105 Getting the Best Results Cost Efficiently - Working with Outside Counsel in Canada & the US

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Monday, June 26, 2006
4:00 PM – 5:30 PM

Roland E. Olivier

Biography – Roland Olivier

- Corporate Counsel – Hitchiner Manufacturing Co.
- 8 years private practice at 2 of NH's largest firms
  - McLane, Graf, Raulerson & Middleton
  - Hamblett & Kerrigan
- 19 years at Digital Equipment Corporation
  - 11 years in-house counsel, 8 years marketing
- Transactional, high-tech and IP practice in 30 countries worldwide
- Admitted to practice 1978
- LLB Catholic University of America
- BS US Military Academy, West Point

Agenda

- Overview of Hitchiner
- Legal Work Product
- Ethics
- Questions / Open Discussion

Hitchiner Manufacturing Overview

- Privately-held NH corporation
- 3000 employees
- 5 locations (NH, Mexico, France)
- Leading counter-gravity casting company of parts for automotive, aerospace and defense industries
- R&D joint venture with GM
- Worldwide customers, licensees & patent portfolio
- Option to build plant in China

Hitchiner's Law Organization

- 2 attorneys – both report to President
- Roland Olivier (Assistant Secretary to Board)
  - Corporate governance, finance, securities, M&A, government relations
  - Product liability, dispute resolution, litigation management
  - Customer and supplier agreements, antitrust
  - IP prosecution, protection and licensing
  - Support for foreign operations, R&D joint venture
  - Strategic business policies
- Timothy Sullivan (VP Administration)
  - HR, employment, benefits, OSHA, immigration)
  - Environmental law, export / import compliance
  - Assistant Ethics Officer

Hitchiner – Outside Counsel Overview

- Generally retain outside counsel on hourly / project basis
- Pay for only actual expenses incurred
- Counsel selected using personal networks, attorney referrals
- Lead firm – McLane Law Firm (NH TerraLex affiliate)
- Specialists (patents, finance, export/import)
- Local country counsel:
  - Asia (China, Japan)
  - Europe (UK, France, Germany)
  - Mexico
  - TerraLex affiliates worldwide (as needed)

Legal Work Product

- What services do you need?
  - Specialized services (IP, environmental, compliance, antitrust, employment, securities)
  - Transactional services (contracts review & negotiations, M&A, finance, government contracts)
  - Litigation, product liability or compliance support (risk assessment and/or management, dispute resolution, collections, litigation)
  - Local country support (Int'l transactions, disputes, corporate governance, foreign investments)
  - Seminars/training by outside counsel
- What deliverables or information do you need?
  - Do you need access to outside counsel's knowledge base?
  - Legal opinions – Get Them in Writing!
  - Make your requests for deliverables as specific as possible

Legal Work Product

- Make your requests specific
  - Analyze the key facts and issues in-house
  - Determine what is the applicable law / jurisdiction
  - Use the Internet / electronic research to familarize yourself with the applicable legal principles
  - Summarize the situation and facts in a memorandum to outside counsel
  - Avoid using broad questions ("please describe what constitutes force majeure under German law")
  - Ask fact-based questions (e.g. "attached is the force majeure clause in this contract, given the above facts what is the company's liability under this clause? Is legal principle XYZ applicable here to mitigate the damages?")
  - Agree upon the nature, scope and costs for the deliverables
  - Question opinions and findings if they don't pass your "nose test"

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Legal Work Product

- What are your expectations?
  - Consider creating outside counsel policies and procedures policy
  - Establish quality, responsiveness and billing standards
    - Total quality management / Six Sigma principles to deliver value!
    - Seek and implement WIN-WIN cost effective solutions
  - Define who you want to do the work (partners, associates, paralegals, contractors)
    - Avoid paying to train inexperienced associates
    - Avoid paying partners to "manage" relationship or files
- What Information will you give outside counsel
  - Information/training on your company, policies, products, terms
  - Memorandum summarizing your analysis of the facts

Legal Work Product

- How will you get it?
  - Define electronic formats (Word, Wordperfect, .PDF)
  - Email and attachments
  - Sharing via Lotus Notes / groupware products
  - Access via law firm or corporate extranets / intranets
  - Technology (HW/SW) for conducting & managing litigation
- How will you evaluate the results?
  - Evaluation by lawyers, business people
  - Create and use an evaluation scorecard
  - Provide feedback to outside counsel & monitor change (if needed)

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Ethics

- Organization is your client
  - Model ABA Rule 1.13(a) – "lawyer retained by an organization represents the organization acting through its duly authorized constituents."
  - Corporate entity can only act through its agents
  - In-house counsel represents the entity by interacting with its agents (directors, officers, managers)
  - Corporate counsel owes no duty to shareholders, stakeholders
  - Penultimate client for in-house client is the Board of Directors
  - Model Rule also applies to outside counsel

Ethics

- Attorney-client privilege for in-house counsel
  - Has been steadily eroding in US since 1970's
  - Need guidance from outside counsel
    - How to establish and preserve the privilege
    - Is normal in-house counsel work product protected?
    - Risk/liability assessment, internal investigations
      - Memorandum from President or CEO to attorney requesting investigation
      - Internal memorandum announcing request, preserving evidence
      - All correspondence directed to attorney and marked as privileged
      - For sensitive matters, hire outside counsel to preserve privileged info
  - Impact of Sarbanes-Oxley Act, new SEC rules in US

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Ethics

- Model ABA Rule 1.13(b) – Attorney internal "whistleblowing" rule
- Elements to consider before a lawyer questions business judgment of organization's agents
  - Is the act "related to the representation?"
    - In-house counsel vs. outside counsel
  - Is there a breach of a duty to the organization?
    - Duty of loyalty
    - Duty of care
  - Is there a violation of the law?
    - Violation of SEC, state or foreign country security laws
    - Violation of other laws (FPCA, export/import/ITAR regulations, environmental, antitrust laws)
  - Is it likely to result in "substantial injury to the organization?"
    - Mere mistake vs improper conduct

Ethics

- What action should a lawyer take?
  - Lawyer cannot assist a corporate officer to commit a crime
  - Violation of duty to organization
    - Ask agent to reconsider
    - Obtain an opinion from outside counsel and present it to management
    - Report the matter "up the chain of command"
  - Violations of law
    - Lawyer must exhaust all possible avenues to remedy in-house before disclosing confidential information
    - SEC rules adopted under Section 307 of Sarbanes-Oxley Act of 2002 require a lawyer appearing and practicing before the Commission to report credible evidence of a material violation outside the organization of the issuer if a prudent and competent lawyer would conclude it is reasonably likely that a material violation has occurred of federal or state securities laws or a material breach of fiduciary duties under those laws

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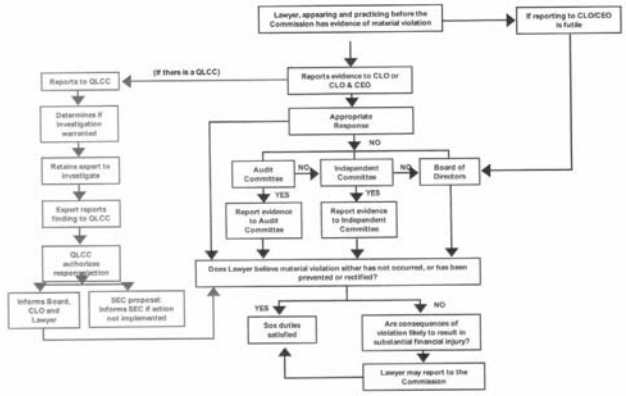
Ethics

- Sarbanes-Oxley Act of 2002 – "reporting up the ladder"
  - Applies to publicly-traded companies, or proposed issuer of securities
  - SOX requires SEC to regulate conduct of attorneys "appearing and practicing before the Commission in any way in the representation of an issuer"
    - Does not apply to "non-appearing" foreign attorneys
  - SEC now expects in-house and outside counsel to serve as "gatekeepers" to maintain fair and honest securities markets
  - Attorneys are expected to report evidence of a material violation of the law
  - Companies should establish a Qualified Compliance Committee (QLCC) to investigate any reported violations
  - Chief Legal Officer (CLO) is expected to conduct a reasonable inquiry regarding potential violations reported by attorneys
  - If there is a violation, CLO or the QLCC must try to get the company to stop or prevent the violations or remedy the consequences
  - Violations may have to be reported by reporting attorney, CLO or QLCC to SEC

Up the Ladder Reporting under Sarbanes-Oxley



Ethics – Establish a Compliance Program

- More proactive corporate governance environment today (Sarbanes-Oxley, Federal Sentencing Guidelines)
- Every US company should establish a compliance program
- Conducting effective risk assessment
  - Meet Federal Sentencing Guide Stipulations
  - Prioritize compliance program initiatives and spending
  - Provide compliance roadmap to reduce material violations of laws
  - Provide legal defense in the event of product liability, civil/criminal proceedings
- 55% of companies use outside counsel to conduct risk assessment

Ethics – Federal Sentencing Guidelines

- Company must adopt compliance standards and procedures (common and business-unique)
- Companies need effective compliance training programs and Board should participate
- Board of Directors needs to know and oversee compliance program
- There must be an appropriate "Tone at the Top"
- Individuals responsible for the program must have effective authority and access
- Program must have adequate resources
- Program should be regularly evaluated
- Approach to compliance should be both "carrot" and "stick"
- Company "hotlines" with anonimity features are required
- Risk assessment drives the program

Ethics

- Outside counsel ethics rules in US
  - See Model ABA Rules in materials
    - Rule 1.7 – Conflicts of Interest: Current Clients
    - Rule 1.8 – Conflicts of Interest: Prohibited Transactions with Clients
    - Rule 1.9 – Duties to Former Clients
    - Rule 1.16 – Declining or Terminating Representation
    - Rule 5.0 - Unauthorized Practice of Law, Multi-jurisdictional Practice of Law
  - Alternative billing arrangements must be in writing, particularly contingency or incentive fees
  - Special rules apply when doing business with clients, accepting stock or stock options for fees in many states
  - State-by-state ethics code variations administered by State Bar Association Ethics Committee
  - Advisory opinions published by State Bar Ethics Committees on specific issues

Ethics

- Conflicts and Waivers
  - Conflicts with current or multi-national clients are a growing problem
  - Conflicts imputed to the entire firm, not just the attorney you retain
  - Conflicts with former clients may not be a problem depending upon the nature of the prior representation
  - Most law firms have an ethics committee that reviews conflicts/waivers
  - In case of a conflict, outside counsel will require a written waiver before representing your company
  - Even if a waiver is signed, most likely outside counsel will not be able to represent either company if a dispute arises between them

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Ethics

- Multi-jurisdictional issues in US
  - Most state bar associations permit in-house counsel to practice law in their company without being admitted to local state bar
  - Many state bar associations will admit experienced lawyers via motion
  - Some state bar associations, like Florida, have specific waiver requirements for in-house counsel
  - In-house counsel must retain outside counsel to appear in any state or federal court where not admitted to practice
- Terminating representation
  - Not every State Bar Association ethics code requires outside counsel to return client's work product and files upon terminating the representation if there's an outstanding balance due to the firm
    - New Hampshire vs. Pennsylvania

Ethics

- International Considerations
  - Local culture can greatly influence practice of law, local management's views regarding ethics matters
    - Mexico
    - Brazil
    - China
  - Common law vs civil law
  - Antitrust laws (US, Canada, EU) governing M&A, joint ventures, marketing, sales and distribution practices
  - Compliance with US laws
    - Foreign Corrupt Practices Act (FCPA)
    - US Export / Import Regulations
    - International Traffiking in Arms Regulations (ITAR)

Conclusions

- Set expectations and standards for work product with outside counsel
- Manage the relationship
  - Build a personal relationship, particularly with foreign counsel
  - Train outside counsel
  - Communicate clearly and regularly
  - Evaluate performance, provide feedback
  - Total quality management – delivering value to your company
- Compliance with ethics, SEC/Sarbanes-Oxley laws and rules, US/Canadian laws
- Consider the impact of local country culture and laws

X. Sample Forms and Policies

A. Proposal For Joining The Dupont Primary Law Firm Network[36]

Date: _____

A. Your Firm And Our Proposal

1. **Description of Your Firm.** We would like to have some background information on your firm such as size, ratio of partners/associates, policy regarding legal assistants, places you recruit, policies regarding associates, how the firm is managed, what you aspire to as firm, strategic plans, overall approach to the practice of law.
2. **The Territory.** Describe the areas within _____ that your firm can service and the range of services you feel you can provide effectively and cost efficiently. If you have branch offices, tell us if you can provide a full range of services from those branches. Our goal is to have as few firms as possible to represent us in -----_____.
3. **Scope of the Work.** Our intention is to retain a firm to represent us with certain exceptions in all DuPont legal matters in _____. We plan to put all of our work in the primary firm, subject to exceptions such as:
   a) Cases currently with other firms which we decide should be grandfathered;
   b) Cases in which there is a conflict of interest which we elect not to waive;
   c) Nationwide series of cases which have already been assigned to national/regional counsel;
   d) Matters placed with other firms in a joint defense effort;
   e) Cases involving affiliated companies such as Conoco and Consolidation Coal;
   f) Cases involving intellectual property rights;
   g) Financial and securities matters.
4. **Volume of Anticipated Work.** The total billings in thousands of dollars on DuPont matters in the defined Territory for the period 1995-1997 are as follows:

   1995 ($M) 1996 ($M) 1997 ($M)

   Admin/Regulatory
   Collection
   Contracts
   Criminal
   Employ/Labor
   Environment
   Intel.Property
   Miscellaneous
   Property Damage
   Personal Injury

5. **Staffing/Conflicts.** Considering the scope and volume of work proposed, describe the staffing you would propose, and how you would handle overload situations. How would you handle a conflicts situation? Do you know of any conflicts?
6. **Diversity.** Diversity is a core value of the DuPont Company and constitutes one of the cornerstones of our convergence program. We want to know about your programs with

respect to hiring and promoting minorities and women. We encourage firms to hire minority and female professionals and to assign them to significant projects, including DuPont work. Please provide statistics and information regarding your efforts and results. Describe how you could assist us in getting certain business to minority firms.

B. Our Needs And Your Expertise

1. We are interested in your expertise in litigation and general areas of legal practice.
2. Describe your resources and expertise in the above areas.

C. The Partnering Relationship

This proposal reflects a significant initiative by DuPont Legal that over time will reduce substantially our outside legal costs through a partnering relationship with selected firms. This is not a one-sided proposal that merely seeks to reduce hourly billing rates. Instead, by establishing long-term relationships with a small number of cooperative firms who learn DuPont's businesses and the way in which we do business, we will be able to implement systems which will allow us to staff and handle matters in the most cost efficient manner possible. We actively solicit your ideas on how to develop such systems and best utilize each other's resources so as to achieve greater productivity and cost reduction consistent with quality results. To this end, we suggest:

1. **Relationship Managers.** James Shomper, Manager of Law Firm Partnering, will work with counterparts from your firm to manage our relationship. We have found that it is most productive to split the responsibilities for managing the relationship at our primary law firms as follows:

Engagement Partner

- enlists firm's Senior Management support
- has influence in the firm
- negotiates fee structures
- leverages the relationship
- serves as foremost external advocate
- seizes marketing opportunities for the firm
- addresses internal compensation to reinforce best in class
- provides strategic thinking
- allocates resources
- promotes technology investment
- conducts annual reviews
- focuses on women/minorities serving DuPont

Account Manager

- handles day-to-day program-related tasks and challenges
- educates others
- applies technology
- serves as primary network communications interface
- participates in annual review
- engages in most network activities
- initiates collaboration with other PLFs and service providers
- writes for external publications
- assists Engagement Partner with advocacy of program within the and elsewhere
- supports supplier usage

2. **Technology.** We expect our primary firms to have, or agree to acquire in due course, specified electronic technology compatible with DuPont's, including the specific areas below.
   a) Use Lotus Notes to communicate via e-mail with DuPont and its primary law firms and suppliers.
   b) Exchange documents for review and revision, etc. using Lotus Notes e-mail.
   c) Actively participate in the KnowledgeBase (see attachment 1 'KnowledgeBase Participation Requirements').
   d) Submit and pay bills electronically using task-based billing codes.
   e) Install the BillWiz software for processing invoices.
   f) Sign DuPont's Corporate Electronic Security Information (ELIS) agreement.
   g) Agree to meet the hardware and software requirements (see attachment 3 'Hardware and Software Requirements').
   h) Have full time Internet access for your firm.
   i) Provide Information Technology staff to work with DuPont on network configuration changes and modifications (see attachment 4 'Circuit, Router, TCP/IP Address and DuPont Server Change Procedures & Timelines').
3. **Case Management.** We have jointly developed with our primary law firms standardized procedures for handling all DuPont cases. The emphasis is on Early Case Assessment within 120 days of case filing which takes into account the potential liability, your knowledge of the plaintiff's counsel and local jurisdiction, business input for the overall strategic approach to the case, and the business implications of the suit. By this process, in-house and outside counsel then mutually agree on the course of action which results in the earliest disposition of the case consistent with the business objectives. Strategic Budgeting will be utilized, but primarily as an input to case management as opposed to an absolute cost control device
4. **Periodic Performance Reviews.** We will do periodic reviews which will include a candid discussion on staffing, quality of services, efficiency in disposing of cases, cost-effectiveness, and areas in need of improvement. These reviews will also include an open and candid assessment of DuPont's support of the primary law firm. We expect to have an annual formal review, but we also believe this should be a continuous process in which the firm and DuPont freely express areas of concern and develop opportunities to increase cost-efficiency and effectiveness on an on-going basis.
5. **Annual Meetings.** We expect all of our primary law firms to attend an annual meeting of DuPont primary law firms and primary suppliers. These typically are two-day meetings and are attended by the firm's engagement partner and account manager.

F. Fees And Billings

1. DuPont is interested in results, not effort. Our long-range goal is to move away from hourly billing where feasible. We believe hourly billing is a disincentive to efficient service, and we welcome opportunities to structure fee agreements that provide for incentives and that reward results rather than time devoted to a matter. We solicit your input on alternative billing arrangements that allow you to deploy your resources in the most cost-efficient manner.
2. For the near term, in consideration for our placing our business with you, we solicit your proposals regarding reduced hourly rates, volume discounts, or other alternative fee arrangements.

B. Request for Qualifications Letter[37]

Joe Attorney
A, B & C, Ltd.
Three First National Plaza
70 West Madison Street
Chicago, Illinois 60602
Re: Request for Qualifications
Dear Mr. Attorney:

From time to time, the American Bar Association ("ABA") requires the services of outside counsel to represent it in intellectual property litigation. In preparation of the assignment of one such matter, we wish to pre-qualify one or more attorneys with expertise in this area.
This letter is a Request for Qualifications (RFQ). We will use the responses to this RFQ to evaluate attorneys on both objective and subjective bases and then intend to develop a short list of attorneys to participate in oral discussions with our General Counsel and senior members of the Law Department. Your strict adherence to the ground rules included in this RFQ will be appreciated and will be an important evaluation criterion.

1. Publicity. There is to be no publicity about this RFQ or the underlying evaluation process. Moreover, if you practice with a firm, no one should be informed of this RFQ or the evaluation process except those with a "need to know" basis so that you may respond to it. Finally, even people in your firm with a need to know basis should be cautioned to strictly abide by the requirements of this paragraph of the RFQ.

2. ABA Contacts. For further information regarding this RFQ your primary contact at the ABA is Michael R. Booden, Senior Associate General Counsel, 312/988-XXXX. In Mr. Booden's absence, you should call Darryl L. DePriest, General Counsel, 312/988-XXXX.

3. No Obligation. This letter is a request for information only. The ABA reserves the right to engage outside counsel or not to engage counsel on any basis that it sees fit. Attorneys and firms engaged may be terminated for any or no reason in the absolute discretion of the ABA. Attorneys and/or firms receiving or responding to this RFQ shall bear all costs of responding and the ABA shall be under no obligation, financial or otherwise, to them.

4. Responses Due. You are requested to submit your written responses to this RFQ no later than 5 PM on XXXX, 2001 by facsimile, mail or e-mail (boodenm@staff.abanet.org).

C. Retention Letter

DuPont Legal
James D. Shomper
Manager, Law Firm Partnering
1007 Market Street, D-7047-2
Wilmington, DE 19898
(302) 774-6403
(302) 774-1398 (FAX)

Date:

Dear _____:
It is indeed a pleasure to send you this letter which sets forth the arrangements under which we will retain your firm as a primary provider of legal services to DuPont in the State of _____.
We at DuPont Legal are very pleased about having your firm join our network of primary law firms and suppliers. It has been an interesting and challenging journey for us these past six years, and with your selection as a PLF we believe we have further strengthened and solidified our network.
As you know from our prior discussions, DuPont's program is founded on three basic goals:
1. Forming long-term strategic partnerships with a select group of innovative and exceptional law firms and suppliers who can collaborate and team with other PLFs to further DuPont's goals and interests.
2. Maximizing the use of technology to increase efficiency and to produce the most cost-effective services possible.
3. Focusing on work processes to increase efficiency and reduce our costs.
From these fundamental goals, critical components of the DuPont Legal Model have evolved including a serious commitment to diversity, early case assessment, strategic budgeting, alternative fee arrangements, and metrics. We believe strongly that the corporate legal industry has changed significantly in recent years and continues to change. We have been on the forefront of that transformation, and together with our PLF and primary supplier network we intend to stay on the "cutting edge". We hope your law firm proves to be a major contributor to that joint effort.
DuPont desires to handle our legal matters in the most cost-effective manner possible, consistent with excellence of service and optimal results. To obtain that objective we have agreed to establish a partnering relationship with your firm whereby we jointly develop systems to allow DuPont to achieve its cost reduction and productivity goals while securing for your firm a profitable relationship with DuPont. We desire that the relationship be flexible and mutually beneficial and that we jointly develop case management systems, which will team DuPont staff counsel with attorneys in your firm. The system that we envision will apply a disciplined, creative and business-like approach to the early, cost-effective resolution of DuPont's matters.
The elements of our partnering relationship are as follows:

Territory

Legal services subject to this engagement letter shall be rendered in _____.

Staffing

Staffing requirements will be based on consultation with DuPont attorneys. Actual requirements will be decided on a case-by-case basis.

Scope Of Services

It is DuPont's intention to retain your firm to represent DuPont in all types of matters. Potential exclusions include: _____.

Fees And Disbursements

Fees and reimbursable disbursements shall be as set forth in the attached Schedule. DuPont's Billing Guidelines from Primary Law Firms are also attached to this letter. We encourage and are open to discussing any proposals you may have for alternative fee arrangements on any specific cases or matters as they come in. Feel free to propose any ideas to the DuPont attorneys assigned to your cases.

The Partnering Relationship

The critical elements of the partnering relationship we seek to establish with your firm involve: a) enhanced communication among DuPont business management, staff counsel and outside counsel; and b) a focused dedication to a case management planning system which is designed to achieve desired client objectives at the lowest possible cost. In furtherance of those objectives we desire to establish a partnering relationship as follows:
Relationship Managers. DuPont's Manager for Law Firm Partnering will be _____. She will have overall responsibility for managing the relationship between your firm and DuPont. You have indicated that you will be the engagement partner for your firm in its dealings with DuPont. Our manager of law firm partnering will be responsible for interacting with you to carry out the provisions of this engagement letter and to work with you to develop new and creative ways to enrich our relationship to our mutual benefit.
Computer Technology. DuPont Legal Information Systems will work with you to identify computer technology, which would make your firm compatible with DuPont Legal's technology. If you do not currently possess that technology, you will acquire it in due course. Computer compatibility is essential to allow us to achieve the following objectives: a) consistent, cost-effective communications; b) share information electronically; c) submit and pay bills electronically; d) develop data bases for legal fees and costs and for other relevant case data; and 3) litigation budget control.
Periodic Reviews. A key element of the partnering relationship is a clear communication of objectives and expectations. Accordingly, we propose that the manager of law firm partnering meet with you periodically to review all aspects of our relationship and to explore additional opportunities to increase productivity and to further reduce costs.
Benchmark Surveys. Each year we expect our PLFs and primary suppliers to complete a benchmark survey that helps us assess the success of the overall program and to identify areas in need of improvement. A copy of last year's survey is attached to give you a sense of the types of inquiries we ask our PLFs to answer each year. This helps us evaluate our programs progress and success and helps us make adjustments as needed.
Network Referrals. We actively encourage the members of the PLF network to refer business to each other from their non-DuPont clients. One of the real benefits to the PLFs from participating in the DuPont Legal Model, among others, is the referral business that has developed within the network. We ask that you track any referrals you receive from others in the network and those that you make to others in the network.
Annual Meetings. We expect you to attend Annual PLF Meetings and occasional interim meetings. They are essential to our program and provide our PLFs with excellent networking opportunities.

Diversity Policy

We have explained to you our policy of promoting full and equal participation in the profession by

minorities and women. In this regard, DuPont encourages the firms with which it is establishing a partnering relationship to hire minority and female professionals and to assign them to handle DuPont work. In addition, we encourage our partnering firms to associate with minority run firms, as well as organizations that provide legal support services. You have indicated that you understand the significance of this policy to DuPont and that your firm is equally committed to this policy and will adhere to it in performing services under this engagement letter.

We have set forth in this engagement letter the principal elements of the partnering relationship, which will be effective as of _____. We view this relationship as a creative and dynamic process to allow both of us to achieve our desired objectives and we would welcome your continued efforts to work with us to improve the process. Although this letter is not intended as a legally binding agreement, we expect it to govern our relationship until modified by either party upon reasonable notice.

Very truly yours,
James D. Shomper
DuPont Legal
Manager of Law Firm Partnering

D. Engagement Letter

Dear _____,

This letter will confirm our firm's representation of [client] in [matter]. We understand that our assignment is limited to [detailed description of scope of representation and specific tasks that will be performed and any tasks that are excluded, e.g., appeals, investigation into insurance coverage, compliance with SEC or IRS requirements]. We look forward to working with you on this matter.

We will be representing [client] in this engagement. We have not been retained by any of [client]'s affiliates, officers, directors, employees, shareholders, partners, subsidiaries, or parent companies, including [any specific individuals or entities]. If we are asked to represent any of these individuals or entities, that representation must be entered into separately and explicitly through a letter such as this. If any uncertainty about our role in this matter arises, we would appreciate your bringing it to our attention so that we can clarify our relationship with that party.

I will be the Partner in charge of this matter, but I may recruit assistance from other lawyers and legal assistants as necessary to provide efficient and cost-effective services. As we discussed, _____ and _____ will also be working on this matter under my direction. We have also agreed that local counsel should be retained for assistance in this matter. [Client] will be responsible for retaining and paying local counsel. We recommend that you enter into a separate agreement with regard to that engagement.

You have expressed your desire that [in-house counsel] be responsible for [describe tasks]. As you like, our firm will rely on you to perform these responsibilities conscientiously and, of course, in accordance with the applicable rules of professional conduct. If we feel that those responsibilities are not being fulfilled to our satisfaction, we reserve the right to withdraw from representation.

Our firm takes ethical obligations very seriously and we trust that you will aid us in fulfilling those duties.

[Our fees will be determined by the time devoted by each lawyer and legal assistant involved and the hourly billing rates assigned to each such person. My current hourly rate is $_____. Our firm's hourly rates range from $_____ for a junior associate to $_____ for a senior partner and from $_____ to $_____ for legal assistants. We periodically revise our rates and we reserve the right to do so from time to time during the course of our representation of [client]. As we have agreed, however, our fees will not exceed $_____ for this matter.]

