but in the end, admissible evidence is what matters.

177. Don't fall in love with the other side's inconsequential problem facts—e.g., the fact that the other side did something wrong, but it was a minor transgression—because jurors might well ignore those problem facts.

178. On the other hand, don't ever discount your own supposedly inconsequential problem facts, because jurors might use them as an excuse to discount everything you say. (No one ever said life was fair.)

179. Jurors usually have the last word on factual matters. Suppose that five bishops swear that the light was green and only one homeless person says the light was red. If the jury decides that the homeless person was more credible, and there's no evidence of jury bias or other reason to grant a new trial, then the light was indeed red—period, paragraph, end of discussion.

180. Just because you're right doesn't mean you'll win.

181. Some judges simply won't grant summary judgment, no matter how compelling the motion—they figure they're much less likely to get reversed on appeal if they let the case go to the jury.

182. A plaintiff will nearly always try to ascribe evil motives to a defendant—and if there's *any* evidence to that effect, it likely will weigh heavily in the jury's mind.

183. On the other hand, a defendant who tries to ascribe evil motives to a plaintiff is playing a dangerous game—it may backfire with the jury. (Again, no one ever said life was fair.)

184. Juries can have a tendency to believe "the defendant must be guilty of something, otherwise they wouldn't have us here."

185. No matter what the outcome, litigation

invariably soaks up lots of management bandwidth.

186. Some litigation is unavoidable, and some litigation is worthwhile from a business point of view. The art is knowing when to fight, when to settle, when to appeal.

187. Depositions are not fun for executives—they are a huge time sink and can lead to embarrassing video clips being shown at trial (ask Bill Gates).

188. Try to convince your executive that, even though she may be smarter, have better values, and be a better person than the lawyer on the other side—or the jury, or the judge—she must put those facts out of her mind when testifying.

189. Delay seldom helps defendants as much as it increases expenses.

EMAILS

190. Be careful what you put into an email. Don't assume that everyone who reads your email will understand the context.

191. Remember that self-damaging emails are likely to be taken as gospel in litigation, no matter how erroneous or how out of context they are.

192. Emails about potential M&A transactions may have to be filed for review by the Justice Department as part of a Hart-Scott-Rodino Act submission, and perhaps also with the EU competition authorities (remember the aborted GE-Honeywell merger, sunk by the EU's refusal to approve it). So don't say in an exuberant email, "if we can buy this company we will *own* the market!"

193. Clean out your email regularly, if for no other reason than to avoid the enormous expense of having to review it for possible document production someday.

194. Establish an email retention policy—but don't raise the bar too high (it can look worse for a company to have a policy but not follow it, than to have no policy at all).

195. Try to get buy-in throughout the organization for whatever email policy you establish.

196. Recycle (overwrite) email backup tapes frequently. In a litigation document production, you don't want your IT people to have to be restoring and searching months worth of backup tapes with essentially the same information on it. (But be extremely careful about recycling email backup tapes if litigation begins, or is threatened—you could be accused of spoliation of evidence.)

197. If you send an email to—or if you are—a government official or employee, consider whether the email might be deemed a "public document" that could be disclosed under the FOIA.

198. Sometimes you have to "just say no" to email—the old-fashioned way of picking up the phone or walking down the hall may be more effective.

RISK MANAGEMENT

199. Find out who the risk-management person is—make sure you and the CEO are on the same page about whether *you* are that person.

200. Learn your company's level of risk tolerance. Almost all companies are willing to accept defined risks, if the cost to avoid all risks is too high (as it almost always is).

201. Insurance policies—review their coverage levels and exclusions. Can claims be made during a renewal term for events that occurred in a prior term?

202. Get to know your company's outside insurance rep. Consider asking for a briefing on existing insurance policies and their coverage limits/exclusions.

203. When does the insurance coverage expire? Who in your company is responsible for renewing it? *(Example: The insurance policies for one author's company reached their expiration dates.* Three days later*, the city was hit by massive, devastating flooding. The company was forced completely out of its building for nearly three weeks by severe flood damage to the building's electrical and phone systems in the basement. Fortunately, the insurance policies had been timely renewed.)*

204. Even if it's not formally your responsibility, consider calendaring the insurance-policy expiration date anyway, and following up to make sure it gets done.

205. Explore available coverage through ACC's members or other industry groups or friends in other companies, to find out what coverage they have negotiated that is not generally covered in the standard policies (or ask other brokers to tell you what they could do to improve your coverage). *[The contributor*

of this item remarked: "I have often been surprised at how much coverage is available for unusual (and sometimes common) problems without additional cost or with very nominal increases in premiums. In many cases, you would instinctively think that various risks are covered when the standard policy doesn't cover them. The one that comes to mind (but I don't recall the details) related to what is covered in the case of water damage, either because of a broken pipe or as a result of the sprinklers going off due to a fire. I was shocked at what was not covered and found out from one of our insurance experts that the added coverage could be obtained for free. Another example is insurance to cover breaches in reps and warranties in an acquisition context. I was again surprised at how reasonable the cost of this coverage was."*]*

206. Disaster plan—does your company have one? Does the Legal Department?

- See *www.disasterplan.com/yellowpages/Displan.html* for an overview of things to think about for disaster-recovery planning.
- See *www.disasterplan.com/* to see links to some sample disaster-recovery plans.

207. How often does your company do rehearsals for its disaster plan?

208. Make a binder with key corporate documents for easy reference. Possibilities: articles of incorporation; by-laws; most recent 10-K/proxy statement; insurance policies; office leases. (Have an extra copy available off-site for disaster-recovery purposes.)

209. Have an electronic set of key forms available off-site (e.g., on a notebook computer).

210. Some legal departments burn weekly CD copies of the entire legal section of the server.

211. If your company serves alcohol at a company event, make sure that an email is sent prior to the event that free cab rides home are available upon request. Repeat the announcement at the event.

ADMINISTERING YOUR DEPARTMENT

General Management Tips

212. Try not to be just an in-box lawyer. Have at least one initiative going that will provide a long-term benefit for your company or division. Schedule regular time periods for working on it.

213. Schedule specific time to work on specific projects, otherwise your day will be nibbled away.

214. Manage projects by using detailed assignment lists, with assigned personnel and target dates.

215. Push for a paperless office—if nothing else, scan in key hard-copy documents into Adobe PDF files.

216. *Immediately* investigate how to use technology (intranet, etc.) to announce your presence and provide information for business processes.

217. Make information and forms available to the employees online to save yourself some time.

218. Reel in all templates, self-service document assembly tools, and any guides to use, and check for accuracy, updating, and appropriate use.

219. Don't be afraid to build your domain—if there is a gap in management that you can competently fill and that fits in with your management of the legal function, do it.

220. Remember that you don't get what you expect—you get what you inspect. *[Heard from Rear Admiral Floyd H. "Hoss" Miller, USN, ca. 1978.]*

221. Remember the 80-20 rule: 80 percent of the revenue comes from 20 percent of the customers; 80 percent of the problems come from 20 percent of the employees; and so on. This is also known as the Pareto Principle, about which see *www.4hb.com/wisdom/08jcparetoprinciple.html*.

222. When you accept a new position as general counsel, you may know from day one precisely what you want to do with your legal department. It is a good thing to make a few changes early on, but reassure your staff that you want to get to know everyone and become familiar with the processes and procedures before instituting any major changes. This will allow your staff to show you what they have, will put their minds at ease, and will pave the way for successful implementation when you finally decide to launch your more significant initiatives.

223. Have a mission! Create a mission statement that guides the legal department's activities. Review it periodically and ask yourself, are you and your colleagues spending your time in line with your stated mission? It can be as simple as: The Legal Department's mission is to efficiently and effectively administer the legal affairs of the Company by internally providing professional, timely, and useful legal advice and services, arranging and actively managing the services of outside counsel as needed; to minimize liability exposure by recommending and

implementing appropriate policies, practices, and procedures; and to administer such legal affairs in the most cost-efficient manner reasonable so as to contribute to the Companywide team effort to maximize the Company's return to its stockholders.

224. Focus on achieving two or three high-profile accomplishments each year. The day-to-day projects, although important, may be viewed as same old, same old. The big projects you complete give the legal department high visibility and recognition with senior management and the board of directors.

225. Managing a department is very different from outside practice. Budgetary responsibility, performance appraisals, and career development counseling are all part of managing a team.

Budgeting

226. Get familiar with your company's budgeting process—you may have to fight for your own budget. Learn what the budget "loads" are for each person in your department, and what expenses *your* budget will be expected to cover (cell phones, etc.).

227. Understand your budget constraints and make every effort to work within them, as your CEO will grade you based on your ability to project quarterly expenses and to meet those projections. Brownie points are not gained by having a million dollar surplus in your budget, nor are they gained for not meeting quarterly objectives. Performance within budget is key.

228. Since you do not have an unlimited budget, prioritize your efforts to be consistent with the business and your budget.

CORPORATE DYNAMICS AND RELATED ISSUES

Dealing with Management

229. Make friends and develop allies.

230. Think—and ask questions—like a CEO, but remember that you're not.

231. Establish a weekly meeting with the CEO (no more than an hour) to give a synopsis of what you're doing, get an idea what is on his mind for the company, and try to think of ideas and actions to help him with what he is trying to do. It's a good idea to have a similar routine with other key executives, to foster communication and develop a team approach to the business.

232. Identify your principal internal clients and make every effort to respond quickly and accurately.

233. Be conservative in your opinions as a rule, but be willing to identify other options along with associated risks.

234. Remember that business people want problem solving rather than problem identification. If at all possible, do not tell them that they cannot do something; instead, tell them how to do what they want to do. (But also remember that depending on the circumstances, ethics and common sense may require that you do something different.)

235. Go to lunch! Use your lunchtime to your business advantage. As often as you can, go to lunch with managers from marketing, sales, IT, finance, tax, and other operating units. Get to know them as people, and let them know about you. Over lunch you can learn much more about their problems as they see them. The best attorney-client relationships are built on trust. This is a simple and pleasant way to achieve that goal. Taking lunch at your desk every day is a missed opportunity.

236. Meet at least once in person with every attorney who provides advice directly to your company. Face-to-face meetings improve communications tremendously. When traveling, line up get-acquainted meetings with outside counsel who are located in cities you will be visiting.

237. Don't get excessively involved emotionally with the company—you want to be able to provide legal advice and judgment from an independent perspective. Try to cultivate a mindset of "lucid detachment" (John Mortimer's phrase).

238. Try to stay neutral in corporate power struggles. But realize there may be times when you have no choice but to back one horse or another—and then live with the consequences.

239. You are going to lose more battles *within your company* than you are going to win. Pick your battles wisely and be gracious in both victory and defeat. Your good communication and listening skills will cement successful long-term relationships within the company.

240. Make nice to *everyone*. It's a great information source.

241. Whenever possible, make your colleagues in the business units look good. When you do this, the legal department by default looks good too. You will find that you will become better informed, will be accepted into their company, and will enjoy a smoother work flow.

242. Don't gossip; you'll get more information through informal channels if people think that you keep your mouth shut (but remember that fiduciary duty may compel you to disclose some things that you are told).

243. Create a community service day as a means for building relationships and understanding among the legal department. This will build employee loyalty and will increase the company's standing in the community. People tend to purchase products and services from companies who brand themselves as community conscious.

Employees' Personal Legal Problems

244. Avoid giving informal legal advice to co-workers, even those whom you regard as friends. You will be asked for advice about many subjects that affect your co-workers as individuals (divorces, home purchases, criminal matters, bankruptcy, etc.). It's hard to say no, but you should do so. It's best to affirmatively let the person know you cannot give them advice. Remember that today's co-worker could turn out to be tomorrow's malpractice plaintiff if something goes wrong.

245. Keep a list of lawyers to whom you can refer employees who have legal issues with wills, real estate, car purchases, divorces, criminal matters, traffic tickets, drunk-driving charges, etc.

246. Conflicts: Err on the side of making it clear to an employee that you are the company's lawyer, not the employee's lawyer. This is especially important when dealing with, e.g., a departing employee who wants to know about his confidentiality or non-competition obligations.

