Session 409

Product Liability Selected Topics for the Small Law Department Practitioner

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Program 409

Product Liability: Selected Topics for
The Small Law Department Practitioner

Eaton Corporation's Early Investigation and Evaluation Program

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EARLY INVESTIGATION AND EVALUATION PROGRAM

Bowman and Brooke has performed over 2000 early investigations and evaluations. Under such a program, the client is quickly provided with the facts and analysis which are needed to decide whether a case is a trial or settlement candidate. This program can be performed for a fraction of the cost involved with formal methods of discovery.

Under a typical program, when the client contacts Bowman and Brooke, we immediately initiate an investigation of the case. This can be done by Bowman and Brooke's in-house investigators or independent investigators. In addition, we contact plaintiff's counsel to learn the basic facts and try to obtain counsel's agreement to declare a moratorium on formal discovery for 90 to 120 days.

The information sought from plaintiff's counsel and from the investigation is the same as is typically requested in formal discovery. But when done informally, significant time and money are saved.

Formal reports, witness interviews, identification of liability theories, damage assessments, plaintiff's background and plaintiff's expert opinions are usually accessible during the investigation period. Experience suggests that 90 percent of all facts relevant to evaluating the case will be discovered through an early investigation. The investigation also identifies defense themes to pursue should you decide to litigate the case.

After completing the investigation, Bowman and Brooke analyzes the information and provides the client with a report containing the facts learned through the investigation including plaintiff's injuries and damages, venue concerns, opposing counsel's ability and potential liability. After analyzing the contingencies, we make a recommendation to settle or try the case. Also identified are possible opportunities to terminate the case through motion.

Within 120 days of receiving the case, and without engaging in formal discovery procedures, in our experience, we learn approximately 90 percent of all the facts relevant to the decision to settle or litigate the case. This early identification of trial and settlement candidates saves a great deal of money and time and assists in the efficient use of company resources.

DISCOVERY MORATORIUM LETTER

(Date)

Re: _____ v. Eaton Corporation

Dear (Plaintiff's Counsel):

This will confirm my telephone conversation with you and my proposal on behalf of my client, . My proposal is that we agree to a 90 to 120 day moratorium on formal discovery while we undertake an early investigation and evaluation of this matter with a view towards determining whether this would be an appropriate case to settle. While I do not guarantee that we will consider this case appropriate for settlement, I do give you my commitment to evaluate the case promptly and to explore the potential for settlement.

I *do/do not contemplate having an answer filed, but otherwise would prefer to forego filing of formal discovery or motions for 90 to 120 days, provided that you are willing to do the same. Should you at any time during the moratorium choose to terminate the understanding and proceed with formal prosecution of this case, you would simply need to notify me.

In order to evaluate your claims, we need some basic information concerning the facts of the subject incident, the witnesses, and your client's damages. If you are for any reason unable to supply this information in response to my informal request, I will send a short set of interrogatories and requests for production. Otherwise, I contemplate filing no discovery during the next 90 to 120 days. To the extent that you can get it, the kind of information we need in order to evaluate your case is as follows:

1. Information concerning the present status, VIN and location of the subject vehicle (including its availability for inspection).

2. Information concerning the present status and location of any other vehicles involved in the subject incident (including their availability for inspection).

3. Vehicle repair records, if applicable.

4. Photographs relevant to the subject incident, accident scene, vehicle condition, or any claimed injury.

5. Identity of witnesses and the thrust of their potential testimony.

6. A copy of the applicable police report, as well as medical records. If you do not have records, I would be happy to share records which we obtain if you will supply the authorizations necessary for us to obtain them. Authorization forms are enclosed to make this more convenient for you.

7. Documentation of the nature and amount of claimed special damages or property damage (both past and future).

8. Documentation of the amount of any claimed wage loss and/or earnings impairment, including tax returns (or authorizations which will enable us to obtain them) covering the period from 5 years before the subject incident through the present. Employment and tax records authorization forms are enclosed in case you do not have such records.

9. Whatever information you have concerning insurance claims for damage to the involved vehicle(s).

10. Information concerning the nature and amounts of any settlements with other parties arising out of the subject incident (including copies of any applicable settlement documents).

11. The captions and venue of any other lawsuits arising from the same incident.

12. Identification of counsel for other parties, if any.

14 In order to understand the effects of your client's injuries and the accident facts, it may be very helpful for us to meet with you and your client. This would be "off the record" and without prejudice to a deposition in the event that we cannot see eye to eye at the end of the moratorium period. I would appreciate your giving consideration to this possibility.

15 I would appreciate information concerning your expert's theories and contentions, including a copy of any report you have received.

I believe that this proposal is advantageous to both of us in permitting an assessment of this matter on a timely and cost-effective basis, and I appreciate your willingness to participate. I look forward to receiving whatever you can provide along the foregoing lines, and very much appreciate your cooperation.

Sincerely,

Robert K. Miller

RKM/cjs

Bowman and Brooke LLP

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EATON CORPORATION
CASE EVALUATION

Case Caption:
_____ v. Eaton Corporation

File No.:

Date:

EXPOSURE:

Privileged and Confidential
Attorney Work Product and Attorney - Client Communication

I. CASE EVALUATION

FILE NO.:

II. SCOPE OF EVALUATION

III. JURISDICTION

A. Case History:

B. Venue:

C. Likely Jury Composition:

D. Trial Judge:

E. Workers' Compensation Litigation:

IV. PARTY INFORMATION

A. Plaintiff:

B. Co-Defendant:

C. Unjoined Potential Parties:

V. COUNSEL

A. Plaintiff's Counsel:

B. Co-Defendant's Counsel:

C. Local Eaton Counsel:

VI. FACTS

A. Date of Accident:

B. Accident Location:

C. Accident Description:

D. Summary of OSHA/Workers' Compensation Investigation and Findings:

VII. PRODUCT

A. Product Description:

B. Product History:

1. Date of Manufacture:

2. Location of Manufacture:

3. Ownership History:

C. Warranty, Recall, Service Claim or Repair History:

1. Subject Product Model:

2. Subject Product:

D. Modifications:

E. Current Status/Location:

VIII. LIABILITY

A. Plaintiff's Claims:

B. Plaintiff's Experts:

C. Applicable Law:

D. Defenses:

IX. DAMAGES

A. Injury:

B. Medical Expenses

1. Past:

2. Future:

C. Lost Wages/Earning Capacity

1. Past:

2. Future:

D. Property Damage:

X. EVALUATION AND RECOMMENDATIONS OF COUNSEL

A. Strategy:

B. Expected Verdict Range:

C. Trial Candidate:

D. Case Plan (If Not Settled):

1. Litigation Strategy:

2. Action to Take in Next 90 Days:

E. Case Budget:

F. Recommended Settlement Range:

Dated: _____ BOWMAN AND BROOKE

By_____
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TABLE OF CONTENTS

AMERICAN CORPORATE COUNSEL ASSOCIATION

PRODUCT LIABILITY PRESENTATION

November 4, 1999

by: William A. Barnett

The role of in-house counsel in a small law department is unusual from most any other practice of law. Why? Because you are faced with the responsibility of representing your "client" competently in many areas of the law. On a daily basis you may be called on to handle things as varied as an acquisition, a real estate transaction, a product recall, or the closing on your bosses' new home, or his kid's traffic ticket, auto accident, divorce, etc, etc.