[Our fees will be determined on a contingency basis. [Client] agrees to pay:

_____ percent (__%) of the total money amount or current value in money recovered or paid to [client] arising from or related to the matter described above if the matter is settled by negotiation and does not go to a hearing on the merits.

_____ percent (__%) of the total money amount or current value in money recovered or paid to [client] arising from or related to the matter described above if the matter goes to a hearing on the merits.

_____percent (__%) of the total money amount or value in money paid to [client] if the matter is taken on appeal or if the matter must be retried in whole or in part.]

[We have received your check for $_____, which will serve as a retainer. We will deposit that money into our client trust account, which our firm maintains in accordance with the applicable rules of professional conduct. We will apply that money against our fees and costs in this matter to satisfy our monthly billing statements, copies of which will be sent to you for your files. Any money left at the close of our engagement will be returned to you, without interest. If the retainer reaches

a balance of zero, we will advise you and you will pay all further billing statements on receipt.]
Our firm will incur costs associated with your representation. These costs may include charges for such items as long distance phone, delivery, copies, facsimile, travel, filing fees, court reporters, translators, and experts. In some cases, the charges for these costs may differ from the actual, fully-absorbed, out-of-pocket costs incurred by our firm for these items. You have agreed to reimburse us for these costs, which will appear on our billing statements. You have also authorized us to retain any consultants or experts that we feel are necessary to advance your interests in this matter. In the event that the charges from these (or other) outside vendors exceed $____, we may submit those bills directly to you for payment.
Our billing statements will be sent to you monthly and are payable on receipt. If after ____days we have not received payment, we reserve the right to suspend performance until all outstanding fees and costs are paid, consistent with applicable rules of ethics.
As we have discussed, the fees and costs that will accrue in our representation of you are unpredictable as is the outcome of this matter. We may from time to time give you our opinions on estimated costs, the likelihood of success, and the strategy we will pursue. These statements are our opinions and are based on the information available at the time; you should not take these statements to be guarantees or promises.
We have agreed that our firm will not disclose any of [client's] confidences or secrets except to the extent necessary to further [client's] interests. All media statements and requests for information will be forwarded to you for disposition.
[Our firm represents many other clients, and as we have discussed, some of those clients may have interests adverse to yours. Specifically [disclose all current and prospective conflicts, including name of client and nature of conflict]. As we have discussed, you have expressed your desire for our firm to represent you despite these actual and potential conflicts. You have agreed that you will not seek to disqualify our firm on the basis of these conflicts and consent to our representation of those interests that may or do conflict with yours. [We have agreed that we will not assign the same people to staff your matter as matters of clients whose interests may be adverse to yours.]]
You may terminate our representation at any time with reasonable notice. Terminating our relationship will not discharge your obligation to pay fees and costs incurred before termination and those incurred thereafter in the transition of the matter. [In the event that you terminate our representation, we will return to you all of your papers and property upon receipt of payment for all outstanding fees and costs.] We will retain our own files associated with this matter, which include drafts, notes, internal memoranda, legal and factual research, administrative records, time and expense reports, accounting records, and personnel materials. [Our firm has a file retention policy. At the conclusion of this matter, we will retain your files in accordance with the policy in place at that time. If you would like documents returned to you, please so notify us.]
We may withdraw from representing you if you breach this agreement in any way, including by failing to pay our fees and costs, or with reasonable notice to you, or as the applicable rules of professional conduct require or permit.
In the event that a dispute arises regarding any aspect of the relationship between [client] and our firm, we agree that that dispute will be subject to the laws of _____ (without regard to the choice of law principles thereof) and will be venued in _____. Our firm and [client] also agree to consent to the jurisdiction of _____ in any such dispute.
Finally, we understand that [client] will cooperate fully with our firm in this matter.
If this letter correctly reflects our mutual understandings, please sign and date this letter and return it in the envelope provided. We appreciate the opportunity to provide these services to [client] and are pleased to be able to continue the relationship between [name of firm] and [client]
Very truly yours,
[firm lawyer]
The foregoing correctly reflects [client's] understanding and the Firm has [client's] consent to take action in accordance with this letter.

_____ _____
[client representative] [date]

E. Outside Counsel Engagement Letter

[Date]
Lead Outside Counsel Name
Law Firm Name
Address

Re: [Matter Name]

Dear _____:
This letter will confirm that [XYZ Company] has asked you to represent us in the above matter. In connection with your representation we have asked you to [describe scope of the engagement].
With this letter I am sending a copy of our Outside Counsel Policy. Except as set forth in this letter, or specifically agreed to by me, the Policy will govern your representation of [XYZ Company] in this matter and all subsequent matters in which you are retained. We have agreed that you will be the lead outside counsel on this matter and will be responsible for ensuring adherence to the Policy. I [or name of appropriate inside counsel] will be lead inside counsel on this matter. We believe that providing you with a clear statement of the principles which apply to your representation of [XYZ Company] will assist us both in providing effective, high quality legal representation responsive to the needs of the company. I urge you to raise any questions you may have about the Outside Counsel Policy with me or [other lead inside counsel] at the outset.
We have agreed that you will be compensated for your work on this matter [insert fee arrangement]. [If fixed-fee billing and budgeting applies, we have agreed that you will prepare [a] task-based budget[s] (monthly, quarterly, for all the work necessary to complete this assignment, for each phase of this matter) for my approval.] We have agreed that you will submit your bills [monthly, quarterly, or at the completion of this matter].
We have agreed that the attorneys and staff who will work on this matter are:
Name
Name
Billing rate
Billing rate
I look forward to working with you on this matter. Please confirm that you have received and agree to abide by the Policy by returning a signed copy of this letter to me at your earliest convenience.
Very truly yours,
XYZ Company Attorney
We have received XYZ Company's Outside Counsel Policy and agree to be governed by that document's terms in our representation of [XYZ Company] and its affiliates.
Law Firm Name
By _____
Lead Outside Counsel

F. Outside Counsel Policy-Billing Requirements and Disbursement/ Expenses Summary

I. General Requirements

A. Engagement Letter (III.A) Required for all matters where fees likely to exceed $Xx,000.
B. Lead Inside Counsel (III.B) Responsible for all substantive decisions; outside counsel to keep informed; provide all documents to inside counsel for review.
C. Retention of Local Counsel, Consultants, Vendors (III.D) Pre-approval required for all retentions; - outside counsel policy terms apply.

II. Billing Requirements

A. Billing Rates (VII.C). In effect for entire matter unless written approval 60 days in advance.
B. Staffing/Billable Time (VII.E)
   1. No more than 2 attorneys at meetings, negotiations unless pre-approved.
   2. No firm paralegals unless pre-approval (III.B)
   3. More than 12 hours per day by one member outside counsel staff closely reviewed
   4. Internal conferences more than 10% total monthly billings closely reviewed
   5. No billing for travel time, clerical work (filing, date stamping, indexing, making arrangements)

III. Budgeting/Billing Requirements

A. Task Based Budgeting and Billing(VII.D) Required for all matters where fees will be greater than $XX,000
B. Billing Timing/ Contents(VII.F)
   1. Bills to be rendered monthly within 30 days after end of month.
   2. Detail of fees by lawyer, paralegal, number of hours by task, description
   3. Expenses/disbursements detail and charges by category

IV. Expenses/Disbursements

A. Non-Reimbursable Overhead (VIII.A)
   1. Computer, e-mail, word processing charges
   2. Conference room charges, rent
   3. Supplies
   4. Library use, staff
   5. Clerks
   6. Proofreaders charges
   7. Meals (except during business travel)
   8. Taxis and limousines to and from firm office (even at night)
   9. Support salaries, overtime
   10. Local telephone calls
   11. Fax charges
B. XYZ Preferred Disbursement Vendors (VIII.B) XYZ legal staffing, court reporting, duplication, scanning/coding vendors must be used; XYZ will not pay any firm mark-up/ad-

ministrative charges.

C. Travel (VIII.C)
1. Airfare. Coach only fare in U.S., within Europe, Asia, Latin America; business airfare maybe reimbursed U.S. to/from Europe, Asia, Latin America with pre-approval.
2. Rental cars Mid-size cars only, no limousines, hired cars unless pre-approved.

D. Meals/Accommodations (VIII.D)
1. Hotels: Use reasonable judgment
2. No personal/incidental expenses reimbursed.

E. Telephone/Facsimile/Photocopying (VIIIE)
1. Photocopying: $0.10 per page or firm's actual annualized per page if lower.
2. Telephone/ facsimile: No local call charges, toll charges only for outgoing transmissions, no charges for incoming faxes.
3. Messenger services: Only actual charges.

F. Computerized Research (VIII.F) Actual charges only without firm mark-up, admin charges; use XYZ password when provided.
1. Secretarial time, Word processing (VIII.G) No charges for secretarial, word processing charges, including overtime.

G. Policies and Billing Requirements for Outside Counsel
NPR Policies and Billing Requirements for Outside Counsel
1. To minimize misunderstandings, outside counsel should share these policies and billing requirements among all firm personnel working on NPR matters.
2. Outside counsel is engaged for NPR by its Office of the General Counsel, and an OGC attorney will manage the engagement. Others at NPR do not normally have authority to expand or contract the scope of the engagement or otherwise to manage the rendering of legal services to NPR. If someone other than an OGC lawyer requests a change in the scope of services to be rendered, before beginning any change in the scope of work you must inform the OGC attorney managing the work of the request and obtain his/her approval of the change.
3. All billing statements for legal services shall be supported with details of the work performed. The details to be included are:

A. A narrative description of the work performed for each specific task by the attorney or paraprofessional performing it. Daily "block" billing descriptions will not be sufficient. The description should state clearly the nature of the task performed and allow us to see why it was necessary.

B. he name or initials of the person undertaking the task.

C. The time spent on the task described, in at least tenths of hours (every six minutes).

D. A summary by each attorney or paraprofessional providing services during that month (or other billing period), showing (a) the total time spent by that person, (b) the billing rate for that person, and (c) total charges for that person

4. Where more than one attorney or paraprofessional is involved in the same work project - such as writing a brief or attending a meeting or deposition - the details in the billing statement should make clear why the other person or persons' presence was necessary.
5. NPR cannot afford to finance training of lawyers or paraprofessionals working on our matters. Persons participating in the matter must in all instances be rendering valuable services based on existing expertise commensurate with their billing rate.
6. NPR when it hires outside counsel expects to be engaging lawyers who are already highly skilled specialists in the subject matter for which legal services are sought. It should thus be rare for legal research by outside counsel to be needed. Before undertaking legal research, therefore, approval should be obtained from NPR. In cases where it is impractical to obtain approval, NPR should be informed as soon after the fact as possible.
7. Discussions or conferences between or among attorneys should be minimized and should only be undertaken when that is the most efficient means possible to convey or obtain information. Billing descriptions for such conferences should indicate why a conference was needed. An entry "Conference with ABC re status" is not a sufficient explanation.
8. Billing shall be undertaken monthly, unless the total amount due is less than $500. The billing statement should be sent no later than twenty days from the end of the billing period. This is necessary for our budget and matter management.
9. Each disbursement shall be billed at actual out-of-pocket cost. No mark-ups or administrative fees may be added.
10. Computerized legal research should not be undertaken without NPR's prior approval. NPR has a special arrangement with Lexis/Nexis that may well be available to outside counsel working on NPR matters.
11. The costs for meals for personnel while working, or for transportation between the office and their home, shall not be charged to NPR.
12. Billing for photocopies should not exceed eight cents per copy (unless you can show us that your actual cost exceeds that). Moreover, the number of copies should appear on the billing statement.
13. NPR may not be billed for receipt or delivery of facsimile transmissions (other than any actual long distance telephone toll associated with the transmission), or for computer or word processing printing charges.
14. NPR will not pay for either secretarial (including word processing) or inside messenger services, or any overtime, unless there is prior written approval.
15. Paraprofessional time billed should not include tasks that are more appropriate for clerical or secretarial personnel, such as stamping or numbering documents, indexing or tagging exhibits, organizing files or reproducing documents.
16. No single disbursement in excess of $500 may be incurred without our prior approval.
17. NPR may find it necessary to impose other billing requirements and policies during the engagement as appropriate to manage the matter properly. Prior notice will be given and the matter discussed with counsel if this is deemed necessary.

NPR encourages outside counsel to put to us promptly any questions about either the above requirements or our billing expectations. We believe that the best way to avoid misunderstandings over billing is good communications. We are committed to payingquickly those billing statements that conform to these requirements.

H.Conflict Waiver Letter

[Date]
[Name of Lawyer Requesting Waiver]
[Outside Law Firm Name]
[Address]
Re: [name of case or transaction for which waiver is requested]
Dear [outside lawyer]:
This letter is in response to your request for a waiver of a [potential or actual] conflict of interest in connection with [law firm]'s representation of [other client's name] in the above referenced matter. We have no objection to such representation subject to the following conditions:

1. [Other client name] agrees not to object to [law firm]'s continued ability to represent XYZ COMPANY or its affiliates on existing and future matters; [and]
2. [Law firm]'s representation of [other client] will not involve the assertion against XYZ COMPANY or any of its affiliates of a claim of fraud, misrepresentation, or other dishonest conduct .[; and]
3. [Law firm] is representing [other client] for the sole purpose of [describe limited engagement to which XYZ COMPANY is consenting]and it is understood that XYZ COMPANY reserves the right to claim a potential or actual conflict of interest and take appropriate action regarding any other matters including broader representation of [other client] with reference to this matter. [; and]
4. [(Law firm) personnel providing services to (other client) in connection with this matter will not be among those concurrently providing services to XYZ COMPANY or a XYZ COMPANY affiliate; and]
5. [(Other client) has been informed of the conditions set forth in this letter and has agreed to these conditions.]

[Please sign this letter and have it signed by a representative of [other client] and return it to me if it is acceptable to you.]
Very truly yours,

XYZ COMPANY Attorney
Received and agreed to:_____
[Attorney at law firm] _____
[Other client representative]

I.Sedgwick Outside Counsel Guidelines

Control And Handling Of Litigation
The cost of litigation has risen dramatically in recent years. Sedgwick, like so many corporations, has added litigation experts to oversee and manage litigation, and has been compelled to seek improved ways to plan and budget its cases. You will be working with me or my staff to develop strategy, assess our exposure and evaluate settlement potential. Your firm will be responsible to the Sedgwick Legal Department. All decisions regarding litigation strategy, discovery, settlement and trial are to be made at the direction of or with the prior approval of the Sedgwick Legal Department. Although you will often have direct contact with Sedgwick personnel regarding the facts underlying a particular file, various Sedgwick personnel may provide input regarding litigation strategy; final decisions on all litigation matters must come from or have the prior approval of the Legal Department.
Our methods of planning and controlling these costs are the defense plan and the case budget. These help us project not only our legal fees, but other costs of litigation as well, such as the time executives and other employees may have to devote to case management. Accordingly, we will need to work with you to develop an overall litigation plan which is both result-oriented with respect to a particular case and cost effective.
Defense Plan And Case Budget
Following the assignment of a new case, your firm, in consultation with us, should develop a defense plan and budget for this litigation. We require the defense plan and case budget within forty-five (45) days of your being assigned the case. The defense plan should provide the following:

- Brief factual summary noting key issues or areas of inquiry;
- An assessment of exposure, i.e., whether coverage exists or is absent and dollar value range of potential damages;
- Anticipated future activity;
- Resolution strategy.

The budget should include anticipated disbursements as well as time estimates and fees for local counsel and experts. The case budget should be your best estimate based upon your experience. We do not want you to deliberately estimate high so that you can "look good" by coming in lower than your estimate. Nor do we want low estimates, accompanied by "cost overruns". Obviously we want you to strive for consistency between estimates and actual billings.
We understand that litigation has elements of unpredictability, and we do not expect clairvoyance. However, when the unpredicted events occur we want you to think about the impact on the case budget and make appropriate revisions. Thereafter, for active litigation matters, monthly reports should be made noting significant developments, revisions of the initial assessment, changes in strategy and budgets, etc. For non-litigation or inactive litigation matters, such reports could be on a quarterly basis. Sound judgment should be used in the time spent on a defense plan and case budget. If it is apparent that the case should be settled early or could be dismissed on motion without discovery, please discuss the recommendations with the supervising in-house attorney before embarking on these analyses.
Sedgwick expects to resolve cases as expeditiously and economically as possible without jeopardizing its position on legal issues of significance and important policies, practices and principal. Accordingly, immediate and continuing efforts should be made to identify cases for early disposi-

tion as well as cases that could be handled more effectively through mediation, arbitration or other means of alternative dispute resolution. Critical to this identification process are the early communications with opposing counsel to establish a precise nature of plans against Sedgwick and early internal investigation and development of facts. Whenever appropriate, dispositive motions should be used early in the litigation to efficiently eliminate meritless claims.

Consultation with and approval by the supervising in-house counsel is required before making any substantive motion, conducting discovery whether in the form of interrogatory, document demands, requests to admit, depositions, or filing any claim, counter-claim or cross-claim. All draft memoranda of law pleadings and other work products shall be forwarded to the supervising in-house counsel early enough to enable consideration, comment and approval.

All settlement proposals and requests for settlement authority must be submitted to in-house counsel. No settlement discussions may be entered into without the approval of Sedgwick Counsel.

Contact With Sedgwick Personnel

Generally, the Legal Department will exclusively communicate on behalf of Sedgwick with outside counsel. We recognize the time constraints of discovery deadlines or trial preparation may make it impractical at times to channel all communication through the in-house attorneys. When it is necessary for outside counsel to work directly with Sedgwick technical personnel who are consulting on a case, it is essential for outside counsel to keep in mind the need of the in- house attorneys to be advised promptly what has been discussed. Accordingly, it is the responsibility of outside counsel to advise the in-house attorneys as soon as possible the nature of any direct communications with Sedgwick personnel. Copies of all correspondence and documents sent to Sedgwick personnel must also be sent to the in-house supervising attorney. We also expect our phone calls to be returned promptly.

Please carefully and thoughtfully review discovery requests prior to sending them to the in-house supervising attorney and the Sedgwick colleague who will be drafting responses, and identify those items to which you will object and those which will require an answer. You should also advise on protective orders or stipulations for trade secrets or other confidential information. These discovery requests should be forwarded with sufficient time to prepare responses. No document should be produced without a thorough review by an attorney familiar with the case or without consideration being given to a protective order or stipulation where appropriate.

In order to speed up discovery matters, outside counsel should send additional copies of the following types of data directly to the in-house attorney and to the Sedgwick technical colleagues who are assisting in the discovery:

a. Significant deposition transcripts;
b. Requests to Sedgwick for answers to interrogatories and requests to admit;
c. Answers of other parties of interrogatories (with the interrogatories if they are not restated in the answers).

Please do not prepare deposition summaries as a matter of routine without first discussing the matter with the responsible in-house attorney. Where you and the in-house attorney concur that you should prepare a deposition summary, it should be concise, setting forth only the relevant testimony, your impressions of the witness, and how the deposition of that witness affects our liability posture and our strategy in the case.

Conflicts

Outside counsel shall undertake a thorough search of conflicts of interest immediately after being contacted to represent Sedgwick in any matter. Any actual or potential conflict must be discussed with in-house counsel at the time of the engagement or as soon as the conflict becomes known. Sedgwick is comprised of all the entities appearing on the enclosed organizational list. It is essential that you recognize the scope of Sedgwick's domestic organization when investigating potential conflicts of interest. Prior to your representation in the matter, please advise us if your firm is presently representing or if your firm has ever represented a client in any matter in opposition to any of the Sedgwick entities appearing on the attached list. In the event a current conflict exists, we request that you notify us immediately. Should you later become aware of potential conflicts that may arise please provide us with all necessary information as soon as possible so that a timely decision regarding the retention of counsel can be made. Notice and waivers of conflicts must be acknowledged in writing.

Staffing

We have selected you to represent us because of your expertise and because we have confidence in your ability and judgment. Consequently, you should be personally in charge of any matter you are handling for us from beginning to end including the billing. If you contemplate anyone else assisting you in this matter, including a paralegal, please consult with us in advance as to the experience of the persons you anticipate assisting you, your anticipated involvement and the billing rate(s) of the people involved. We also ask that you counsel with us if a change in staffing is contemplated. If the change becomes necessary because of the firm's needs, Sedgwick will not be billed in start-up costs of educating the new person in the case. Also, Sedgwick will not pay the billing rate for more than one attorney when two or more firm attorneys meet to discuss Sedgwick's case. We trust that you will attempt to minimize legal expenses by relying on a junior attorney or legal assistant for less demanding tasks, rather than yourself, where their skill and ability would result in more effective economical efforts. However, we know that duplication and inefficiency can sometimes be avoided by a few hours of your direct effort.

Legal And Technical Research

We expect to be billed only for that legal research deemed necessary to defend Sedgwick's interests. With the exception of legal and other research for an initial report and evaluation of liability and exposure in a new matter, any such legal research and the need for any written memoranda or opinions based thereon must be authorized in advance by the supervising in-house attorney. We require that a copy of any significant legal memoranda or opinions be provided to the supervising in-house attorney. Sedgwick will not pay for and expects not to be billed for legal research to educate attorneys in basic fields of expertise on the basis of which the firm is chosen.

Billing/Check Request

We require detailed monthly bills. The bills should include:
the name or initials of the attorney handling the matter;
the date of service and time allocated to the service,
a full description of the service rendered and the billing rate of the attorney and of attorneys in addition to those in which we have agreed, it would be helpful if the explanations were included along with the billing.

Disbursements for extensive computerized research services, extensive copying, computerization of documents and the like will not be reimbursed unless approved by us in advance. Disbursements should not include charges for routine secretarial work or processing or office supplies. Disbursements for overtime should be charged only if required for client effort and not because of other firm or personal priorities or interest (e.g., charges for an attorney working nights or weekends necessitated by another client or bar activities during the business day should not be chargeable to us).
We will reimburse you for necessary photocopying and other expenses at your cost. We do not authorize and will not generally reimburse for first class air transportation, luxury hotel accommodations, and lavish meals. All out of town travel must be approved in advance. Sedgwick will compensate for time spent in transit. However, if work is done for another client in transit we will not reimburse for transit time. If travel time is devoted to working for one or more clients in addition to Sedgwick, we should be billed only for the proportionate time period. Time away from home or the office which is not in transit or spent performing legal services will not be compensated. Sedgwick will reimburse only for coach class travel unless unusual circumstances justify otherwise. We do not reimburse for normal secretarial services such as time spent in filing, file indexing, typing, clerk filings, and the like unless we are informed in advance as to the reason. Disbursements should be charged only if required for client effort and not because of other firm or personal priorities or interest. Major disbursements must be agreed to in advance (e.g., expert's fees, extensive microfilming, computer use, document retrieval, etc.). Please do not bill us for support staff overtime unless we have agreed in advance.
We will reimburse you for necessary photocopying and other expenses at your cost. We do not expect to be charged for courier service or other expedited mail delivery where the urgency was created by last minute preparation not caused by Sedgwick. Invoices should be addressed to the attention of Peter Marchel, Assistant General Counsel and Professional Liability Risk Management and Litigation Director. We trust that you will find the above acceptable. Should you have any questions please contact Peter Marchel at (901) 684-3894.

_____

Name & Title

J. Performance Evaluation Letter[38]

PERFORMANCE EVALUATION WITH OUTSIDE COUNSEL

FIRM:_____ DATE:_____

Coordinating or Lead Partner:

Number of Matters Currently Being Handled:

Number of Firm Attorneys Handling Matters:

PERFORMANCE CRITERIA	This Eval.	Last Eval.
1. LEGAL KNOWLEDGE/SKILL/EFFORT/RESULTS (Overall)		
a. Results	_____	_____
b. Legal knowledge/expertise	_____	_____
c. Quality of service/advice/counsel	_____	_____
d. Professionalism	_____	_____
2. MATTER/CASE MANAGEMENT & ADMINISTRATION (Overall)		
a. Efficient staffing of cases	_____	_____
b. Cost consciousness & control; working within budget	_____	_____
c. Cooperation with other legal services providers	_____	_____
d. Organization & planning	_____	_____
e. Timeliness of work product	_____	_____
3. USE OF SYSTEMS, PROCESS & TECHNOLOGY (Overall)		
a. Timely & detailed case plans and budgets	_____	_____
b. Timely & detailed invoices	_____	_____
c. Use of e-mail for communication	_____	_____
d. Sensitivity to cost issues - expenditures, experts, travel, lodging, service providers	_____	_____
4. COMPLIANCE WITH SET GOALS & PROCEDURES (Overall)		
a. Timely delivery of documents	_____	_____
b. Timely delivery of legal research studies & memoranda	_____	_____
c. Securing approval when appropriate or required	_____	_____
d. Prompt notice of significant changes or events	_____	_____
5. TEAMWORK (Overall)		
a. With other outside counsel	_____	_____
b. With client's in- house counsel	_____	_____
c. With other legal service providers	_____	_____
d. With outside counsel	_____	_____

6. COST CONSCIOUSNESS AND CONTROL (Overall)
a. Understanding client position re legal expenses _____ _____
b. Willingness to consider/use alternative billing arrangements, rate discounts & freezes _____ _____
c. Performance re budgets & plans _____ _____

7. CLIENT/ COUNSEL SATISFACTION (Overall)
a. Sensitivity to wants/needs _____ _____
b. Anticipation of wants/needs _____ _____
c. Willing cooperation _____ _____
d. Sensitivity to personnel issues _____ _____
e. Resolution of conflict situations _____ _____
f. Understanding culture & style _____ _____
OVERALL EVALUATION _____ _____

COMMENTS/OBSERVATIONS:
_____
_____
_____
_____
_____

K. Engagement Checklist[39]

CHECKLIST - ENGAGEMENT LETTERS
Every firm, and every practice group within each firm, will have its own preferred style and text for its form engagement letters. Our purpose is to present the basic checklist of items that should be covered in all such forms. If a firm decides to structure its intake process as described in this work, it should review each version of the engagement letter form so that the review process, can proceed without separate consideration of every form letter by the oversight partner or committee. Because clients have differing needs and levels of sophistication, this checklist includes both required and optional items. Required items, listed in bold face and large type, should at least be considered for inclusion in every engagement letter; in bold face italic type are additional optional items which may also be included. The Checklist is presented in two forms, first as a simple list, and, second, with detailed commentary.

THE CHECKLIST

1. Parties
2. Scope of Engagement
3. Nature of Services - Course of Representation (optional)
4. Lawyers and Others Providing Services
5. Communicating with the Responsible Lawyer
6. Methods of Communication - Preserving Confidences (optional)
7. Client's Obligations
8. (i) Fee Arrangement; (ii) Disbursement Arrangement
9. Billing Arrangement
10. Dispute Resolution
11. Right of Withdrawal
12. Additional Requirements of State Law or Court Rules (optional)
13. Agreement (Countersignature) of Client

ANNOTATED CHECKLIST - ENGAGEMENT LETTERS

1. Parties

- The letter should specifically identify all parties or entities represented in the matter - and all parties specifically not represented - by proper legal name.
- If the client is a corporation or organization, make clear that you will represent the interests of the entity, not the president, the board of directors, or the trustees. If the engagement involves services provided to individuals, state whether you will represent, for example, the husband, as opposed to the husband and wife. If appropriate, include advice to those not being represented to seek and obtain separate counsel.

Comment: Careful specification of the client can clarify the interests involved in the case and reveal any potential conflict of interest. Because multiple clients may have very different interests, this element is especially important in joint represen-

tations. If more than one individual or entity is named as client, the letter should automatically be reviewed to determine whether appropriate steps have been taken to deal with actual or potential conflicts that may arise from multiple client representation, as discussed in Chapter 2, Making Judgments: Managing The Client Selection Process.