Communicating Plainly

247. Keep your legal advice short when speaking with senior executives. Use your time to describe the business impact of that advice and how it can be mitigated. They don't have time to learn the law.

248. Try to speak in English when giving advice.

249. Write your documents as if you were writing a letter to your sisters. (Adapted from Warren Buffett's introduction to A Plain English Handbook, *www.sec.gov/pdf/handbook.pdf*).

250. As a rule, a company can tolerate mistakes, but not surprises. Therefore, we need to communicate, communicate, communicate. If you make a mistake, admit it and learn from it. Don't dwell on or continually revisit decisions.

USING OUTSIDE COUNSEL

251. At least initially, the lawyers who had been doing the company's legal work will know more about the company and its legal affairs than you. Use them to help you get up to speed.

252. An in-house attorney needs to know his or her limitations. It's tough, for example, to be an expert in insurance law AND intellectual property. You need to know when to reach out for expert advice when confronted with an issue.

253. Remember that when you start as a new general counsel, your company's outside counsel may have some apprehension, in particular a fear of losing business.

254. Try to figure out which legal issues are core to the business and should be handled by in-house counsel, and which are best handled by outside counsel.

255. Remember that you are now the client. Be active in knowing the competency of the partners and associates assigned to your individual matters.

256. Act quickly when you are not satisfied with the work of a particular attorney.

257. Get to know your options with other law firms—sometimes your loyalty to a particular firm will not serve the company's interests.

258. If one of your attorneys changes firms, be sure that you are informed and that you make the decisions about what happens to your files.

259. Watch the bills. Some people are uncomfortable talking about bills, but it is not difficult. You may have been very careful in your billing practices when you were in a law firm, but not everyone is. Ask questions and make sure you are satisfied with the answers.

260. When hiring an outside lawyer, factor in the amount of time you will need to invest in educating him. This should be factored into the cost associated with purchasing the advice.

261. Since you will be accountable for the decisions made by outside counsel, make sure that you are consulted as often as you feel necessary.

262. Develop good working relations with the best law firms and specialist lawyers. (I have found that it is better to have lawyers nearby rather than far away.) Time here is well spent as they will generally make extra efforts the better they know, like, and respect you. I recommend that you establish these types of relationships with the senior partners of the respective law firms as they are most likely to be there when you need them and can garner the necessary resources quickly if needed. Ask that they be the billing lawyer so that they are in control of all matters.

263. Initial items to consider in using outside counsel:

- Discuss need for outside counsel with the business people;
- Identify needed skills, governmental contacts, location, firm size, fees, and sophistication; and
- Determine if costs can be passed on to another party or insurance company.

264. Things to consider in selecting outside counsel:

- Ask coworkers for recommendations;
- Search internal database (if available);
- Ask professionals (lawyers, accountants, investment bankers) for recommendations;
- Search external databases (Westlaw, Lexis) to identify lawyers with necessary skills;
- Consider whether a beauty contest would be useful;
- Consider whether to establish or strengthen a strategic relationship with a law firm;
- Have counsel run conflicts check and perform internal conflicts check; and
- Interview the top two or three candidates.

265. Develop a mandate for the law firm:

- Establish outside counsel's expected role;
- Send a retention letter;
- Agree upon the fee and expense structure;
- Develop a budget where possible, and monitor on-going expenses; and
- Develop a project list and timetable.

266. Evaluate the law firm's work:

- Was the lawyer responsive?
- Were the results accomplished in a timely, cost-sensitive manner?
- Was the work product of sufficient quality for the project?
- Were invoices provided in a timely manner?
- Was the working relationship satisfactory?
- Did outside counsel work well with the client? and
- Conduct a post-closing feedback session.

CORPORATE SECRETARY/BOARD-RELATIONS MANAGEMENT

Play an Active Role, Anticipate Needs, and Be Knowledgeable

267. Work to create an invaluable and trusted role for yourself with the Board. The best way to do this is by making yourself useful to each of them at every turn.

268. Access to board meetings is paramount to ensure decisions are based upon all relevant information.

269. Hone your diplomacy skills, and be sensitive to different needs of different directors—it's not enough just to be a smart lawyer. Learn how each director wants to receive information (including their pre- and post-meeting travel plans), their differing need for reminders (make certain to keep their assistants informed), and how best to prepare them before the meeting. Pre-meeting phone calls on an informal basis—which may not be as effectively provided in a more formal board setting—may make all the difference in obtaining a smooth and favorable outcome at a board meeting.

270. Create a role that complements and supports that of the CEO, to foster key executive support of your role with the Board. In order to gain the CEO's trust to "leave you alone" with the Board, the CEO will need to trust you to support his initiatives, understand the issues, and have the "senior" skills to work with the Board. There's no magic bullet for this, just a lot of consistent and diplomatic effort, with no margin for error. Avoid at all costs any appearance that you are in competition with the CEO for the Board's favor. Watch out for the CEO's interests (including executive compensation) and be the CEO's champion with the Board whenever possible.

271. Keep everything you do as simple as possible. This applies to everything about the Board meeting: the process (the agenda, the format of the board book) as well as the substance (avoid legalistic language). Find a formula that works, and stick to it. The format of the meeting preparation and Board briefing books should be simple, understandable, and taken for granted, so that the Board can concentrate on the substance. Familiarity in Board meetings is a good thing (leave the creativity for the actual presentations and management performance).

272. Make certain that the Board feels procedurally and substantively comfortable (particularly in the post-Enron and current Sarbanes-Oxley compliance environment) in taking the action management is supporting. This may entail providing "Notes to Board" and other summary "Cliff Notes" as to background/history of complicated matters presented to the Board.

273. Look at the materials from a Board member's perspective, and anticipate the necessary evaluative information without them needing to ask for it.

274. Bring additional information to the Board room that might be required to respond to the next level of questions (e.g., the relevant agreement, statutory reference, information or other documents). This instills confidence in the Board that you've thought through the issues, even if you actually use the backup material only a portion of the time. (The Board is less likely to subject you to intensive follow-on questions once this level of confidence is established.)

Be Prepared

275. "No surprises" for the Board. By the time of the actual Board meeting, you have done your job if management knows where each director stands on every significant issue. Do not spring new issues on the Board at the meeting, if at all possible; no one likes surprises and nowhere is this more the case than in the Board setting.

276. If you are relying on past Board actions or past years' precedents, summarize those facts in the Board book—your directors will appreciate not having to excavate for the information or admit a lack of immediate recollection.

277. Strive for "completed staff work." Anticipate questions, facts, and analysis that Board might request. If materials in the Board briefing book are necessarily complex or assume background information, try to include additional information in an "Executive Summary" or "Notes to the Board" to facilitate their review.

278. Aspire to operate error-free at a fast pace. (Of course, that may sound like the Little League coach's shouted advice to the young batter at the plate, "Be a hitter!"—how??) You will be asked to provide legal advice and make procedural judgment calls on the spot. The more you are prepared and can simplify the ministerial aspects of your in-meeting secretarial responsibilities (see advice below on preparing draft minutes before the meeting), the more prepared and able you will be to address the different issues raised at the meeting.

279. Try to keep abreast of possible hot topics and trends that board members may encounter in their own companies or on other boards. Focus particular attention on issues of director liability, D&O insurance, director compensation plans (including § 16 issues), and changes in applicable tax law. The Board members will appreciate it.

280. Anticipate when third party assistance is needed, whether to provide additional protection to Board (outside counsel); provide independent perspective on management issues (e.g., compensation); or provide independent analysis (e.g., investment bankers, outside auditors).

281. Include a housekeeping items time on each Board-meeting agenda for approval of committee minutes, signatures for unanimous written consents, and similar matters. (Important SEC filings such as the 10-K usually rate their own agenda item, for optics purposes if nothing else.) One strategy: Include at the beginning of the Board agenda a brief opening item for approvals of minutes and explanations of actions to circulate during the meeting and breaks. Board members appreciate taking care of these ministerial matters at the Board meeting and it's a great way to keep your records complete.

Address Legal Concerns Without Over-Lawyering

282. Be flexible and think up simpler ways to accomplish goals. Example: In confirming information in (typically lengthy) Director and Officer Questionnaires, have Directors confirm the accuracy and completeness of their personal information, but develop a shorthand for the Board members to confirm that they are not aware of any information additional to that already proffered by management (e.g., by reference to disclosure made in another document—draft proxy or registration statement—as consistent with their information).

283. Try to take care of legal concerns and necessary procedures in the least-intrusive method

possible, so that it appears effortless to the Board. Example: Send Board members monthly § 16 reporting reminders, and file their forms for them.

Establish a Board Routine that Works

284. Drive the process by preparing the CEO and management for anticipated issues at the meeting.

285. Prepare a draft agenda and draft board materials.

286. Keep track of open action items from prior meetings.

287. Periodically review prior years' minutes for what actions were taken when with respect to certain repeat matters (incentive compensation plans, registration statements, proxy statement, and annual report).

288. Keep a tickler as to future approvals needed.

289. Have a Board agenda file into which you can put reminders, notes, etc., as they come up in day-to-day business.

290. Information and data that are important to the Board's understanding of the business should be distributed in writing to the Board before the Board meets.

291. Generally, materials should be distributed in advance so that Board meeting time may be most productive. Sensitive or "in process" subject matters may be discussed at the meeting without written materials being distributed in advance.

292. Assist in structuring the Board in a manner that works for your company in terms of Board size, meeting frequency, and standing committees.

Keep the Board Educated and Informed

293. Prepare a Board Reference Manual of useful information: corporate data sheet, committee charters, corporate bylaws and certificate of incorporation, board and management information/addresses. (This manual is also invaluable for the legal department, finance, and others with a need for detailed information for reporting purposes.)

294. Keep informed on Director trends, concerns, and considerations, and make relevant information available to the Board as appropriate. In particular, look for:

- National Association of Corporate Directors (NACD) publications, including Blue Ribbon Commission Reports and Directors Monthly. Consider an individual or Board membership.
- Current SEC review issues and areas of potential Director liability.

Be Detail-Oriented, Dependable, and Well-Organized

295. Assist Board committees in their meetings, by coordinating meetings, and giving secretarial assistance. Even if a Board member is the official secretary of the committee, offer to assist in preparing minutes for his approval. Be careful, however, not to seem like you are trying to force your way into the Board process.

296. Provide Board committees necessary legal information and research to address the task on hand, e.g. executive and director compensation trends and comparables (compensation committee); board size and governance trends (nominating committee); investment banker advice and financial analysis (audit or independent committee).

297. Strive to ensure all legal obligations are made as effortless (and error-free) as possible for directors, e.g., § 16 filings.

298. Check whether directors are covered for potential liability, including sufficient levels and scope of D&O insurance and indemnification agreements.

Strike the Correct Balance in the Board Meetings

299. Above all, have understated control of all formal, required procedures and approvals at Board meeting.

300. A unanimous written consent for board approval should only be used when the acceptability of the proposal is so obvious that no board member will feel that the issue merits discussion.

301. Pre-plan for issues that might arise at the meeting, to improve your ability to provide advice on the spot and to free you up for a greater participatory role.

302. Draft as much of the anticipated Board minutes as you can before the meeting to allow yourself the ability to focus on more difficult issues, be more active, and be viewed at the meeting as more of an executive participant.

Always Follow Up on Board Questions and Requests

303. Maintain an "action item" list of requests made by Board members during the Board meeting that require follow up. Circulate the list immediately following the Board meeting to executives who would be responsible for addressing the Board task. Recirculate the list before the next Board meeting as a reminder.

COMPLIANCE PROGRAMS

304. Target the riskiest compliance areas for your company—you will rarely have the luxury of time, resources, or management patience to address the "nice to haves."

305. For a domestic company, depending on the nature of your business, that may be securities law, antitrust, product liability, environmental risks, and/or employment and benefits.

306. For an international company, add to the above the Foreign Corrupt Practices Act, OFAC sanctions, and export law.

307. Set up your program with the three P's of compliance in mind: Paper, People, Process. "Best Practices" to maximize compliance and protection from liability would have a clear policy statement and written guidelines; effective compliance procedures with appropriate review/audits; high-level oversight and accountability; visible senior-level commitment; a compliance ethic that is supported both in word as well as deed by management; and appropriate, customized training to facilitate compliance.