What will help the practitioner in a small law department when it comes to dealing with product liability issues? Experience. Since everyone does not have the same level of experience, it makes sense to cover the basics. I have found that some of the most routine concepts, like obtaining certificates of insurance from vendors, can be the difference between corporate hero, or bum of the week.

I will break up this discussion into several parts. The first being Insurance Coverage. Second, is Pro-active Risk Management programs. Third is Handling Claims and fourth is the concept of In-House Partnering With Outside Counsel. I consider each f these areas to be building blocks for a solid in-house practice for addressing product liability issues.

I. INSURANCE COVERAGE -- WHEN, WHAT, WHY

Even if you are not the risk manager for your corporation, you should be generally aware of the types of insurance policies that your company has, where they are and what they will and will not cover. It does not require a specialized degree in the insurance field to know what coverage you have in the file. Step number one. Make sure you can put your hands on each and every general liability policy (property policies too) available to you. Even as far back as 1920! The chances of your needing that policy may be pretty slim however, if you do need to refer back because of a long term exposure case or a claim that relates back, the likelihood of your insurance carrier having a copy of that

policy are zero. I would even venture to say that getting policies from your carrier within a 10 year range are not great. Without a policy your chances of succeeding in a coverage action are not very good. It is not a bad idea to have all of the policies that you can locate copied, microfilmed and kept in several locations. Some companies will even hire an insurance archivist, it is that important!

An insurance policy will cover a period of time. For most companies, there will be a commercial lines insurance policy that will either be "claims made" or "occurrence form". The distinction can be very important. The difference is when the policy will respond to claims for coverage. An "occurrence" policy will cover certain events, or occurrences that give rise to the claim. The incident giving rise to the claim must have occurred during the coverage period however, notice of the claim may be received at any time thereafter. A "claims made" policy will only respond to claims that occur and are reported within the policy period. Sometimes you will hear of a reference to "tail coverage" that involves acquiring coverage prior to the inception of the policy over a gap in coverage or, adding a period of time that the policy would cover. This can also be referred to as covering the "gap". As a practical matter, when you have insurance you want it to cover the whole time period (similar to release language…"from the beginning of the world up to and including…"), you do not want to leave any periods of time uncovered.

From a product liability perspective, it is important to know the policy limits and deductible or SIR levels. A good start is to determine how much insurance you have. On the declarations page of the (primary, or first layer) policy you will find the amount of insurance. It is important to know whether there is excess insurance over the "primary" insurance policy, and if there is an umbrella policy as well. This will give a complete picture of how much money is potentially available in the event of a large claim. From there you have to know what the company is responsible for paying and when. This may be in the form of a self-insured retention or, deductible. As will be discussed later, there are a number of potential conflicts between an insured and their insurer by virtue of the insuring agreement. If you represent the type of company that

likes to control the manner in which its lawsuits will be handled, settled, tried and paid for then this is an important topic for you. [1]

It is also important to understand the distincitions between SIR's and deductibles. A self-insured retention (SIR) means the insured is responsible for a portion of the risk. It is important because it allows the insured to have control over its own cases. A self-insured would pay defense costs and indemnity up to a certain amount. The deductible concept means you pay the first $XXX and the insurance company takes over. With the deductible program, the insurance carrier is hiring the defense counsel, paying the bill and directing the litigation. When you have a self-insured retention program and have secured the right to select counsel, you are in a position to run the case. This is a preferred route for protecting the integrity of your products and controlling the settlement of claims particularly when you wish to take a position of as liability when the facts and circumstances justify such an approach.

A SIR also insures that your counsel's loyalties are to you rather than the carrier. You will also find that the relationship between in-house and outside counsel is well suited to these types of cases, particularly where there are internal company facts to be developed. In addition, there may be occasions when a dispute exists with the carrier on whether the claim is covered at all. With a self-insured retention and the corresponding right to select counsel, you are moving ahead unencumbered by the concern of having to bring a declaratory action against the same carrier hiring defense counsel.

There are other key issues involving the insurance policy. For instance, why do you have a policy in the first place? The duty to defend language is a key answer but that language may vary from policy to policy. Current comprehensive general liability policies (CGL) state:

"We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend any suit seeking those damages."

The language from earlier CGL policies stated:

[1] See, "Don't Let Your Insurer Take Complete Control in Product Lawsuit", Business Insurance (December 27, 1976) attached).

"The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage even if any of the allegations of the suit are groundless, false, or fraudulent…"[2]

In reference to self insured status, the language of the Self-Insured Retention Endorsement may read as follows:

"The insured, or the Named Insured in the insured's behalf, has the duty to defend any claim or "suit" seeking damages to which this insurance applies and shall be responsible for any "claim expenses" (as defined below). The "claim expenses" incurred by the insured serve to erode the self-insured retention amount(s) stated in the SCHEDULE above."

A few words about the definitions and exclusions set forth in the insurance agreement. Definitions will be found for "the insured", "agents and employees", as well as "occurrence". How these terms are defined will determine the scope of coverage. Sometimes an insurance carrier will substitute the term "accident" for "occurrence". This may serve to narrow the coverage since an occurrence refers to "an event, including continuous or repeated exposure to the same event, that causes harm, including bodily injury, personal injury or property damage. Such harm must be neither expected nor intended from the standpoint of the insured". An accident may be limited to a sudden, fortuitous event. Then there is the question of whether the occurrence was intended by the insured (which would fall under an exclusion), or whether the act was intended but not the consequence that gave rise to the harm.