If a decision is reached to accept the engagement despite a conflict of interest, either the engagement letter or a separate letter should deal specifically with the issue, including the necessary full disclosure. It may also be appropriate to describe the action you will take if a conflict subsequently arises that requires separate representation. If appropriate, specify which client you will represent under these circumstances. Warn that if you are required to withdraw because of a conflict of interest, all parties may be denied your services, and each party will then have to pay a new attorney to assume the matter. If warranted, recommend that the client seek independent counsel regarding the conflict of interest and its impact.

Notes:

(1) In multiple client situations, additional language at Item 6 (Methods of Communication - Preserving Confidences) will be appropriate to inform all clients that they do not have separate (only collective) expectations of confidentiality.

(2) Additional language will also be necessary at Item 13 (Agreement of the Client) in every matter where there is a conflict to be waived or consented to, in order for the client(s) to give express waiver or consent to the engagement notwithstanding the conflict.

2. Scope of Engagement

- Clearly, fully, and specifically describe and define the services you have agreed to perform for each individual representation. This definition is essential in ensuring that you meet the client's goals, and can provide a valuable reference point for discussion of goals and expectations over the course of the engagement.
- Specifically state any limitations on services and exclude services that you have not agreed to perform. Exclusion warns the client that he or she should protect himself or herself through other means if potential issues arise that you do not want to address. Be as specific as possible so that you cannot subsequently be blamed for failing to address a related issue. When you are representing one party to a divorce proceeding, for example, the engagement letter should state that your representation will not include the sale of a house or other property.
- Disclaim responsibility for providing any services not specifically listed
- Specify any special areas of authority that the client has agreed to grant you, such as hiring of co-counsel or experts or incurring of significant expenses. Note, however, that this advance grant of authority is not all-inclusive; you may need to seek renewed authorization for authority issues that may arise later in the representation.

Comment: A clear, full, and explicit description of what the firm is - and is not - being retained to do is an essential element in establishing the basis of any fee arrangement (especially any non-time based fee), and in avoiding claims that the firm failed to perform assigned tasks. Ambiguity in the definition of the scope of the engagement can be extremely dangerous from a risk management perspective. In one case, for example, a firm was retained "to recover damages for injuries sustained in an auto accident" of a certain date. The firm understood its role to be the filing and prosecution of a civil suit, and did not pursue workers' compensation remedies. When the limitations period expired on the workers' compensation claim, the client sued for malpractice. Because the engagement letter stated broadly that the firm's responsibility was to handle matters related to the accident, the firm and its carrier paid a large settlement on a matter that the firm had never consciously accepted. Limitation of the scope of engagements is expressly permitted by the Model Rules of Professional Conduct, and has been accepted by many courts. It may also be helpful and advisable, to state that a closing letter will be sent at the end of the engagement, after which the firm's representation of the client will cease unless a new engagement letter is exchanged.

3. Nature of Services - Course of Representation (optional)

- Outline the work to be performed, define a general time line for its performance, and note major tasks, deadlines and milestones. Establishment of a clear framework for conduct of the representation can help you define tasks, meet deadlines and avoid excessive expenditures. It can also alert you to unclear or unrealistic client expectations.
- Indicate both attorney and client responsibilities on the task schedule. If appropriate, note scheduled ongoing meetings or other channels of communication.
- If you want to address the likelihood of success in a litigation, be careful to avoid wording - especially a percentage-based estimate - that could be interpreted as a guarantee of success. If you do discuss the likelihood of a positive outcome, be sure to include appropriate caveats.

Comment: This is distinct from the statement of the scope of the engagement, and is intended for the benefit of individual or unsophisticated (especially first-time) clients. This element describes and explains how lawyers will perform the assigned project, and the kinds of activities involved, so that there are no expressions of surprise by the client at the time or efforts spent on activities outside the client's vision or expectation. In litigation matters, such as contested matrimonial cases, it can be very helpful to provide clients with a detailed description - perhaps in a separate document - that explains the steps and timetable for a "typical" case.

4. Lawyers and Others Providing Services

- Identify the primary attorney responsible for the engagement, other attorneys within the firm, paralegals and all other professional staff who will work on the engagement. Also identify any outside consultants, experts or co-counsel at other firms who will be involved in the matter.
- If the client is retaining other attorneys besides you, delineate exactly what responsibility and authority you will assume and what responsibility and authority others will have. Make sure the client is clear about this delineation.

- Comment: Identify with specificity the lawyers who will be working on the client's matter, or at least those who will be responsible, and with whom the client may communicate.

5. Communicating with the Responsible Lawyer

- Describe the frequency and form of your anticipated communications with the client. Establishment of clear lines of communication is essential to ensure that changes during the course of the representation - in the matter itself, the firm's or the client's circumstances, or the attorney-client relationship - are recognized and adequately addressed.
- Specify the firm's policy regarding the time within which calls or faxes are customarily answered, and what to do if no response is received on a timely basis.

Comment: The most frequent complaint voiced about lawyers - to disciplinary authorities, as well as in malpractice cases - is "My lawyer never returned my telephone calls." Accordingly, this element of the engagement letter presents an ideal opportunity to make a positive commitment that can only have a beneficial effect on the relationship - that your firm, and your lawyers, understand the importance of being accessible - and agree to live up to the firm's policy.

6. Methods of Communication - Preserving Confidences (optional)

- Early discussion of attorney-client privilege - including protections, limitations, and waiver - is critical, especially in matters involving joint representation, and with respect to the use of technological devices (cellular phones, E-Mail, etc.).
- You may want to specify that client records will be returned at the conclusion of the matter or state your document retention policy, including periodic disposal, for other materials whose return the client does not request.

Comment: Much time and energy has been spent in recent years discussing the need for protection of computer systems and data by encryption and the dangers of mis-addressed faxes, and cellular telephones and other threats to attorney-client confidentiality. Many of these potential problems can be eliminated if the issue is directly addressed in the engagement letter and the client consents to whatever security (or lack thereof) is to be adopted in communications between the firm and the client, and within the firm generally. Expression of such concerns in the engagement letter is essential if the client or a particular matter demands special treatment.

7. Client's Obligations

- Identify any important matters that must be decided by the client, and specify any deadlines involved.
- Emphasize that the client is responsible for regular communication and provision of complete and accurate information throughout the engagement. State that you will rely on the completeness and accuracy of that information when performing your services.
- Specify any tasks your client must perform, such as obtaining tax returns or other relevant documents, and state deadlines for their completion.
- Changes in the client's structure, ownership or other circumstances can give rise to new conflicts. If appropriate, specify that the client must inform you of any such changes during the engagement. On a more practical level, some firms state that the client must notify the attorney of any change of address or telephone number and any extended travel plans.
- Further specification of client responsibilities may be appropriate in some personal representations. For example, you may want to stipulate that the client agrees to comply with court orders or medical requirements relevant to the engagement.

Comment: Until serious problems arise, lawyers tend to forget that their clients have basic obligations, especially truthfulness toward counsel. When lawyers discover that clients have lied or committed fraud, during the course of representation, the problems which ensue under every version of ethics codes are nothing less than horrendous. The problems can be significantly mitigated by a clear expression within the engagement letter of the client's obligations and the consequences which will follow under the applicable ethics code in the event that these problems arise. If it is clearly and simply expressed, this language can prevent serious trouble later.

8. (i) Fee Arrangement

- Clearly state the basis on which fees will be charged, and note the client's agreement that the fees are reasonable. Many states require that the firm's fee schedule be communicated to the client in writing, regardless of whether a contingent fee is involved. In some states, the attorney must specifically inform the client of the basis of charges at the outset of the engagement. The courts will always resolve ambiguities in the client's favor.
- In all hourly fee engagements, specify the respective billing rates of all professional staff who will be working on the matter, and note any likely change in rates during the course of the engagement.
- Specify any charge you intend to bill on a basis other than straight hourly charges, and describe how such charges will be computed. Specify any additional charge you intend to impose, such as a premium for achieving a favorable outcome. It may be useful to explore potential alternative fee arrangements with the client before formalizing the basis of charges. Specify whether a lesser rate will be charged for travel time; if not, state that necessary travel will be billed at the rates previously set forth.
- Most states require exact written explanation of how contingent fees will be determined - including, as specified by ABA Model Rule 1.5, "the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated." Some states may impose additional requirements.
- If there is any arrangement for the sharing of legal fees with other lawyers (including referral fees), review local ethics rules, and state the sharing arrangement

in the necessary detail as set forth in those rules.

Retainer and Management of Client Funds

- State the amount of your retainer, the types of fees and expenses covered, when the retainer must be replenished and what actions you will take if it is not replenished. Careful scheduling of retainer payments can ease the payment process and eliminate surprises as the engagement proceeds. Some clients may prefer to make direct payments to third-party consultants or vendors instead of paying a large retainer.
- Specify whether or not the retainer is refundable if the engagement ends before it is exhausted. Non-refundable or advance-pay retainers may be void or voidable in some states; check local ethics rules and case law first.
- Specify how client funds will be handled and whether or not interest will accrue. Many states require that refundable retainer monies be placed in a trust account; depending on the amounts and times involved, your fiduciary role may dictate that the account be interest-bearing. Trust arrangements are especially vulnerable to outside scrutiny; review all arrangements carefully to ensure that there is no appearance of advantage to you or the firm.

Comment: Clearly state the nature of the fee arrangement and the firm's policies with respect to all disbursements. Segment 3 of this work, Fees, Billing and Collections, will deal at length with the reasons why hourly billing is problematic; what the alternatives are - including contingent, task-based, value-based, capped, flat, discounted or blended fees - and why lawyers will make more money if they adopt them; and how to make the transition.

(ii) Disbursement Arrangement

- Clearly indicate whether out-of-pocket charges (such as long-distance telephone calls, copying and transcription charges, travel, court costs, postage and couriers, and charges for computerized research) will be passed on to the client, and specify your procedures for doing so. Warn the client if these charges are likely to be significant. If appropriate, explain that internal staff time for word processing and similar tasks is not included in the hourly fee and will be billed. Scrutinize your estimates to ensure that the client receives the best rates possible for such tasks, whether performed in-house or contracted to a vendor.
- Comment: There are both ABA Formal Ethics opinions, as well as local opinions, regarding permissible charges for disbursements.4 Beyond the negative appearance of substantially marked-up disbursement charges, in many states it is unethical to make a profit on the provision of non-legal services, such as photocopying. While one approach is to provide a schedule of standard disbursement expense charges, many lawyers and firms have concluded that clients prefer a single inclusive bill without separate charges for disbursements - and have raised their rates to accomplish that end.
-

9. Billing Arrangement

- Explain your billing and payment requirements and set out a clear payment schedule. Specify the frequency and format of your standard bills.
- You may want to state that you will submit interim reports specifying what legal services have been performed and what funds have been disbursed during the stated period, even if no payment is due. Interim reports both inform the client and protect the attorney by providing a detailed record of time and expenses. In the event of termination or a future claim against the firm, this record can help establish the reasonable value of services provided.

10. Dispute Resolution

- Describe the procedures you will take to resolve any disputes that may arise during the course of the representation.
- Inclusion of a mediation clause is recommended to demonstrate your commitment to lower costs and rapid resolution of possible problems. This method has proven both successful and efficient in resolving disputes; it can help you build good client relations.
- Consider including an arbitration clause for fee disputes. Some states require ADR to resolve disputes regarding legal fees, while others limit these clauses. Accordingly, before using alternative dispute resolution (ADR) clauses, check with your insurer to make sure they do not violate the terms of your policy or state or local rules. Limitation of this clause to address fee disputes only, as opposed to all disputes, is essential to limit your risk exposure by separating any claims arising from fee disputes from any broader malpractice claims.

Comment: This element is optional - and in a few states, some elements, such as mandatory arbitration, may be prohibited or restricted. In our view, however, it is always preferable for disputes with clients to be resolved in private, rather than in open court where they are likely to be exposed to the glare of the media. We recommend that arbitration always be offered as an option, even where it may not be mandated under local ethics rules.

11. Right of Withdrawal

- To eliminate any uncertainty, state that the client can terminate your engagement at any time, without cause.
- Explain that you also have the right - and sometimes the obligation - to terminate the engagement, on written notification and subject to the ethical standards in the Rules of Professional Conduct.
- You may want to state that you reserve the right to suspend or terminate the representation if the client either breaches its obligations with respect to the engagement (see item 7 above) or does not pay the firm's invoices within a specified period. This provision can lessen the likelihood that you will have to file suit to collect your fees, which often results in counterclaims by the client. Statements that the client agrees not to contest the firm's withdrawal if its fees have not been paid, however, may violate state ethical standards.

Comment: If, as recommended above, the engagement letter clearly expresses all of the client's obligations to the firm, the courts are likely to honor a firm's request to withdraw in cases where consent is required, provided that this right is also clearly expressed in the engagement letter. This provision, combined with ongoing oversight of billing and collections to prevent accumulation of significant accounts receivable, should enable firms to extract themselves from engagements in which the clients fail to pay their bills on a timely basis. Of course, firms should also not wait until the eve of trial in cases where a court's permission to withdraw is required. Even when such permission is not required, termination just before a transaction is due to close may constitute a violation of applicable rules of professional conduct.

12. Additional Requirements of State Law or Court Rules

- Include any additional disclosure or discussion of any other items specifically required by the state. See, in particular, New York's rules relating to matrimonial lawyers, and many states' rules regarding the content and, in some cases, the registration of contingency fee agreements.

13. Agreement (Countersignature) of Client

- Suggest that the client call you to discuss any terms of the engagement letter that are not clearly understood. Your offer to explain the terms can both improve client relations and protect you from possible future assertions that the client didn't know what he or she was signing.
- Specify that the engagement letter is a binding legal agreement.
- Provide two copies of the engagement letter and include a clearly labeled space for the client's signature. Request that the client sign and return one copy of the letter and keep the other copy for his or her records. A signed engagement letter is essential to resolve any future questions regarding client consent, client responsibilities, or any other terms of the representation.
- If the client fails to return a signed copy of the engagement letter, send a reminder noting that you need an executed copy of the agreement to proceed. Ask the client to call you to discuss any questions or problems.

Comment: Unless the client countersigns the letter before the engagement commences or very promptly after initial engagement, the letter may be held to be unenforceable against the client on the grounds that a letter signed after significant work has been performed gives the client no choice but to accept the terms. Worse, an unsigned letter may be enforced against the firm as draftsmen, but not against the client. To avoid these problems, the client intake process should not be concluded, and significant work should not be commenced until the countersigned letter is on file.

L. Letter to Outside Counsel Regarding Compliance with Sarbanes-Oxley

LETTER TO OUTSIDE COUNSEL

To All U.S. Outside Counsel:

In May 2003, Chris Johnson and I wrote you about, among things, the standards of attorney conduct that the Securities and Exchange Commission has established under the Sarbanes Oxley Act of 2002. As we noted, these new standards, requiring lawyers who appear or practice before the SEC to report material violation of law or fiduciary duty "up the ladder" of authority, are entirely consistent with your responsibility under the policy of the General Motors Legal Staff to bring any significant misconduct by GM employees to the attention of our Legal Staff.
In our May 2003 memo, we urged each of you to feel free to contact us directly if you believe that a situation warrants our immediate or direct attention. In addition, we want you to know that the Board of Directors of General Motors has recently designated its Audit Committee as the Corporation's Qualified Legal Compliance Committee or QLCC.

The QLCC, which is comprised of independent directors, has been authorized to receive evidence of a material violation, investigate as they deem appropriate, and recommend the appropriate response. Under the Sarbanes Oxley Act, if for some reason you do not want to raise an issue up to Chris or me, or to another members of the Legal Staff, you may raise it confidentially to the QLCC by writing or calling its Chairman, [contact information deleted].

I recognize that many of the attorneys who will receive this message do not advise GM under the U.S. federal securities law and may be not subject to these new standards under the Act. Each of you, however, when you represent General Motors has a duty, both under GM policy and under the ethical rules of our profession, to assure that GM, its subsidiaries, and its employees are aware of their legal and fiduciary obligations, especially with respect to those matters for which you have been retained as counsel.
We appreciate your continued cooperation and support in helping General Motors as our shared client assure its compliance with legal requirements and with GM's standards of integrity.

Thomas A. Gottschalk
Executive Vice President
Law & Public Policy
and General Counsel

M. Sample Convergence Spreadsheets

- Hourly Rate Benchmarking Analysis[40]
  Overview of Specialization, Avg. Summarizes the mean hourly billing rate for each type of billing person (partners, associates, of counsel, paralegals, and administrators) you use for each area of specialization - from bankruptcy to litigation to tax matters.
  Overview of Job Class, Avg. Summarizes the hourly billing rates for each type of billing person you use; includes high-low range, sample size, and mean billing rate.
  Avg. by Job Class Lists the entire billing rate sample for each type of billing person and shows the calculation of the mean hourly billing rates.
  Avg. by Specialization Lists the entire billing rate sample for each area of specialization and shows the calculation of the mean hourly billing rates.

- Legal Fee Analysis (by Region, by Law Areas)
  Summarizes the total cost of legal fees, by region, for each area of specialization - from bankruptcy to litigation to tax matters.

- RFP Proposed Rates
  Lists the hourly billing rate received for each type of billing person, proposed by each law firm invited to respond to your RFP. The list can be used to set the mean billing rate that finalists will be asked to accept.

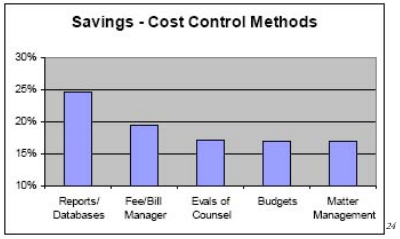
- Firms by Region - for use in RFP
  Shows the projected total cost of legal fees, by region, using the RFP proposed billing rates that finalists will be asked to accept.

V. Conclusion

The usefulness of each type of alternative billing method depends on many variables such as the type of project, the goals of inside counsel, the law department's budget, the amount of time inside counsel wishes to spend in negotiating a proper form of alternative billing for the project, and the amount of time inside counsel wishes to spend in preparation for an alternative billing method.

The use of alternative billing is beginning to face less serious resistance in the world of in-house counsel. 54.6% of counsel surveyed said they face no internal resistance to alternate methods.[22] However, there is continued resistance by outside law firms to move away from the profitable system of billable hours. In the same study, only 4.9% of counsel reported no resistance from law firms when attempting to utilize alternative billing methods.[23] Until in-house counsel change strategies and begin providing more work to firms using alternate billing methods, the resistance will continue to remain high.

By looking to alternative billing methods, a company is likely to see a reduction in its overall legal fees. Instead of maintaining an attachment to the antiquated billable hours systems, in-house counsel who explore alternate options will be rewarded with an effective means of cost control.



[24]

There is no single right way to do it—counsel may choose one of several methods that meet the company's needs. Regardless of the method employed, perhaps the best approach is to try to anticipate potential problems and be ready with solutions, including a willingness to reshape the plan if the need arises. With an increasing number of firms offering alternative billing methods to their clients, it is worth a look.

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[22] *Assessing Key elements of the In-house Counsel / Outside Counsel Relationship*, *supra* note 1, Excutive Summary at p. 20..
[23] *Id*. Executive Summary at 20
[24] *Id*. Executive Summary at 20

VI. Additional Resources

ACC sources:

Timothy J. Coleman, Brackett B. Denniston, III, Deborah K. Fulton, Robert J. Grey, Jr., Sara L. Hays, Michele J. Hooper, James R. Jenkins, and Harold Morgan, Chair's Forum: Wearing More Hats Than a Hydra Has Heads- In-House Practitioners in Today's Corporate Environment…Anticipating the Challenges and Meeting the Demands in Today's Corporate Practice, 2004 ACC Annual Meeting, available at www.acca.com/am/04/cm/forum.pdf

Jeffrey W. Carr, Marla S. Persky, and Hans U. Stucki, Implementing Alternative Fee Structures- Real Life Experiences, 2004 ACC Annual Meeting, available at www.acca.com/education03/am/cm/605.pdf

Jeffrey Carr, Marla S. Persky, and Hans Stucki, Implementing Alternative Fee Structures – Real Life Experience, 2003 ACC Annual Meeting, available at www.acca.com/education03/am/cm/605.pdf

Jim Sullivan, Shiv Grewal, and Mike Rule, Success Formulas for Containing Outside Legal Costs," ACCA Southern California Chapter (April 30th, 2003), available at www.acca.com/chapters/socal/program/managefees.pdf

2004 ACC / Serengeti Managing Outside Counsel Survey: Assessing Key Elements of the In-house Counsel / Outside Counsel Relationship. To order this resource, please visit www.acca.com/Surveys/partner/2004/

Other sources:

ABA Commission on Billable Hours Report, available at www.abanet.org/buslaw/committees/CL745500/toolkit/bhcomplete.pdf

Ameet Sachdev, Hourly legal fees under attack; Traditional billing by time spent is standard at most big law firms, but McGuire Woods is offering alternatives, Chi. Trib., April 18, 2005

Robin Sparkman, You Get What You Pay For, Corp. Couns. Mar. 2005 at 10.

John K. Villa, 2 Corp. Couns. Guidelines §4.07, Billing-Alternative Billing Arrangements: Their Genesis, Utility and Limitations (2005 ed.)

Arthur F. Greene, Thinking Outside the Box, Leave the billable-hours behind, Bus. L. Today, May/June 2004 at 17. Also available at www.abanet.org/buslaw/blt/2004-05-06/greene.shtml

Anthony E. Davis and Julianne Splain, The Alternatives to Hourly Billing, N.J. Lawyer, the Magazine. Apr. 2004 at 52

Robert L. Rossi, Attorneys Fees, Chapt. 1. Retainer Contracts V. Alternative Billing Methods §§ 1:23-1:25 (3rd. ed. database updated Oct. 2004)

American Bar Association Ad-Hoc Committee on Billable Hours, "On-line Bibliography", www.abanet.org/buslaw/committees/CL745500/toolkit/bib.html (2004).

Joseph L. Kociubes, Billable Hours: Given the Perception, Does the Truth Matter?, 47-FEB B. B.J.2 (2003).

Top of Mind: A Survey of Senior In-House Counsel [On-line] available at: www.kl.com/TOM_brochure/launchpad.htm Kirkpatrick & Lockhart LLP (2003).

Alternative Billing
Association of Corporate Counsel updated May 2005

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VII. Sample Forms and Policies

A. Sample Outside Counsel Engagement Letter[25]

XYZ Company

[Date]

Lead Outside Counsel Name

Law Firm Name

Address

Re: [Matter Name]

Dear _____:

This letter will confirm that [XYZ Company] has asked you to represent us in the above matter. In connection with your representation we have asked you to [describe scope of the engagement].

With this letter I am sending a copy of our Outside Counsel Policy. Except as set forth in this letter, or specifically agreed to by me, the Policy will govern your representation of [XYZ Company] in this matter and all subsequent matters in which you are retained. We have agreed that you will be the lead outside counsel on this matter and will be responsible for ensuring adherence to the Policy. I [or name of appropriate inside counsel] will be lead inside counsel on this matter. We believe that providing you with a clear statement of the principles which apply to your representation of [XYZ Company] will assist us both in providing effective, high quality legal representation responsive to the needs of the company. I urge you to raise any questions you may have about the Outside Counsel Policy with me or [other lead inside counsel] at the outset.

We have agreed that you will be compensated for your work on this matter [insert fee arrangement]. [If fixed-fee billing and budgeting applies, we have agreed that you will prepare [a] task-based budget[s] (monthly, quarterly, for all the work necessary to complete this assignment, for each phase of this matter) for my approval. We have agreed that you will submit your bills [monthly, quarterly, or at the completion of this matter].

We have agreed that the attorneys and staff who will work on this matter are:

Name	Billing rate
Name	Billing rate

I look forward to working with you on this matter. Please confirm that you have received and agree to abide by the Policy by returning a signed copy of this letter to me at your earliest convenience.

Very truly yours,

XYZ Company Attorney

We have received XYZ Company's Outside Counsel Policy and agree to be governed by that document's terms in our representation of [XYZ Company] and its affiliates.

Law Firm Name

By _____

Lead Outside Counsel

B. Sample Retention Letter (Courtesy of DuPont Legal)

XYZ Firm Address

Date: Dear _____:

It is indeed a pleasure to send you this letter which sets forth the arrangements under which we will retain your firm as a primary provider of legal services to DuPont in the State of _____.

We at DuPont Legal are very pleased about having your firm join our network of primary law firms and suppliers. It has been an interesting and challenging journey for us these past six years, and with your selection as a PLF we believe we have further strengthened and solidified our network.

As you know from our prior discussions, DuPont's program is founded on three basic goals:

1. Forming long-term *strategic partnerships* with a select group of innovative and exceptional law firms and suppliers who can collaborate and team with other PLFs to further DuPont's goals and interests.
2. Maximizing the use of *technology* to increase efficiency and to produce the most cost-effective services possible.
3. Focusing on *work processes* to increase efficiency and reduce our costs.

From these fundamental goals, critical components of the DuPont Legal Model have evolved including a serious commitment to diversity, early case assessment, strategic budgeting, alternative fee arrangements, and metrics. We believe strongly that the corporate legal industry has changed significantly in recent years and continues to change. We have been on the forefront of that transformation, and together with our PLF and primary supplier network we intend to stay on the "cutting edge". We hope your law firm proves to be a major contributor to that joint effort.

[25] For additional sample forms and policies, visit ACC's Virtual Library *at*: http://www.acca.com/vl

DuPont desires to handle our legal matters in the most cost-effective manner possible, consistent with excellence of service and optimal results. To obtain that objective we have agreed to establish a partnering relationship with your firm whereby we jointly develop systems to allow DuPont to achieve its cost reduction and productivity goals while securing for your firm a profitable relationship with DuPont. We desire that the relationship be flexible and mutually beneficial and that we jointly develop case management systems, which will team DuPont staff counsel with attorneys in your firm. The system that we envision will apply a disciplined, creative and business-like approach to the early, cost-effective resolution of DuPont's matters.

The elements of our partnering relationship are as follows:

TERRITORY

Legal services subject to this engagement letter shall be rendered in _____.

STAFFING

Staffing requirements will be based on consultation with DuPont attorneys. Actual requirements will be decided on a case-by-case basis.

SCOPE OF SERVICES

It is DuPont's intention to retain your firm to represent DuPont in all types of matters. Potential exclusions include: _____.

FEES AND DISBURSEMENTS

Fees and reimbursable disbursements shall be as set forth in the attached Schedule. DuPont's Billing Guidelines from Primary Law Firms are also attached to this letter. We encourage and are open to discussing any proposals you may have for alternative fee arrangements on any specific cases or matters as they come in. Feel free to propose any ideas to the DuPont attorneys assigned to your cases.

THE PARTNERING RELATIONSHIP

The critical elements of the partnering relationship we seek to establish with your firm involve:

a) enhanced communication among DuPont business management, staff counsel and outside counsel; and

b) a focused dedication to a case management planning system which is designed to achieve desired client objectives at the lowest possible cost. In furtherance of those objectives we desire to establish a partnering relationship as follows:

Relationship Managers. DuPont's Manager for Law Firm Partnering will be _____. She will have overall responsibility for managing the relationship between your firm and DuPont. You have indicated that you will be the engagement partner for your firm in its dealings with DuPont. Our manager of law firm partnering will be responsible for interacting with you to carry out the provisions of this engagement letter and to work with you to develop new and creative ways to enrich our relationship to our mutual benefit.