308. It's far worse to have a strong policy and then not comply with it than it is to have a weak policy or even no policy at all.

309. Provide meaningful real world examples—Enron, Arthur Andersen—as well as the risks of failing to follow a meaningful compliance program (e.g., loss of corporate export privileges, jail sentences). The biggest challenge is to strike the right balance between legal compliance and meeting real life business limitations (time, money, patience for the more subtle legal nuances). A lawyer's failure to strike a realistic, common-sense balance will be the quickest route to losing credibility in a compliance program.

310. Do not expect compliance to be easy, or painted in black and white. Decisions are usually in the gray areas, where business needs and risks are balanced. Rarely will counsel be in the position of saying "you cannot do X."

311. Get buy-in from the top down. Without the CEO's buy-in—his statements and actions, including budget funding—you're fighting an uphill battle.

312. Strive to instill both a healthy respect for and healthy fear of the legal department to drive compliance efforts. The business people must both respect your judgments and fear the consequences of non-compliance (namely, the genuine ire of the CEO).

313. Identify key gatekeepers for the compliance function who have the most significant breadth of responsibility and understanding of compliance, e.g., legal, finance, human resources. Have one of them appointed as the "owner" of the program by the CEO, responsible for its performance. One very useful training tool is to analogize legal department approval to an insurance policy.

314. Keep your policies as short and simple as possible. The lawyers and other gatekeepers need to understand the details. Translate the legal theory into practice for your company.

315. Keep abreast of how your company measures up to recent hot buttons of liability or government agency scrutiny.

316. Use outside counsel and ACC to leverage learning for compliance programs; chances are it's been done before and you can avail yourself of existing learning on best practices.

317. ACC's website at *www.acca.com* is a great resource for model policies and ideas. (No, this is not a paid advertisement.)

318. Be responsive and as flexible as possible: do not create a bottleneck or impose unrealistic compliance standards. If you do, people will find a way around you despite the (theoretical) consequences.

INTERNATIONAL BUSINESS

319. Adjust yourself to the contrasting risk profile and practice of law between domestic and international transactions—both the similarities and differences.

320. Periodically take inventory of the way you do business in the various jurisdictions and the issues raised in each. Typical areas to review include:

- Foreign Corrupt Practices Act (including finance recordkeeping and payment practices)
- Export compliance
- Patent, trademark, domain name protections
- Corporate presence and subsidiary, office structure
- Corporate records and housekeeping generally

321. Consider using branch offices of U.S. law firms, who understand both requirements on U.S. companies as well as local law, particularly in the most different, legally sensitive, or difficult of jurisdictions, e.g., China.

322. Consider using a firm that can act as a "general counsel" for a region due to multiple language skills, offices in multiple countries, etc.

323. Good identification and use of international counsel, particularly where language and legal differences are most significant, can be of tremendous benefit to in-house counsel in minimizing risk and required in-house oversight.

324. Recognize that, particularly for smaller transactions, some risks and uncertainties as to application of U.S. terms in foreign jurisdictions may be necessary. This is one of the most difficult areas of in-house practice: honing your skills to know when to spend the time and outside counsel fees to research a question and when the circumstances do not warrant it (and the risks are reasonable).

325. Know the legal aspects of the big items in each country that can multiply your risk in ways that you wouldn't imagine in the United States. For example, can you effectively exclude consequential damages in Germany? Are you subject to consumer protection statutes in France?

326. Spend some time to learn the relevant culture and business practices/styles in each jurisdiction in which you do business, and make it a point to go out of your way to spend time with them in their country whenever possible.

327. Do not expect to see U.S.-style lawyering in a contract in many jurisdictions, either because of the language differences or role of attorneys in that culture, e.g., Japan.

328. Even a basic knowledge of the expectations and protocol of the other culture may result in significant benefits to the success of the relationship and the efficacy of the transaction.

329. Never underestimate the need for face time to build trust and relationship with your own international offices and transaction parties. While this is true domestically as well, it is critical internationally, particularly to gauge the culture and language barriers.

330. Recognize that international laws (e.g., antitrust, takeover codes, and privacy laws) are having increasingly independent impact on U.S. companies with international operations. This is especially true of the EU (remember the busted GE—Honeywell merger).

GET ORGANIZED: FILING SYSTEM AND RECORD RETENTION

331. A clean, clear, and crisp filing system and retention policy is worth its weight in gold when you have to find a document to answer your CEO's question, respond to a legal claim, or answer a discovery request. Take advantage of the Enron and Andersen situations to convince the business people to address this need.

332. Non-lawyers seldom understand how valuable a top-notch legal assistant/legal secretary can be in promoting the success of any document-driven endeavor (including filing, litigation, discovery).

333. A filing system should be logical and organized, and understandable by anyone accessing the system. A filing system can be either centralized or decentralized (with centralized access to the document list).

334. Review and reconcile your email retention policy with your existing retention policy. Do not be surprised if you don't have either or both, or that they aren't reconcilable (after all, different groups are probably responsible for each).

335. Make sure that the IT department is actually following the written document-retention policy, or make them revise the policy to fit reality.

PROFESSIONAL & PERSONAL DEVELOPMENT

CLE

336. Attend legal seminars and conferences to maintain and develop your skills. There's no substitute for being legally competent. As a general counsel, you must know something about all the legal areas that affect your company's business.

337. Join ACC and participate in local chapter meetings.

338. Read the *ACC Docket*—it contains some of the best practical articles around.

339. Subscribe to appropriate legal newsletters for your areas of practice/expertise (BNA, CCH, etc.). Make the time to read them.

Stress Management

340. Stress management can be a big issue. One contributor says, "There is really no way to explain how stressful it can be to go from being an outside 'white tower' lawyer to being on the inside."

341. Learn about ergonomics. Find out what your health insurance will cover, then *do it*.

342. Do not worry about being right all the time. Trust your instincts. You will sleep better and be more valuable to the company.

Managing Your Career—and Your Life

343. If the company is not going to give you the salary that you want (which it probably won't), try to get (a) extra vacation time or (b) an employment contract or (c) (you be creative here).

344. Negotiate your own employment contract and change-of-control provisions. Search for examples of executive employment contracts at *www.10kwizard.com*.

345. Keep a running list of accomplishments in your current job. You can put it to good use at compensation-review time—and then use it to update your résumé when the time comes.

346. Speak up if you "win" something. If you settle a case for $100,000 when you had authority to settle for $200,000, let that be known; laugh and say what a shame it is that you don't get a commission. Make people think that you are making money for the company in some way—because otherwise some will see you as Evil Legal bleeding their money away.

347. However you set up your work schedule, that's what your colleagues will come to expect. So when you try to break free to leave at a "reasonable" hour (as in, 8:00-6:00 without lunch), if that isn't the pattern you've trained your colleagues to expect, they will think you are sneaking out early. So if you tell them that you work from home on Thursdays, then work from home on Thursdays.

348. One contributor suggests: If you get loads of vacation as your salary "trade-off" (the contributor in question gets five weeks a year), *use it*; if you work for a "rocky" company, they might try to make you use it, or to say that you can't use it, but make it clear that you can, and you will.

349. Cross-train yourself to expand your skill set.

350. Make it a point to talk to one person in your professional network each week. The time to do this is *before* you find yourself looking for a job.

351. Look for speaking opportunities at bar associations, high schools, civic groups, etc.

352. All jobs end. Prepare now.

353. Remember that you have a life.

354. Don't neglect family time. Some day you will be old and feeble. Presumably you will want your children to come visit you at least once in a while. For them to *want* to do that, you must spend the time with them *now* to lay the groundwork for a solid relationship. If you spend all your time at work while they're young, you shouldn't count on suddenly being able to bond with them after they're grown and gone—they'll have their own lives by then (and maybe their own families) and will be too busy for you.

THINGS TO PONDER: WHAT DO YOU DO WHEN . . . .

Each of these items is worth an article unto itself. They all bear thinking about now, before they land on your desk.

355. You get a letter from the SEC requesting clarifications of your financial statements from previous fiscal quarters.

356. The SEC (or NYSE or NASD) informs you that it is investigating an unusual number of transactions in your stock (or call options or put options) just before news that significantly changes your stock price.

357. You are told the company will encourage telecommuting to save office expenses/boost morale.

358. The CEO tells you he wants to RIF 20 percent of the workforce.

359. A key supplier goes bankrupt.

360. A key customer can't pay—or wants to renegotiate its contract.

361. The CEO tells you he wants to outsource a critical business function.

362. The CEO asks you why you don't have a robust patent program like the competitor down the street.

363. The products team tells you they just incorporated a feature/product that makes your product subject to export regulations.

364. Your software developers tell you that the company's latest product release includes software that they got from the Internet with a "GPL" license. They want to know what that means.

365. You are served with a search warrant.
366. The EPA inspector arrives to check your emissions.
367. The IRS auditor arrives to review your returns.
368. The state tax auditor arrives to review your withholding and full-time, part-time, and consultant agreements.
369. A shareholder group files a Form 13-D stating that they have purchased X percent of your company's common stock and demands that your top management and board of directors resign.
370. Your CEO resigns.
371. Your CEO has a heart attack.
372. You get a call at 2 a.m. from the local police, telling you that your CEO (or her son) is in jail and refuses to submit to a blood alcohol test.
373. Your CEO asks you to do something unethical.

GC Rules: Over 350 Things

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D. C. Toedt III, Robert R. Robinson, and Randy Segal "GC Rules: Over 350 Things I Wish I'd Known My First Year as General Counsel," *ACC Docket* 23, no. 5 (May 2005): 80-114. Copyright © 2005 the Association of Corporate Counsel. All rights reserved.

Seeing Through Your Clients' Eyes: Six Steps Beyond Client Surveys

BY RONALD F. POL

A man in a hot air balloon realized he was lost. He reduced altitude and spotted a woman below. He descended further and shouted, "Excuse me, can you help me? I promised a colleague I would meet him an hour ago, but I don't know where I am."

The woman below replied, "You're in a hot air balloon hovering approximately 30 feet above the ground. You're about 39 degrees south latitude and 176 degrees west longitude."[1]

"You must be a lawyer," said the balloonist.

"I am," replied the woman, "How did you know?"

"Well," answered the balloonist, "I'm sure that everything you told me is technically correct, but I've no idea what to make of your information, and the fact is I'm still lost. Frankly, you've not been much help at all. If anything, you've delayed my trip."

The woman below responded, "You must be in management."

"I am," replied the balloonist, "but how did you know?"

"Well," said the woman, "you don't know where you are or where you're going. You have risen to where you are due to a large quantity of hot air. You made a promise which you've no idea how to keep, and you expect people beneath you to solve your problems. The fact is you are in exactly the same position you were in before we met, but now, somehow, it's my fault."

Client Perception Surveys

Professional managers understand the need for top-quality legal advice, yet their relationship with lawyers is often characterized by the familiar public perception: technically excellent, but expensive and difficult to manage in ways that relate directly to the business issues.

To get a better handle on the client perspective, many legal departments and law firms regularly survey their clients. Designed and conducted well, client surveys provide useful insights, helping find ways to deliver legal services more effectively.

Relatively few programs, however, systematically enable lawyers to take the next step, beyond the usual "learning about the client perspective," sometimes seemingly conducted from an ivory tower vantage point, far removed from the clients' own experiences.

The Client Experience

The client experience of what front line managers and staff actually do in their job, day-by-day, offers some of the most valuable insights into ways of delivering more effective legal services, and a deeper understanding of the context in which the organization operates.

With lawyers often functioning at the most senior levels, such insights can have benefits beyond simply providing context for the provision of legal advice; it can also help shape strategy in ways that better reflect organizational realities.