Exclusions limit scope of coverage. General liability policies typically will exclude punitive damages (involving intentional acts), pollution, Y2K issues, employment practices matters, to name a few. For each of these exclusion areas, volumes can and have been written. These exclusions may also relate to product liability cases. In particular, the pollution exclusion could be used by the insurance carrier as a way to

[2] The Practical Litigator, November, 1994, Ed E. Duncan, Insurance Coverage for the Non-specialist: What Every Lawyer Should Know

avoid covering a product liability claim involving an exposure case by claiming it does not fall under the sudden and accidental language of the policy. While these are only a few of the issues arising out of the insurance policy, they are nevertheless critical. You should make it a point to become familiar with the general liability policies that protect your company.

II. PRO-ACTIVE RISK MANAGEMENT PROGRAMS

As far as pro-active measures are concerned, something as simple as having a Certificate of Insurance or, Vendors Endorsement program may spell disaster or success. This is an example of the type of pro-active program that pays back in big numbers if properly managed. Another pro-active measure is for legal counsel to be a part of the design and implementation process for products and product development, particularly in drafting and reviewing warnings. How many times do the newspapers report that an accident could have been avoided but for replacement of a part that costs a few dollars? Business decisions are often made over economics as well as practicality; however, the legal "angle" should be a constant in the process of conception to production to distribution. Do not overlook the harmful potential of foreseeable accidents.

Vendors endorsements cover liability which arises from the distribution or sale of the named insured's product. The "Vendors Endorsement" is a type of protection for the retailer or distributor of a product that is manufactured by another party. The Vendors Endorsement grants coverage by amending that policy's definition of "persons insured" to include the vendor. The coverage may be granted to all vendors or, a more limited category. A typical insuring clause may read as follows: "It is agreed that the "Persons Insured" provision is amended to include any person or organization designated below (herein referred to as "vendor") as an insured, but only with respect to the distribution or sale, in the regular course of the vendor's business, of the named insured's products subject to the following additional provisions…"

Under the vendors endorsement, there may be coverage issues when the product supplied is merely a component rather than the complete product itself. Similarly,

there may be issues prohibiting coverage when the product supplied by the manufacturer has been repackaged.

Another risk management tool that should be managed well is the "Certificate of Insurance". Certificates are typically on an "Acord" form or, may be generated by a broker's word processor. They set forth the amounts of insurance that the party supplying the certificate has. Typically, it is a statement that "yes, I have insurance and can do business with you…" The Certificate of Insurance has a provision that may provide for the certificate holder to be added as an "additional insured" on the policy of insurance of the party supplying the certificate. The inclusion of additional insured status is a major tool in the pro-active arsenal. If a claim were to arise involving products supplied by that manufacturer, you could call on their insurance company to provide a defense and indemnification in the event of a loss. (Similarly, if your company is being asked to provide additional insured status on a certificate of insurance you should be aware that it then dilutes the coverage available to your company under that insurance policy).

Moving outside of the insurance arena, pro-active product liability risk management can be best enhanced through a review of products and warnings. Legal counsel is often most sensitive to the risks involved when key warnings are left off, minimized or, included incorrectly. If marketing and product development departments are in a rush to get products on line, the potential for legal review, if any, could be an afterthought. This legal review will involve more than just warnings, it should also include a risk benefit analysis.[3]

In chemical exposure cases claims are not often based on defective manufacturing. The claims are most often due to defective design of packaging or inadequate warnings. As counsel, you will need to be sensitive to issues including "human factors-type" matters like size, color, readability of the warnings. Also, you will need to be in a position to address issues like the state of medical knowledge at the time the product was introduced and the impact of federal and state statutes and regulations on

[3] Under Ohio law "a product is defective in design or formulation if, at the time it left the control of its manufacturer, the foreseeable risks associated with its design or formulation as determined pursuant to division (B) of this section exceeded the benefits associated with that design or formulation as determined pursuant to division (C) of this section." ORC §2307.75

the warnings. Often times, regulatory requirements or the state of medical knowledge may change over the life of a product and it will be necessary to explain why the warnings are better now than when the product was first put in the market.

Under Restatement (Second) of Torts Section 402A, comment j, a flawlessly designed and manufactured product may still be unreasonably dangerous if the manufacturer failed to warn the foreseeable user about the product's latent dangers. There is a duty to warn even downstream users of a product based upon issues of either forseeability or, adequacy of the warnings. Suppliers of bulk materials are required to provide sufficient warnings to avoid liability. Where chemicals are involved, these warnings may be in the form of Material Safety Data sheets (MSDS). Thus, it is critical to have a record keeping system in place to account for the history of material safety data sheets, tracking back to suppliers in the event of a claim.

When a product is marketed, the warnings will be scrutinized, as well as the instructions for proper use. This will raise the question about sophistication of the users. One issue is bilingual warnings. Most warnings cases will turn on the facts of that particular case. Language issues may revolve around the company's target users, ethnic makeup of the local workforce, and the nature of the product. In the case of sophisticated users, those who are fully familiar with the risks attendant to the use of the product, the manufacturer's failure to warn about those risks cannot be the proximate cause of an injury to the user. Brown v. Link Belt Division of FMC Corp., 666 F.2d 110 (5th Cir. 1982).

One of the areas of product liability defense work that gives rise to frustration is the varying statutory requirements from state to state and federal to state. It could be a state statute requiring warnings to be in a particular language, however, the federal HAZCOM regulations may require the warnings to be in English (29 C.F.R. Section 1910.1200(g)(2)). Or, there could be a preemption issue. In a case that I was involved in several years ago, the product label was registered with the U.S. EPA under the requirements of the Federal Insecticide, Fungicide, and Rodenticide Act yet the plaintiff challenged the product as not meeting the requirements of the state where the claim occurred. The statute for that state had more stringent requirements than the federal statute.

As is often the case, plaintiff's counsel in a product liability case will argue that if the warnings were adequate, the plaintiff would have known of the hazard and acted to avoid it. But what about the situations that (often) occur when the plaintiff never read the warnings in the first place? A plaintiff cannot claim liability for a warning he never read. E.R. Squibb & Sons, Inc. v. Cox, 477 So.2d 963 (Ala. 1985). There have been numerous studies that show people will ignore even the most explicit of warnings.[4] Therefore, if it can be shown that the plaintiff or the plaintiff's employer routinely ignored warnings it can then be argued that additional warnings would not have been effective.