Computer Technology. DuPont Legal Information Systems will work with you to identify computer technology, which would make your firm compatible with DuPont Legal's technology. If you do not currently possess that technology, you will acquire it in due course. Computer compatibility is essential to allow us to achieve the following objectives: a) consistent, cost-effective communications; b) share information electronically; c) submit and pay bills electronically; d) develop data bases for legal fees and costs and for other relevant case data; and 3) litigation budget control.

Periodic Reviews. A key element of the partnering relationship is a clear communication of objectives and expectations. Accordingly, we propose that the manager of law firm partnering meet with you periodically to review all aspects of our relationship and to explore additional opportunities to increase productivity and to further reduce costs.

Benchmark Surveys. Each year we expect our PLFs and primary suppliers to complete a benchmark survey that helps us assess the success of the overall program and to identify areas in need of improvement. A copy of last years survey is attached to give you a sense of the types of inquiries we ask our PLFs to answer each year. These help us evaluate our program's progress and success and helps us make adjustments as needed.

Network Referrals. We actively encourage the members of the PLF network to refer business to each other from their non-DuPont clients. One of the real benefits to the PLFs from participating in the DuPont Legal Model, among others, is the referral business that has developed within the network. We ask that you track any referrals you receive from others in the network and those that you make to others in the network.

Annual Meetings. We expect you to attend Annual PLF Meetings and occasional interim meetings. They are essential to our program and provide our PLFs with excellent networking opportunities.

DIVERSITY POLICY

We have explained to you our policy of promoting full and equal participation in the profession by minorities and women. In this regard, DuPont encourages the firms with which it is establishing a partnering relationship to hire minority and female professionals and to assign them to handle DuPont work. In addition, we encourage our partnering firms to associate with minority run firms, as well as organizations that provide legal support services. You have indicated that you understand the significance of this policy to DuPont and that your firm is equally committed to this policy and will adhere to it in performing services under this engagement letter.

We have set forth in this engagement letter the principal elements of the partnering relationship, which will be effective as of _____. We view this relationship as a creative and dynamic process to allow both of us to achieve our desired objectives and we would welcome your continued efforts to work with us to improve the process. Although this letter is not intended as a legally binding agreement, we expect it to govern our relationship until modified by either party upon reasonable notice.

Very truly yours,

In-house Counsel

DuPont Legal

Alternative Billing
Association of Corporate Counsel updated May 2005

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Manager of Law Firm Partnering

C. Tasked-based Billing Sample Letter

Date
Senior Partner
Law Firm
Address

Dear ___:

This letter will update you on an important electronic invoicing initiative that Our Company will soon launch. It requires information and a response from you. Our Company will soon install a new computer system that will enable most law firms to submit invoices electronically. We believe expanding the number of firms that submit electronic invoices will permit Our Company to monitor legal costs; our law firms will also benefit from the new process in two ways:

- expedited approval and payment process
- your electronic invoices can be prepared more easily, once the procedure is established

Our Company has selected product for processing, auditing and analyzing electronic invoices. The goal is to have more than 90% of all invoices submitted electronically through this system within time period. Your firm has been chosen as one of the first to send electronic invoices in electronic ASCII format. In order to accomplish this, you will be working directly with PeerPoint to create the necessary ASCII files. The attached survey contains the information PeerPoint needs to facilitate your process. Additional Technical Information is provided for your reference. Please return the survey promptly, but no later than date.

PeerPoint will provide the following assistance:

- consultation with your administrative personnel
- help you perform or find the necessary programming for e-invoices
- review test e-invoice files for compliance prior to launch date

There may be additional programming fees if your time & billing system does not currently produce an ASCII invoice in the PeerPoint format.

Under our current schedule, properly formatted invoices need to be sent to Our Company for test purposes by date. Actual electronic invoices need to be sent for payment purposes by date. Both electronic and paper invoices will be required for time period in order to verify the accuracy of invoices.

In addition to converting to electronic invoices, Our Company is also switching to the Uniform Task-Based Management System (UTBMS). Outside counsel who are involved in electronic billing need to begin using the new codes by date for testing purposes. All outside counsel, whether sending electronic or paper invoices are required to begin sending all billing using the UTBMS codes by date.

We look forward to your participation in this effort to help both Our Company and our outside counsel provide cost-effective legal services to the corporation. If you have any questions, please contact name.

Sincerely,

General Counsel

Enclosures:
Law Firm Billing/Technology Questionnaire
PeerPoint ASCII File Format
Overview of UTBMS Code Sets

Law Firm Time and Billing Software Questionnaire

(Please fill out one survey per product)

Company Name: _____

Address: _____

Sales Phone Number: _____ Sales email address: _____

Date: _____ Person Responding: _____ Phone: _____

1. What minimum operating system does your system require? _____
2. What are your minimum hardware requirements?

Processor _____ RAM _____ Hard drive _____

3. What is the maximum number of users supported by your system? _____
4. Does your system support Task Codes? (circle one) Yes No
5. Does your system support Activity Codes? (circle one) Yes No
6. Does your system ship with billing codes pre-installed? (check all that apply)

   UTBMS No Don't Know Other_____
7. Does your system produce electronic invoices? (check all that apply)

Alternative Billing
Association of Corporate Counsel updated May 2005

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Data Clearing House
Examen
LEDES
ELF Technologies
PeerPoint Technologies
Legalgard
No
Don't Know
Other _____

8. What are the features of your system? _____

_____

_____

D. Outside Counsel Policies and Procedures

May 12, 2005

Name
Law Firm
Address
City, State, Zip

Dear Ladies and Gentlemen:

The purpose of this letter is to clarify and memorialize principles under which your firm provides legal services to COMPANY and its subsidiaries (collectively, "CO."). Enclosed for your review are CO.'s Policies and Procedures for Outside Counsel. It specifies our expectations, among other things, regarding quality and level of service, compensation, reimbursable costs and expenses, and billing procedures. We ask you to agree that these principles will govern and will be an integral part our relationship.

We hope that your firm will have no difficulty in complying with the policies and procedures attached to this letter. I encourage you to share them with all individuals assigned to matters and look forward to an ongoing, mutually satisfactory association.

Sincerely,

PERSON
General Counsel
COMPANY

OUTSIDE COUNSEL POLICIES AND PROCEDURES

Scope

These guidelines are applicable to all matters referred to outside counsel absent express agreement or instructions from CO. to the contrary. A copy of these guidelines should be provided to all attorneys and paralegals assigned to a case and/or matter before work begins.

CO. is committed to making effective use of both in-house and outside resources. These guidelines are directed at outside counsel to achieve three goals: 1) high quality legal representation that produces maximum value results; 2) the most efficient use of resources; and 3) results in the most cost effective manner. Controlling costs is a high priority and CO. needs the cooperation and best efforts of outside counsel working with us to reach it. Evaluation of outside counsel will be based on effective control of costs, as well as on success in achieving our particular objectives.

The assistance of outside counsel is essential to identifying opportunities for cost savings. We expect outside counsel to consistently examine CO. matters in order to determine whether particular expenditures of time or money are truly necessary to reach the intended objective.

Protocol

The CO. General Counsel is responsible for your firm's selection and engagement as outside counsel, for determining the manner in which legal advice and assistance will be given to CO., and for determining the scope of legal services to be provided to CO.. The General Counsel is your firm's point of contact with CO., and therefore, you should communicate and send correspondence to the General Counsel directly. The CO. General Counsel is a subscriber to electronic mail and we encourage you to use this tool as a method of communication regarding CO. matters.

Any requests for the provision of services will be made by the CO. General Counsel. You should neither seek nor accept direction from anyone else within CO.. The CO. General Counsel will act as the liaison between your firm and CO. and will be responsible for stating CO. objectives for assigned projects, establishing open channels of communication and access to relevant information, monitoring progress, and assessing your firm's continuing role. The CO. General Counsel will also participate in and approve all important decisions and all projects that will require an expenditure of time, money, and resources.

Staffing

The CO. General Counsel and outside counsel should discuss the firm's staffing of a matter at its outset. Ultimately, staffing is a CO. decision, and the CO. General Counsel will provide input and review staffing to insure that it is optimal to achieve the goals of CO. at the least cost. Additions or changes to staffing are not to be made without the CO. General Counsel's prior agreement. If a staffing change is made after the start of a case, CO. does not expect to bear the cost of educating any attorneys so added.

The resources of CO. should be the starting point for all projects. The goal here being to utilize CO. resources where available, consistent with the needs of the matter at hand. For gathering and reviewing files, for instance, it may be more efficient for us to collect and review the information. For certain research activities you might otherwise undertake, or for business, economic, financial, or historical information, we expect you to look to the information and experience available throughout CO. as a primary source.

Effective control and management of CO. matters requires the most efficient and effective use of all available resources. We expect work of the highest quality at reasonable costs. We also expect the individual attorneys to whom we assign a project to be personally and directly responsible for it in all aspects. We expect that the attorney in charge of the matter will avoid: overstaffing the matter; shifting personnel assigned to the matter except when absolutely necessary; authorizing premature or peripheral legal or factual research; holding inessential internal "conferences" about the matter; directing the routine digesting or summarizing of documents and depositions; and handling specific tasks through persons who are either over-qualified or under-qualified.

To promote effective utilization of time and skills, we request that you make every effort to provide for continuity in staffing and to assign the appropriate level of legal talent to an undertaking. For instance, we expect that tasks that do not require the skills of an attorney to be done by paralegals. When more complex matters may be handled more cost-effectively by a partner with expertise in the subject matter, rather than by an associate, we expect the partner to be used. The CO. General Counsel will evaluate on an ongoing basis whether tasks are assigned to the appropriate level, with the goal of having the work carried out by the individual who can most cost effectively deliver results.

In the course of handling a CO. matter, we expect you to use prior relevant research that is available within or to your firm whenever possible. In addition, we expect that you will keep consultations with other attorneys in the firm to a minimum and that you will communicate by the most efficient method available, such as electronic mail if appropriate. If intra-office conferences and meetings are required between attorneys in your firm, we expect you to ensure that they are limited and clearly justified and that their reason and purpose are included on your invoice in detail.

Finally, we require that other law firms, outside consultants, or expert witnesses will not be retained without prior approval and that outside counsel will work closely with the CO. General Counsel to closely manage and control any expert fees and disbursements which are incurred.

Management

We require prompt project plans and budgets be made in every matter and we would appreciate your responsiveness to considerations of cost effectiveness in making your estimates and evaluations. A project plan should include, at a minimum, a timetable of activities, the person primarily responsible for conducting that activity, and a detailed budget forecasting hours, fees, and expenses. To ensure that everyone understands CO. budgetary considerations before undertaking any work, a project plan and budget should be communicated to every member of the outside team. Project plans and budgets are to be reviewed at least every quarter, and after the occurrence of a significant event, to assess strategy and status.

Fees

CO. expects to be charged only a reasonable fee for all legal services as determined in light of the factors recognized in the prevailing rules of professional ethics. The baseline for determining such a reasonable fee should be the time appropriately and productively devoted to the matter, in essence, the "real" value of the services provided. We also expect you to scrutinize and reduce billed time in situations involving: (a) internal conferences or consultations between members of the firm; (b) legal research on basic or general legal principles; (c) assignments to inexperienced attorneys; (d) reassignments among attorneys; or (e) work that is unnecessary or redundant or which should be shared with other clients. CO. should not be billed for: (a) time spent in processing conflict searches, preparing billing statements, or in responding to our inquiries concerning your invoices; (b) travel time during which you are billing another client for work performed while traveling; or (c) services associated with the maintenance of the firm's client files. In addition, CO. should not be billed for the administrative

tasks of creating, organizing, and updating files; receiving, reviewing, and distributing mail; faxing or copying documents; checking electronic mail; or converting information to disk.

Expenses/Disbursements

CO. will reimburse you for your actual costs and expenses related to matters assigned to you and for necessary and reasonable out-of-pocket disbursements, subject to the limitations and exceptions set forth below. Outside counsel is expected to have a system in place that ensures those who bill time and disbursements to CO. matters do so promptly and accurately.

CO. will not reimburse you for: (a) costs for work exceeding that which was authorized by the CO. General Counsel; (b) costs billed on the basis of a standard minimal charge; (c) costs that are not fully reported, as described below; (d) costs included in a 'miscellaneous' or 'other' category of charges; (e) total costs for photocopying where neither the number of copies nor the cost of each copy is indicated; (f) overhead costs and expenses- such as those relating to fees for time or overtime expended by support staff (secretaries, administrative/clerical personnel, internal messengers, and other similar services), word processing and/or proofreading, cost of supplies or equipment, and/or other similar costs of doing business; (g) time spent attending education seminars or training programs; or (h) mark-ups or surcharges on any cost or expense. In addition, if communications are sent to CO. through the use of more than one medium, CO. does not expect to pay for the cost of both communications. For instance, if a piece of correspondence is sent to CO. by fax, we do not expect to pay for the cost of that same correspondence if it is also send via regular or expedited mail.

CO. will reimburse firms for separately itemized expenses and disbursements in the following categories:

Messenger/courier service – CO. will reimburse actual charges billed to your firm for deliveries (including overnight deliveries) where this level of service is required because of time constraints imposed by CO. or because of the need for reliability given the nature of the items being transported. Appropriate summaries of messenger/courier expenses must reflect the date and cost of the service and the identity of the sender and the recipient or the points of transportation. We do not expect all documents to be hand delivered or sent by overnight express; indeed, we do expect that decisions about modes of delivery, from by-hand messenger to electronic transmission, will be made with due regard for need, economy, and good sense.

Long-distance telephone and facsimile transmission charges – CO. will reimburse actual charges billed to your firm for each call or outgoing facsimile, without overhead adjustment, and without a premium. We do not expect to pay for incoming calls or facsimiles.

Travel - CO. will reimburse actual charges for transportation, hotels, and restaurants reasonable and necessary for effective representation of CO.. CO. will not pay for any first-class travel. Summaries of transportation expenses should reflect the identity of the user, the date and amount of each specific cost, and the points of travel. Summaries of hotel and restaurant expenses should include the identity of the person making the expenditure, the date and amount of the cost, and the nature of the expenditure. We expect you to be reasonable and prudent both in selecting hotels and restaurants for which we are to be charged and in distinguishing between personal expenses and properly chargeable business expenses.

Computerized research - We acknowledge that computerized research reduces the attorney's time spent on research and therefore is productive and cost-efficient. Accordingly, CO. agrees that it will reimburse firms for actual charges for on-line services, and any associated charges for legal services which accompany its performance. CO. will not reimburse your firm for any overhead premium for computerized research beyond the actual charges billed to the firm for a specific matter. Summaries of expenditures for computerized research should reflect the hourly cost of utilizing online services, the amount of time utilized, and the date of the research.

Photocopying/printing – CO. will reimburse actual charges for outside photocopy, binding, and printing services and costs of inside photocopy services not to exceed the actual expense per copy. Summaries of expenditures for copying should reflect both the number of copies made and the cost per copy.

CO. reserves the right to question the charges on any bill (even after payment) and to obtain a discount or refund on those charges that are disputed.

Billing Statements

CO. and outside counsel must agree at the outset on the hourly rates (or other fee arrangement) for each person in the firm who will bill on a particular case or matter. CO. expects to be charged at no more than the firm's "preferred client" hourly rate for attorneys and paralegals assigned to its cases.

It is part of the CO. General Counsel's responsibility to review all statements for legal services and disbursements. A detailed statement of your services to CO. should be submitted on a monthly basis, within thirty days after the last business day of the month in which the services were rendered. Invoices payable by CO. will generally be paid within forty-five (45) days of receipt, but our internal review may result in some delay.

All invoices should be sent to the CO. General Counsel at the following address:

PERSON
General Counsel
COMPANY
ADDRESS

Please do not send your bills to any other person or location.

All statements must be prepared within the following guidelines to ensure prompt payment. We cannot process invoices not meeting the items below. Please include on each invoice:

1. the name or title of the matter;
2. a specific invoice number for the particular bill;
3. the firm's Federal Employee Tax Identification Number (TIN);
4. a chronological description, by date and task, of the services performed by each attorney with a comprehensive and comprehensible description of the services actually performed (i.e. a description that provides sufficient information so as to enable CO. to understand the nature of the services rendered);
5. the name and position of each attorney who performed each task, the time spent on each task, and that attorney's hourly rate;
6. the current month's total hours and total fees for each attorney billing time to the case;

7. the total fee for all professional services rendered during the period;

8. the inclusive dates of the month covered by the bill;

9. a separate itemized list of disbursements and expenses;

10. a total of fees and disbursements year-to-date on the matter;

11. the mailing date of the statement;

Billing information for each separately identifiable matter should be on a separate bill. Statements should be rendered in tenths of an hour. If at all possible, please put the description of the work performed by attorneys in your firm on pages that are separate from pages providing any other information, such as total hours, hourly rates, expenditures, etc. In addition, please send a summary page to accompany the invoice. The information required on the summary for CO. to process includes the invoice date and number, invoice total, total fees, total disbursements, and matter name. Finally, please show clearly on the invoice the total of only the current bill. Prior balances or payment history should be shown separately, if at all, by invoice number, invoice date, and amount.

Beyond Task-Based Billing:

By Stuart E. Rickerson

Stuart E. Rickerson is general counsel to Golden Triangle, Ltd. A member of ACCA's San Diego chapter, he has also served as general counsel to Keene Corporation and Cardiac Pacemakers and as senior counsel for litigation to Eli Lilly and Philip Morris.

A management revolution is transforming business around the world, as thousands of companies strategically retool and improve their human resources, manufacturing, sales, and accounting departments. In the past few years, companies have invested more than $50 billion in such efforts as enterprise resource planning, customer relationship management, and Six Sigma systems.[1] A similar revolution can streamline and improve corporate legal departments and save billions of dollars annually. Corporations have only to commit the time, talent, and financial resources to getting the job done.

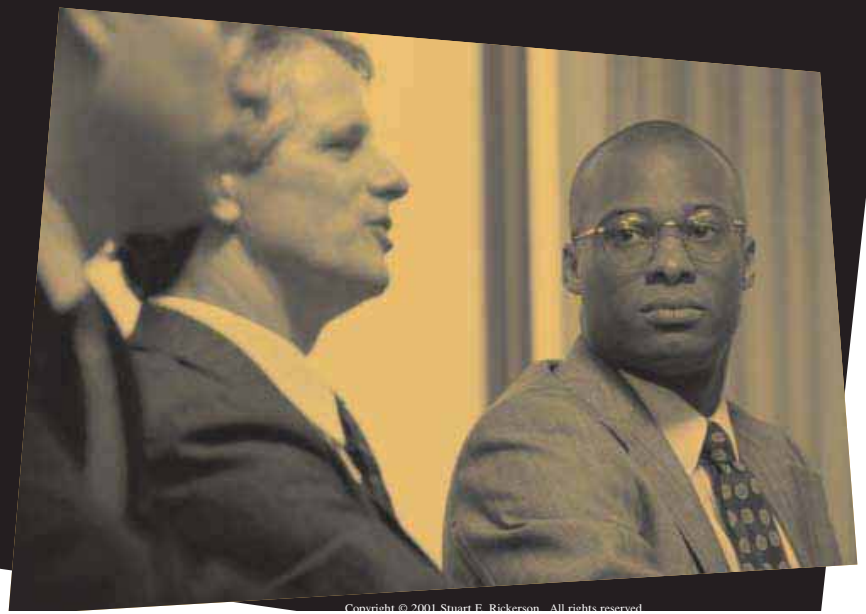
Stuart E. Rickerson, "Beyond Task-Based Billing: Dramatically Improve Results with Strategic Legal Management," *ACCA Docket* 19, no. 1 (2001): 28-48.

Corporate law departments spend a median $11.7 million on outside counsel annually.[2] Overall, corporate legal spending amounts to 0.3 to 0.6 percent of sales[3] or more than $100 billion annually.[4] For nearly a decade, law departments have been looking for better ways to manage outside counsel,[5] but they have been slow to embrace proven strategic management principles for legal activities.

Strategic management in the legal department reduces legal costs, improves quality in legal services, produces better legal outcomes, restructures relationships, and delivers other benefits. It starts with the tools of task-based billing ("TBB"), but then goes far beyond into process analysis and the application of newly available technology to dramatically improve the quality of legal matter management.[6]

As more companies apply strategic management ideas to their legal functions, they begin to identify best practice approaches to optimize results and to make legal expenditures more predictable.[7] As they do, the invisible walls that separate management of the law department from business-side management principles begin to crumble. This article will show you how to realize some of the many benefits that flow from strategic management.

Dramatically Improve Results with Strategic Legal Management



A GOOD SLM SYSTEM ALLOWS EXECUTIVES TO ASSESS THE RETURN ON THE COMPANY'S INVESTMENT IN LEGAL SERVICES, JUST AS THEY EVALUATE THE RETURN ON OTHER KINDS OF BUSINESS INVESTMENTS.

THE RISING TIDE OF TASK-BASED BILLING

Six years ago, the American Corporate Counsel Association and the American Bar Association endorsed the breakthrough uniform task-based management system code list for litigation.[8] More than 50 major corporations and outside law firms developed the code sets, which now have been expanded to cover bankruptcy, intellectual property, workers' compensation, and general counseling. Made available on a royalty-free basis, these task codes give the legal profession a common dictionary to describe the work that lawyers perform for their corporate clients.[9]

A recent survey of more than 500 general counsel in 44 states found that "organizations that pay more than half of all legal fees in the United States have declared their commitment" to task-based billing.[10] A comparable survey three years earlier found that TBB had been implemented in only 12 percent of responding law departments.[11] The reason for this growing acceptance of TBB should be obvious: you cannot determine whether a result is worth your investment until you know how much you have spent to obtain it. You also cannot fully appreciate the steps that are essential to achieving your desired outcome until you can examine the process that gets you to the outcome. Legal task codes enable this sort of strategic analysis and thus promise substantial legal cost savings, greater predictability, improved quality in services obtained, and better communication between corporate clients and their outside counsel.

But requiring task coding is only the first, small step toward a comprehensive strategic overhaul in a company's approach to managing legal matters. Companies that make the necessary investment of resources can reduce legal costs at least 10 to 30 percent and can improve legal quality by at least 10 to 20 percent after just three or four years of effort by using TBB as part of a comprehensive strategic effort.[12]

Despite the obvious benefits, corporate legal departments have been slow to change the way in which they bill and manage legal work.[13] Why? Among the many reasons are the natural resistance to change and the lack of time, tools, resources, experience, or incentive to do things differently. Also, some law departments do not have adequate support from their information technology ("IT") groups, while other IT groups overestimate their ability to meet their companies' legal needs. A few corporate lawyers even seem to echo their outside law firms' belief that the legal process is an art that cannot be objectively measured or quantifiably improved. More fundamentally, the problem at many companies often comes down to investing insufficient resources to see the process to its successful conclusion.

Before a company can realize the promised gains of strategic management, its law department must be able to understand the approach and justify the additional personnel, technology, and financial resources that successful implementation requires.

WHAT IS "STRATEGIC LEGAL MANAGEMENT"?

Like the business-side improvements in recent years,[14] Strategic Legal Management (SLM) is a process in which you set important corporate goals and objectives and then map legal plans and strategies to achieve those desired outcomes. By successfully applying these strategic legal plans, a corporate law department can become a proactive business unit and a competitive advantage for its client company.

A good SLM system allows executives to assess the return on the company's investment in legal services, just as they evaluate the return on other kinds of business investments. The corporate law department thus becomes an important weapon for achieving corporate objectives, rather than merely an administrative cost center. Predictable, experience-based strategic legal plans, and budgets based on those plans, identify the corporation's strengths and weaknesses and better prepare it for opportunities and threats that may come up in its legal and business environment.

In the traditional work process used by the vast majority of law firms providing services to corporate law departments today, the firm:

- performs the legal work;
- provides the bill some time later;

- discusses what has been done, but usually only if the client questions the bill or after a legal audit;
- tries to justify that the work was worth the cost, often on some subjective standard;
- decides whether to reduce the statement and by how much; and
- receives payment on the bill, usually 60 to 180 days after the work has been performed.

The flow of events is very different for law departments. When they apply SLM to managing legal work, it:

- keeps the focus on the future, so lawyers anticipate events months in advance;
- adds value by encouraging communications primarily about strategy, objectives, and results;
- allows law firms and corporate counsel to budget with greater precision;
- encourages corporate counsel to approve work to be done before the law firm invests time;
- results in fewer billing surprises, so bills get paid more promptly, thus cutting down on the law firm's receivables;
- makes legal audits unnecessary or relegates them to the status of compliance reviews;
- substantially reduces or eliminates the need for law firms to reduce bills or write off time;
- makes the bill review process more automated and informative; and
- forces counsel to look at the big picture, the very essence of macromanagement.

The benefits of using strategic management approaches on the legal function are huge. When clients better manage legal activities by applying proven business principles to law, productivity rises, and the quality of outside legal work improves. The lawyer-client relationship grows stronger because better communication on more important topics takes place sooner. Applying the teachings of the quality movement to law eliminates unneeded work on subjects of marginal benefit. Legal fees are bound to go down. The result is less frustration and greater trust on each side of the relationship.

Companies that manage the legal function strategically report results that are comparable to the business-side process improvements.[15] These companies can document 15 to 50 percent savings on outside legal costs.[16] Legal savings of this magnitude translate into a potential aggregate savings on corporate legal fees of $15 billion to $50 billion each year.

The enormous legal cost savings potential is reason enough for corporate law departments to turn to experts in legal management and SLM systems. If a law department's budget is small, doing more for less should be appealing. For larger law departments that spend multiples of the annual national median of $11.7 million[17] on outside legal counsel each year, achieving better outcomes while saving 20 to 40 percent in costs should be irresistible.

HOW DOES STRATEGIC LEGAL MANAGEMENT WORK?

The strategic management process in the corporate law department has three levels. In each level, the corporate client begins with the industry-approved task codes or a customized task-tracking and billing system that organizes outside law firm bills and makes them more coherent. The primary differences among the levels relate to what a company plans to do with the data generated from their lawyers and how sophisticated the law department wants to become in managing the corporate legal function.[18] This section first defines these levels and then presents case studies of each level to give concrete examples of corporations that have implemented and are using strategic management processes.

Level One (Basic Portfolio Analysis): At the introductory or level one of strategic management, you use task codes as convenient buckets into which to pour raw, usually hard-to-interpret, legal billing records.[19] As with any other portfolio analysis, you identify the activity performed and who performed the activity; aggregate the costs; and decide whether the activity was worth the effort. This converts unsynthesized, difficult data into meaningful information. You can then use this historical analysis of billing information to support informed decision-making.

Adopted in 1995, the uniform task codes for litigation gave corporations an authoritative dictionary for legal billing and standard measures against which they could quantify, assess, and evaluate outside legal work. Outside counsel often criticize corporate counsel for micromanaging cases. This complaint actually stems from the inherent nature of the hourly billing statement, which breaks billed time into small intervals and thus encourages a microscopic view of legal activities.[20] With the UTBMS codes, however, corporate clients can refer their law firms to an industry-approved bill coding standard, and law firms can avoid divergent and administratively costly coding systems promulgated independently by their various clients. Nearly all corporate law departments now have at least the basic tools to permit them to act at level one, even though most have yet to access or interpret the data available to them.

Level Two (Before the Fact): Strategic management becomes more powerful when it encourages or even requires corporate counsel and the company's outside lawyers to engage in before-the-fact planning, not simply after-the-fact reviews characteristic of level one, or legal audits.