In a January 29, 2007, article entitled, "Seeing Through Buyers' Eyes," *The Wall Street Journal* reported on efforts to resolve the universal management problem of how to get a handle on customers' needs, beyond surveys and focus groups. In the article, it was reported that General Motors videotaped consumers to study their behaviour and found a hitch in the controls for DVD players in some of its vehicles. The "everyone wears glasses" policy at eyeglasses retailer Meganesuper Co., was a more extreme example, where 2,000 employees literally see through the eyes of their customers. The *WSJ* reported the experience of Yoshihiro Shibata, a manager with 27 pairs of glasses. As Shibata was fitted for glasses, he became more aware of customers' needs in relation to one of the company's most important consumer contact points. He also found that glasses with a certain coating eased headaches from long periods at a computer, and that a special type of lens helped reduce fatigue. "You don't really know that from looking at a catalog," he said.

Six Steps

There are many ways for lawyers to more directly understand their own clients' experiences. Here are six practical examples.

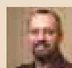
1. **Get out there.** Rather than dealing mostly with clients by phone and email (often reactively), consider spending six months or so in the offices of your main operational client. This might be in a different city, a different building, or simply a different floor. Either way, it's an ideal way to see how they work, and become part of *their* team as well as your own legal team.
2. **Go walkabout.** For nearby clients, arrange a meeting rather than exchange lengthy emails, drop by their office rather than play phone tag, and for offices further afield, start a regular "lawyer is in" day. Face-to-face meetings quickly get to the core of most issues, and the early identification of others.
3. **Flip burgers.** Step into a front-line role for a week or so. Long enough to experience a critical interface between the client and its customers. After all, *this* is what the organization does, and the better you know how it works, the more effective you will be back at your desk.
4. **Take their pulse.** The sales team is your primary client? The last conference you went to was a legal conference? Make your next one the sales conference; gain a deeper understanding of the key issues that keep your main client awake at night.
5. **Get a handle on what they know.** Do your eyes glaze over when your finance department client hands over an inch-thick wad of spreadsheets? A quick course on understanding financial statements for non-accountants, or a mini-MBA if you're really keen, will do wonders for your ability to connect with client needs.
6. **Use their language.** In the March 2007, *ACC Docket*, Sean Venden's column, "Mixing Numbers and Lawyers: Accounting as a Second Language" noted that "to better advise your business clients of legal risks, you should speak their language. Your clients don't want to hear legalese. We're relatively certain that they will hear 'plain English', but we also know that they will *listen* to the language of business— accounting." By mentioning during negotiations the impact on operating revenues of a particular clause rather than simply the contract termination risk, Sean changed the context from "legal issues," and got the support needed for a recommended revision. He understood the client; and they understood him.

There are countless other ways to help develop a deeper understanding of clients' needs; from their perspective, and grounded in their experience. So, break out of your comfort zone: You won't be disappointed.

Have a comment on this article? Email editorinchief@acc.com.

NOTE

1. The joke, source unknown, is an old one, often (as here) modified. The most important change was to place the balloon appropriately for meeting a valued colleague. Above the vineyards of New Zealand's Hawke's Bay seems a mighty fine place. (With thanks to Kevin Smith from hydrographic sciences company HSA Systems: *www.hsa.co.nz*.)



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CBA.ORG

How to *irritate* your CEO

Inspired by our recent list of ten ways to irritate a judge, we provide ten sure-fire steps to annoy, aggravate and disappoint the company CEO. Both in-house lawyers and outside counsel need to steer clear of these keys to failure.

By Martha Findlay

Lawyers, both in-house and outside, spend a lot of time (and consulting fees) learning how to keep their corporate clients happy. It's certainly tough for legal departments, which face increasing budget pressures and greater demands in areas like corporate governance. Too often, the legal group is regarded as the "business prevention department."

Outside lawyers seem to struggle even more. Every consultant who advises outside law firms has said (correctly) that it's easier and more profitable to keep and grow the work from existing clients, rather than trying to attract new ones. Problem is, despite all the advice from these consultants, other lawyers, or even well-known war stories, business clients still complain.

So why shouldn't both sets of lawyers go straight to the horse's mouth and ask a number of CEOs what they don't like about their legal service, and what they really want? The CEO is ultimately the person you want to please – and certainly not the person you want to frustrate. We went out and talked to CEOs about this subject. What we found, in most cases, is as useful for outside firms as it is for in-house counsel.

Some of the responses were expected: "My lawyer doesn't understand my business." "It takes forever to get something back." "I asked a simple question and two weeks later, I got a 20-page memorandum of law that I didn't even understand – let alone have time to read!" We know these problems are out there, but so do most of you.

What we found more useful was the practical advice these CEOs provided. These people are in business for basic reasons: profit, growth, shareholder value. They expect those who assist the business (including lawyers) to understand and participate in furthering these goals. Fundamentally, CEOs advise lawyers to be more practical and business-oriented themselves.

The good news is that doing a better job usually doesn't require more time or money; it may only take a shift in attitude. So instead of telling lawyers what they need to do, we decided to spin it differently. Here are ten things you really shouldn't do if you want to advise businesses properly. Here are ten ways to irritate the CEO.

1. Be ignorant about the business

Every CEO with whom we spoke agreed: as a business lawyer, your first priority must be to understand your client's business well. This is easier for in-house counsel, but good outside counsel has to do the same. It's just astounding how often counsel will read a contract, assist with a negotiation, draft memoranda, or give an opinion, without having a clear understanding of the context – and context is critically important in the business world.

It's not enough just to learn what your own business's goals are – you have to learn the goals of your business's customers, suppliers, and strategic partners as well. Armed with this knowledge, you can understand the company's relationships with others much better, and that's critical to effective negotiation.

Does it matter that Customer A was the company's first and most loyal customer, and saw the company through hard times? Does it matter that troublesome Supplier B is owned by the brother-in-law of a certain cabinet minister? If you're realistic (and business-oriented), you know that of course it does. You may pride yourself on your extra-tough negotiating skills, but the CEO won't be happy if in the process you antagonize a special customer or supplier.

2. Be utterly risk-averse

Risk is an inherent part of doing business. Lawyers, however, are often trained to see risk as something to be avoided, and that's not always helpful.

The trick is to help manage risk, not simply minimize it. Good corporate legal advice recognizes that there is far more to any business decision than, for example, whether the limitation of liability clause is strong enough. There are many layers of risk: financial, competitive (dis)advantage, public perception, effect on share price, etc.

Nadir Mohamed, President and CEO of Rogers AT&T Wireless, describes one situation he witnessed: "The company was negotiating with a potential new supplier, who balked at providing strict service level guarantees. One lawyer simply said that it was too risky to do the deal without that protection. That advice didn't help at all – the supplier was too important for other business reasons.

"Then another lawyer suggested getting guarantees of performance at least no worse than what the supplier gave to others – that way, the risk would be limited to being no worse off than any of the company's competitors. It wasn't perfect," Mohamed says, "but it provided a practical solution."

Rather than simply saying, "You shouldn't do that," inform your business people of the risks and provide creative alternatives, so that they can make educated decisions in the overall business context.

Remember, though, that not all businesses or CEOs are the same. You need to know your CEO and the management team and understand how risk-averse they are; this will help you learn how conservative your opinions need to be. Participate in the relevant discussions, and don't be afraid to ask. But remember: whatever the context, CEOs want solutions, not roadblocks.

3. Wait to be asked.

"Why didn't you warn us?" is not a question you ever want to hear. Unfortunately, it's a fact of a lawyer's life that she's often not consulted until after a problem has arisen. The oft-repeated command of "be proactive" sounds great, but it's difficult in practice if the lawyer is only brought into the deal or other issue at the 11th hour (and we all know this happens).

On this point, don't expect the CEO to help you – rest assured that they want you to be involved early, but they won't always think to ask. But don't just complain – in most cases, the impetus is on you. Don't hide in your office and wait for people to come to you.

Despite the temptation to eat at your desk (we know you're busy), go for lunch with your business colleagues occasionally. Ask to be copied on relevant e-mail correspondence, just to keep an eye on what's going on. If it's practical in your corporate environment, consider simply asking the CEO directly if anything is brewing that you can help with. You might be surprised by the answer, and your interest will be appreciated.

4. Be vague or inconclusive.

This is one of the cardinal sins of a business lawyer. Unfortunately, many lawyers are trained this way. "I just received an opinion from outside counsel, most of which said what the firm wasn't willing to say. How can I rely on that?" While this is understandably hard for outside counsel, in-house lawyers should see this as an invitation to be more straightforward. "Lawyers tend to 'caveat' up the yin-yang," one CEO told us. "That doesn't help anyone make a decision."

It's not enough to simply list all of the various options in any given scenario – prioritize them, and be willing to recommend action. The CEO usually wants your real opinion. And though it may seem sacrilegious, be prepared to be wrong. It's difficult for a lawyer, but sometimes, to be effective in a business context, you need to take a bit of risk yourself.

Nadir Mohammed provides a good analogy: "It's like being a defenceman who likes to score – sure, every once in a while you're exposed, but you're much more valuable to the team."

5. Make it complicated.

Do not provide 20-page memoranda of law to the CEO. Every one we spoke with agrees on this point. Doug Hall, President of Camis Inc., puts it bluntly: "Frankly, I'm just not interested in legal theory, and I don't have the time."

"Don't give me a 20-page legal memo. I'm not interested in legal theory and I don't have the time."

If you've been asked a question, answer it. You will, of course, have done all the required research and compiled a thorough review of fact and law – that's your job, and you'll have the memorandum at the ready, like a proud new parent. But resist the temptation to show how hard and how well you've worked. Put the memo in your files and give the businesspeople the conclusion or an executive summary. That's why they call them executive summaries, after all.

6. Be a pushover.

In the face of a dispute or challenge, don't just "roll over" –don't even give the appearance of doing so. Business success – indeed, the CEO's own success – usually is due to a healthy measure of confidence and competitive spirit. It fits, then, that your CEO does not want a pushover for counsel.

When it comes to disputes, or tough negotiations, your CEO will often see you as the "hired gun," and it that situation, shooting blanks isn't an option. It may very well be practical to avoid litigation or arbitration; but if that's the case, don't appear to avoid litigation because of fear of battle – be clear that it's because, in the case at hand, battle will be less productive. Be tough, have alternatives, and show that you are working toward getting the best possible results.

7. Dwell on the little things.

Understand the big picture, and focus on it. Nothing frustrates a "get it done" businessperson more than lawyers fussing over details. Of course, sometimes that's exactly what lawyers are there for, and that's how we're trained. But too often, lawyers also want everything to be perfect, and get caught up in details to do so.

When you hear a businessperson refer to the "nits," take it as a comment on how important they think those particular issues are: not very. One CEO points out: "It's not the specifics of the deal, but

the overall objective." Make sure you know what the real business drivers are in any deal, and focus on them.

In any negotiation, if you have one big issue and 15 small ones, always, always deal with the big one first, and if it needs to be escalated, do so as soon as possible. "And that 'big' issue is not likely the indemnity clause," Hall adds. "In our major contracts, we go back time and time again and work with the real 'money issues' material in the Schedules, not the boilerplate."

It's a common complaint that in contract negotiations, lawyers spend too much time and effort stressing over things like punctuation errors (believe it, it happens all the time). If it's inconsequential, it wastes everyone's time. So don't worry too much about commas. Be practical and focus on the big issues.

It will serve you well too, by the way – if you're outside counsel, you won't be seen to be dawdling over small points to increase your billable hours; if you're in-house counsel, you can be more helpful, get the job done more quickly, and move to the next fire waiting to be put out.

8. Always play by the book.

Too often, lawyers are trained to refrain from giving business advice, particularly in outside firms. But how many CFOs restrict their business discussions to just numbers?

Business lawyers, particularly in-house counsel, are in a unique position because they've exposed to almost every aspect of the business: human resources, intellectual property, procurement and distribution, competition and marketing matters, and, yes, finance. This exposure to the bigger picture gives lawyers the ability to be much more helpful with overall business discussions than they normally are.

This was a big point with the CEOs we interviewed. "Lawyers shouldn't just focus on what can go wrong," says Randy Reynolds, President and CEO of Bell West. "They're often exposed to the bigger picture, and develop the knowledge necessary to spot opportunities which others more narrowly focussed might miss – but they seldom do. Being creative and looking for those opportunities make a lawyer far more effective."