In the review of warnings and instructions do not overlook the work that others in your industry have done. While you do not want to let the work of others be a substitute for your own good quality work, it can be a guide to determine what standards are being followed in the market.

While warnings are an important component to the fitness of a particular product, the packaging and design can be equally if not more critical. During the design phase of a product legal counsel's input may be important where there are critical areas that are being designed. Also, when it comes to components, the overall cost of the item may increase with an added safety feature, however the decision to eliminate that feature could be a focus of a plaintiff's liability case. The recent jury verdict in California against General Motors by Anderson and Tigner for $4.9 billion was a clear example of how the cost of a fuel tank became the plaintiff's target in their case and the basis for a punitive damages verdict. Plaintiffs in that case claimed that for GM to fix the cars, it would cost $8.59 per car, but to settle individual lawsuits, GM would have only spent approximately $2.40 per GM car on the road. While I would not suggest that company's make a conscious decision to include a lower cost part factoring in the payouts on expected liability claims, I do contend that features may often be modified or eliminated as a factor of cost without the input of experts such as in-house counsel (who are often better able to see the downside risks).

[4]Warnings Issues in Chemical Exposure Litigation by Mark S. Geraghty for the Defense, May, 1999.

III. HANDLING CLAIMS

You know its not going to be a good week when Monday's mail includes a summons or two, and an invitation to join in a product liability lawsuit in some jurisdiction that you never knew existed. You may be the target defendant or, it could be that you are being served at the tail end of the statute and this is a precautionary filing to protect plaintiff's case that is being pursued against other target defendants. Sometimes you are party to a "sue everybody" lawsuit where plaintiff may have used your product, or someone thinks they did but no one knows until discovery or trial.

For those situations where the lawsuit arrives and there was no prior knowledge, the best advice is to move to section four (herein) Partnering with Outside Counsel. When there has been some prior notice of the claim it would have been well advised to resort to the claim review process that should be part of your pro-active risk management program.

Any company that regularly places products into the stream of commerce will have occasions to deal with quality control issues and complaints by customers and other users. I mention other users because they include people who may not have been original the purchasers of the product; sales people and foreseeable and unforeseeable third parties included. How this information is captured and what you choose to do about it will be the focus of this discussion.

If your organization is self-insured (see discussion above), you will be responsible for handling your own claims. The insurance carrier will want to (and you will want them to) be apprised of claims that arise. Sometimes, things come up that are not actual claims. Reports of personal injury or, property damage may come to your company's attention that are not made for recovery of damages. A good incident reporting procedure is recommended. In some regulatory areas like FIFRA, TSCA, OSHA, there are mandatory requirements that also have government reporting components (also, they can wreak havoc on your attorney-client privilege and attorney work product issues).

An early report of incidents provides the in-house practitioner with an opportunity to investigate the incident (potential claim) and develop a file while the information is fresh. One of the procedures that I have found beneficial is to have a third

party investigative service available for conducting full blown incident investigations at a moments notice. The benefit of such an investigative process is multi-fold.

First, a quality investigative service will provide expert assistance in gathering and preserving evidence of the loss. This may include securing physical evidence, photographs of the incident site, the package, damages, and any other factors that may later be important in defending the case. In addition, I cannot stress the importance of obtaining witness statements at the time of the incident. The earlier this is done, the less chance people would have reformulated their thoughts from factual recounting of the events to one that may be more slanted towards prosecuting a claim. Often, this will be after processing through plaintiff's counsel, who also may act as a buffer to reaching persons involved in the case.

It is equally important to obtain this early investigative report in order to make your own determination of the nature and severity of the claim. If you determine there may be liability, you would be well advised to adjust the claim and close it out. The investigative service should be qualified in this regard as well. By immediately attending to the situation, the potential claimant or your customer will see that you take these matters very seriously and are not willing to ignore issues that involve your company or its products. It is a good idea to keep the investigative process going even after you have developed the initial set of facts.

Consider the following scenarios. In the case of a burn claim as a result of the use of a product, the plaintiff has bad looking burns shortly after the the incident. Several weeks later, the investigator follows up by getting the medicals and takes subsequent photos of the claimants she learns that the claimant has completely healed, with no residual scarring. Without the follow up, you may not learn of the real condition of the claimant prior to litigation and discovery. It is a good settlement negotiating tool. In another case, the key witness to the incident provides a very good statement for the defense involving the causation of a fire that clearly contradicts the statement of the plaintiff who alleges your product was the cause and origin of the fire. Investigators were instructed to keep tabs on the witness who left his job and "disappeared". Over the next few years, every 4-6 months the investigators would secure a current location for the

witness. At trial, the investigator was able to locate the witness and the testimony was preserved.

The record keeping of incidents involving products can be helpful for discovering trends that can lead to changes prior to accident or injury. In-house counsel should be part of the periodic review process of these product reports in order to counsel the decision making team on the proper approach to take and, to preserve the attorney client privilege attached to the documents. It is also of great importance, when acting as a self-insured party, to keep loss runs. Loss runs help to identify the existence of claims, the costs associated with the claims to date, and future projections (reserves) for those claims. These costs will include any costs of investigation, outside counsel fees and indemnity payouts. The loss run will also help the risk manager or, litigation coordinator in keeping senior management apprised of the status of litigation matters, one of the key functions of such individuals. In addition to needing the loss history for insurance renewal purposes, often this information is critical for year end audits with financial auditors, lending institutions, analysts, etc.

Once the claim has been received and an investigation started, it is important to undertake a file review and to formulate a litigation plan. While the litigation plan will often be developed with the aid of outside counsel, the in-house expert is in a position to do a substantial amount of case "work up" prior to the assignment to outside counsel. Consider the following issues: what documents will be important for the defense of the claim, who will be the important witnesses (are they still with the company, if not, are they friendly?), what is the company's approach to litigation (aggressive or not), the potential for publicity and factoring in the risk of an adverse ruling in a public proceeding.

In order to establish the correct working relationship with outside counsel and to be in a winning position, you need to be in control of your file. If you have good investigative documentation, and witness/document backup it will go a long ways towards advancing the case.

IV. IN-HOUSE PARTNERING WITH OUTSIDE COUNSEL

The role of in-house counsel has become much more important and vital to corporations as a direct result of competent attorneys making "career" changes to go in house instead of continuing on the "partner" track at outside law firms. This has enabled corporations to take a controlling approach to the defense of product liability claims. With the evolution of the in-house practice, comes the definition of the partnership between inside and outside counsel. If the relationship is adequately defined, it can be the basis for a cost-efficient and effective litigation strategy. Additionally, it will minimize the conflicts that can develop from insurance counsel representation.