STRATEGIC MANAGEMENT ACHIEVES ITS FULLEST POTENTIAL FOR THE CORPORATE LAW DEPARTMENT WHEN IT HELPS YOU TO IDENTIFY AND APPLY BEST PRACTICE OR OUTCOME-OPTIMIZING APPROACHES.

At level two, you apply your company's historic experience to future legal plans. Your corporate law department begins to see the return on its investment in various legal activities. You can start to evaluate objectively whether the result achieved is worth the corporate legal expense. In short, you go beyond basic portfolio analysis and begin to direct your investment in various legal activities in different directions to better achieve your desired outcome.

Level Three (Closed Loop Outcome Modeling): Strategic management achieves its fullest potential for the corporate law department when it helps you to identify and apply best practice or outcome-optimizing approaches. At level three, the process is (1) interactive, meaning that both the client and the law firm participate in the strategic planning process; (2) dynamic, meaning that both the client and the law firm can modify the strategy when the occasion warrants it; and (3) closed loop, meaning that you can draw on past experience to produce better outcomes and better strategies for future legal matters.

Most approaches to improving legal activities during the past 25 years have typically sought modest, incremental, and, all too frequently, unverifiable improvements. In contrast, the best practice approach of level three can quickly and dramatically improve performance. It can lead to extraordinary results, such as new ways to perform, bill, and compensate legal services. Improvement comes not only in doing required tasks better, but also in eliminating unnecessary tasks and in identifying and paying special attention to tasks that make a measurable difference in the outcome.

The following case studies show that strategic management works in a wide variety of legal matters, in various industries, and for law departments of widely varying sizes.[21]

Level One: Strategic Management in Mass Litigation

Level one Strategic Legal Management is perhaps most easily understood in the context of repeated, high-volume, and roughly similar legal situations. For some companies, this might mean workers' compensation cases; for others, patent prosecutions. For financial institutions, the context might be pursuit of bad loans; for some conglomerates, mergers and acquisitions portfolios. Class action litigation and bankruptcy practice, both of which require court approval of all legal fees, are especially amenable to level one principles. This case study looks at level one principles in the kind of mass tort litigation that hundreds of companies confront today.

In the early 1980s, Keene Corporation[22] won the first asbestos insurance coverage case,[23] thereby accessing more than $400 million for claims and defense costs. This amount was more insurance than Keene's legal advisers thought would ever be necessary to pay its asbestos-related claims and legal expenses. After all, the company's involvement with the litigation had stemmed entirely from its 1968 purchase for $8 million of a heating and ventilation subsidiary that had been shut down four years later. But Keene's legal advisers badly miscalculated the appetite of the contingent-fee community. The company eventually became a deep-pocket defendant, embroiled in more than 206,000 asbestos personal injury cases.[24]

In 1990, Keene left a joint defense group and took control of its own litigation. Soon, Keene was spend-

ing $3.4 million every month in legal fees. But Keene's monthly sales revenues came to less than $2 million, and its net income was only about $200,000 per month. The time that Keene's three-attorney legal department needed to spend analyzing outside counsel billing statements had become a drain on its real job of managing national litigation.[25]

Facing these dire financial realities, Keene applied a level one strategic management approach to its outside legal costs and achieved dramatic results. It began by collecting and organizing the legal billing data that it was receiving so as to inform its planning and decision-making. Almost immediately, Keene's legal costs began to drop while the performance measures began improving across the board. Within less than three years, the company's legal expenses had dropped nearly 57 percent (see fig. 1).[26]

What did Keene do? Lacking the benefit of the UTBMS codes, which would not be promulgated until nearly four years later, Keene started categorizing and tracking various legal activities and expenses. Ultimately, the company tracked and reported on 97 different tasks and compared them against performance standards that it had developed in consultation with its outside lawyers.

Representative of many of Keene's performance charts, fig. 2 displays one of the criteria that Keene used to help manage its cases: the over-standard percentage.

The data in fig. 2 show the percentage of the tasks billed to Keene that took longer than the time its outside lawyers thought such tasks should take on average. In the beginning of the measuring period, 37 percent of the tasks took longer than budgeted. Within six months, that number had dropped by two-thirds to 13 percent. At that point, Keene's law department decided that this performance level was acceptable and focused on other areas for improvement.

As over-standard or other performance data accumulated, Keene began to compare the law firms handling roughly comparable work. Keene prepared and distributed monthly performance reports to its law firms based on this data. Dramatic improvements occurred, and Keene stumbled onto one of the inherent secrets of strategic management, which it began calling the biofeedback phenomenon. This behavioral tendency stems from the fact that many people, including most lawyers, are competitive.

FIGURE 1 Keene Corp. Defense Costs Jan '91–Jun '93

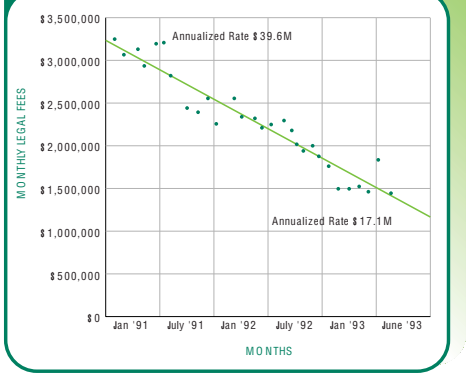
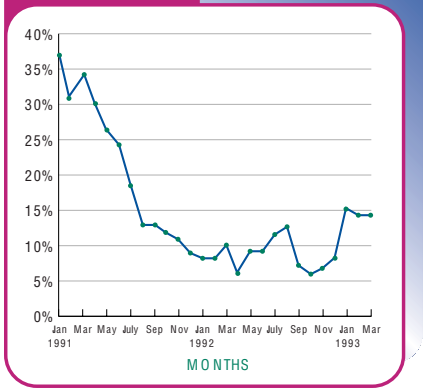


FIGURE 2 "Over Standard" Percent by Period

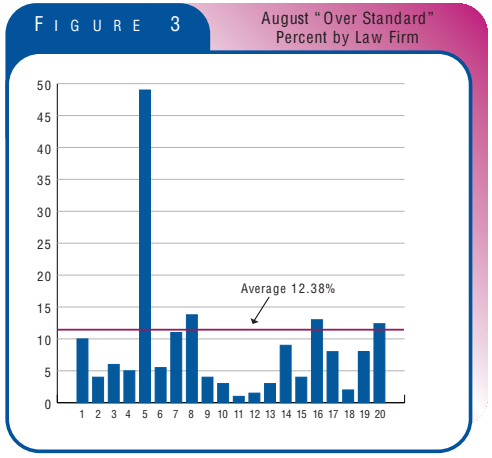


Source: "Industrial Engineering for Lawyers," Metropolitan Corporate Counsel, April 1995

Competitive people usually become energized when their efforts are quantitatively measured and rewarded and improve their performance once they have seen how they stack up against their peers. (See fig. 3 for an example of one of Keene's many performance charts.)

Keene also measured results for quality control purposes. Even as its total legal costs and costs per case were dropping, Keene was doing nearly 30 percent better than its peer group of defendants in such measures as average settlement cost, average verdict, and trial outcome. Legal briefs and appellate

FIGURE 3 August "Over Standard" Percent by Law Firm



Source: Corporate Legal Times, August 1994

results improved, and legal arguments became more sophisticated.[27]

Any number of tools can achieve level one performance. Preparing manual ledgers or reentering billing data is a labor intensive option, but it works.[28] Only slightly more sophisticated are Microsoft Excel® or comparable software that can be adapted to track legal fees and expenses. A number of commercially available tools appear able to operate at level one.[29] However basic these approaches are, they are light years ahead of the alternative: after-the-fact guesswork and legal fee auditing.

Level Two: Strategic Management in Unique Cases

The Keene case study illustrates the application of strategic management ideas to a large number of similar cases and runaway legal expenses. Skeptics might discount these results by claiming that asbestos lawsuits are cookie-cutter cases, but most companies have their share of what they consider routine matters. Even if strategic management successfully worked only on such matters, companies would benefit from its wider use. One-of-a-kind cases, however, are also amenable to strategic planning, process-mapping, or best practice analysis. Case study two involves level two SLM in which before-the-fact planning is applied to a unique case.

A multinational diversified chemical company with a sophisticated corporate law department numbering several hundred lawyers already had spent several years and several millions of dollars in discovery, preparing for the trial of a highly complex commercial lawsuit.[30] Because the company had received only traditional hourly billing statements, the law department was unsure where its legal resources were being focused and whether these expenditures were consistent with company goals. The company's general counsel wanted a better grasp on what was going on because executives were beginning to ask questions he was unable to crisply answer.

With about 90 days left before trial, the outside trial lawyers thought they understood what they needed to do to get the case ready. At that time, the company's law department asked the trial team to list everything it required before trial. In-house counsel asked what level lawyer or paraprofessional would perform each task the team contemplated. They also asked how long the various tasks would take to complete and when the work should be done.

The trial lawyers identified hundreds of tasks required to prepare for trial. When added up, the fees for these tasks totaled $313,000. When the case was over, the actual amount billed to the client for work done up to the start of jury selection was $311,000, a variance of less than 0.7 percent.

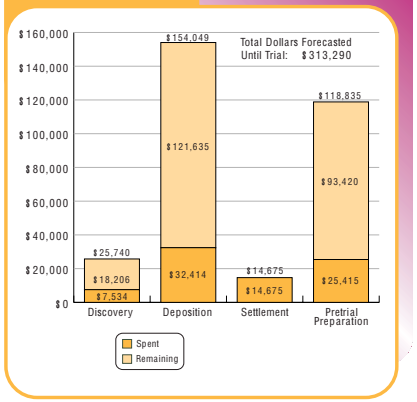
Most law firms and many clients would compare the estimated costs to actual billed amounts and conclude that the performance against the budget was excellent. But you get a different impression by comparing the required tasks with the tasks that were actually completed. In the most significant example, the company's level two analysis identified an area that the trial lawyers did not intend to devote much time to, but that corporate counsel deemed essential. Armed with this knowledge in advance, the law department was able to redirect the trial team's efforts before it was too late.

As fig. 4 illustrates, the trial firm's plan called for it to spend less than 5 percent of the budget on settlement preparation and negotiations. With only 60 days until trial, the trial firm had spent no time on this activity. Of course, when the client wants to try a case, such a plan is consistent with its strategy. But here, corporate counsel said that the company was extremely interested in settling the case. Thus, the data showed that the trial firm and the client were not on the same page of the strategic playbook regarding settlement. Fortunately, level two analysis forced the trial lawyer and the

corporate litigation manager to confront the divergence in case strategies. This before-the-fact planning helped the company achieve its strategic goal.[31]

In other areas, the outside firm proposed investing a great deal of time and then failed to deliver on its promises. For example, fig. 5 shows the cost to prepare the desired defense experts for trial testimony.

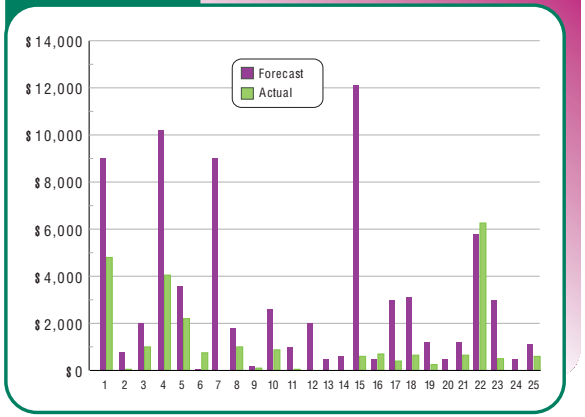
FIGURE 4 Forecasted Dollars Spent vs. Forecasted Dollars Remaining Phase



The corporate counsel responsible for the case seemed genuinely surprised by the number of expert witnesses the trial lawyer wanted to prepare. Fortunately, level two tools allowed counsel to ask some key questions. With 25 defense experts and a roughly equal number of plaintiff experts, one question was whether all of these people were necessary. Another was whether the judge would consider limiting each side to 10 or 20 experts. Counsel also wondered why the trial team had been spending so little time on what the budget estimates suggested were the important witnesses. As fig. 5 shows, within 60 days of trial, the outside firm had done virtually no work with witness 15, and the firm had yet to start preparing witness 7.[32]

Several commercial products are available to help attain level two performance, particularly when billing data are transmitted electronically. The best products analyze billing data, separate invoices by project or case, compare invoices to budgeted costs, contrast the practices of various outside counsel to uncover inefficient processes or over-billing, base fees on the UTBMS of task codes, and allow counsel to redirect legal expenditures to achieve strategic goals.[33]

FIGURE 5 Defendant's Expert Depositions



Level Three: "Closed Loop" Strategic Legal Management

By keeping corporate and outside counsel focused on the same goals, strategic management substantially reduces or eliminates unneeded, marginal, or unwarranted legal work. Simply put, as the quality of the legal work increases, legal fees decline. Level three provides the means to delve into best practices and facilitates predictive modeling.

Over the years, Hershey Foods, a leading maker of chocolates and other fine foods, collected data to develop optimal strategy protocols for handling a wide range of product inquiries and complaints from customers. In developing a process to sort such inquiries and route them to the most appropriate location for resolution, it put level three strategic management into action.

The company decided that customer service should handle most of the inquiries, that risk management should handle some, and that the law department should handle a few, specific ones. It then categorized the nature of the concerns and developed detailed and proprietary action lists for each inquiry category, based on its ever-expanding experience. The company measured the number and percentage of complaints resolved at each level and the internal and external costs to resolve them. In this way, Hershey gained strategic insight into what was happening in the marketplace, measured and increased its customers' satisfaction, and continuously updated its best practices while allocating its limited legal resources to issues that really needed them and that could provide the greatest value.

Hershey Foods did not hopelessly search for meaning from stacks of minutely detailed, but unsynthesized task records, as corporate law departments still must do with traditional legal billing statements. Nor did it simply analyze what had taken place after-the-fact, as companies on level one do. Going beyond the before-the-fact strategy of level two, it operates in real time, drawing on its past experience to identify and implement optimal solutions to its ever-changing business needs, which is what level three SLM is all about. The Hershey case study shows that benchmarking and predictive modeling are not distant dreams. Level three outcome modeling is already in practice.[34]

Several years ago, a consortium of major corporations, led by Hershey Foods, Fieldcrest Cannon, and AmHS Insurance, asked a team of outside and corporate counsel, claims executives, financial and systems professionals, and even an industrial psychologist to create a legal management system.[35] As this multidisciplinary team began to wrestle with the issues, it realized that much of the territory was uncharted and that, although helpful, the common code sets were only the first step. The team discovered that achieving significant breakthroughs in the performance, measurement, predictability, and compensation of legal services would require much more than a common dictionary of tasks. The team's work eventually led to a patent on systems that use predictive modeling in the legal field. The patent describes a system "having iterative convergence to an optimal strategy and dynamic tracking of current prevailing legal climates."[36] The schematic of the closed loop predictive modeling system of the patent appears in fig. 6.

The flow in fig. 6 shows how level three tools work. When a new matter arises, the law department selects a best-practice strategy protocol. The protocol serves as an initial working task list and is developed from roughly similar experiences. In a matter of first impression, the department creates a new best-practice template from scratch. The protocol is the foundation on which to build a case strategy and task list.

The working task list is not cast in stone. Instead, it fosters communication between outside counsel and corporate legal management. It starts the operational and strategic planning thought process. Over time, the law department can modify the protocol, either manually or by using data-mining tools, based on what is effective.[37]

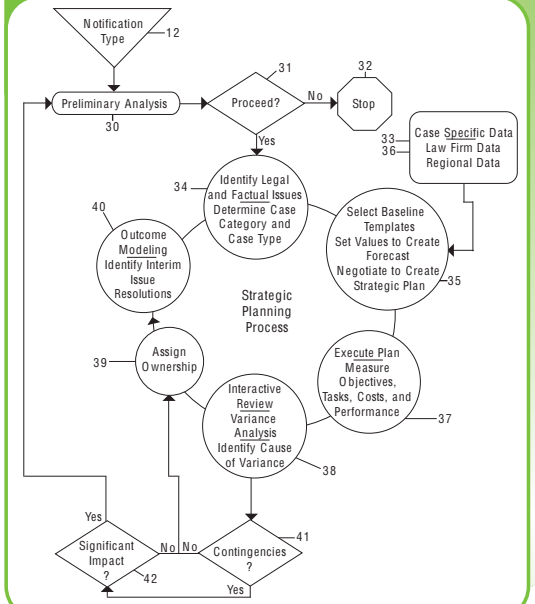
Is legal work art or science? Certainly, inspiration sometimes achieves unexpected legal results. Just as some chefs have more flair for certain recipes than others, some lawyers will more easily effect the protocols than others or will consistently achieve superior results. Occasionally, chefs and lawyers will create new recipes or even new styles. Peer review certifying boards, after all, can develop clinical practice guidelines for brain surgery and rocket scientists can develop detailed protocols to support NASA's ventures into the unknowns of space. Similarly, most of the activities that lawyers work on can be planned, measured, taught, and improved.

HOW DO YOU GET STARTED? SUMMARY RECOMMENDATIONS

As the first two case studies show, Strategic Legal Management can help identify the questions that you need to ask in both mass litigation and unique legal matters. They provide performance measures to assess both productivity and the quality of legal services.

With level one, spending patterns begin to appear from which you can make decisions and draw conclusions. Productivity should improve and legal fees should begin to drop soon after you start measuring and publishing the data. At level two, you can resolve many questions before commencing the work, thus enabling course

FIGURE 6



corrections or changes in strategic emphasis. Better advance communication all but eliminates the need for legal audits or time write-offs by law firms, thus increasing law firm profitability.[38] This benefit occurs even as corporate clients significantly reduce their legal fees.

The Hershey case study demonstrates how, with level three or interactive, closed-loop management processing, you can develop a best practices protocol that you can apply and adapt as necessary to roughly similar situations as they arise.

Now that you better understand strategic management and some of its benefits, and have seen its powerful, positive effects applied to real legal activities, how do you go about implementing an SLM system in your own law department? The following practice points, culled from the case studies and years of experience in strategic management of corporate legal functions, should help you in doing just that.

Choosing an Approach

The UTBMS codes are helpful but not mandatory.[39] Many companies successfully use their own custom codes for their legal work, just as Keene did. You should be able to customize any software system you select to your company's unique code set and to track various subcategories of legal matters you confront.

If it takes your law department more than 90 days to decide on a strategic management system, your team may not have enough commitment or the right composition to be successful. Shake up your group; better still, reward implementation benchmarks.

If it takes more than six months (a year at the outside) to implement a UTBMS or SLM system, either homegrown or commercial, you probably need to look for another system. Again, you can minimize this risk by rewarding benchmarks.

Unless your company's IT group has previously designed, built, and implemented legal management software on tight timetables, the homegrown approach will rarely prove economical. Near-term savings from internal development often prove illusory. It is better to benefit from others' mistakes rather than to repeat them.

But if your company is intent on creating a homegrown system instead of licensing a commercial SLM system, you should include lost-opportunity costs in your development cost analysis. If, for example, it takes an extra year to fully develop and implement an internal system, what cost savings did you forego during that year?[40] If the internal system is only half as robust as the commercial system, what quality improvements will never manifest? Such hidden costs rarely appear in a cost analysis, and yet companies that incur those costs cannot recover them.

Expert systems should be based on use in real cases and designed by a multifunctional team of experts. Accounting systems are more likely to meet the needs of the financial component than the law department. Time and billing systems and most case-management systems are designed for law firms, not for their corporate clients. You need a system based on real experience in real corporate law departments.

Whatever software system you select, your outside law firms' time and billing systems should export data directly into your system. If they do not, demand that those vendors take whatever steps are necessary to provide this export/import feature in their software or change vendors. Reentering data has no place in a computer literate world, especially at the price legal services command.

Getting Things Running

For many companies, the two biggest barriers to realizing the potential of the UTBMS or SLM are delay and the fear of making mistakes. Companies can spend an inordinate amount of time performing needs assessments. You may recall how desperate Keene was to understand what it was getting for its legal investment and to improve its litigation outcomes. In its desperation and urgency to implement a program, numerous insights became obvious more quickly. When it made mistakes, Keene made corrections, but equally important, it kept going.

The message is clear: get started and do not quit. Set a rigorous timetable and stick to it. The sooner you begin, the sooner you will see results.[41]

The case studies also contradict other generally assumed barriers. These include that performance metrics is difficult to identify, that improvement tends to be incremental, and that measurable changes do not take place quickly. Again, the best way to begin to see tangible and measurable results is just to start.

When you confront seemingly impenetrable barriers or experience delays, turn to experts who have repeatedly overcome similar ones at other corporations. Look for legal consultants with a proven track record in this area. They should help you to define objectives, provide measuring standards to assess progress, develop appropriate rewards, and improve communications between you and your outside lawyers.

Even as you begin to see performance improvements and legal cost reductions, persevere. As you start to develop your own best practice standards, you will not reach a new steady-state legal cost and performance level until you have invested three or four years of serious effort. Look again at fig. 1 with its steady decline in spending. At the start, Keene would have welcomed 25 percent reductions; after 30 months, it expected 70 percent savings. Be patient, but be persistent.

The biofeedback phenomenon, which is present on all three levels, can help you decide in which practice area to start. Litigation consumes roughly half of outside legal spending and is often a good place to initiate Strategic Legal Management.[42] Trial lawyers tend to be more competitive than most, which is an added benefit. Other good starting places include any area in which your company is very active, such as workers' compensation, M&A, and mass torts; you will be able to test and discover best practice protocols more quickly. Intellectual property is another likely area, because lawyers who are also engineers will tend to understand the process improvement goals.

Regardless of where you start, publish the data internally and to your outside counsel. You need do little more than issue a regular report to begin to see performance improve. (See the Keene data in fig. 2.) You will soon find that your outside counsel will start doing more of the time-consuming compliance review, and you will spend less time laboriously poring over traditional legal billing statements.

Qualitative performance metrics demonstrating improved trial and settlement outcomes disposes of the anecdotal criticism that legal cost savings inevitably compromise the defense effort.[43] The chemical company in case study two was able to achieve its strategic goal of settling a case that it thought might have a disastrous trial result. Keene also improved its trial results, and Hershey can now invest its legal resources where they can make a positive difference.

Few law firms have embraced strategic management approaches to date. Too many firms still reject proven strategic planning ideas even when the almost certain result is a substantially improved working environment and a rise in annual revenues of $20,000 to $100,000 or more per partner.[44] Expect resistance. Do not get frustrated. Instead, think through how you will overcome foot-dragging. If you need help, turn to experts for advice.

The reality is that by applying strategic management principles to legal work, law firms can

increase their gross margins and net income, even as corporate clients' outside legal costs drop.

Benchmarking Benefits

For corporate counsel, no strategic task is more important than improving the quality of the legal work performed for the company. One side effect of improved quality is lower costs for legal services. If you are concerned about start-up costs, your department's savings will more than offset the initial installation, training, and consulting costs of a good SLM system.

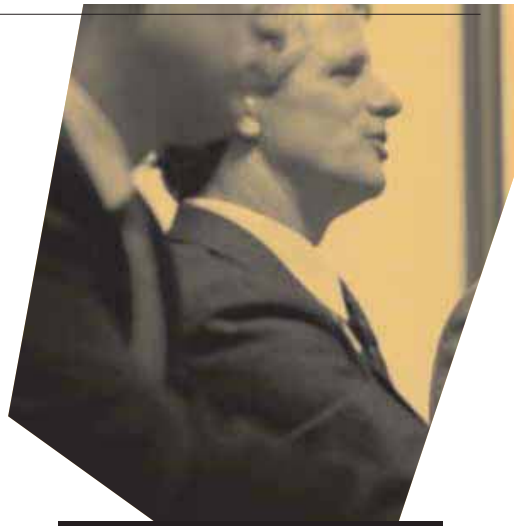
According to one reviewer, "A typical legal management system can cost around $175,000 for a mid-sized corporate law department with 40 or 50 users. However, these systems can have a quick payback.…Some systems charge a percentage of costs that are run through the system."[45] A few vendors will partner with you on a variety of performance- or savings-based incentive arrangements.

A corporate law department that spends the median $11.7 million annually on outside counsel needs to save less than 2 percent of its legal costs to recoup its investment. Its payback will take about a year. Most companies will generate cost savings in the 10 to 30 percent range, so the return on investment is many multiples higher, and the payback can take place sooner.[46]

If you cannot point to significant, demonstrable improvements within a year, take another look at your SLM team. Bring in experienced outside help. Better still, design the law department incentive compensation program to reward meeting desired targets.

If, after two years, your quality and savings improvements are less than 15 percent, think about bringing in additional expert consulting help. Be willing to pay for proven experience; whatever the cost, it is small compared to what you are likely to achieve.

As illustrated in the chemical company's case study, asking trial lawyers to account for the differences between the tasks they believe are required and the tasks they are actually performing is a productive strategic dialogue. Compare the value of that dialogue to the usually highly charged and frustrating conversations that you probably have had with law firms when you challenged individual time entries months after the work was completed.



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Without a strategic legal plan, you and your outside counsel have not agreed on how to invest the law firm's time or what your company's costs will be. You will not be able to fix the strategy before you have wasted money on marginal activities. You will not be able to focus on those issues your best practice analysis shows make a difference in outcomes. Unhappy clients, unhappy outside law firms, needless expense, legal audits, and write-offs are the typical results.

If you can derive total costs only after completion of the work, as in level one, you do not get to ask many productivity, efficiency, and resource allocation questions. Seeing a strategic plan before you and your outside counsel implement it, as you do in level two or level three, gives you a chance to ensure that both you and your outside counsel will make the proper investment of resources. In effect, you approve the plan before you incur the expense.

CONCLUSION

Increasingly, corporations are applying strategic management principles to their legal functions. The adoption of industry-approved legal task-based billing codes and the availability of new tools and new technology are speeding up this evolutionary process. It is only a matter of time before in-house counsel will apply Strategic Legal Management, using data generated by the royalty-free UTBMS codes, to a significant percentage of the legal work performed for corporate America. Corporate legal officers should be retaining experienced consultants or licensing expert SLM software systems now to help achieve their company's business and strategic goals quicker.

With the likelihood of a payback on such investments in the first year and a five-fold, ten-fold, or even fifty-fold return in just three or four years, companies should find the implementation of an SLM system to be inexpensive, whatever the initial cost. Although it may be overly optimistic for companies to expect to save one-half of their legal costs, those that select the right people and tools can realistically expect to reduce costs by 20 percent.

With so much to gain and so little to lose, top corporate management should be requiring their corporate law departments not only to implement UTBMS, but also to begin using SLM on at least a portion of their companies' legal portfolio. The level you select will depend on the level that best suits your company's needs and available resources. Each has its advantages, and all are preferable to the traditional approach that the vast majority of corporate law departments use now.