If you can't shed the baggage of legal versus business advice, follow this suggestion from Hubert Lacroix, former Executive Chairman of Telemedia: "Just preface whichever advice you're giving with the qualifier, 'This is my legal opinion" or "This is my business view"–however you say it, say it."

And don't rely on, "This is how it's usually done." As one CEO puts it, "You can't excel by simply following – you have to be prepared to write new pages." Fundamentally, it's about participation in the business. "Lawyers want to be part of management, even at the executive table," the CEO adds. "But they often don't earn it. There's a big difference between a technician and a member of the executive team."

9. Ignore the business basics.

The CEO is a businessperson, and expects those supporting the business to be of the same mindset. You are a professional, yes, but you're also a supplier of goods and services. Be efficient. Be cost-conscious. Recognize that it's competitive out there, both among outside firms and within legal departments; work hard to keep your customers happy.

Sometimes, the issues will surprise you: even though it's a tiny fraction of any business's legal costs, a large number of the CEOs we interviewed mentioned the frustration of being billed by outside counsel for fax, photocopy and long distance phone charges. "Even with all the money we spend, we're still being nickel-and-dimed!" You will impress, far out of proportion to the cost, if you can either swallow those costs or build them into your fees.

Overwhelmingly, CEOs understand that legal services are not cheap, and believe it or not, they're prepared to pay for them. But they want to see value. This article is to help you not only provide better value to your business client, but to be seen to be providing better value as well.

10. Forget who the CEO is.

Most CEOs are CEOs because they're good at what they do. They tend to be effective communicators and strong leaders, and most are pretty intelligent. Unfortunately, lawyers can come off as a bit arrogant and a little patronizing. Don't. You can learn a lot from your CEO and other senior management, particularly as you implement the foregoing points in your efforts to be more businesslike.

And be realistic: directly or indirectly, the CEO is the person you report to, and often the person who can decide your future (especially for in-house counsel). You want to keep this person happy. With the current focus on corporate governance issues, there's more scrutiny on who your real client is – not the CEO, but the company, represented by a Board of Directors.

The good news is that the CEO and the Board are usually aligned; for operational management matters, the CEO and "the client" are almost always one and the same. To keep a balance, be proactive in keeping your CEO informed of governance rules and requirements and the Board's needs, before your Board or committee meetings, and help the CEO do what's needed. You'll be looking after your client, and your CEO will thank you.

CEOs recognize that lawyers are not always the bearers of good news. They represent the law which, let's face it, imposes all sorts of restrictions on various forms of business conduct. However, most CEOs respect the need for lawyers and what they do – they just want their lawyers to be a bit more business-savvy, practical, and helpful. A CEO gets the final word: "Keeping us onside, while helping with our business goals, shouldn't be mutually exclusive."

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Illustration: Peter Ferguson / Three In a Box Inc.

english

Comment irriter votre chef de direction

En nous inspirant d'un article que nous avons publié récemment, nous vous proposons dix façons d'énerver celui à qui vous devez plaire.

1. Ne connaissez rien de l'entreprise

Vous devez connaître la réalité de l'entreprise qui requiert vos services. Tel client peut toujours lui avoir été fidèle ou tel fournisseur peut s'avérer être le beau-frère d'un ministre influent. Des informations que vous devez connaître avant de montrer vos dents lors d'une négociation.

2. Démontrez-vous allergique au risque

Risque et affaires vont de pair alors que pour les avocats, le risque est souvent un ennemi. Sachez que dans le secteur corporatif, il ne s'agit pas nécessairement de minimiser le risque mais bien de savoir le gérer.

Nadir Mohamed, président et chef de direction chez Rogers AT&T Communications sans fil nous offre un exemple de la différence de perception : « Nous devions négocier une entente avec un

nouveau fournisseur qui ne pouvait nous offrir de garanties strictes quant aux services offerts. Un avocat nous a recommandé de refuser l'offre puisqu'elle ne nous protégeait pas suffisamment. Pourtant, nous avions besoin de cette entente pour d'autres raisons commerciales. »

Il ajoute : « Un autre avocat nous a plutôt conseillé d'obtenir une garantie d'exécution qui spécifierait que le service offert ne pourrait être pire que celui offert aux autres clients. Ce n'était pas parfait mais il s'agissait d'une solution pratique. »

3. Attendez qu'on vous pose les questions

Vous ne pouvez compter sur le chef de direction pour vous tenir informé de ce qui se passe. Il n'a tout simplement pas le temps ou n'y pense pas. Allez vers les gens, sortez pour le lunch, demandez de recevoir copie des courriels. Vous saurez alors ce qui se passe et pourrez vous impliquer dès les premières étapes d'un projet.

4. Cultivez l'art d'être vague

Ce défaut est fréquent chez les avocats. Il ne suffit pas d'exposer les différents scénarios, vous devez en expliquer le pour et le contre et faire des recommandations. Le chef de direction souhaite obtenir votre véritable opinion sur une question. Allez-y, plongez et assumez qu'il est possible que vous commettiez une erreur!

5. Compliquez les choses

N'allez pas remettre au chef de direction une opinion de 20 pages. Répondez à la question posée et résistez à la tentation de montrer votre savoir. Bien sûr, accomplissez des recherches adéquates et rédigez un mémo en ce sens, mais conservez-le dans votre classeur et offrez plutôt un résumé de vos trouvailles.

6. Soyez la parfaite carpette

Devant les possibilités de litige, ne fuyez pas ou ne donnez pas l'impression de fuir. Il peut parfois s'avérer judicieux d'éviter les tribunaux ou l'arbitrage mais n'ayez pas l'air d'une poule mouillée. Démontrez pourquoi, dans ce cas, une dispute serait contre-productive.

7. Focalisez sur les détails

Ne vous attardez pas à l'arbre, visualisez plutôt la forêt. Bien sûr, on requiert souvent vos services en raison de votre capacité à vous attarder aux détails mais sachez faire preuve de parcimonie. N'essayez pas que tout soit parfait.

8. Respectez le protocole

En tant qu'avocat, et surtout en tant qu'avocat en entreprise, vous toucherez à toutes les facettes d'une compagnie : ressources humaines, propriété intellectuelle, finances. Vous bénéficiez d'une position privilégiée pour participer concrètement aux décisions. Ne vous en tenez pas simplement aux aspects légaux et soyez créatif.

9. Ignorez les pratiques du monde des affaires

Le chef de direction est un homme d'affaire et il s'attend qu'il en soit de même pour vous. Soyez efficace et conscient des coûts. Les chefs de direction reconnaissent que de bons services peuvent coûter chers mais souhaitent aussi en avoir pour leur argent.

10. Oubliez ce que représente le chef de direction

Les chefs de direction représentent généralement les vues du conseil d'administration et excellent dans leur métier. Ne jouez pas les arrogants, vous avez tout intérêt à vous faire apprécier d'eux et ils ont beaucoup à vous apprendre.

En somme, souvenez-vous que même si la plupart des chefs de direction reconnaissent l'importance et la valeur de vos services, ils souhaitent vous voir démontrer un bon sens des affaires. Ayez l'esprit pratique, soyez utile et vous aurez n'importe lequel chef de direction dans votre poche… ou presque!

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A C C A D O C K E T F E A T U R E

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John B. Douglas,III is Vice President and General Counsel of Reebok International,Ltd.

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Reebok Rules

by John B. ("Jack") Douglas, III

As General Counsel for Reebok, I have learned some important lessons about lawyering in an entrepreneurial environment. My CEO is a businessman who has developed a healthy mistrust of lawyers and their role in furthering the business function. Indeed, not long after I joined Reebok, as we were sitting in a meeting, Paul Fireman, my CEO, launched into one of his lawyer diatribes; his parting line was, "I hate lawyers-- not you, Jack; you don't count." Not sure quite how to accept that remark, I took it as a compliment. But somewhere tied up in that comment there's a lesson.

Reebok started in England in 1895 as the first company to manufacture and sell spiked running shoes. The shoes were sold under the J.W. Foster brand name. The company remained a small running shoe company until the 1950's, when the grandson of the original founder decided that he wanted to try his hand at his own athletic shoe company. He split off from the family and started a new company which eventually became known as Reebok. This new company eventually absorbed its predecessor company and continued as a small running shoe company with sales of no more than $1 million worldwide when Reebok's current CEO, Paul Fireman, took a license to distribute Reebok shoes in North America.

The company started to take-off in 1982 with the introduction of athletic support shoes specifically designed for women for the new sport of aerobics. The shoes were performance shoes, but they were comfortable beyond anyone's expectations. They were made of a garment leather which had never before been used for shoes before and they were colorful. They were designed to appeal not only to the performance needs of this developing sport but also to make a fashion statement. Sales in 1982 were

$3 million.

In succeeding years, sales grew to $13 million, $66 million, and $307 million in 1985 when the company had its initial public offering. By then, the U.S. company had acquired its U.K. licensor. I joined Reebok in early 1986 when Wall Street was anticipating that the company would achieve sales of about $450 million. The company ended up with revenues of $919 million that year. It was a rocket show. Sales in 1991 were $2.734 billion; 1992 sales are expected to exceed $3 billion.

Obviously, the company is successful. In fact, when I came to Reebok, the company was already successful beyond most people's wildest imaginings. The fear at that time was that perhaps Reebok was a fad. The rocketship had gone up and now the rocketship would go down. One of the key challenges facing me was how to start a legal department within a very successful company in a way that would add value to the organization, rather than detract from its business success. The last thing Reebok needed was for me to try to install a complex set of legal mechanisms designed to fix what wasn't broken.

That is not to say that Reebok did not face a number of major legal concerns, especially as the company took on the challenge of international growth and global copying and counterfeiting. As an attorney, I could see that my new job would offer many challenges, but I could also see that the job had incredible potential for fun.

I attribute whatever satisfaction and success I have had to strict adherence to a set of rules that dictate our mission and method for doing business at Reebok. I had largely developed these rules by the time I got to Reebok, but my colleagues and I in the law department have enhanced and refined them during our tenure at the company.

The rules serve two functions: they keep the lawyers focused on the client's objectives and they remind us of the priorities which will keep us successful and challenged in our jobs. It is my feeling that every legal manager in today's business environment should develop his or her own set of rules, publish them, and make sure that the legal staff follows them. I hope that our rules at Reebok can act as a springboard for those who are interested in creating and maintaining a healthy business-to-legal (as well as a good intra-

legal) team.

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REEBOK RULES

1. ***Lawyers Should Attend All Key Business and Staff Meetings***

When I was hired to be Reebok's General Counsel, I did not care (within limits) how much I got paid or what my title was. What I cared about was being in the middle of key business decisions at the company. I agreed to join the company on the basis that I would attend all meetings of the Board of Directors and any Executive Committee and Strategic Planning Committee meetings. This involvement has proven to be a critical asset to my performance and job satisfaction; because of it, I am an important player in key decisions at Reebok. I make sure that all Reebok lawyers are invited to staff meetings for those business units for which they serve as counsel. And I make sure that I or my staff members attend.

When faced with a Division President who is reluctant to open his or her business meetings to the lawyers, I point to past successes in other divisions, and ask that this Division President try it on a trial basis. Then I talk with my lawyer to make sure that he or she realizes what works and what does not work at staff meetings. For example, if the lawyer hears something at the staff meeting that is absolutely outrageous, illegal or unethical Ñ especially in the first few meetings while the lawyer is still gaining credibility as an attendee Ñ the lawyer should not jump up and down and demand the conversation cease. A more delicate strategy is to take the Division President aside after the meeting and give some quiet advice. The goal is not to prove that the lawyers know more than the clients. The goal is to ensure legal and ethical behavior by encouraging managers to invite the lawyer back to the next meeting.

2. ***Eliminate the "No"Word From Your Vocabulary***

When a client walks into your office and begins talking about how he or she would like to engage in an horizontal anti-trust conspiracy with your biggest competitor because that would allow both of you to make more money, there are at least two ways in which you can respond. First you can say: "Oh my God! NOOO! You can't do that. If you do something like that you'll go to jail- that's a ridiculous idea!" This approach has the advantage of laying your position out on the table quickly and succinctly, but

has little else to speak for it.