The "insurance conflict" is based upon an insurance carrier providing a defense under a reservation of rights. An insurer may choose to defend its insured while reserving its rights to deny coverage after it completes its investigation of coverage issues or, if the evidence later justifies a denial. Most jurisdictions have recognized a potential conflict of interest when an insurer defends under a reservation of rights, but in some jurisdictions an actual conflict is a prerequisite to the insured's right to have independent counsel. Even so, in every jurisdiction, the insured is always the insurance defense counsel's client and said counsel's primary duty of loyalty is to the insured. The following are a few of the questions raised by insurance counsel's representation of the insured: 1. Is the carrier defending under a reservation of rights? 2. Is the amount sued for in excess of the policy limits? 3. Is it possible for part of the claim to be covered, and another not? 4. Does the policy cover one theory of liability, but not another one? See, Moeller v. American Guarantee & Liability Insurance Co., 707 So.2d 1062 (Miss. 1996).

The focus of any defense should first and foremost be the marshalling of resources to defend the claim. Insurance coverage issues and conflicts only serve to distract from that focus. The *selection and direction* of outside counsel is sometimes a matter of art and luck rather than an exact science. Here I would again defer to experience (with outside counsel). Organizations such as The American Corporate Counsel Association can be an excellent resource for references to outside counsel. Many outside firms are well aware of this and make their services available to the ACCA including local chapters (of the ACCA) to capitalize on the networking opportunity for business. The level of experience I wish to emphasize is from the in-house counsel who

have worked on cases through discovery and trial and are able to place their stamp of approval on the reference. Good results in trial are not accidental, but are the result of hard work and competent counsel.

Apart from the issue of selection of counsel is *direction*. As the client, in-house counsel can and should take affirmative measures up front to direct the case handling process. This can begin with the retention of outside counsel letter. The retention letter will come after fee arrangements have been negotiated (and they should be). The retention letter will set forth a few parameters, like travel costs (not flying first class) and other major expenditures being pre-approved. It will also request that a budget be prepared and set forth the oversight function of in-house counsel. This means providing copies of depositions, not summarizing depositions that can be read in house, not billing for more than one attorney at court proceedings, the preferred utilization of paralegals for tasks that do not require an attorney.

Apart from the basics, in-house counsel can be utilized efficiently in a number of areas critical to the handling of the case. First, they can and should attend major depositions and court proceedings, and participate. Corporate counsel can often take effective depositions merely because they have an innate knowledge of the subject matter that outside counsel does not have. As trial advocates, in-house counsel can assert a strong position in front of the court bringing credibility to the defendant prior to the start of trial by virtue of the fact that the corporation has an in-house practice. Most importantly, opposing counsel will know that the use of in-house counsel brings depth of knowledge and economy to the trial table.

An early topic of discussion with outside counsel should be to divide up the duties so that each party can prepare for their function in the handling of the case. In many instances, in-house counsel will do the heavy lifting throughout the discovery process responding to interrogatories, requests for production of documents, gathering documents and expert witnesses, as well as the preparation of internal witnesses for deposition and trial. It is also beneficial for in-house counsel to conduct certain phases of the trial such as direct examinations of company witnesses.

Document control is critical to the efficient running of a case. A lot of time and money is spent on the gathering of documents, collating and copying as well as

Bates number stamping and summarizing of those documents. Preparing large volumes of documents not only will streamline the time and cost factor of utilizing outside counsel, but it will also create a library or resource for handling similar cases uniformly. This process enables outside counsel to focus on the important trial and strategy issues that presumably is why you have hired them in the first place.

Given the importance of being successful in trial proceedings both for economic reasons and product integrity, there is a lot of pressure placed on in-house counsel. The strategies and techniques discussed herein are designed to alleviate that burden through planning, load sharing and best use of resources. If these essential practices are implemented, in-house counsel should find that their job will become easier as they work "smarter".

V. CONCLUSION

In the short amount of space allocated, it is difficult to cover any one subject in too much depth. That may be a blessing for those who, like me, do not have the time to read all of the materials that cross our desks. However, if there are a few good practical pointers that can really affect your in-house practice in the product liability area, then it is worth the time. I believe that by focusing on the four areas presented here: insurance coverage; pro-active risk management programs; handling claims; and in-house partnering with outside counsel, you will improve your practice. It will also bring rich rewards to your company in the way of improved results that are also economically satisfactory.

PRODUCT CAUSED INCIDENT REPORT

CHECK ALL THAT APPLY:
- ☐ Environmental
- ☐ Property Damage
- ☐ Personal Injury
- ☐ Animal Exposure

CORPORATION:
- ☐ _____
- ☐
- ☐
- ☐
- ☐

Claim Number	File Number		
Present Customer? ☐ Yes ☐ No	If Yes, Customer No.	Name of Customer	Sales Representative
Product Involved		Person Reporting Incident	Phone Number of Person Reporting

Name(s) of person(s) or organization affected (INCLUDE ADDRESS)
(For environmental effects, list plant or animal affected or contaminated portion of the environment)

Date of Incident	Sex of Person Affected ☐ Male ☐ Female	Birth Year (or Age) of Person(s) Affected	MSDS in Possession ☐ Yes ☐ No	Date of MSDS

Detail of report received (include route of exposure e.g., swallowing, inhalation, skin contact, etc.; manifestation of health effects e.g. skin rash, burn, nausea, stopped breathing, etc.; treatment given e.g., hospitalization, topical skin care, etc.): ATTACH WRITTEN REPORTS

Employee Receiving Report	Department	Date Report Received	Method ☐ Phone ☐ Written

Follow-up or Additional Comments

If Notification of Claim:	Date Claim Received	Type of Claim (i.e. letter, lawsuit)

RETURN ALL REPORTS TO LAB FOR REVIEW
SEND COPIES TO GENERAL COUNSEL'S OFFICE

This report is meant to inform; it does not confirm or deny any adverse effect.

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- ☐ TSCA Section 8C

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Week of December 27, 1976

business insurance

the national newsmagazine for buyers of employe, property and liability protection and financial services

50¢ a copy; $12 a year

PERSPECTIVE

Don't let your insurer take complete control in product lawsuits

By James A. Freeman
Legal Officer
The Murray Ohio Mfg. Co.,
Brentwood, Tenn.