The walls of tradition that shield law practice in both corporate legal departments and outside law firms from generally accepted strategic management approaches are crumbling. The legal profession increasingly should and will move away from its traditional ready-shoot-aim work process and billing models. Corporate counsel like you have the chance to shape that future. ◻

NOTES

1. Companies will spend at least $41.8 billion annually for business systems developed by SAP, Siebel Systems, Oracle, dd/Synergy, Peregrine Systems, PeopleSoft, and BAAN, among many others, by 2004. *See* Melanie Warner, *Oracle and Siebel's Software Hardball*, FORBES, Oct. 16, 2000, at 391. Most efforts are devoted to the process-mapping, software, and accompanying consultants. Enterprise resource planning ("ERP") systems automate manufacturing processes, organize accountants' books, streamline corporate human resource departments, and maximize the productivity of sales organizations. Customer relationship management ("CRM") software helps companies to coordinate their sales, customer service, and marketing groups and to share information about customers. Six Sigma is "a method of applying focused analysis to a business operation in order to streamline it and find economies at every step." *See* Mikel Harry & Richard Schroeder, *The Six Sigma Bible*, CORP. COUNS., Aug. 2000, at 48; Michael Burger, *DuPont Goes Six Sigma*, *id.* at 42; Anthony Paonita, *GE and the Art of 'Systematic Common Sense'*, *id.* at 50 (this trilogy of articles explains what corporate law departments hope to achieve using Six Sigma).
2. PricewaterhouseCoopers's 16th Annual U.S. Law Department Spending Survey, Executive Summary (Oct. 31 2000) at 4. PricewaterhouseCoopers conducts an annual survey of corporate law departments; the current survey includes data gathered from "216 law departments in 16 industries with an aggregate $7 billion in total legal spending. Over 55% ... are Fortune 500 companies." *Id.* at 1. The chemical, manufacturing, and pharmaceutical industries have the highest total legal spending as a percentage of worldwide revenue. For 1999, median spending on outside counsel increased by 9 percent, or nearly three times the rate of increase in the gross national product. *Id.* at 4. Litigation spending, excluding intellectual property, is a median 44 percent of total spending on outside counsel. *Id.*
3. *See* Lisa Brennan, *Large Companies Trim Legal Costs,*

NAT'L LAW J., Nov. 3, 1997, at 1, reporting on PricewaterhouseCoopers's 13th Annual U.S. Law Department Spending Survey. The booming economy has been driving corporate revenues up even faster than legal fees are rising. Legal spending as a percentage of revenues in large corporate law departments was 1.3 percent as recently as 1996. Should the economy cool, upward pressure on spending percentages is bound to follow.

4. *See* Leslie Spencer, *The Tort Tax*, FORBES, Feb. 17, 1992, at 40.
5. *See, e.g.*, Susan Beck, *Skaddenomics: The Ludicrous World of Law Firm Billing*, AM. LAWYER, Sept. 1991, at 3; Karen Dillon, *Dumb and Dumber*, AM. LAWYER, Oct. 1995, at 5; Linda Himelstein, *The Verdict: Guilty of Overcharging*, BUS. WEEK, Sept. 6, 1993, at 47; Amy Stevens, *Six Ways to Rein in Runaway Legal Bills*, WALL ST. J., March 24, 1995, at B1.
6. One such tool, DefenseNetR strategic legal management system, helps companies prescribe best practice approaches to legal issues to optimize results. DefenseNet is a registered trademark of Golden Triangle, Ltd.
7. *See* Richard Hall & Keith Katsma, *Tips, Traps, and Technology for Tracking Costs with Task-Based Billing*, 18 ACCA DOCKET 54, 58 (April 2000) ("The answer, of course, is that in the future [corporate legal departments] will want to use this data [generated by their outside law firms] to perform predictive modeling, which will help determine how much certain cases should cost, or when and for how much to settle.").
8. Coordinated by PricewaterhouseCoopers, the uniform task-based management system codes are available online at >http://www.acca.com/infopaks/taskbasedbill.html<. You may find a step-by-step guide for implementing a UTBMS system at >http://www.acca.com/protected/infopak/tb_billing/ implement/html<. *See also* Stuart Rickerson, *Billing Practices and Arrangements, in* QUALITY PRACTICE MANAGEMENT 138, 154-167 (International Association of Defense Counsel 1995).
9. The American Medical Association is a generation ahead of the legal profession, having developed medical task codes in 1966. The AMA views its medical task codes as valuable intellectual property and licenses them for millions of dollars annually. See Ann Carrns, *AMA Fights for Control Over Doctor-Price Data Web Sites Are Providing*, WALL ST. J., Aug. 25, 2000, at A1. Doctors, too, once had a hard time imagining how they could fit their activities into task categories. Now, virtually all doctors use the medical task codes to describe their work and to get paid for it.
10. *See* Hall & Katsma, *supra* note 7, at 54. *See also* David Rubinstein, *Task-Based Management Goes In-House*, CORP. LEGAL TIMES, Oct. 2000, at 82 (describing how Craig Glidden, the first general counsel of Chevron Phillips Chemical Co., employs task-based billing to "enable the legal department to communicate its value to management [and to determine] which work is best to outsource and which is best done in-house.").
11. *See supra* note 3, at 7.
12. DuPont's goal is to "save the company $8-12 million—or 10-15 percent of the legal department's total costs-each year." *See* Burger, *supra* note 1, at 44. From 1994 to 1997, DuPont reduced its legal expenses by 39 percent and saved $30 million in litigation costs. ACCA, *Five Years Into the Experiment: An Evaluation of DuPont's Legal Model*, 16 ACCA DOCKET 24, 26 (July 1998). DuPont reported a 25 percent reduction in outside legal fees in the first year of its "lawyer re-engineering" project. *See* Bruce Rubinstein, *DuPont Partners with Law Firms to Build Legal Network*, CORP. LEGAL TIMES, Aug. 1996, at 15.
    Whirlpool reports "a 15 to 20 percent decrease in litigation costs [this year and expects] another 15 to 20 percent next year." *See* Kelley Bowers, *Whirlpool's National Product Counsel Deemed Successful*, CORP. LEGAL TIMES, Nov. 1996, at 26.
    Republic National Bank of New York "expects the software to cut its legal costs by at least 20% this year." *See* Carolyn Geer, *Haggle No More*, FORBES, Jan. 27, 1997, at 96.
    Eli Lilly realized a reduction in legal fees "from 18 percent up to 28 percent in 18 months," depending on the type of case. *See* Stuart Rickerson,Guest Opinion, THE CIV. LITIG. REP., Feb. 1996, at 5.
13. *See e.g.* Kelley Bowers, *Uniform Task-Based Billing Codes Receive Mixed Reviews*, CORP. LEGAL TIMES, Oct. 1996, at 28.
14. *See supra* note 1.
15. Business-side improvements command huge investments of corporate resources. Within the next five years, these investments are expected to exceed $40 billion annually. *See supra* note 1. If companies invest in SLM according to the percentage of their law departments' share of corporate revenues, they will have to spend an aggregate of $1.2 billion to $2.4 billion annually to keep pace with the business side.
16. *See supra* note 12.
17. *See supra* note 2.
18. Law firms that embrace strategic management can realize a now largely theoretical fourth level of SLM. At this level, the law firm gains a new and powerful tool to evaluate and compensate its professionals; to facilitate widespread and more profitable use of alternative fee arrangements; to enhance gross margins; to reduce or eliminate write-downs; and to marginalize concerns about legal audits, all the while delivering higher quality legal work to clients. Each firm partner representing corporate clients can expect an additional $20,000 to $100,000 profit per year.
19. Electronic transmission of legal billing data is probably also inevitable, but is the subject of another article. Electronic transmission moves billing data from the law firm to the corporate law department faster. But quicker transmission alone does not help corporate counsel to understand what is going on at the law firm or to strategically manage the work. Instead, data mount up more quickly, awaiting traditional review and approval.
20. Ironically, while law firms complain about being micro-managed, the primary tool they provide, the hourly billing statement, is most suited to micromanagement. Law firms should embrace anything that would permit, encourage, or even require their corporate counterparts to look at the big picture and to plan ahead. Too many do the opposite.
21. This was the conclusion of the ABA's Committee on Corporate Counsel, Section of Litigation Task Force on Reengineering the Delivery of Legal Services. *See* Tom Hill, David Snively, Murray Levin & Arvin Maskin, co-chairs, *Final Report of the Task Group on Corporate Counsel Management, in* LITIGATION MANAGEMENT BEST PRACTICES 127, 134-38 (Glasser LegalWorks 1998). The task force's charter charged it to seek out and report on best practice approaches used or developed by corporate America for all practice areas, including litigation. *Id.* at 129. Seven legal management initiatives were detailed as particularly "noteworthy and instructive" themes repeatedly found in leading corporations. *Id.* at 130-34. The author was an active participant on the task force, which interviewed more than a score of corporate law departments, including those at Monsanto, American Insurance Companies, Chrysler, General Electric, DuPont, Alcoa, Pacific Telesis, Chevron, and Keene.
22. The description of Keene's circumstances, responses, and conclusions is extensive for several reasons. First, the author was general counsel to the company and a member of its Board of Directors. He has firsthand knowledge of the facts and conclusions drawn from them. Second, Keene waived most of its privileges, enabling detailed descriptions of its legal thinking. Most companies cannot be so forthcoming. Finally, with 206,000 cases and $535 million in fees and liability payments, Keene simply had more cases, spent more money on the lawsuits, and tracked its legal investments in greater task detail than all but a handful of companies does. Its legal experiment is roughly analogous to a large clinical trial performed with a new pharmaceutical agent. Keene learned in the crucible of on-going litigation what worked and what did not.
23. *Keene Corp. v. Ins. Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), cert. denied, 456 U. S. 951 (1982) (establishing the "triple trigger" insurance recovery theory).
24. For a general review of the "perverse incentives" of asbestos litigation, see Lester Brickman, *The Asbestos Litigation Crisis*, 13 CARDOZO L. REV. 1819 (1992). Keene's experience has been widely reported. See, e.g., Glenn Bailey, *Litigation Abuse is Destroying My Company*, WALL ST. J., July 15, 1992, at A13; Andrew Blum, *Playing Asbestos Hardball*, NAT'L L. J. , May 18, 1992, at 1; Linda Himelstein, *The Lessons of 200,000 Lawsuits*, BUSINESS WEEK, April 11, 1994, at 4; Wade Lambert, *Keene's Asbestos Fight Spreads Beyond Courts, Onto Ad Pages*, WALL ST. J., June 29, 1992, at B7; Suzanne Oliver & Leslie Spencer, *Whom Will the Monster Devour Next?*, FORBES, Feb. 18, 1991, at 75; Stuart Rickerson, *Task Based Billing: Industrial Engineering for Lawyers*, THE METROPOLITAN CORP. COUNS., April 1995, at 40; Andy Zipser, *Asbestos Victim: Keene Corp.*, BARRON'S, Mar. 29, 1993, at 12.
25. According to a leading practitioner: "The three most important functions of corporate in-house counsel are: (1) to ensure consistency of defense policy and performance; (2) to exercise quality control; and (3) to act as a clearing house for the dissemination of [strategy,] information, facts, and training necessary to provide a defense in the field." *See* Lawrence Cetrulo, *Managing Defense*, 2 TOXIC TORTS Ch. 12-7, 12-9 (Clark Boardman Callaghan 1993).
26. Without these changes, Keene's expenses would have been at least $60 million higher. Had Keene embarked on its plan even one year earlier, it would have outrun what Forbes magazine calls the "asbestos litigation monster." *See* Oliver & Spencer, *supra* note 24, at 75. Stated differently, the $60 million that Keene saved gave it two more years to find a solution in what turned out to be a vain effort to avoid another products-litigation-caused bankruptcy. Keene eventually became the nineteenth company to file for Chapter 11 protection because of asbestos litigation. *See In re Keene*, 93-B-46090 (SMB) (Dec. 3, 1993). *See also* Wade Lambert, *Appeals Court's Decision In Keene Case Raises Doubt on Settlement*, WALL ST. J., Dec. 2, 1993, at B5. The number of asbestos-litigation-caused bankruptcies is now twenty-three. *See* Claudia Deutsch, *Owens Corning Has Filed for Bankruptcy Protection*, N.Y. TIMES, Oct. 6, 2000, at C2. Had Owens Corning, which reports $5 billion in annual sales revenues (or roughly 250 times Keene's annual revenues, 10 times Keene's liability payments, and 2.5 times its number of claims), adopted an effective level one program when Keene did in 1991 (or even in 1995 and 1996 when Keene's data were published), could it have avoided another job-killing and stock-devastating bankruptcy?
27. Outcome improvement, in the face of declining legal costs, occurs regularly when strategic management is applied to the legal function. Several years ago, for example, Eli Lilly lost a $4 million jury verdict with more than 400 seemingly similar cases on file. The author spearheaded a strategic refocusing of the company's approach to the cases. With new counsel, different emphasis, and a detailed strategic plan to deal with the cases, Lilly never lost another of these cases. Within a short time, the cases were history. This represents a 100-percent improvement in trial outcome, and converts what could have been a $1.6 billion liability or worse into a minor footnote in the company's history. Simultaneously, Lilly's legal costs declined 18 percent for the cases. *See Rickerson, supra* note 12.
28. The first tool the author used was the "Barb software." When bills would arrive at Cardiac Pacemakers, Inc., (now part of Guidant) in the 1980s, his secretary Barb would hand-tabulate them. The resulting ledger would show how the corporation's legal dollars were being spent, provide crude comparisons among law firms, and permit conclusions on whether the company's "investment" was warranted by the "returns" produced by the

activity. Some of these reports were posted outside of the law department offices for the rest of the company to see.

29. One company that facilitates electronic billing appears to have a feature that functions on level one. It summarizes the potential benefits of its product for corporate law firms as follows: (1) eliminate paper involved in traditional paper invoices; (2) realize significant administrative cost savings, particularly for law departments that manually input invoice data into their systems; (3) dramatically reduce time that attorneys spend reviewing invoices; (4) permit law department "slicing and dicing" of electronically captured data to prepare management reports and graphs; and (5) speed up approval of validated invoices. More information can be obtained at the company's web site, http://www.evelocity.com/prodserv/cldbenefits.htm.
30. The company, with whom the author consulted, prefers not to be otherwise identified.
31. The media later reported that the case had settled in the low eight digits.
32. If the witnesses who required the most preparation time were not the most important, another series of questions about proper allocation of resources would be raised.
33. *See The Two Best Systems to Control In-House Legal Spending, in* REP. ON MGMT. ACCT. SYS. & TECH., April 2000, at 2 (Andy Dzamba ed., Inst. on Mgmt. & Acct.).
34 See Hall & Katsma, supra note 7, at 64-65 ("Predictive modeling, task-based compensation, law firm benchmarking, strategic planning, best practices, and other management tools are made possible by reliable [task-based billing] data.").
35. Here's what Forbes magazine said about the resulting system: "The software ... suggests how much certain cases should cost. It also has formulas for how the work should be performed, who should do the tasks, how long they should take and in what order they should be done. ... Over time, these baselines will be continually modified according to the participants' experience." *See* Geer, *supra* note 12, at 96. *See also* Julie Dalton, *Automating In-House Counsel: Corporate Law Departments Are Finally Getting Connected For Sizable Savings*, 15 CFO 71 (Feb. 1999); Wendy Leibowitz, *New Tech Helps Curb Legal Fees,* NAT'L L.J., July 14, 1997, at B11; *The Two Best Systems to Control In-House Legal Spending, supra* note 33, at 2.
36. "Legal Strategic Analysis Planning and Evaluation Control System and Method," U.S. Pat. No. 5,875,431. The author is one of the inventors of this patent.
37. You might liken this working protocol to a recipe found in a cookbook. As with a recipe, you can slavishly follow the directions and be relatively assured that you will achieve a predictable, and satisfying, result. Often, however, there will be external factors (incomplete or substitute ingredients, personal cooking preferences, or unreliable oven temperature settings) that cause the chef to adapt the recipe. As with the cookbook, so with the SLM protocol. You simply modify it. Again, like the chef who decides to make changes in the recipe, lawyers must think about the impact of changes in the protocol, while the client gets the chance to approve proposed changes, before the work is performed. Once you develop best practice protocols or recipes, you perform what is analogous to the triage that occurs in a hospital emergency room or on a battlefield. In triage, doctors assess the seriousness of an injury or illness and allocate resources appropriately to achieve the best overall results. You can also use the protocols to establish a budget or to serve as the basis for an alternative fee arrangement.
38. *See* Hall & Katsma, supra note 7, at 54.
39. *Id.* ("The remaining barriers to implementing [task-based billing] are logistical rather than philosophical. The question is no longer whether to implement TBB, but how.") When the potential gains are great, and the cost is minimal, what can justify further delay?
40. Assume, hypothetically, that commercial SLM systems generate annual savings of 20 percent on average. A law department with a $50 million legal budget will forego $10 million in savings if internal development adds one year to the project and should add that amount to its cost calculations. Similarly, if the actual savings for the homegrown system are 10 percent instead of the commercial assumption, you should add another $5 million per year to your calculation to get a true picture of the total in-house development costs.
41. "Whatever method you choose, start collecting your legal cost and task data now. Buy a database, get it into case management software, or hire a company to process your legal bills and store the data until you are ready to use it—but start now. This information is the key that will help you obtain predictable legal costs and results." *See* Hall & Katsma, *supra* note 7, at 66.
42. See PricewaterhouseCoopers survey data, *supra* note 2.
43. Law firm profitability will rise simply by reducing the firm's write-off percentage and speeding payment realization. For example, Keene approved legal work before it was done, so the law firms wrote off virtually no time. Keene paid its firms in advance, based on approved forecasts of work to be performed, and thus eliminated the traditional payment cycle time. If law firms generate new business with SLM, per partner profitability increases will be even larger.
44. When law firms use Strategic Legal Management, they write off less time. SLM facilitates profitable use of alternative fee arrangements and gives law firms a powerful tool to evaluate and compensate its professionals. No client wants to pay to train inexperienced lawyers; law firms that use SLM can provide less experienced lawyers with best-practice approaches that the firm or client has found successful.
45. *See The Two Best Systems to Control In-House Legal Spending, supra* note 33, at 3.
46. *See* Andrew Kessler, *Software That Pays for Itself,* FORBES, Oct. 21, 1996, at 294.

ing judgments and awards) than litigation. The perception of arbitration's ability to lower process costs was uniform across the three groups-an average of 58 percent expressed a belief that arbitration decreases costs, with only 9 percent on average believing that arbitration increased their costs.

Rationales differ greatly about the reasons for using-and therefore about the value of-ADR methods. While there was, for example, a very uniform and high recognition across the entire survey group that mediation saves time and money, 91 percent of the "most dispute-wise" legal departments expressed the opinion that mediation "provides a more satisfactory process" compared to 74 percent in the "least dispute-wise" group. Similar but less extreme differences can be seen for the "gives more satisfactory settlements," "preserves good relationships between disputing parties," and "is desired by senior management" responses. Of particular note, 74 percent of the "least dispute-wise" found themselves in mediation because of a court mandate, compared to 49 percent of the "most dispute-wise" companies. This disparity reflects the dispute-management approaches taken by these companies. Parallel differences in the perception of value of arbitration were found among the respondents.

In summary, those companies falling into the "most dispute-wise" category with respect to their handling of ongoing disputes are actively engaged in conflict avoidance programs; they put in place a framework that both helps prevent disputes from arising and that deals with disputes in their earliest stages as close as possible to the point of origin.

The survey results demonstrate the impact of a strategic approach to utilization of alternative dispute resolution processes within well-managed corporate legal departments. Perhaps more importantly, they offer substantial business reasons for senior corporate legal executives to reexamine both the strategic orientation of their legal teams, along with their day-to-day approach to conflict management. A copy of the full report of the study findings is available through the American Arbitration Association Web site at www.adr.org or by calling the American Arbitration Association at 1.800.778.7879.

IV. Sample Dispute Resolution Clauses

To be of maximum benefit, a dispute resolution clause should address the special needs of the parties involved. An inadequate clause may produce as much delay, expense, and inconvenience as a traditional lawsuit. When writing a dispute resolution clause, keep in mind that its purpose is to resolve disputes, not create them. Drafting an effective clause is the first step on the road to successful dispute resolution.

NOTE: the following sample clauses have been reprinted with the permission of the organization indicated in parenthesis. For additional information or sample clauses, please contact the organization as listed in the Dispute Resolution Organizations section of this InfoPAK.

A. Mediation Clauses

The parties can provide for the resolution of future disputes by including a mediation clause in their contract. Some typical mediation clauses read as follows:

Sample 1 (AAA)

The parties hereby submit the following dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures. [The clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties.]

Sample 2 (AAA)

If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.

Sample 3 (JAMS)

Except as provided herein, no civil action with respect to any dispute, claim or controversy arising out of or relating to this agreement may be commenced until the matter has been submitted to JAMS, or its successor, for mediation. Either party may commence mediation by providing to JAMS and the other party a written request for mediation, setting forth the subject of the dispute and the relief requested. The parties will cooperate with JAMS and with one another in selecting a mediator from JAMS panel of neutrals, and in scheduling the mediation proceedings. The parties covenant that they will participate in the mediation in good faith, and that they will share equally in its costs. All offers, promises, conduct and statements, whether oral or written, made in the course of the mediation by any of the parties, their agents, employees, experts and attorneys, and by the mediator and any JAMS employees, are confidential, privileged and inadmissible for any purpose, including impeachment, in any litigation or other proceeding involving the parties, provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation. Either party may seek equitable relief prior to the mediation to preserve the status quo pending the completion of that process. Except for such an action to obtain equitable relief, neither party may commence a civil action with respect to the matters submitted to mediation until after the completion of the initial mediation session, or 45 days after the date of filing the written request for mediation, whichever occurs first. Mediation may continue after the commencement of a civil action, if the parties so desire. The provisions of this Clause may be enforced by any Court of competent jurisdiction, and the party seeking enforcement shall be entitled to an award of all costs, fees and expenses, including attor-

neys fees, to be paid by the party against whom enforcement is ordered. Mediation clauses may also provide for the qualifications of the mediator, the method of payment, the locale of meetings, and any other item of concern to the parties.

B. Arbitration Clauses

Sample 1 (AAA)
Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its [applicable] rules and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.
Sample 2 (AAA)
We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its [applicable] rules the following controversy [cite briefly]. We further agree that we will faithfully observe this agreement and the rules, and that we will abide by and perform any award rendered by the arbitrator(s) and that a judgment of the court having jurisdiction may be entered upon the award.[1]

C. International Arbitration Clauses

Sample 3 (International Centre for Dispute Resolution (ICDR))

a. Any controversy or claim arising out of or relating to this contract shall be determined by arbitration in accordance with the International Dispute Resolution Procedures of the International Centre for Dispute Resolution.

b. Any dispute, controversy, or claim arising out of or relating to this contract, or the breach thereof, shall be finally settled by arbitration administered by the Commercial Arbitration and Mediation Center for the Americas in accordance with its rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

c. Any dispute, controversy, or claim arising from or relating to this contract, or the breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the Rules of Procedure of the Inter-American Commercial Arbitration Commission in effect on the date of this agreement.

d. Any dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, shall be settled by arbitration under the UNCITRAL Arbitration Rules in effect on the date of this contract. The appointing authority shall be the International Centre for Dispute Resolution. The case shall be administered by the International Centre for Dispute Resolution under its Procedures for Cases under the UNCITRAL Arbitration Rules.

D. Customizing Arbitration Clauses

The standard arbitration clause does not always meet the mutual needs of the parties. The parties are free to design their arbitration agreement in whatever manner they choose. To illustrate this point, below are some of the choices made by parties in addressing their various concerns. The following clauses are all from the American Arbitration Association.

E. Governing Law

It is not uncommon for parties to specify the law that will govern the contract and/or the arbitration proceedings. Some examples follow:
Sample 1 shall be resolved by arbitration in accordance with Title 9 of the U.S. Code (United States Arbitration Act) and the Commercial Arbitration Rules of the American Arbitration Association.
Sample 2 This contract shall be governed by the laws of the State of [specify].
Sample 3 shall be settled by arbitration in accordance with [state] Arbitration Law and administered by the American Arbitration Association under its [applicable] rules.

F. Provisional Remedies

The parties may wish to give themselves the option of applying to court for provisional remedies, in conjunction with the arbitration process. This can be accomplished as follows:
Sample 1 Any provisional remedy which would be available from a court of law, shall be available from the arbitrator, to the parties to this Agreement pending arbitration.
Sample 2 Either party may apply to any court having jurisdiction hereof and seek injunctive relief so as to maintain the status quo until such time as the arbitration award is rendered or the controversy is otherwise resolved.

G. Escrow Provision

Pending the outcome of the arbitration, parties may agree to hold in escrow money, a letter of credit, goods or the subject matter of the arbitration. A sample of such a clause providing for escrow follows:
Sample 1 Pending the outcome of the arbitration [name of party] shall place in escrow with [law firm, institution or AAA] as escrow agent, [the sum of _____ _____, letter of credit, goods, or subject matter in dispute]. The escrow agent shall be entitled to release such [funds, letter of credit, goods or subject matter in dispute] as directed by the arbitrator(s) in the award, unless the parties agree otherwise in writing.

H. Locale Provisions

Parties may want to add language specifying the place of the arbitration. Examples of locale provisions which may appear in an arbitration clause follow:
Sample 1 Any controversy relating to this Agreement or any modification or extension of it, shall be resolved by arbitration in the city of [specify], administered by the American Arbitration Association under the then prevailing [applicable] rules.
Sample 2 The arbitration shall be held in [city], [state], or at such other place as may be selected by mutual agreement.

I. Number And Qualifications Of Arbitrators

Parties often have very definite ideas about the qualifications of an arbitrator appointed to a dispute. The qualifications requirements may include specific educational, professional or training experience. Typical additions to an arbitration clause dealing with such matters are:
Sample 1 The arbitrator shall be a certified public accountant.
Sample 2 The arbitrator shall be a retired judge of the [specify] Court.
Sample 3 The arbitration proceedings shall be conducted before a panel of three neutral arbitrators, all of whom shall be members of the Bar of the State of [specify], actively engaged in the practice of law for at least ten years.

J. Remedies

Under a broad arbitration clause, the arbitrator may grant "any remedy or relief that the arbitrator deems just and equitable" within the scope of the parties" agreement. Sometimes, parties want to specifically include or exclude certain remedies. Samples of clauses dealing with remedies appear below:
Sample 1 The arbitrator shall have the authority to award any remedy or relief that a court of this state could order or grant, including, without limitation, specific performance of any obligation created under the agreement, the awarding of punitive damages, the issuance of an injunction, or the imposition of sanctions for abuse or frustration of the arbitration process.
Sample 2 The arbitrators will have no authority to award punitive damages or any other damages not measured by the prevailing party's actual damages, and may not, in any event, make any ruling, finding, or award that does not conform to the terms and conditions of the Agreement.

K. Award Provisions

The arbitration clause can be specifically worded to limit the remedial power of the arbitrator, even if the evidence indicates that greater relief might be warranted. For example, the clause may establish high and low figures beyond which the arbitrator may not award. This is called "high-low" arbitration. Another type is "last best offer" arbitration, also known as "baseball" arbitration. In this system, the parties negotiate to their final positions, and the arbitrator is compelled to select the figure of one party or the other-nothing in between, above, or below. Examples of such arbitration clauses follow.
Sample 1 In the event the arbitrator denies the claim or awards an amount less than the minimum amount of [specify], then this minimum amount shall be paid to claimant. Should the arbitrator's award exceed the maximum amount of [specify], then this maximum amount shall be paid to the claimant. It is further understood between the parties that if the arbitrator awards an amount between the minimum and the maximum stipulated range, then the exact awarded amount will be paid to the claimant. The parties further agree that this agreement is private between them and will not be disclosed to the arbitrator.
Sample 2 Any award of the arbitrator in favor of [specify party] and against [specify party] shall be at least [specify dollar amount] but shall not exceed [specify dollar amount]. [Specify party] expressly waives any claim in excess of [specify dollar amount] and agrees that its recovery shall not exceed that amount. Any such award shall be in satisfaction of all claims by [specify party] against [specify party].
Sample 3 Each party shall submit to the arbitrator and exchange with each other in advance of the hearing their last best offers. The arbitrator shall be limited to awarding only one or the other of the two figures submitted.