The second alternative is a bit more subtle: "Gosh, I think you've got a great idea to make more money for the company. I really like your idea, but there are one or two things that perhaps we should discuss concerning your method of implementation and some legal implications." By all means, proceed with the legal analysis, and straighten the deal out. Just start with a "yes," not a "no." Remember: your client suggested the idea because he or she liked it, and wants your help; don't cast yourself as a hindrance.

3.***Corporate Counsel are Business People Ñ- Hone and Use Your Business Judgment***
Too often I hear corporate counsel suggest that lawyers should carefully limit their input to legal analysis only. This was the philosophy employed by the General Counsel of a large legal department where I previously worked. I think this is a big mistake. Some of the most valuable contributions that I have made at Reebok (and that members of my department have made) have been a result of our collective business judgment and input. As lawyers, we get an opportunity to approach a problem without line responsibility for it. As a result, we are sometimes able to contribute insights that are very meaningful in resolving a business issue. Operate with a broad field of vision. Don't limit yourself. (However, the corollary of this rule is to make sure you still give good legal advice Ñ if you don't do so, no one will.)

4. ***Return Phone Calls Promptly***
One of the most important aspects of the in-house counsel/client relationship is making sure that you return phone calls promptly, and respond to memos, hallway requests and other requests for legal advice on a timely basis. Nothing is worse than a client who cannot get in touch with his or her lawyer. I know, because I am frequently the client trying to call an outside lawyer. In my opinion, customer service and good communications are crucial for the inside practitioner. As an in-house lawyer, you have only one set of client relationships; if those relationships are not carefully built and preserved, at the very least the working environment will be less pleasant. At worst, you could lose your job.

5. ***Learn About Problems Early***
Nothing beats learning about legal problems early. This is one of the key benefits of attending important

staff meetings. It is also a reason why lawyers should find other means of staying abreast of business developments, whether it is by informal contact with members of your business and working groups, talking to secretaries of key business people, or otherwise. It is much easier to convince a client to revise a proposal in its incipient phase than it is to curb it once it has begun to gather momentum or supporters who develop a personal investment in its success.

6. ***Get to Know Your Clients as People***
I attend the major business trade shows in our industry and many of our sales meetings. I encourage my staff lawyers to do likewise. This not only enables you to know your clients by spending time with them in a business setting, it also allows a little bit of after-hours mingling and enables you to become "one of the gang." It is a mistake to think that you will be treated as a member of the team if you don't act like one.

7. ***Learn the Business***
Whatever the business is, make sure that you learn it thoroughly. Get on the list of trade journals for your industry. Attend sales meetings and trade shows. Bone up on the company's literature or files. One of the values that an in-house counsel can bring to a company is a thorough understanding of both the business and legal principles applicable to the business.

8. ***Try Spending a Portion of Your Day Wandering the Halls***
Have meetings in your clients' offices. Arrange some time to simply run into people. I find that some of my most productive time at Reebok has come from hallway meetings that have been completely unplanned on my part or on the part of my clients.

9. ***Avoid Memos: Communicate Orally***
Memos are a cool method of communication. They don't allow the give and take that can occur in an oral exchange. Avoid memos unless written memorialization is absolutely essential to avoid miscommunication or because of scheduling conflicts. For those who are not on-site at your office, I suggest that you work your telephones instead of writing memos. When clients are out of the office, call them with your information, even if it means calling them out of town or at home (using good judgment on this, of course), or in other

difficult-to-reach situations. In this way, you will establish yourself as their lawyer, and not just another office bureaucrat.

10. ***Integrity is Crucial***
Make sure that you respect confidences and that you are honest and fair both with your clients and your opponents. I'm not suggesting that you shouldn't be an aggressive advocate in dealing appropriately with your opponent. Just do so honestly and fairly. The dividends will be enormous over time in future situations.

11. ***Make the Coffee***
One of the things that impressed me when I joined Reebok was finding Paul Fireman making the morning brew in the coffee room during my first week on the job. It certainly delivered a message to me - and, I'm sure, to other employees - that no job is too unimportant. I'll never forget one Board Meeting when we had lunch served on expensively decorated china plates. Lunch was over, and Paul wanted to get on with the meeting. Rather than place a phone call and wait for someone to come and clear the plates, Paul simply got up and carried his and one other director's plate to a small kitchen nearby. He returned to the room, picked up two more plates, and walked out the door again. All of a sudden, the directors realized that the CEO was clearing the table. You have never seen a table cleared faster in your life. Again, quite an impression.

12. ***Be a Problem Solver***
When a client walks into your office, it usually means that some problem needs to be solved. Sometimes the client brings in perfectly formed legal questions which require your legal advice. Other times, the client's problem might be more in the nature of a business question which the client assumes is a legal problem, or a mixed, unformed mish-mash. Regardless of which category the question falls into, help the client solve the problem, even if it requires your help or action outside of the traditional "limits" of legal advice. You want to encourage clients to come in; you don't want to encourage them to decide without your help whether the problem really requires legal input.

13. ***Stay Focused on What is Really Important***
I remember being in a meeting at a large, prestigious Boston law firm at which we were discussing a possible takeover. We were discussing our strategic

plan for the transaction and other details when someone suggested that, "of course we would need to get a fairness opinion." Paul asked about the nature of a fairness opinion and what it would cost. One of the senior partners at the firm said, "Well, fairness opinions generally run less than one percent of the deal, so it wouldn't be that much... probably about $400,000." Paul leaned forward: "Oooohhhhhh, Wait a minute - do you realize what you just said? Does your mother know you talk like this? You just spent $400,000 as if it was nothing." This senior partner turned as bright a shade of red as I've ever seen. The lesson: stay focused on what's important. Four hundred thousand dollars is a lot of money at any time.

14. ***Be a General Practitioner***
My job at Reebok is as a general practitioner responsible for the overall legal (and business) health of the client. I liken the role to the medical doctor who acts as the general practitioner responsible for his or her patient's health. If I can perform some specialty functions Ñ fine, but my most important job is to make sure that Reebok gets the legal services it needs, when it needs them, and at the most reasonable cost.

15. ***Do "The Legal Thing"***
My direction from Paul when I got to Reebok was to do The Legal Thing - whatever that might be. What a powerful job description! The freedom that directive gives me in addressing the problems of the company is enormous. It has allowed me to create a fabulous job in an exciting legal department in a terrific company. I've never forgotten that. When people come to work for me, I suggest that they do the same thing: "Do the legal work for 'X' division." I then allow them to dream and create their own jobs. Naturally, I stay involved, but I think it's important for people to create and fulfill their own goals. And I view my job in that context - to help my staff lawyers and paralegals achieve their career goals by helping to eliminate external or internal obstacles that are inhibiting them from achieving what they want to achieve.

16. ***Be Available***
I have an open door in my office at all times. My phone numbers at home, work or travel are always available to my clients and staff. I'm available 24 hours a day, every day. I don't work 24 hours a day, but I'm always available.

17. ***Legal Work & the Bell Curve: Not Every Job Requires an "A" Effort***
One of the most important judgments that I ask my lawyers to make is what work needs an "A" effort and what work needs a "C" effort. Some projects that come into the department deserve a quick glance and approval, others should be reviewed carefully. Some projects shouldn't be done at all. If you micro-analyze every project and treat the resulting opinion as a law review article, you are not allocating your time to its best use. If you fail to prioritize your workload, you will not be able to respond appropriately to the important projects, and you may find yourself missing the forest for the trees.

18. ***Avoid Titles***
Especially in a small law department, titles are unnecessary and probably promote more ill-will than good. At Reebok, we have no titles and never have had any. By not having titles we avoid competition and complaints, and we promote teamwork and solidarity.

19. ***Be Proactive: Educate Your Client Groups***
Hold seminars regularly to train people outside the law department about routine responsibilities that have a legal implication. At Reebok, we hold regular educational programs in areas of antitrust law, employment law, advertising law, and intellectual property law. Your company might require different programs, but they surely require some education, perhaps in antitrust issues, officer and director liabilities, environmental concerns, etc.

20. ***Move Routine Work Outside the Department***
At Reebok, we've been able to develop standard contracts and make the drafting of such contracts fairly routine. We first move this work to a paralegal. We then move the paralegal to the business department where that person functions as a manager of contracts. This is good for the individual and for the legal function and the business department. We "normalized" these functions for our marketing department and did the same thing in our treasury department by "installing" a stock option plan administrator. By routinizing functions and moving people into the business departments that house their workload, we keep the legal function more focused on areas truly requiring our expertise. Our goal is to get the job done in the best possible manner, not to create the largest department.

21. ***Be Enthusiastic***
Nothing gets you "invited in" and "invited back" quite as well as plain old enthusiasm. Join in, be part of the program, commit yourself and your department, be a team player.

22. ***Give answers: Get to the Point***
Give answers. If Paul Fireman had prepared this article, he might have started with this "rule." Nothing upsets Paul more than a detailed analysis of a problem with no answers - for any reason - even, or especially if, it is because it is outside your "area." If you don't know, find out who does. Always make a recommendation or provide requested information and be clear about it. Your client may disagree and that's ok, but make sure you answer the question.

23. ***Hire People Better Than You Are***
Always hire people whose intelligence and capabilities scare you because they might be better than you are. Then allow them to succeed. This is the sign of a good manager and you will flourish as a result. Resist the temptation to hire people who will make you shine in a one-on-one comparison. A team made up of inferior people will drag you down. The high level of competence of my lawyers always makes me a little nervous, but my client benefits. In return, that's a better reflection on me than I could ever engender on my own.

Conclusion

These "Reebok Rules" may not apply universally to every department and management style. You may disagree with some of the rules I swear by. The lesson is not that I'm right or wrong, but that these rules work for me because my client and I are in tune and communicating. What is included in your set of rules is not paramount; what truly is important is that the rules you adopt reflect the values of your company and the priorities of your working relationship with your client.

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CRISIS COMMUNICATION PLANNING AND TACTICS

by William Allcott and Donald Anderson

Primary Goal

- Minimize damage to the organization's reputation

Other Goals

- Minimize compensatory damages
- Avoid punitive damages
- Minimize civil enforcement
- Avoid criminal prosecution

Before the Crisis

- Identify audiences that need to be informed in case of a crisis. Determine the mode of communication that is most accessible to each audience.
- Develop written materials that can be predetermined, (i.e. company facts, key phone numbers of government agencies and internal team members), and keep filed both on-site and off-site. Also have safety, labor and employment records readily available.
- Media training for team leaders, appointed spokespeople, and back-ups at each location

When the Crisis Occurs

- The first priority is to deal with the crisis itself. If forced with a choice between acting to diffuse the crisis and talking to the media, the media can wait. The only exception is when there is a danger to the public at large.
- Communicate directly and immediately to internal audiences such as directors and employees and crucial external audiences such as customers, so that they do not hear of the news through the media.
- Always remember the public is looking for two things: reassurance and responsibility. As soon as the danger has passed, let them know. Likewise, whenever possible, assume responsibility. Don't pass the buck!
- Provide timely, honest information, but use prepared talking points and media statements dispersed by the appointed spokesperson. Never lie!
- Be especially alert about photographers. You have no control of photos or video taken off company property, but every right to control photos or video taken within the facility.