Editor's note: Mr. Freeman's remarks were delivered as testimony Sept. 30 at the briefing conference on product liability, sponsored by the Federal Bar Assn. and Bureau of National Affairs, as part of a series of meetings on the product liability problem facing industry during that week in Washington.

MY TOPIC IS corporate management's response to the product liability problem. A corporation must first understand the problem and secondly understand its own strengths and shortcomings. From a basis of full understanding responsible corporate officials and their counselors can develop a viable response to the complex legal, manufacturing and financial questions that are the heart of the product liability problem.

The problem of product liability is extremely complex and this complexity has in effect been responsible for the lag in the corporate response. For a number of years we had a situation where companies were virtually immune to product liability actions by consumers. That situation has now altered significantly. Excellent discussions of this evolutionary change were presented by Dean Prosser in his articles entitled "The Assault on the Citadel" and "The Fall of the Citadel".

It is correct to state that the citadel of product liability defenses (principally privity) was assaulted by enterprising plaintiffs' attorneys and socially concerned legal scholars and jurists. However, I would disagree with Dean Prosser's comments that all of the fortifications were stoutly defended. I would advance another theory called "Retreat from the Citadel" as being important in understanding the change that has taken place.

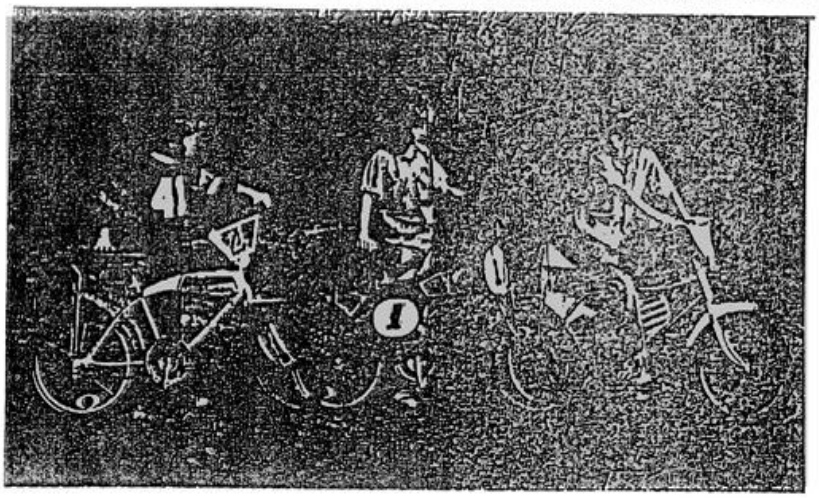
Insurance companies found the complexity of product liability an aid in selling businesses on the idea of delegating control of product liability suits and claims. Insurance companies realized that businesses have a natural desire to concentrate on their primary function of designing, manufacturing and selling products and are reluctant to accept defense of law suits as a part of the business enterprise. Thus when businessmen were told that insurance companies are "better equipped to handle such problems", there was an instinctive desire on the part of businessmen to agree.

I feel history has now proven an insurance company makes a poor representative of the business because the insurance company of necessity has a double consideration. The insurance company must represent itself and at the same time the insurance company is a business whose objective must be to make a profit.

These two factors at times are incompatible because there are instances when the best interest of a business is to take a risk and defend its product while the profit motive of the insurance company dictates that risks be reduced insofar as possible to a certainty thus enabling the insurance company to make correct financial decisions.

The result of all of this has been what I earlier called "Retreat From the Citadel". Insurance companies found it expedient to settle many cases that could have been won in court because they could settle those inexpensively. This approach deprived them of the opportunity to create or reinforce the common law which was favorable to defendants. On the other hand, insurance companies frequently litigate when they cannot settle a case on a basis which seems to them to be economically reasonable. Thus insurance companies find themselves engaged in litigating the cases with the greatest likelihood of producing bad law from the defense viewpoint.

In order to stop the continuing "Retreat From the Citadel" I believe it is essential that businesses and insurance companies



Liability exposure

As Mr. Freeman points out, The Murray Ohio Co. is a metal fabricating company making two very visable consumer products, bicycles and outdoor power equipment.

reevaluate their traditional relationship. Insurance is not all bad. It has the ability to spread the risks in catastrophic situations and it provides an umbrella of protection for small businesses thus allowing greater growth potential. It also offers a way to bring together individuals with cumulative expertise in areas such as quality control, risk management and claim investigation and make their services available to businesses as counsellors. However, they should be functioning with, not in lieu of, the business.

In my judgment, for large and medium sized businesses it is both unnecessary and unwise to rely on traditional insurance programs in product liability matters. Even for small businesses which must have insurance it is unwise to surrender total control to the insurance company. Thus it is my basic feeling that effective corporate management response to the product liability problem dictates that businessmen take control of the situation in the same way they would act to correct a manufacturing or quality control problem.

I would like to turn at this point to a brief case study of what my corporation did to react to the product liability problem. First I want to take a few seconds to tell you about Murray Ohio. We are a metal fabricating company making two very visable consumer products in bicycles and outdoor power equipment. Our sales volume in 1974 was over 160 million dollars with unit sales in the millions both under our own name

and under the private labels of major retailers. Murray Ohio's stock is traded on the New York Stock Exchange.

Until three years ago we had insurance for product claims that may be described as "standard coverage" with a significant loss participation. Under standard coverage we had assurance from the insurance company that we would be consulted about settlements but no assurance that our recommendations would be followed. To date, the insurance company has paid only one loss above our deductible and has only a few other such possible losses pending. The loss that was paid was substantial. However, it was a claim which we recommended be defended since no defect existed and there was evidence the operator was negligent.

In light of those facts, it came as a surprise to us when we were advised our policy was being renewed with a premium increase of almost 100% and a loss participation increase of more than 100%. Our past experience indicated that these changes eliminated virtually all risk for the insurance company while allowing them the use of our money, paid in advance of settlement, to fund claim reserves. The results of an internal study confirmed we had the financial resources and a good enough claim history to expect a cost saving by changing to self-insurance. Also, we concluded that we could expect better claim handling.

To implement the change certain things had to be done: (1) job assignments were altered and people were trained to work in the program; (2) a new policy of insurance was negotiated to provide excess coverage; (3) an agreement was reached cancelling our existing policy, thus avoiding penalty provisions; (4) a contract was signed with an independent investigation agency; and (5) our internal systems and procedures were worked out and documented.