L. Fees And Expenses

Fees and expenses of the arbitration, including attorneys' fees, can also be dealt with in the arbitration clause. Some typical language dealing with fees and expenses follow:
Sample 1 All fees and expenses of the arbitration shall be borne by the parties equally. However, each party shall bear the expense of its own counsel, experts, witnesses, and preparation and presentation of proofs.
Sample 2 The prevailing party shall be entitled to an award of reasonable attorney's fees.
Sample 3 The arbitrator(s) is authorized to award any parties such sums as shall be deemed proper for the time, expense, and trouble of arbitration, including arbitration fees and attorneys' fees.

M. Mini-Trial

Sample 1 (AAA)
Any controversy or claim arising out of or relating to this contract shall be submitted to the American Arbitration Association under its Mini-Trial Procedures.

N. Negotiation

Sample 1 (AAA)
In the event of any dispute, claim, question, or disagreement arising out of or

relating to this Agreement or the breach thereof, the parties hereto shall use their best efforts to settle such disputes, claims, questions, or disagreement. To this effect, they shall consult and negotiate with each other, in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of sixty (60) days, then upon notice by either party to the other, disputes, claims, questions, or differences shall be finally settled by arbitration administered by the American Arbitration Association in accordance with the provisions of its [applicable] rules.

Sample 2 (JAMS)
The parties will attempt in good faith to resolve through negotiation any dispute, claim or controversy arising out of or relating to this agreement. Either party may initiate negotiations by providing written notice in letter form to the other party, setting forth the subject of the dispute and the relief requested. The recipient of such notice shall respond within five days with a written statement of its position on, and recommended solution to, the dispute. If the dispute is not resolved by this exchange of correspondence, then representatives of each party with full settlement authority will meet at a mutually agreeable time and place within ten days of the date of the initial notice in order to exchange relevant information and perspectives, and to attempt to resolve the dispute. If the dispute is not resolved by these negotiations, the parties will consider and decide whether the dispute should be submitted to JAMS, or its successor, for mediation or arbitration.

O. Mediation/Arbitration

Sample 1 (AAA)
If a dispute arises out of or relates to this contract, or the breach thereof, and if said dispute cannot be settled through direct discussions, the parties agree to first endeavor to settle the dispute in an amicable manner by mediation administered by the American Arbitration Association under its Commercial Mediation Rules, before resorting to arbitration. Thereafter, any unresolved controversy or claim arising out of or relating to this contract, or breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment upon the Award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Sample 2 (JAMS)
The parties agree that any and all disputes, claims or controversies arising out of or relating to this agreement shall be submitted to JAMS, or its successor, for mediation, and if the matter is not resolved through mediation, then it shall be submitted to JAMS, or its successor, for final and binding arbitration. Either party may commence mediation by providing to JAMS and the other party a written request for mediation, setting forth the subject of the dispute and the relief requested. The parties will cooperate with JAMS and with one another in selecting a mediator from JAMS's panel of neutrals, and in scheduling the mediation proceedings. The parties covenant that they will participate in the mediation in good faith, and that they will share equally in its costs. All offers, promises, conduct and statements, whether oral or written, made in the course of the mediation by any of the parties, their agents, employees, experts and attorneys, and by the mediator or any JAMS employees, are confidential, privileged and inadmissible for any purpose, including impeachment, in any arbitration or other proceeding involving the parties, provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation. Either party may initiate arbitration with respect to the matters submitted to mediation by filing a written demand for arbitration at any time following the initial mediation session or 45 days after the date of filing the written request for mediation, whichever occurs first. The mediation may continue after the commencement of arbitration if the parties so desire. Unless otherwise agreed by the parties, the mediator shall be disqualified from serving as arbitrator in the case. The provisions of this Clause may be enforced by any Court of competent jurisdiction, and the party seeking enforcement shall be entitled to an award of all costs, fees and expenses, including attorneys fees, to be paid by the party against whom enforcement is ordered.

P. Arbitration/Mediation

Sample 1 (AAA)
Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall first be submitted to arbitration administered by the American Arbitration Association in accordance with its [applicable] rules. The award rendered by the arbitrator under the rules shall be sealed for [specify number] days while the parties attempt to mediate the dispute. Said mediation shall be administered by the American Arbitration Association under its [applicable] mediation rules. The mediator shall not be the arbitrator previously appointed to hear the dispute. If the mediation is successful, the parties agree that the award of the arbitrator shall be [destroyed] [transmitted to the parties for their information]. If the mediation is unsuccessful, the award of the arbitrator shall be transmitted to the parties and judgment upon said award may be entered in any court having jurisdiction thereof.

V. Article: ADR - A Competitive Imperative for Business

By Todd Carver

Todd B. Carver is the law vice president and chief legal officer for the Teradata Divi-

505 Effectively Leveraging Outside Resources

Mark L. Carlton
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General Electric Company

Kimberly J. Myrdahl
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Mark L. Carlton is the former senior vice president and general counsel of Universal Compression, Inc., a leading supplier of compression equipment and services for the natural gas industry. Mr. Carlton was responsible for the company's legal division and served as corporate secretary.

Prior to joining Universal, Mr. Carlton was with Mobil Oil Corporation, serving in a variety of roles, including senior counsel, litigation.

Mr. Carlton graduated with honors from the University of Tulsa College of Law.

Suzanne E. Hawkins

Suzanne E. Hawkins is senior counsel, legal operations of General Electric Company. Ms. Hawkins is a leading member of the CEC Lawyers, GE legal's senior leadership team, the "managing partner" of GE's 900-lawyer global department. Ms. Hawkins has overall management responsibility for GE Legal, with emphasis on deploying and increasing the productivity and quality of GE's internal and external legal resources. Ms. Hawkins is known as a tough strategist and negotiator, credited with saving millions of dollars a year from GE's outside legal expenses; a dynamic, creative thinker, evidenced by being named inventor on two patents covering legal-related technology systems; and an energetic, effective, hard-working team player, who works seamlessly with GE's senior management and leads numerous cross-business/functional teams to achieve desired results.

Ms. Hawkins joined GE as an in-house attorney with the GE Plastics division in Germany. Prior to joining GE, Ms. Hawkins was of counsel to Curtis, Mallet- Prevost, Colte & Mode in Frankfurt, Germany. Early in her career Ms. Hawkins was a litigator at Weil, Gotshal & Manges in New York City.

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Ms. Hawkins received her BA from Georgetown University and is a cum laude graduate of the Georgetown University Law Center.

Kimberly J. Myrdahl

Kim Myrdahl is the director of litigation for SUPERVALU Inc. in Minneapolis. Her responsibilities include managing the commercial litigation for all of SUPERVALU's business units, advising business units on how to handle potential disputes, and implementing preventive litigation initiatives.

Prior to joining SUPERVALU, Ms. Myrdahl worked in the litigation group at the law firm of Fredrikson & Byron in Minneapolis.

She currently provides pro bono legal services as a volunteer lawyer to Volunteer Lawyers Network. She is the past board chair of Volunteer Lawyers Network. In addition, she is active in state and local bar committees concerned with seeing that the disadvantaged have access to the legal system.

Ms. Myrdahl received a BA from Texas Christian University and is a graduate of the University of Minnesota School of Law.

ACCA Annual Meeting 2002
October 21-23, 2002

Effectively Leveraging Outside Resources

Moderator: Richard Mannella
Atofina

Mark L. Carlton
Universal Compression, Inc.

Kimberly J. Myrdahl
SuperValu, Inc.

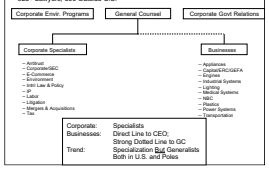
Suzanne E. Hawkins
General Electric Company

GE Legal Organization

- GE Legal Organization:
  - 925 Business-Focused Specialists Handling Cutting Edge Issues
  - Co-Located w/ Clients in 50 Business Units in More than 30 Countries
  - Compliance Focus: Black and White and Gray
  - Proactive not Reactive; Future Not Past; Offense, Not Defense
  - Business Advice -- Constructive/Broader Judgments
  - Policy -- Change Playing Field: Advocate and Effect Change
  - Significant Global Presence, and Growing (>300 Lawyers)
  - Integrated Through Technology, Practice Groups (16), Regional, Country Councils
  - Decentralized Dep't. but Strong Leadership, Unified Vision, Six Sigma, Agenda, Initiatives
  - Thin Corporate Staff of Leading Specialists (GC Direct Reports+ GC≈ CEC Lawyers)
- Quality, Digitization, Customer Focus:
  - Hiring the Best In-House and External Legal Talent Paramount
  - Overall Legal Cost as a Percent of Revenue Below Industry Average
  - Extraordinary Matters/Litigation Costs Down Contrary to Trends
  - Inside/Outside Legal Costs Shift: Now 60% Inside, 40% Outside
  - Effective Management of Highly Regarded Global Organization: with Six Sigma, Quality, Digitization, Customer Focus

GE Legal Organization

925+ Lawyers; 300 Outside U.S.



GE Legal –Legal Operations

- Outside Counsel Management: Emphasis on Quality, Effective Firms
  - Preferred Provider Programs in >12 Substantive Areas
  - Fixed Fees, Auctions, Added Value Benefits (CLE, Work Product)
  - Discounts/ Alt. Fees Save Millions Annually from Outside Spend
  - Detailed Legal Spend Data Captured on Web (OCMS) and w/ E-Invoicing
  - Trend Analysis: Litigation Spend Down, Global Spend Increasing
- Digitization Focused: Cutting Edge Technology -- Productivity
  - GE Legal Knowledge Bank, State-of-the-Art Features: Search Engine, Decentralized Loading of Documents, Linking Business Intranets
  - Digitizing Legal/Business Processes: Doc Generation, IP, Deal Room
  - Use of Collaborative Tools Internally and with Outside Firms
- Practice Group/Regional Integration: Specialists Across All Fields
  - 16 Substantive Groups (Antitrust, IP, Litigation, M&A, L&E, etc.)
  - Cross-Business Membership: In-Person, Digital Meetings
  - Quality Initiatives, Digitization, Best Practices
  - Global Expansion – International Lawyers Move Towards Specialization
- High Quality, Cost Effective Resources: Supporting 925 Global Lawyers
  - Lexis, Westlaw, GE CIRC
  - Preferred Vendors for Temporary Paralegals, Lawyers, etc.

SUPERVALU

- SUPERVALU is one of the largest grocery companies in the U.S. with total annual sales in excess of $20 billion.
- SUPERVALU operates two complementary businesses – grocery retailing and distribution services of food and other highly consumable goods.

  Retail SUPERVALU has 1,260 stores under the following banners – bigg's, Cub Foods, Farm Fresh, Hornbachers, Metro, Save-a-Lot, Scott's Foods, Shop 'n Save, Shoppers Food Warehouse

  Distribution SUPERVALU supplies and provides services to over 4,000 grocery retailers such as Buehler Foods, Byerly's, Haggens, Unrops, Target Superstores, D'Agostinos and Dierbergs.

SUPERVALU *Legal Department*

- 15 attorneys – 10 employees and 5 contract
- Region Counsel – handle real estate, acquisition and general legal matters for assigned region of the company.
- Litigation – handle all commercial litigation for the company along with providing clients with advice and preventive strategies to avoid litigation.
- Labor and Employment – provide advice to human resources personnel, assist with labor negotiations and handle all employment litigation for the company.
- Corporate – handle board matters, stock options, acquisitions, and other corporate matters.
- 7 paralegals – 5 employees and 2 contract
  - 2 real estate
  - 2 litigation
  - 1 labor employment
  - 2 corporate

Universal Compression

Universal Compression (NYSE: UCO), headquartered in Houston, Texas, is a leading natural gas compression services company, providing a full range of contract compression, sales, operations, maintenance and fabrication services to the domestic and international natural gas industry.

Leveraging Outside Resources

- Introduction: When to Go Outside; Cost/Benefit Analysis
- Hiring of Outside Counsel
  - Consolidation of law firms
  - Preferred Providers (by practice area, business, location)
  - Fixed Fees—Auctions
  - Use of Legal Groups (i.e. Meritas) to hire counsel
  - Added benefits: (seminars, CLE, work-product)
- Alternative Billing Arrangements with Outside Counsel
  - Discounts
  - Fixed Fees (individual matter or group of matters)
  - Contingency
  - Success Based
  - Retainer/Secondments

Leveraging Outside Resources

- Business Objectives
- Leveraging Outside Counsel to Support Internal Business Objectives
  - The Current Model & Response
    - Billable Hours
    - Metrics
    - Partnering
  - A Proposed Business Model
    - The Billable Hour
    - Metrics
    - Partnering
    - Requirements for Success
  - Communication
  - Commitment
  - Flexibility

Leveraging Outside Resources

- Hiring of Contract Attorneys and Paralegals
  - Use of Preferred Vendors (efficiency, consistency, reporting)
  - Project basis
  - Long term assistance
  - Use of Recruiting Firms
- Hiring of Consultants
  - Internal Investigations
  - Expert Witnesses
  - Economic Analysis
  - ADR
  - Jury Consultants

Leveraging Outside Resources

- Use of Technology Providers
  - Technology Consultants
  - Electronic Billing
  - Internet Depositions
  - Electronic Discovery\Document Productions (scanning/coding)
  - Trial Support
- Research Providers
  - Access to case law, statutes (Lexis, Westlaw)
  - Research Organizations (LRN, LRC)
- Conclusion

General Electric Company

Outside Counsel Policy

Rev. 08/00

General Electric Company expects outside counsel to provide GE and its affiliates with the highest quality legal services in the most cost-effective manner possible. GE values the contributions of both inside and outside counsel and strives for a collaborative relationship between the two. This Policy sets forth the principles and requirements by which GE intends to meet these objectives.

I. Scope and Applicability

These policies and procedures (hereafter "Outside Counsel Policy") govern the relationship of the General Electric Company and its affiliates (collectively referred to as "GE") with outside counsel. Outside counsel performing any type of legal services for GE may depart from this Outside Counsel Policy only with the prior written approval of the lead inside counsel responsible for the applicable matter. Questions concerning this Outside Counsel Policy should be directed to that lead inside counsel. This Outside Counsel Policy replaces the November 1995 *GE Guidelines for Outside Counsel*, and will take effect August 1, 1999 for all existing and future legal matters. Outside Counsel will be expected to follow this Policy in its entirety, unless specifically waived by GE.

II. Lead Inside Counsel

In any attorney-client relationship, the client has the responsibility for making all substantive decisions about the course of the matter. Accordingly, GE will designate for each engagement a lead inside counsel to direct the representation and coordinate communications with all other GE personnel. The lead inside counsel is responsible for ensuring that appropriate GE personnel are informed about and make the necessary substantive decisions about the matter and that outside counsel is kept appropriately informed both about GE's objectives in the matter and about pertinent business issues and developments. Lead inside counsel should be kept regularly apprised of all significant developments in the matter and consulted sufficiently in advance of the date by which any significant decision must be made. Lead inside counsel should also be given the opportunity and sufficient time to review drafts of all significant documents, including contracts, substantive pleadings, briefs, correspondence, and any other documents that will be provided to third parties on GE's behalf.

III. Outside Counsel Engagement and Staffing

A. Retention Decisions

GE inside counsel are responsible for the selection and supervision of outside counsel. Outside counsel may not accept an engagement directly from a GE businessperson unless GE inside counsel has authorized the specific use of their services for that engagement. Except in extraordinary circumstances, GE will not retain the services of a law yer affiliated with a firm that has asserted a claim against GE of alleged fraud, misrepresentation or other dishonest or illegal conduct.

B. Engagement Letter

Every engagement (or series of engagements) of outside counsel in which the fees for the entire matter are likely to exceed $25,000 should be memorialized by a letter setting forth the terms and conditions of the engagement. The letter should be signed by both lead inside and lead outside counsel and should indicate outside counsel's familiarity with and agreement to adhere to this Outside Counsel Policy, subject to any modifications agreed upon with lead inside counsel. GE will ordinarily not pay bills submitted by outside counsel who have not signed such an engagement letter. An example of an appropriate form of engagement letter is attached to this Outside Counsel Policy as Appendix A.

C. Staffing.

At the outset of the engagement, GE and lead outside counsel will together designate as the lead outside counsel a specific law yer within the law firm who will be chiefly accountable for the conduct of the engagement. That law yer should be personally and directly involved in the representation and is responsible for assuring that GE's objectives are met with respect to the engagement. **The lead inside counsel must approve all additional members of the team handling the matter, as well as any subsequent changes to the team.** Once the team is established, GE expects continuity of staffing for the duration of the engagement absent extraordinary circumstances. GE will not pay for "learning time" required by the substitution of attorneys or paralegals working on the engagement. Matters should be staffed with the number and level of personnel that are appropriate in order to render quality service in a cost-effective manner. GE prefers that its legal matters be staffed with law yers who have developed knowledge of GE and have appropriate subject matter expertise. GE will generally not agree to the assignment of first year associates or summer associates to work on GE matters unless special permission is obtained.

GE expects outside counsel to use paralegals instead of law yers whenever a task does not require a law degree. Certain GE legal departments have trained paralegals on staff who should be utilized on all projects requiring a significant expenditure of time or where knowledge of GE's products, processes or witnesses is helpful. In addition, GE has relationships with legal staffing providers that provide temporary paralegals and junior attorneys at GE-negotiated rates (*See Section VII.B Preferred Disbursement Vendors*). **For certain activities, such as file review, compiling and digesting documents and transcripts, due diligence, and similar functions, lead outside counsel is required to consult with and obtain the approval of lead inside counsel before using law firm personnel for such activities.**

D. Diversity

In the selection of counsel, as in its own employment decisions, the Company is committed to equal opportunity and fair treatment for all law yers and law firms without regard to their race, color, religion, national origin, sex, age, disability, veteran status, or other characteristic protected by law, and selects outside counsel based solely on merit, qualifications, and other job-related criteria. The Company also complies with the spirit and letter of all applicable laws in taking affirmative action to make sure a diverse mix of individuals and firms apply for and are considered for Company engagements. We expect the law firms that represent our companies to work actively to promote diversity within their workplace.

E. Retention of Local Counsel, Consultants, Experts and Vendors

Outside counsel are not authorized to retain any local counsel, consultant, expert or vendor without the advance approval of the GE lead inside lawyer. Unless lead inside counsel approves different arrangements, lead outside counsel will be responsible, in consultation with lead inside counsel, for the budgeting and billing arrangements governing the work to be performed by such local counsel, consultants, experts, or vendors that are required to conform to this Policy. Lead outside counsel will be responsible for any amount billed over budget or not in accordance with this Outside Counsel Policy that is approved in advance by lead inside counsel.

F. Representation of GE Clients and Third Parties

If a GE customer, client or supplier agrees to pay the fees and expenses of outside counsel for GE, the policies and procedures contained in this Outside Counsel Policy shall apply to that representation, unless the GE customer, client or supplier, GE and outside counsel agree to another arrangement. If outside counsel represents a GE customer, client or supplier where GE has agreed to be responsible for the fees and expenses of such counsel, the policies and procedures contained in this Outside Counsel Policy shall apply to that representation.

IV. Planning and Evaluation

Whenever requested by lead inside counsel, lead outside counsel should prepare a written strategic plan for the conduct of the representation. It should be prepared early in the engagement and include an identification of GE's objectives and a proposal as to how best to achieve them; the major steps likely to be required as well as their timing and sequence; an estimate of the projected fees and expenses for each phase of the matter; and the staffing planned for the matter. The plan should be reviewed in draft with lead inside counsel prior to being finalized and updated from time-to-time, as appropriate, to reflect developments in the matter and evolving understanding of the relevant objectives, facts or issues.

V. Early Dispute Resolution

GE is committed to the early and inexpensive resolution of its disputes. Toward that end, and as part of its Six Sigma quality initiative, GE has instituted a Company-wide Early Dispute Resolution ("EDR") Program designed to foster such early resolutions through mandatory early case evaluations and the systematic use of alternative dispute resolution ("ADR") techniques, especially mediation. EDR requires that all such GE disputes be evaluated for their suitability for resolution through some form of ADR. If a case is deemed eligible for resolution through ADR, every effort should be made to resolve the matter on that basis. Lead inside counsel will expect lead outside counsel to fully assist GE in its EDR efforts.

VI. Legal Research

Outside counsel should not bill GE for drafting documents or conducting research previously generated for GE or other clients. At the outset of an engagement, and at appropriate times during the matter, lead outside counsel should ask the lead inside counsel if there are standard GE documents or research that may be used for this matter.

Any legal research project billed by outside counsel must be approved in advance by lead inside counsel. GE has entered into a preferred vendor relationship (currently Legal Research Network) and may, at the discretion of lead inside counsel, determine that legal research should be performed by such preferred vendor. Although GE encourages the use its preferred legal research vendors, outside counsel are free to recommend to lead inside counsel any particular research that it believes outside counsel should perform.

VII. Fee Arrangements/Compensation

A. *Preferred Provider Status*

Certain firms have been designated a GE "Preferred Provider" as the result of being selected to participate in a formal program in the following substantive areas: Antitrust, Environmental, Intellectual Property, Labor & Employment, Litigation, Mergers & Acquisitions and Tax. In the event of a conflict between the terms of a Preferred Provider agreement and this Outside Counsel Policy, the Preferred Provider agreement takes precedence for the term of the agreement. All references to the Outside Counsel Guidelines in the Preferred Provider agreements shall now be deemed to refer to this Outside Counsel Policy.

B. Types of Fee Arrangements.

GE encourages outside counsel to propose, in appropriate cases, alternatives to conventional hourly-rate fee arrangements, including fixed or flat fees, productivity incentives, risk-sharing and contingent fees. Any proposal to use a different basis for billing such as "value based" or transactional billing, or to charge a success fee based on the outcome of the matter must be raised at the outset of the engagement and approved in writing by the lead inside counsel. In all cases, the terms on which GE will be charged for the representation must be set forth in writing both at the outset of the engagement and at any point in the engagement at which those terms are modified.

C. Billing Rates.

In matters that are to be billed based on the law firm's hourly rates, outside counsel shall, upon engagement of the firm, provide lead inside counsel with a schedule showing the billing rate for each timekeeper (or class of timekeeper) assigned to the engagement. Once agreed upon at the commencement of a matter, the scheduled billing rates shall remain in effect for the duration of the engagement. An exception to this requirement will be made only if the lead inside counsel **approves in writing a proposed rate change sixty (60) days in advance.** GE expects to be billed at rates that are highly competitive with those of firms providing comparable services to GE or other similar clients. In addition, GE requires that outside counsel charge for services at net billing rates that are no higher than those charged to other clients of the firm, except for not-for-profit or pro bono clients.

D. Task-Based Budgeting and Billing

It is GE policy that in engagements where professional fees are expected to exceed $25,000 based on hourly rates, outside counsel will charge those fees and expenses that are consistent with task-based budgets approved by the lead inside counsel, and that outside counsel will render its bills in a form corresponding to that budget, as described and illustrated in Appendix B. Prior to incurring unbudgeted fees for a particular task, outside counsel must obtain the advance approval of lead inside counsel. In the absence of prior approval by the lead inside counsel, GE will not pay bills for legal fees and expenses for a particular task that exceed the budget approved for that task.

The budget and bill formats should, to the extent practicable, employ the standard task codes promulgated by the American Bar Association and the American Corporate Counsel Association, as modified from time to time. The particular form, frequency and content of the task-based budgets and bills to be used for a specific engagement should be agreed upon in advance by lead inside and outside counsel. Outside counsel are expected to update task-based budgets whenever necessary without a reminder from inside counsel. GE will not pay for any time associated with preparation of the budget and staffing plan for a particular matter or for consultations regarding matter management required by this Policy.

E. *Staffing/Billable Time*

GE strongly encourages lean staffing on its matters. **Consequently, GE will pay for no more than two attorneys (or one attorney if so determined by lead inside counsel) to attend events such as depositions, witness meetings, settlement conferences, negotiations and meetings with other parties' counsel**. Duplicative document review, research and drafting tasks should be avoided and will be reviewed carefully.

GE requires that lead inside counsel exercise good judgment with regard to the number of hours per day billed to GE matters by each attorney. GE will closely review the productivity and efficiency of any member of outside counsel's staff who bills more than 12 hours per day to GE matters. GE will only pay for reasonable internal conferencing, and internal conferencing exceeding 10% of the total billings for the month will be questioned. Clerical work is not billable, irrespective of who performs it. Clerical work includes maintenance of internal databases, bate stamping, filing, preparing bills, indexing pleadings, opening and closing files, scheduling meetings or making travel arrangements, participating in review or

"feedback" sessions, billing audits. Likewise, time spent on "standby" when no actual work is being performed will not be chargeable without advance approval of the lead inside attorney.

F. Billing Timing and Contents.

Unless lead inside counsel approves different arrangements, bills should be rendered monthly, within 15 days after the end of the month in which the services were rendered. Bills should include **a detail of fees by lawyer and paralegal, including the number of hours spent by task,** a description of services, a list of reimbursable expenses by category, as well as a statement by lead outside counsel that charges for fees and expenses comply with this Outside Counsel Policy. GE will generally not pay for fees or expenses that are not billed on a timely basis or in the agreed-upon format. GE expects bills for professional services to be based on the time reasonably devoted to the matter. The number of hours for which GE is billed should be the subject of "billing judgment" exercised by the lead inside counsel, so that the fees charged reflect only the time appropriately and productively devoted to the matter. **GE reserves the right to request copies of the firm's billing records and supporting documentation with respect to charges to GE and to conduct audits of the bills.**

VIII. Expenses/Disbursements.

A. Overhead/Administrative Costs:

GE considers the following costs part of outside counsel's unreimbursable overhead, and will not accept charges from outside counsel for the following items: computer, word processing and e-mail charges, rent, conference room charges, supplies, library staff, library use and materials, clerks, proofreaders, meals, taxis and limousines for employees to get to and from the office (including at night), support staff salaries and overtime, and local telephone calls. As to other costs, GE will reimburse outside counsel for actually incurred out-of-pocket expenses with no mark-up, provided those expenses are reasonable and comply with the guidelines set forth below. GE expects outside counsel to use its best efforts to minimize reimbursable out-of-pocket costs both by avoiding unnecessary expenditures and by taking advantage of volume discounts and bulk arrangements that may be available either through GE or otherwise. A summary of GE's policies with respect to billing requirements, expenses and disbursements is attached hereto as Appendix C.

B. *GE Preferred Disbursement Vendors*

GE has entered into agreements with preferred vendors in the following areas: Legal Staffing, Court Reporting, Duplicating and Scanning/Coding. The use of these vendors (as opposed to having the services performed by outside counsel or other vendors) can result in high quality services at significant cost savings for GE. GE requires that outside counsel use these vendors on all GE matters unless an exception is obtained from lead inside counsel. GE expects that outside counsel will contact these vendors directly and use them on GE matters without the necessity for lead inside counsel to raise the issue (*See Contact Information listed on Appendix D*). The GE-negotiated rates will apply to the services provided by these vendors whether the vendor bills GE directly or bills outside counsel. Outside counsel must advise the vendor for each new engagement that the services are for GE in order that the GE-negotiated rates will apply. In no case will GE accept and/or reimburse outside counsel for any mark-up or administrative charge on these services. GE receives regular reports from these vendors that indicate the use of these services by outside counsel.