Excerpted from: Keeping Up Corporate Defenses after 9/11 2002 Annual Meeting

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- Monitor news, evaluate coverage and adjust public relations tactics if reporters are not covering the positive actions the organization is taking to minimize the damage, help the victims, etc.
- Consider the value of building "goodwill equity," such as positive actions that can be taken after the crisis to rebuild community relations

Key Communication Tips During the Crisis

- Demonstrate you are acting on the identified problem.
- Accentuate the positive steps being taken
- Never lie
- Never comment on hypotheticals
- Have spokesperson be accessible to the media and communicate on a regular basis
- Get the name and phone numbers of all reporters in case the spokesperson has to call them back later
- Give brief, direct, factual answers that do not include your personal opinion
- Never say "no comment"
- Never get angry
- Do not act defensively or be confrontational
- Do not be evasive
- Do not bury facts
- Do NOT go off record
- Do not use colorful language
- Do not say anything you would not want to use in a headline
- Do not use technical jargon that people outside your industry/field would not understand
- Do not repeat questions or mistatements that a reporter says
- Be in control of where media interviews take place, keep media in designated areas, which should be close to phones
- Don't avoid talking to reporters
- Do respect deadlines
- Do not ask to see the reporter's story before it is published
- Obtain feedback from publics
- Document actions

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Common Mistakes in Crisis Communications

- Failure to prepare materials in advance
- Failure to communicate with all publics
- Failure to communicate directly with internal audiences, such as employees
- Failure to return phone calls from the media
- Saying "no comment"
- Speculating, going off record, burying facts, being evasive
- Making misleading or false statements
- Playing favorites by giving more information to one reporter than another

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SHEARMAN & STERLING LLP

Risk Management Tool: How to Educate your Client Not to Create Dumb Documents

May 4, 2007

SHEARMAN & STERLING LLP

American Corporate Counsel CLO ThinkTank Series 2007

May 4, 2007

Jonathan Greenblatt

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Risk Management Tool

Every litigator's (and general counsel's) nightmare is the discovery of an incredibly damaging client document that must be produced to the other side as relevant, responsive to a document request and not protected by any applicable privilege. With the proliferation of electronic documents and e-discovery obligations, the nightmare is multiplied one thousand-fold. For reasons that confound most litigators, email, which is the least confidential form of communication known to man, is considered to be the most confidential form of communication by its users. Users of email say things they would never say in a memo or letter. The danger is that email is often viewed as clear evidence of what was intended, known or felt at the time in question. Often thoughts are so fleeting one could never remember them, yet if they are written in an email, that fleeting thought is embedded in history. Thus, even if email does not refresh recollection, it becomes prior recollection recorded and actual recollection is rendered irrelevant. Tone and nuance, which are critical to conveying the full meaning of a communication, are lost in a short, black and white email note. For all of these reasons, email is susceptible to damaging misinterpretation, while at the same time it appears to convey to a trier of fact a degree of credibility normally associated with deathbed confessions.

It is no easy task to educate the users of email to more carefully consider what they commit to writing. It is important not to convey the message that sensitive issues should be avoided or not discussed. Responsible organizations must and will discuss those issues in writing. Instead, the task is to sensitize the authors of documents and email to the way documents and email are used, and often misused, in litigation. If they understand the extraordinary scope of U.S. discovery obligations, the way damaging documents have directly contributed to liability, and the distorted meaning associated with the content of cavalierly drafted emails, the hope is that officers, directors and employees will think before they write and read before they send to ensure their writings reflect what is necessary and accurate to say.

I recommend, and often give, presentations to key employees (division heads, supervisors and employees in the most macho unit of the organization) designed to educate them on these issues. I use documents produced in actual cases (appropriately redacted to protect confidentiality unless otherwise in the public domain) in an effort to personalize the lessons. The employees must understand that their written words will be directly attributed to them and may contribute directly to the liability of their employer. They will be subject to deposition and potential examination at trial. Their words, often written without much thought, will be blown up, highlighted, placed on placards and scrutinized in unimaginable ways. To survive this scrutiny, they must be comfortable their words reflect what they really want and mean to say.

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A. The Discovery Obligation

Employees should understand the breadth of discovery obligations imposed in litigation and government investigations. Employees should know that every document they create may be subject to production to an adversary in civil or criminal litigation whether or not they intend it to be confidential. I use an actual document request for purposes of illustration. A typical definition of a "document" from any well crafted discovery request defines a document in such broad terms that virtually every form of written or recorded communication is captured. This includes notes, diaries, calendars, drafts and electronic documents. It is virtually impossible (and depending upon the timing, may well be illegal) to effectively delete and discard electronic documents. Someone has a retrievable copy. If it is retrievable, the assumption should be that a court will require it to be retrieved, even in the face of significant time and expense. Therefore, employees must understand that once written, the documents they create are subject to production in discovery. The time to influence the impact of such documents is before, not after, they are written.

B. The Direct Relationship Between Documents Produced in Discovery and the Outcome of Ltigation or a Government Investigation

Examples abound that demonstrate the direct relationship between damaging documents produced in discovery and the outcome of litigation or a government investigation. Many employees are aware of the relationship between Microsoft's e-mails and the difficulties Microsoft encountered in its antitrust battle with the Department of Justice. It is worth quoting from court decisions to drive home this point. For example, I show employees the court's decision in *State Nat. Bank v. Farah Mfg. Co*, (678 S.W.2d 661 (Tex.App. 8 Dist. 1984), in which the court relied on the notes of a banker taken at a bank meeting to support the lender liability judgment entered against her employer: "Notes prepared by Bettina Whyte of Continental reflect the feeling of that bank that if Farah were elected he should be strongly controlled and have life made miserable for him." Employees can easily extrapolate from Ms. Whyte's predicament to their own.

C. Categories of Things That Should Not Be Written

I also try to break down for employees the areas in which the most damaging written statements are made. I use documents produced in actual litigations to illustrate the point. While some of these documents are almost humorous in hindsight, the employees understand they were not humorous for the authors or their employers during the course of the litigation or investigation.

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1. Things That Should Not Be Thought

It may be impossible to educate an employee not to write what he or she should never have thought in the first place, but writing those thoughts certainly compounds the problem. The following examples illustrate the point:

- Email, written on a Saturday afternoon by a top financial analyst: "He's already been done by Armstrong just doesn't know it. You know everyone thinks I upgraded T to get lead for AME. Nope. I used Sandy to get my kids in 92nd ST Y pre-school (which is harder than Harvard) and Sandy needed Armstrong's vote on our board to nuke Reed in showdown. Once coast was clear for both of us (ie Sandy clear victor and my kids confirmed) I went back to my normal negative self on T. Armstrong never knew that we both (Sandy and I) played him like a fiddle."
- Bank Annual Review of a customer, in a case where the question was whether the bank knew the customer engaged in check-kiting: "[Customer's] modus operandi is built around the network of corruption, tax evasion and the circumvention of currency restriction in [country]. Should the Government bring in the white knight and clean house, [customer's] operation could be jeopardized."
- Language from a long electronic document from one employee to another: "The question is where do we take the hit. Do we admit that we have to go back to the drawing board on ____ manufacturing process engineering, drop the product line (as we have already done in sales), and explain the situation somehow without having it come out that we have lied to ____ about the technology all these years?"

2. Unprofessional language or profanity

Unprofessional language or profanity rarely plays well in front of a judge or jury. It is embarrassing and therefore painful for the author to defend in a public setting. It should be avoided. The following example makes the point:

- Language from a long electronic document: "let's give the tar baby to ____ . . . there is an opportunity to do it right the first time and we may be able to avoid the same premature ejaculation we made [in the past]."
- Language from a letter from a banker to his customer (later accused of bank fraud) containing the closing "From your best f---ing friend."

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3. Inflammatory Language

The same point regarding unprofessional language or profanity applies to inflammatory language. Thus language such as this (taken from a memo prepared by one bank in a bank group) should be avoided:

- "Several of the banks couldn't care less about [borrower] they want to blow it up because of the owners."

4. Self-critical language and the possibility of involving counsel in the communication

Self-critical documents are difficult to criticize because responsible organizations gain insight from reviewing their mistakes. Nonetheless, it is important to recognize there is no "self-critical" privilege. Therefore, unless the document is legitimately protected by the attorney-client privilege, it will not be protected from discovery.

The following are extracts taken from the notes of a senior executive from his meeting with other senior executives doing a post-mortem on the conduct of some of their subordinates. The document made several points that supported theories of liability advanced by adversaries in litigation:

- "Inadequate senior supervision", "There was enough static in the environment that we should have been more skeptical", "Willing suspension of disbelief", "Acct officer objectivity co-opted."

The question raised by self-critical analysis is whether the same issues can be legitimately addressed by an attorney and thus protected by the attorney-client privilege. The answer depends upon the facts. In some cases the analysis is purely business related, while in others it is legally related. Much of this analysis is for the purpose of attempting to avoid liability. When that is the case, involving an attorney as a central player may provide grounds for the assertion of the attorney-client privilege. The object is to educate employees to the proper use of the privilege so that they can consider whether they can and should involve counsel in the communication.

D. Miscellaneous Rules of Thumb

There are a several rules of thumb that should be conveyed to email users.

First, beware the "Reply to all" button. Whoa unto the unwitting worldwide distributor of an email intended for only the privileged few. Aside from causing untold embarrassment to the sender, it expands the universe of persons in possession of potentially responsive documents in discovery and can lead to a thoughtless reply from an uninformed recipient.

Second, copy only those persons who have a reason for receiving the email. Again, adding unnecessary recipients expands the universe of custodians and leads to a proliferation of email chatter and the risk of careless communication.

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Third, compose thoughts into one carefully drafted email and avoid the multiple, stream of consciousness variety of the species.

Fourth, read, read, and read again before hitting "send." If there is any doubt how the email will be interpreted, rewrite it or pick up the phone and have a conversation.

E. Conclusion

At the end of the day, a risk management program should attempt to educate employees to consider the ramifications on potential litigation of the things they write. Using examples such as the ones reviewed here helps to reinforce that point. If employees consider whether they would be comfortable with the publication of their writings in a public forum before they write and hit "send" (putting aside business confidentiality), the risks associated with the production of dumb documents in litigation will have been lessened. Ancillary topics to consider include the wisdom of adopting a document retention policy and the dangers of destroying document in the face of impending or pending civil or criminal litigation.

The Beauty of Innovation

BY JOHN B. ROSS

"As an attorney, what you have to sell is your time and your judgment," advised the crusty senior partner of the law firm where I began my legal career. Even though this marketing maxim overly simplifies the attorney's contribution to the client, it effectively underscores one vital point: In our profession, time is extremely important.

Today, in our in-house environments, the bulging river of work places relentless demands on our time. Just take a look at your email inbox, your paper inbox, your calendar (electronic and/or paper), and your "to do" list(s). With these demands come the attendant pressures to be more efficient, to get more done, and to attain the illogical nirvana of "doing more with less."

But wait a minute! In the face of this rising tide of work, we in-house counsel have responded quite well. We have become more efficient, and, in a real sense, we are "doing more with less." Our improvements in efficiency have emerged gradually, like the Grand Canyon slowly rising out of the relentless current of the Colorado River.

In our profession, communication absorbs a great deal of our time. We talk frequently to our legal department colleagues, meet with and send emails to our fellow employees, converse by email and on the telephone with outside law firms, and correspond with our company's customers and vendors. All of this communicating takes time—lots of time.

When I first began my legal career in a law firm in 1979, there were four common avenues for professional communication:

- *Face-to-Face Contact.* A person could meet me in my office;
- *Telephone.* A person could call me on the telephone or leave a message with my secretary;
- *US Mail.* In the days when the mail contained mostly noncommercial correspondence, such as pleadings and letters, the mail's arrival was an important event in the workday; and
- *Hand Delivery.* A courier might deliver important documents by hand.

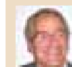
Today, as the result of technological innovations, there are at least six additional channels open for professional communication:

- *Commercial Courier.* Federal Express, UPS, DHL, et al. now bring us packages overnight, which typically contain original legal documents, but which sometimes contain an interesting item, such as a fresh King Cake from New Orleans just before Fat Tuesday;
- *Email Messages.* Typed messages are received through the personal computer, which has been given the impersonal moniker of "PC";
- *Facsimile Transmission.* Once state-of-the-art, the fax machine now is something of a dinosaur due to the "pdf" capability of the PC;
- *Voicemail Message.* Recorded messages are received from people who are not fortunate enough to get us "live" on the telephone. At my office, these messages are now retrievable through our PCs (just don't ask me how);
- *Cellular Telephone.* The ubiquitous "cell phone" has become an essential communication tool—even for children, whose helicopter parents regard it as a security device; and
- *PDAs.* In essence, a personal digital assistant is a very small PC that travels with its owner. It also doubles as a cell phone, if you don't mind talking into a brick.