Our operating procedures provide that all claims will be reported to my office for preliminary evaluation and investigation. Some minor claims are settled directly by my office while other claims may be referred to a supplier for handling. This approach involves cost savings not frequently realized under standard insurance as well as bringing greater experience and understanding to the problem in its early stages. To save time claims of a major nature are sent directly to the field office which will handle the investigation. For the same reason the transmittal package includes as much detail as possible. On serious claims we involve a top quality local law firm in our evaluation and handling. When claims become lawsuits, we use the services of this firm (Bass, Berry & Sims—the Nashville equivalent of Covington & Burling) to recommend and retain defense counsel and to assist in supervising the litigation.

This approach provides the necessary manpower flexibility without the need for maintaining an overly large internal staff. My office makes decisions concerning claim handling with input from our investigators and on major claims from our local counsel. Expenditures or potential losses above a certain level (which would necessarily vary with the size of the company) are reported to the accounting department and members of the executive staff so we can get their input in decision making.

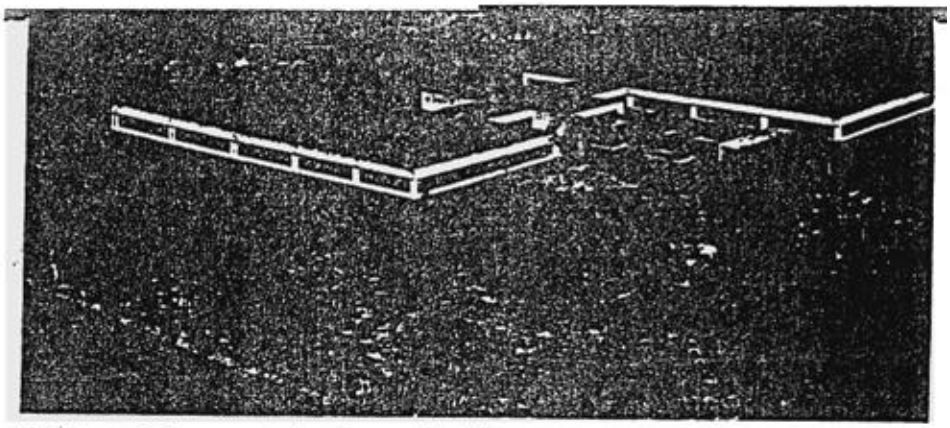
In the area of claim handling we have noticed significant improvements. Our investigators are more conservative than the adjustors involved with our standard coverage. We also find that the investigators, freed of the burden of decision making imposed by standard insurance, are more efficient and more hard-nosed in their evaluation. Results to date indicate costs associated with "nuisance value" settlements have dropped sharply. We have also found that with more information available and more direct contact between investigators and Murray Ohio personnel we have achieved a significant cost decline for major claims.

In suits handled under self-insurance we have also seen benefits. When probable losses are involved, we learn the facts earlier and can act to minimize exposure. Also, we learn when suits are defensible and are thus in a position to act promptly to verify product condition, secure statements and prepare other defense materials. Under standard coverage we found that some defense counsel, saving money for the insurance companies, frequently waited until trial was imminent to begin preparation. They also followed this approach because they felt the insurance company would probably settle. We instruct our counsel to proceed on the assumption that the case

20/business insurance, December 27, 1976

PERSPECTIVE

Defending product suits . . .



The Murray Ohio corporate headquarters' building in Brentwood, Tenn.

settlement. Vigorous pre-trial discovery activity by our defense counsel involves costly legal fees but has produced good results to date.

There are other cost consequences we should note. By giving up a guaranteed maximum cost and relieving the insurance company of its investigation and administrative expenses we were able to secure a drastic premium reduction. By administering our own self-insurance program we are able to retain and use claim reserve funds internally until they are actually paid.

There were also problems in the transition. The assistance of a good insurance broker was required to secure coverage to match our planned system. With apologies to their trademark, my office has been blamed for a tremendous increase in Xerox cost. I don't know whether the charge is true, but I do know that our correspondence has increased tremendously with all of the typing, copying, follow-up and storage problems that involves. Self-insurance also involves time on field work for me and our engineers. Since we now have a direct role in claims we find we are required to travel to more field inspections, depositions and attorney conferences. The time required by these activities is significant and increasing.

Another area of difficulty involved establishing internal reporting procedures to handle the system, satisfy our auditors and the IRS. This increased reporting, while a time consuming job, has served to reinforce our awareness of product claims, their causes and their costs. This awareness has led to more emphasis on our programs related to design review, product testing and quality control. This awareness is something which was in part lacking under standard insurance because the insurance company acted as an insulator or buffer between the company and the consumer.

I have left one item for last because, though important, it is not a tangible item. Part of our decision to go to self-insurance was based on our desire to assert and defend a position of no liability where such an approach was justified by facts and circumstances. It is Murray Ohio's feeling that by taking a harder line in claim handling and by defending suits where we feel we are not liable we will gain both immediate and long term benefits for our company and our industry in the form of better products, a deterrent to frivolous claims and suits and more control over the financial consequences of products liability.

To briefly summarize, the first step for a corporation in responding to the problem is to understand the legal climate. An in house lawyer is ideal for this purpose but retainer counsel or a top executive assigned to monitor legal developments and coordinate the company's product liability response can also work effectively.

The second step is to learn about the company's product liability problems. What are the situations most frequently encountered? Can the situation be improved through quality control or greater design review and testing? A good product is both a way to prevent suits and an excellent defense!

The third step is to learn how cases and claims are being handled and see where improvement is possible. The process starts with claim investigation. No one, and certainly not an insurance adjustor, knows more about a company's products than that company's engineers and service representatives—get them involved in investigation!

A corporation with its large financial and manpower resources is a difficult opponent in a product liability trial. Yet many insurance companies keep the manufacturer out of suits until near the end. A far better approach is to develop a system—whether self-insurance or a true deductible or loss participation with control by the insured—to enable the corporation to employ its assets in the defense effort. In short, the best response to the products liability problem is for corporate management to act from a position of strength!

There is one area of my presentation that is perhaps less emphatic than it should be. I am referring to the need for a partnership or greater cooperation between the business and insurance communities. To do this will require flexability on the part of both entities as well as some innovative and creative thinking, however, by employing to best advantage the strengths of both entities I feel it will be possible to effectively respond to the growing challenge of product liability.