These additional modes of communication have enabled us to communicate faster and, in most cases, more easily than was the case 25 years ago. For example, in 1980, a letter to outside counsel would most likely have been sent via US mail (n/k/a snail mail); in 1990 that same letter would most likely have been sent via the fax machine; today that same communication would most likely be sent via email—each communication performed in less time than its predecessor.

These new communication tools also have increased that portion of our workday in which we are able to communicate. This leveraging of our time has made us more accessible, more engaged with our organizations, and, presumably, more effective. For example, when I attend an out-of-town meeting, such as the ACC Annual Meeting, I take my Blackberry® (which doubles as my telephone) and, if necessary, I can use a PC at the hotel or an internet café. These tools allow me to be more available to get information, to give guidance, and to communicate my perspective and decisions than in years past. These devices, for better or worse, expand our availability for our day-to-day work.

So if anyone even hints that you or your legal department is not doing enough, simply explain that you and your group are magnitudes more efficient (just for fun, fabricate some statistic, like 187 percent) than your predecessors were just five/ten/a few years ago.

[Postscript: As an attorney, I am keenly aware that there are two sides to every issue, so my next column will explore the harnessing of the beastly aspect of this beauty.] 

Have a comment on this article? Email editorinchief@acc.com.

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Communicating Effectively with Your In-House Client

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Canadian CCU:
New Challenges/New Solutions

November 19-20, The Metropolitan, Toronto, ON, Canada

The in-house bar association.℠

COMMUNICATING EFFECTIVELY WITH YOUR IN-HOUSE CLIENT

1 - Making the Connection

Teri Monti
Director Employee Relations
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Engage in the business

- Participate in key business meetings
- Mingle – water cooler chats can be just as important as strategy sessions
- Conduct and attend roundtables – mutual learning sessions

Be proactive

- Develop opportunities to communicate key legal developments
- Conduct post mortems – prevent the next issue
- Understand that knowing (and telling others) what should be done is much easier than figuring out how to do it

Talk to your clients

- Don't just answer questions – probe for more information and find out what the real issues are
- Never, ever, ever write a blatant CYA memo (or email)
- Use email to communicate information and face to face meetings to discuss and debate

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Have a point of view

- Make a recommendation, and be prepared for debate
- "Own" the legal issues but recognize the common, broader, goal
- Add value – don't just be an interface between the business and external counsel

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COMMUNICATING EFFECTIVELY WITH YOUR IN-HOUSE CLIENT

2 - Handling Legal Risk in collaboration with your Business Partner

Robert W. Bell
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Sharing ownership of legal risk

- Share ownership of the legal risk with your business partners – provide recommendations, be accountable and be creative
- Get fresh perspectives on legal risk issues and corporate risk appetite from key members of your organization
- Understand the risk reporting required of your business partners – can you help with their reporting needs?

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Weigh legal risk in a business context

- Don't focus solely on the law – consider the overall business context and nuances
- Be a valued member of the business team – not just a legal technician – think "big picture"
- Obtain business feedback on risk advice in real time and adapt your message

Avoid perfection / Avoid legalese

- With the luxury of time for analysis – avoid being a perfectionist
- Cull your legal advice before delivery
- Communicate directly and briefly in business language – in person, if possible
- Focus on business implications and mitigation strategies, not law

Risk communication in crisis mode

- In a crisis – get your facts straight first
- Head off kneejerk reactions in a crisis
- Probe the accuracy of known facts and develop better information
- Be a problem solver
- Communicate with all potential stakeholders

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Sizing up the legal risk

- Be an early warning detection system
- Determine what is at stake and the pressure points
- Advise on the potential repercussions of risks identified

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Anticipating legal risk

- Not every legal risk can be vetted by a lawyer in real time
- Anticipate risk and establish risk protocols for business partners and others to follow
- Explain the process to your business partner and agree to share and handle risk in this manner

COMMUNICATING EFFECTIVELY WITH YOUR IN-HOUSE CLIENT

3 – Using Plain Language

Kelly L. Brown
Vice President & General Counsel
Molson Canada

Providing Meaningful Legal Advice

- Three surefire ways to irritate your client:
  - Be vague or inconclusive
  - Make it complicated
  - Forget who your audience is
- How do you avoid these pitfalls and provide more meaningful advice?
  - Use Plain Language!

What is Plain Language?

- **Plain Language** is communication your audience can understand the first time they read or hear it.
- Written material is in plain language if your audience can:
  - **Find** what they need,
  - **Understand** what they find, and
  - **Use** what they find to meet their needs.

Why Plain Language?

Benefits of Plain Language:

- Plain language gets your message across in shortest time possible.
- More people are able to understand your message.
- There is less chance that your message will be misunderstood, so you spend less time explaining it to people.
- If your document gives instructions, your readers are more likely to understand them and follow them correctly.

If people don't understand your message, you may have to:

- Answer more phone calls
- Write explanatory emails or letters
- Resolve more disputes or litigate

Basic Rules of Plain Language Writing

1. Know your client (the reader)
2. Know how the information will be used
3. Organize your ideas
4. Use appropriate words
5. Clear, simple and short sentences
6. Clear, effective and short paragraphs
7. Design
8. Get Feedback

Practical Tips For Meaningful Advice

Meet face to face where possible:

- This allows you to ask questions and have a dialogue
- You may learn a vital fact – needed to give the right advice

If written advice is required:

- Make it simple and use plain language
- Avoid quoting legislation, case law or contract provisions
- Don't fall into the "displaying knowledge" trap
- Your client really just wants the answer

Beware of emails:

- Educate your clients on lawyer/client privilege
- Label your emails as privileged with instructions not to forward

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COMMUNICATING EFFECTIVELY WITH YOUR IN-HOUSE CLIENT

Providing Meaningful Legal Advice Using Plain Language

Kelly L. Brown
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History of Plain Language

- Plain Language movement started in 1970s
  - Government regulation
- Gained ground in 1980s and 1990s
  - Government - all communications
  - Legal and judicial communities
- Jan 1, 1999 Clinton memo mandates Plain Language in all government communications
- Nov 29, 2004 Government of Canada Communications Policy mandates Plain Language in all government communications

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6. Clear, effective and short paragraphs
7. Design
8. Get Feedback

1. Know Your Client (the reader)

- Plain language focuses on the needs of the reader:
  - Tone (formal, informal)
  - Language (formal, informal, legal, industry, terms of art)
  - Length (how much detail?)
  - Format (word, excel, powerpoint…)
  - Medium (email, paper memo, sharepoint…)

2. Know How Info Will be Used

- How people use your document will help you decide how to organize it
  - A quick reference tool?
  - An action document?
  - Is the reader supposed to remember it?
  - Is the reader supposed to agree with your point of view?

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3. Organize Your Ideas

3.1 Serve the Reader

- Tell reader what to expect
- Organize from reader's perspective (must be logical to them)
- Different requirements for different users? Use separate sections

3.2 Be Obvious

- Easy-to-follow and intuitive
- Make it visually apparent by using headings, indents and lists

3.3 Use Structure to Your Advantage

- Self-explanatory title, introduction, structured body and conclusion
- Short paragraphs organized by topic
- Parallel forms of grammar for equivalent ideas

4. Use Appropriate Words

4.1 Use simple, everyday words:

Instead of:	Use:
Accomplish	do
Amongst	among
Ascertain	find out
Disseminate	send out, distribute
Endeavour	try
Expedite	speed up
Facilitate	make easier, help
Formulate	work out, form
In lieu of	instead of
Optimum	best, most
Strategize	plan
Utilize	use

4.2 Cut out unnecessary words:

Instead of:	Use:
In order to/with a view to	to
With regard to	about
In the event that	if
Subsequent to	after
Prior to	before
Despite/Notwithstanding the fact that	although
Because of/in light of/due to the fact that	because/since
Until such time	until
During such time	during
In respect of	for
On the part of	by
It would appear that	apparently
It is probable that	probably

4. Use Appropriate Words

4.3 Avoid Jargon, Technical Terms or Acronyms

- **Jargon:**
  - is trendy and can date your work
  - can be confusing and appear insincere
- **Technical Terms:**
  - avoid words your reader may not know or define them
  - legal terms should be translated into plain language
- **Acronyms:**
  - not everyone will know what it means – when in doubt, spell it out

4.4 Don't Change Verbs into Nouns - Use Action Verbs:

Instead of:	Use:
Give consideration to	consider
Is applicable to	applies to
Make payment	pay
Give recognition to	recognize
Is concerned with	concerns

5. Clear, Simple and Short Sentences

5.1 Keep it short - Average sentence should be 15 words, not longer than 25 words

5.2 Use the active voice

5.3 Use personal pronouns - "I", "we" and "you" personalizes, clarifies and simplifies

5.4 Write in the positive:

Instead of:	Use:
Not able	unable
Not accept	reject
Not certain	uncertain
Not unlike	similar, alike
Does not have	lacks
Does not include	excludes
Not many	few
Not often	rarely
Not the same	different
Not…unless/except	only if
Not…until	only when

5. Clear, Simple and Short Sentences

5.5 Avoid unnecessary preambles

- Unnecessary preambles hide or weaken a point
- For example, do not use:
  - It is important to add that…
  - It may be recalled that…
  - In this regard, it is of significance that…
  - It is interesting to note that…

5.6 Use simplest tense possible – usually present tense

6. Clear, Effective and Short Paragraphs

6.1 Keep it short and simple

- One idea per paragraph, no more than 5 sentences per paragraph

6.2 Put parallel ideas in parallel constructions

- Instead of: The mandate of the policy committee is to *ensure* that procedures are followed, *taking* any necessary actions and *reporting* to management.
- Use: The mandate of the policy committee is to: 1. *ensure* that procedures are followed, 2. *take* any necessary actions, and 3. *report* to management.

6.3 Use point form and lists appropriately

- The items in the list must form a logical group
- Each item should contain one idea and work separately with the lead-in to form a complete sentence
- Put anything common to all items in the lead-in
- Use bullets or numbers to identify each item on the list
- Use commas or no punctuation, put a period after last item
- If list is inclusive, use “and”, if list consists of alternatives, use “or”

7. Design

7.1 Spacing
- Leave space between paragraphs and be generous with margin space
- Divide document into sections of related information
- Use left justified and right ragged margins

7.2 Headings
- Use a clear and consistent style for headings and subheadings
- More than three sublevels is too much

7.3 Highlighting
- Use bullet points for point form lists, italics to emphasize a phrase or word
- Underline titles and use colour or shaded areas to set text apart

7.4 Table of contents
- Make a table of contents for long documents
- Use an introduction section for shorter documents

7. Design

7.5 Font and size
- Choose a solid, plain font which is easy to read (at least 10pt)
- Don't combine more that three different fonts on the same page
- Don't use all capital letters – this is hard to read
- Choose a ***serif*** font for the body of the document - it makes text easier to read because it leads your eye from letter to letter (e.g. Palatino, Times New Roman, Courier…)
- Choose a ***non-serif*** font for titles because it leads the eye downward into the body of the text (e.g. Arial, Century Gothic, Tahoma…)

7.6 Colour of ink and paper
- Use dark ink on light paper - Avoid light print on dark backgrounds

7.7 Graphics and illustration
- Use graphics sparingly – may mean different things to different people
- Put graphics and illustrations as close to the relevant text as possible
- Put them on the page in a way that doesn't disrupt normal reading patterns

8. Get Feedback

- Ask your client:
  - Is this easy to read?
  - Does it make sense to you?
  - Does it suit your needs?
  - What changes do you suggest?
- Respond to the feedback
- Do periodic check-ins to keep on track

Want to learn more about Plain Language?

- Government of Canada Communications Policy: http://www.tbs-sct.gc.ca/Pubs_pol/sipubs/comm/comm_e.asp
- U.S. Government plain language site: www.plainlanguage.gov
- Bryan Garner, ***Legal Writing in Plain English,*** 2001
- Cutts, Martin. ***Oxford Guide to Plain English***. 2nd ed. (New York: Oxford University Press, 2004)
- Bailey, Jr., Edward P. & Larry Bailey. ***Plain English at Work: A Guide to Writing and Speaking***. (1996)