Mr. Freeman is an attorney for The Murray Ohio Manufacturing Co. with general corporate responsibility including patents, credit and collections, consumer product safety and product liability. He administers the company's modified self-insurance system which oversees product liability cases and claims. A graduate of Vanderbilt University and Vanderbilt University School of Law, he is a member of the Nashville, Tenn. and American Bar Assn.'s. Mr. Freeman is a member of the Bicycle Manufacturer's Assn. and Outdoor Power Equipment Institute study committees on product liability and product-related injuries. He frequent speaks on product liability and its relation to business.

PRODUCT LIABILITY LITIGATION: THE ROLE OF INSIDE COUNSEL

I. INTRODUCTION

A. Goals.

1. Excellent work.

2. Cost effective work.

3. Excellent results.

B. The question is not whether inside or outside counsel work together; the question is how and how closely.

C. A close partnership should be welcomed, discussed and manner of implementation agreed at the outset.

II. DIFFERENT ARRANGEMENTS

A. Traditional arrangements.

1. Traditional arrangements range from "let us know how it's going" to monitoring.

2. Include:

a. Monitoring.

b. Decisionmaking on some issues.

c. Discovery participation:

i. Document gathering.

ii. Interrogatory answers.

iii. Locating, interviewing, working with witnesses.

B. Part of trial team.

1. Handling witnesses?

2. Working with experts/other witnesses to prepare them?

3. Creation of demonstrative evidence, e.g., models, videos, mockups?

THE CROWN APPROACH

A. Who is Crown?

1. The company.

2. Size and experience of the Law Department.

3. Types of litigation; caseload.

a. Products.

b. Repetitive issues.

B. Counsel Selection Process.

1. National/regional vs. local teams.

a. Pros- cons- efficiency vs. local knowledge.

b. Consider hybrid "issue counsel."

c. Regular meetings.

2. Retention agreement and standard policies.

a. Crown does not use flat/fixed fee arrangements.

b. Crown does use standards for billing.

3. Reporting/cost requirements.

a. Goals—efficiency and quality.

b. Thirty-day assessment – assess potential and jointly decide level of activity.

c. 120-day reports – standard form covering discovery, damages (workers' compensation), law, strategy, etc.

d. Cost estimates – not to "budget," but to track.

C. Day-To-Day Joint Handling.

1. Overall strategy.

a. Exposure analysis: sooner the better.

b. What impact does case have on company beyond this case?

c. Continuity from case to case.
d. What can we gain by trying/settling?

e. Knowledge of litigation history.

2. Written discovery and information gathering.

   a. Crown legal department/outside counsel jointly handle.

   b. Crown lawyer does final review.

   c. Knowledge of documents and files.

   d. Knowledge of product lines and awareness of product development.

3. Selection and preparation of experts.

   a. Crown selects liability in conjunction with counsel.

   b. Rely on local counsel for damages/medical.

   c. Medical record review system.

4. Selection and preparation of in-house witnesses.

   a. Crown controls and participates heavily: no distraction.

   b. Witness preparation: multiple levels/familiarity.

5. Depositions.

   a. Plaintiff, Crown, and liability experts – Crown lawyer attends.

   b. Fact, medical witnesses.

6. Trials.

   a. Crown lawyer attends.

   b. Technical person is trial representative.

   c. Local Crown participation.

   d. Reporting to insurance carriers.

   e. Working on trial logistics.

   f. Focus groups.

D. Technology Issues.

1. Use of e-mail in communicating with outside counsel.

2. Document/deposition organization.

E. Settlement.

1. Crown's philosophy – "it depends." Factors:

a. Type of case/claim – is it a "repetitive" case?

b. Injury/damages.

c. Venue.

d. Trial counsel and experts (Crown and plaintiffs).

2. Crown attorney often is lead negotiator.

3. "Early" settlement overtures, including pre-filing.

a. 50% of plaintiff's attorneys listen, say they will talk.

b. 10% actually participate realistically.

c. Voluntary—Crown participates but seldom suggests.

4. ADR

a. Court requested/mandated—Crown always participates.

b. Voluntary—Crown participates but seldom suggests.

c. Mediation problems.

F. The Essence of the Partnership.

1. Crown attorney role is as *co-counsel* for discovery, strategy, and preparation.

2. Crown attorney is *client* for settlement, company policy, personnel, cost management issues.

III. AREAS OF MOST FRUITFUL CLOSE COOPERATION BETWEEN INSIDE AND OUTSIDE COUNSEL

A. Strategy.

1. Agreeing on goals.

2. Making "strategy calls" such as forum, witness selections, ADR.

3. Sensitizing outside counsel to concerns about:

a. Publicity and public relations.

b. Effects on other litigation.

4. Settlement (goals, approaches, timing).

B. Discovery.

1. Document collection, production; review of opponent's documents.

2. Answering written discovery.

3. Depositions.

4. Experts.

C. Witnesses.

1. Selection.

2. Preparation.

3. Experts from company and industry.

D. Motion Practice.

1. Discuss and agree upon which motions are worthwhile.

2. Motion for summary judgment decision: not always/routinely; partial summary judgment?

E. Expert Discovery.

1. Obtaining experts from industry/academia.

2. Research information to use with and against experts.

3. Working with expert on development of opinions and testimony.

IV. METHODS OF COLLABORATION

A. Decisionmaking should be joint.
B. Close communications.

1. E-mail and fax are fine, but periodic meetings (at least by telephone) are essential too.

2. Inside counsel should receive copies of all correspondence and pleadings coming in or going out, and drafts of significant papers in time for review and comment.

   a. Inside counsel should make plain what they wish to receive.

   b. Extent to which inside counsel prepares drafts of papers should be agreed upon in advance. The most common area of preparation is responses to discovery requests, such as interrogatories.

C. Division of Responsibilities.

1. It is usually the inside counsel who must, initially, propose or define what the company would like to do, and how. Unless the firm and the client have worked together previously, it is unlikely that the outside lawyer will know the resources and preferences of the client.

2. Unless duties and responsibilities are specifically divided and assigned, partnering will not happen.

3. Assignments between inside and outside counsel have to account for workload and resource pressures.

4. Make decision based not only on costs, but also on efficiencies and importance to the case.

5. Consider videotaping depositions of parties and key witnesses so the general counsel who is unable to attend can see the key witness.

6. Re-evaluate task-sharing as case proceeds (don't just discuss it at inception of the case).

V. Conclusion.

1. Knowledge/communication.

2. Teamwork.

3. Efficiency.