C. *Travel:*

GE expects outside counsel to avoid unnecessary travel through such alternatives as teleconferencing. Only coach air fare and mid-size rental cars will be reimbursed, except that business class air fare may be reimbursed for travel to and from Europe, Latin America and Asia but not within Europe, Latin America and Asia. Luxury transportation, including limousines and hire cars, will not be reimbursed unless lead inside counsel has approved the expense in advance. If counsel is traveling on business for more than one client, GE expects counsel to apportion the expenses appropriately. Outside counsel shall purchase travel services under GE contracts with travel service providers, such as car rental companies and hotels, whenever such rates are available to contractor personnel. **GE will not pay for time spent traveling unless outside counsel works on GE business while traveling.**

D. *Meals and Accommodations:*

GE expects its counsel to use good judgment in selecting hotels and restaurants while traveling on GE business. Personal incidental expenses incurred while working on GE matters will not be reimbursed and must be distinguished from those expenses that are appropriately charged to GE. GE will not pay for meals or other incidental expenses, **including evening taxis or cars for attorneys or staff members when** they are working in their normal office location.

E. *Electronic Distribution of Documents:*

Advances in technology, specifically transmission of information and documentation by e-mail, scanning, imaging, sharing of documents on secure web sites, etc., have made routine copying, faxing and delivery of hard copy documents less critical and, in many cases, unnecessary. Consistent with security concerns, GE expects outside counsel to maximize the use of state of the art technology to minimize the expenses listed below (*See Section XIII, Technology*).

(i) *Photocopying:* GE will reimburse the firm for necessary photocopying at the firm's actual annualized per-copy expense or ten cents per page, whichever is lower. GE expects outside counsel to avoid and/or minimize unnecessary copying. GE requires the use of its preferred legal duplicating vendor for bulk copying, unless there are specific concerns about speed, confidentiality or reliability that dictate the use of the firm's own facilities.

(ii) *Telephone and Facsimile:* GE will pay for actual charges billed to the firm for toll calls including those relating to outgoing fax transmissions. No other amounts will be paid for outgoing or incoming faxes.

(iii) *Messenger Services:* GE will reimburse the firm only for actual charges billed to the firm for deliveries (including overnight express) that are necessary for speed and reliability.

F. *Computerized Research:*

Lead outside counsel shall monitor and be responsible for all research conducted to assure that the matter is handled in the most cost-efficient and productive manner. GE will pay only for actual charges billed to the firm for computerized research, without mark-up or administrative fee. In the event GE provides outside counsel with a unique password for electronic research to be utilized only for GE matters, outside counsel agree to utilize said password in accordance with the specified requirements.

G. Secretarial *Time, Word Processing:*

GE will not pay fees, costs or charges for word or document processing or for secretarial time, including overtime.

IX. Public Comment

In the absence of specific authorization, GE does not authorize outside counsel to 1) offer media or other public comment on GE or matters being handled for GE or 2) respond to requests for comment. Any inquiries or proposed public comment about GE or a GE matter must be referred to lead inside counsel or to GE public affairs specialist designated by GE lead inside counsel. That GE representative will be

responsible for determining what comment is appropriate and who should be designated to comment on GE's behalf.

X. Other Clients

Outside counsel are required to search for and disclose to GE any actual or potential conflicts of interest prior to accepting an engagement. Outside counsel should identify and disclose to GE any existing or prospective engagement by another client that could create an actual or potential conflict of interest with counsel's representation of GE (or the appearance thereof). For purposes of the rules of professional conduct barring or limiting an attorney's representation adverse to the interests of existing or former clients, GE itself and all of GE's subsidiaries, unincorporated divisions, and affiliates should be treated as the client of any outside counsel providing services to any one of such businesses, entities, or affiliates. See American Bar Association, Standing Committee on Ethics and Professional Responsibility, Formal Opinion 95-390 at 5 (January 25, 1995). This standard is applicable as well to counsel outside the United States.

Requests for waivers of potential or actual conflicts of interest will be considered on a case-by-case basis; GE will not provide blanket or prospective waivers. Waiver requests should be directed to the lead inside counsel for the matter on which the waiver is sought and, where the waiver is sought for litigation or potential litigation, the law firm should provide a complete list of the matters currently being handled by the law firm for GE or its subsidiaries, divisions or affiliates, the identity of each GE component or affiliate involved in those matters and the identity of lead inside counsel for those matters. Any waiver granted by GE will be conditioned on counsel's other client providing a written agreement that it will not object to counsel's continued ability to represent GE on existing and future matters. An illustration of a letter confirming the waiver of a potential conflict of interest is attached as Appendix E.

GE will ordinarily not waive a conflict where representation of another client will involve the assertion against GE or any affiliate of a claim of alleged fraud, misrepresentation, or other dishonest or improper conduct. If GE grants a waiver subject to this limitation on the scope of the firm's proposed representation, the limitation must be clearly communicated in writing to the other client at the commencement of the adverse engagement, because the limitation could later require counsel to withdraw from that engagement. If GE consents to the representation of another client adverse to GE in a transaction, it will not consent to the firm's representation of the other client in litigation against GE arising out of the transaction. No waiver will ordinarily be granted if the subject of the proposed adverse representation involves substantially the same matter in which the firm has represented GE on a related matter. Nor will a waiver be granted if the firm's access to confidential information, including GE's business and litigation strategies, would be useful to the adverse client.

If GE's outside counsel anticipates that representation of another client will involve counsel advancing a position on a legal issue which may be materially opposed to GE's interests, counsel should, to the extent reasonably practicable and consistent with that counsel's confidentiality obligations to other clients, bring the matter to GE's attention in advance of doing so.

XI. Ownership of Material

All materials in written, graphic, electronically stored or other form, generated or prepared in the course of representing GE or its affiliates and all copyrights therein shall belong to GE. Outside counsel, by representation of GE, agrees to assign all right, title, interest and copyrights in all such materials to GE and agrees to execute all documents necessary for GE to perfect its ownership and copyright interests. At the conclusion of the engagement, lead outside counsel should obtain direction from lead inside counsel regarding disposition of all such materials, in addition to the requirement in Section XII.

XII. GE Legal Home Page

GE maintains a Legal Home Page on a secure internal web site for legal research, briefs, pleadings, memoranda of law, contracts, agreements and other documents generated in GE matters. In order to maintain the Legal Home Page with current materials, GE requires lead outside counsel at the conclusion of each GE matter to forward completed research memoranda, briefs, pleadings and transaction documents (contracts, acquisition agreements, etc.) by e-mail to Legal.Gatekeeper @ corporate.ge.com, or on disk to Counsel, Manager Legal Resources, GE, 3135 Easton Turnpike, Fairfield, CT 06431. GE may request from time to time that outside counsel provide GE with non-privileged research memoranda, forms, training materials or other documentation prepared for the firm or other clients which GE may load onto its Legal Home Page (with appropriate credit to the firm preparing the materials).

XIII. Technology

The effective use of technology in legal matters and with outside law firms is critical to generating superior work product efficiently and at a significantly lower cost. GE expects that unless another format is required or agreed to by GE, outside firms will utilize software and technology compatible with GE's technology. GE will not be responsible for any costs associated with the purchase or installation of hardware or software by outside counsel for GE matters.

XIV. Confidentiality

GE may provide to outside counsel on a confidential basis copies of confidential and proprietary information, including intellectual property, trade secrets, internal policies, business plans, customer information, organizational charts, standard forms or other materials relevant to the work outside counsel is performing on GE's behalf. None of these documents or other materials should be used by outside counsel directly or indirectly for any purpose other than in connection with their representation of GE.

XV. Quality-Outside Counsel Evaluation

GE is endeavoring to improve all critical processes using Six Sigma Quality methodology, a discipline of defining, measuring, analyzing, improving and controlling key process performance, to assure that strategic goals are achieved. As part of the application of GE's Six Sigma quality methodology to legal processes, GE will be tracking and evaluating the performance of outside counsel at the conclusion of each matter. GE has implemented an internal Outside Counsel Management System that collects, tracks and disseminates information about outside counsel retained by GE and the legal matters they handle. GE lead inside counsel will evaluate outside counsel at the end of each legal matter by use of numerical rankings in the following four categories: Expertise, Client Service, Cost Effectiveness and Results. GE may inform outside counsel as to the results of these evaluations and suggest areas for improvement. Outside counsel agrees to conform its work product to GE's quality standards where advised. Outside counsel will be expected to cooperate with these efforts to improve the overall quality of outside counsel representation at their own expense and will not bill GE for time spent for this purpose.

Appendices

A. Sample Engagement Letter
B. GE Task-Based Billing and Budgeting Formats and Worksheets
C. GE Billing Requirements, Disbursements and Expenses Summary
D. GE Preferred Disbursement Vendors
E. Sample Conflict Waiver

APPENDIX A

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General Electric Company
Sample Outside Counsel Engagement Letter
(8/00)

[Date]

Lead Outside Counsel Name
Law Firm Name
Address

Re: [Matter Name]

Dear _____:

This letter will confirm that [GE business name] has asked you to represent us in the above matter. In connection with your representation we have asked you to [describe scope of the engagement].

With this letter I am sending a copy of General Electric Company's Outside Counsel Policy (Rev. 8/00). Except as set forth in this letter, or specifically agreed to by me, the Policy will govern your representation of [GE business name] in this matter and all subsequent matters in which you are retained. We have agreed that you will be the lead outside counsel on this matter and will be responsible for ensuring adherence to the Policy. I [or name of appropriate inside counsel] will be lead inside counsel on this matter. We believe that providing you with a clear statement of the principles which apply to your representation of [GE business name] will assist us both in providing effective, high quality legal representation responsive to the needs of the company. I urge you to raise any questions you may have about the Outside Counsel Policy with me or [other lead inside counsel] at the outset.

We have agreed that you will be compensated for your work on this matter [insert fee arrangement]. [If task-based billing and budgeting. We have agreed that you will prepare [a] task-based budget[s] (monthly, quarterly, for all the work necessary to complete this assignment, for each phase of this matter) for my approval.] We have agreed that you will submit your bills [monthly, quarterly, or at the completion of this matter]. We have agreed that the attorneys and staff who will work on this matter are:

Name	Billing rate
Name	Billing rate

I look forward to working with you on this matter. Please confirm that you have received and agree to abide by the Policy by returning a signed copy of this letter to me at your earliest convenience.

Very truly yours,

GE Attorney

We have received General Electric Company's Outside Counsel Policy and agree to be governed by that document's terms in our representation of [GE business name] and its affiliates.

Law Firm Name

By _____
Lead Outside Counsel

g APPENDIX C
(8/00)

GE Outside Counsel Policy-Billing Requirements and Disbursement/Expenses Summary

I. General Requirements

A. **Engagement Letter** (III.A) Required for all matters where fees likely to exceed $25,000.

B. **GE Lead Inside Counsel** (III.B) Responsible for all substantive decisions; outside counsel to keep informed; provide all documents to inside counsel for review.

C. **Retention of Local Counsel, Consultants, Vendors** (III.E) GE pre-approval required for all retentions; GE outside counsel policy terms apply.

II. Billing Requirements

A. **Billing Rates** (VII.C). In effect for entire matter unless GE written approval 60 days in advance.

B. **Staffing/Billable Time** (VII.E)

1. No more than 2 attorneys at meetings, negotiations unless GE pre-approval.
2. No firm paralegals unless GE pre-approval (III.B)
3. More than 12 hours per day by one member outside counsel staff closely reviewed
4. Internal conferences more than 10% total monthly billings closely reviewed
5. No billing for travel time, clerical work (filing, date stamping, indexing, making arrangements)

III. Budgeting/Billing Requirements

A. **Task Based Budgeting and Billing** (VII.D) Required for all matters where fees will be greater than $25,000

B. **Billing Timing/Contents** (VII.F)

1. Bills to be rendered monthly within 30 days after end of month.
2. Detail of fees by lawyer, paralegal, number of hours by task, description
3. Expenses/disbursements detail and charges by category

IV. Expenses/Disbursements

A. **Non-Reimbursable Overhead** (VIII.A)

1. Computer, e-mail, word processing charges
2. Conference room charges, rent
3. Supplies
4. Library use, staff
5. Clerks
6. Proofreaders charges
7. Meals (except during business travel)
8. Taxis and limousines to and from firm office (even at night)
9. Support salaries, overtime
10. Local telephone calls
11. Fax charges

B. **GE Preferred Disbursement Vendors** (VIII.B) GE legal staffing, court reporting, duplication, scanning/coding vendors must be used; GE will not pay any firm mark-up/administrative charges.

C. **Travel** (VIII.C)

1. **Airfare.** Coach only fare in U.S., within Europe, Asia, Latin America; business airfare may be reimbursed U.S. to/from Europe, Asia, Latin America with GE pre-approval.
2. **Rental cars** Mid-size cars only, no limousines; hired cars unless GE pre-approval.
3. **GE Travel Center/Providers:** Use where possible.

D. **Meals/Accommodations** (VIII.D)

1. **Hotels:** Use reasonable judgment, GE Travel Center
2. No personal/incidental expenses reimbursed.

E. **Telephone/Facsimile/Photocopying** (VIIIE)

1. **Photocopying**: $.10 per page or firm's actual annualized per page if lower.
2. **Telephone/facsimile**: No local call charges, toll charges only for outgoing transmissions, no charges for incoming faxes.
3. **Messenger services**: Only actual charges.

F. **Computerized Research** (VIII.F) Actual charges only without firm mark-up, admin charges; use GE password when provided.

G. **Secretarial time, Word processing** (VIII.G) No charges for secretarial, word processing charges, including overtime.

GUIDELINES FOR DEVELOPING PROPOSAL TO PROVIDE E-COMMERCE RELATED LEGAL SERVICES TO GE AND ITS AFFILIATES (hereinafter "GE")
GE Proprietary Information

I. GENERAL INFORMATION TO BE INCLUDED IN PROPOSAL

A. ***Description of attorneys, offices, experience and expertise***. Please provide the names of the attorneys in your Firm who would be appropriate to work on GE matters in this area. For each attorney, state: the address of the office in which he/she works; his/her billable rate on a discounted basis; the extent of his/her experience in Internet and E-Commerce matters, specifically (i)e-commerce contracts of all types, encryption, content liability, digital signatures; (ii) e-commerce and business method patents; (iii) experience relating to domain name protection in all TLDs, enforcement of trademark rights against domain name cyber squatters and other infringers; (iv) internet privacy issues, internet site terms and conditions and disclaimers; ((v) tracking legislation and regulations in the e-commerce field; (vi) transaction experience related to various types of e-commerce transactions, including joint ventures, alliances, acquisitions etc. We are looking for litigation (specifically trial experience) and non-litigation experience. In addition, please provide citations to published opinions on Internet or E-Commerce matters handled by your Firm, and any published articles by the attorneys to be assigned to GE matters.

B. ***Equal Opportunity***. In the selection of counsel, GE is committed to equal opportunity and uses criteria such as merit and qualifications, without regard to race, color, religion, national origin, sex, age, disability, veteran status or other characteristic protected by law. GE also complies with the spirit and the letter of its affirmative action obligations in making sure a diverse mix of individuals and Firms apply for and are considered for company engagements. Please comment on your ability to assist GE in meeting these commitments. Please also state whether your Firm is a participant in the ABA Minority Counsel Program.

C. ***Office Technology***. What type of technology/equipment do you currently have at your Firm (e.g. types of computers, word-processing software, e-mail, internet access, "security" software to send encoded messages, video-conferencing capability, etc.)? Has your firm used an extranet (secure web-site) to exchange information with clients, if so, please provide state whether it internally developed or if a third-party software was used.

D. ***Budgeting and Billing Software***. Do you currently have software which has the ability to generate budgets and invoices in Task Based Budgeting and Billing format? If so, state the name of the software. To what extent are you currently using the software for your clients? Are you currently interfacing with your clients electronically on budgeting and billing?

E. ***GE Contacts***. Provide the name(s) of GE lawyers who are currently familiar with your Firm/work product.

F. ***Possible Presentation***. Your Firm will be willing to meet with GE in October, 1999 to discuss your proposal.

II. TERMS AND CONDITIONS

GE expects that certain important terms will be part of any "preferred provider" arrangement between the selected Firms and GE. Please indicate in your proposal whether you will agree to the following terms:

- ***Administrative***

A. ***Rights to Use GE-related Work Product***. All memoranda, motions and other work product created by the Firm for use in a GE matter will, upon request, be provided to GE in an electronic format. GE will have unlimited rights to use such materials.

B. ***Access and Rights to Other Firm Work***. GE will be given access to any existing Firm repository of e-commerce memoranda, pleadings and other work product created for GE *and* non-privileged documents and materials (including library resources)--for its unlimited use in GE matters.

C. ***Partnering with GE Staff***. GE may, upon its request, substitute GE or other personnel for any Firm secretary, paralegal or counsel who is assigned or expected to work on GE matters. Please indicate whether you would be willing to provide office space and support (e.g. secretarial) to a GE person at your facility at no cost while a GE matter is being handled by your Firm.

- ***Billing***

D. ***Productivity Meetings***. Your Firm will agree to meet with GE on a periodic basis (in person or by other means) to discuss strategy to decrease costs, increase productivity, etc. on a non-billable basis.

E. ***Non-Billable Advice***. Your Firm will agree to offer advice that does not involve substantial research or time on an ad hoc basis. Such advice will not be included as billable advice.

F. ***Budget***. Your Firm will submit a detailed budget concerning potential

matters identified by GE in accordance with ***GE Outside Counsel Policy*** (rev. 8/99).

- ***Services***

G. ***Seminars***. Your Firm will offer, at no additional cost, an annual seminar on an Internet and/or E-Commerce topic of GE's choice to a GE Practice Group at a location designated by GE.

H. **Legal *Developments***. Your firm will provide GE electronically, on no less than a bi-weekly basis, with updates and developments on Internet related issues.

I. ***Attorney Loan***. If requested, your Firm will be willing to loan an attorney to GE for short-term support in exchange for a negotiated amount which approximates the firm's cost for the attorney (salary and benefits) for that time period.

III. GEOGRAPHIC CAPABILITIES

Please indicate whether you would be capable of providing service to GE on a national basis (for all GE businesses, in all 50 states) or whether your proposal will be limited to a specific geographic region or city/state. Please provide specific information regarding the amount of work which you have done both within the city/state in which your offices are located and outside the city/state. Please provide information as to your expertise and experience in Internet and related matters outside the US.

IV. ALTERNATIVE FEE ARRANGEMENTS/DISCOUNTS

GE's objectives are to maintain or improve quality, decrease costs and increase productivity. It is our intention, through these proposed "preferred provider" arrangements, to work in partnership with selected Firms to achieve GE's objectives, to the mutual benefit of both parties.

A. ***Arrangements with other Firms***. Please advise us if your firm has been selected as a Preferred Provider for E-Commerce for any other major corporations, and provide references. Describe in detail, by practice area if applicable (e.g. litigation, M&A work, etc.), any alternative fee arrangements in which you are/have been involved, including your opinion as to which elements have been successful and unsuccessful. Please indicate whether your Firm has any arrangements involving national representation of clients and identify the client(s).

B. ***Fee Arrangement with GE***. Please provide the types of fee arrangements your Firm is willing to enter into with GE for particular types of work and describe in detail the fee arrangements that you are proposing. If your firm currently provides a discount to GE, please provide the discount and confirm that it will apply to these services. GE is open to alternatives to the traditional hourly fee arrangement. A fixed budget based on Task Based Budgeting and Billing with substantial incentives and disincentives for meeting or exceeding the budget will also be considered. The objective is to encourage efficient, cost-effective resolution of issues.

Note: where hourly fees are proposed, your Firm should list the hourly fees for all people whom you will have work on GE matters and indicate whether the rate is before or after any proposed discount. GE expects that any firm that is accepted into this preferred program will provide a discount off standard rates for services that are billed on an hourly basis. We would also expect that if the Firm substitutes an associate (or other person) on a matter, the new person will be billed at a rate which is no higher than his/her predecessor.

V. PROCEDURAL MATTERS AND OTHER IMPORTANT INFORMATION

A. Enclosed please find a copy of ***GE's Outside Counsel Policy*** (rev. 8/99) which will be included in any final agreement between the Firm and GE.

B. ***Deadline for submission***. All proposals must be submitted to GE by October 4, 1999. GE will not be charged for the time spent or costs incurred in preparing any proposal. Each Firm shall send two hard copies as designated in the cover letter and one copy by e-mail to Suzanne.Hawkins@corporate.ge.com or on diskette (Word 97 preferred). All documentation submitted will become the property of GE unless otherwise requested in writing by the Firm at the time of submission.

C. This request does not commit GE to any contract award or action based upon any information submitted. GE retains the right to accept or reject any proposal.

September 15, 1999

E-COMMERCE
PREFERRED PROVIDER AGREEMENT

This Agreement is dated January 13, 2000 between General Electric Company with offices at 3135 Easton Turnpike, Fairfield, CT 06431 and (hereinafter the "Firm") with its head office in New York, New York.

1.0 PURPOSE

1.1 The purpose of this Agreement is to establish a preferred provider arrangement for the provision of one or more types of E-Commerce services (as described in Paragraph 1.2) by the Firm to GE and its direct and indirect subsidiaries and controlled affiliates (collectively "GE"). However, if the Firm is a party to another preferred provider or other contractual agreement with GE that relates to provision of legal services in an area that is also covered by such other agreement, then with respect to a particular engagement involving such a dual coverage situation, the GE lead lawyer involved in such matter may determine which preferred provider or other agreement applies to that engagement.

1.2. "E-Commerce Services" as referred to in this Agreement shall mean legal services (including corporate matters (such as mergers and acquisitions, licensing and commercial transactions, securities, financing), litigation, and relevant specialty practices areas (such as antitrust, tax, intellectual property)) related to, or the need of which arises from, various aspects of electronic commerce, Internet and other similar interactive technology and related software, applications, intellectual property, business and investments, including but not limited to matters involving:

A. Intellectual Property, such as domain names, trademarks, copyright, linking, framing, metatags, trade secrets, patents, URL piracy;
B. Financial Services and On-Line Processing, such as, transaction processing, advertising, marketing, gambling, sweepstakes, fraud prevention, insurance, securities;
C. On-Line Contracting Matters, such as, digital signatures and encryption, terms of use, electronic management, "clip wrap agreements", enforcement, fraud prevention;
D. Regulatory, such as anti-trust, sales tax, advertising, securities, consumer laws, trade laws; and
E. Commercial Transactions, Mergers and Acquisitions and Investments, such as marketing, distribution, transactional agreements (e.g. warrants, equity purchases, joint ventures), license agreements, website development and hosting and outsourcing agreements.

2.0 TERM

Subject to Paragraph 12, this Agreement shall become effective as of January 13, 2000 and shall continue in effect through January 31, 2002. Unless terminated by either party by notice at least 30 days prior to the scheduled termination date, this Agreement will be renewed for successive one-year periods.

3.0 PREFERRED PROVIDER STATUS

By agreeing to the terms herein, the Firm shall be considered a Preferred Provider of E-Commerce Services. This designation does not give the Firm an exclusive arrangement or commit GE to provide any particular work to the Firm. However, GE's in-house attorneys will be provided with information regarding the Firm and the lawyers designated as lead legal resources for GE matters (as listed on Exhibit A) and will be encouraged to use such providers to furnish E-Commerce Services and for other related projects.

4.0 SUPPORT FOR GE

4.1 All memoranda, agreements and other work product created hereafter by the Firm for use in a GE matter will, unless the GE lead lawyer involved in the matter instructs otherwise, be provided to GE in an electronic format (in a Word '97, Excel, Power Point or other type of file format as requested by GE) and GE will have unlimited rights to use such materials.

4.2 GE will be given access to and permitted to use any existing Firm repository of E-Commerce related (1) memoranda, legal opinions, agreements and other work product created for GE and (2) any redacted or non-privileged documents and materials created for the Firm (e.g., legal analyses, memoranda, model agreements and documents, training materials) or for other clients (including but not limited to all publicly filed agreements and documents). Within 10 business days after the date hereof and thereafter on a quarterly basis (with respect to new materials), GE shall be provided with an index to such documents to the extent such exists (or be advised as to searching capabilities) and with assistance for any searches, at no cost to GE (other than costs of duplication). GE shall be provided with such documents in electronic format (Word '97 unless otherwise requested) to the extent feasible and, if not, then on computer disk. To the extent made available to any other client or third party, GE will be given access (including, if feasible, through a link from GE's Legal Home Page or similar direct computer or Internet access) to the Firm's intranet database of nonprivileged memoranda, documents and information. The Firm will send to designated GE lawyers any memoranda, newsletters or other materials relevant to E-Commerce practitioners (for matters within the scope of Paragraph 1.2) which it distributes to persons outside the Firm.

4.3 From time to time or in connection with a particular E-Commerce matter in which the Firm is representing GE, GE may request the Firm assist GE in its efforts to enhance GE's technological capabilities and utilization of technology in connection with E-Commerce projects and matters (such as though establishing a secure electronic extranet or other method to facilitate secure electronic document distribution, collection of comments on draft documents and sharing of information among a team). In addition, at GE's request in connection with provision of E-Commerce Services, to the extent feasible the Firm shall make available at no cost its technological capabilities and resources for increasing efficiency in connection with E-Commerce matters.

4.4 At GE's discretion, GE may substitute any GE or other personnel (including temporary legal assistants and/or attorneys) for any Firm secretary, legal assistant or counsel who is assigned or expected to work on GE matters. To the extent the Firm has available space, the Firm shall provide office space and support (e.g., secretarial) to a GE person at its offices at no cost while the Firm is handling a GE matter.

4.5 The Firm will provide fee and expense information in a form and at such times as GE requests and will meet with GE representatives on an as needed basis (in person or by other means) to discuss strategies to increase efficiency, decrease costs, etc., on a non-billable basis.

4.6 At GE's request, the Firm shall periodically meet by telephone or in person with GE and with GE's other E-Commerce Services' Preferred Providers to discuss substantive issues and productivity issues of interest to GE.

5.0 TRAINING

5.1 The Firm will make available to GE attorneys and other GE personnel all continuing legal education ("CLE") and other educational seminars and/or the written and other materials from seminars and other educational programs and presentations offered by the Firm, at no cost to GE and, if other non-Firm personnel are invited, will invite GE attorneys to attend any seminars or other education programs offered by the Firm to the extent feasible.

5.2 If requested by GE, the Firm shall conduct an annual one-day seminar, free of charge, on E-Commerce topics selected by GE at a GE-designated site. GE agrees to pay for the Firm's reasonable travel expenses in connection with providing the seminar. The Firm is encouraged to propose topics that it considers appropriate for such seminars.

6.0 POLICY FOR OUTSIDE COUNSEL

The Firm shall provide legal services to GE in accordance with the "Outside Counsel Policy" (Rev. 8/99) a copy of the current text of which has been provided to the Firm and which is made a part hereof, and any revisions of such Policy which may be generally used by GE (as may be revised further, the "Policy"). In the event that any provisions of the Policy conflict with provisions set forth in the Agreement, the provisions in the Agreement shall prevail.

7.0 FEES

7.1 As provided in Article VII(B) of the Policy, in connection with all engagements, the Firm and GE shall consider arrangements that are alternatives to conventional hourly-rate fee arrangements, unless GE advises otherwise.

7.2 Absent the conclusion of such alternative fee arrangements, fees shall be billed on an hourly basis, with GE to be entitled to a 15% discount from the standard rates charged by the Firm for its attorneys' and legal assistants' services on January 1, 2000, provided that such rates shall be subject to increases as specified in Paragraph 7.3 (the "GE Rate"). The GE Rate shall be applicable with respect to the following matters as to which GE is being charged for services on an hourly rate: (a) unless the lead GE lawyer involved elects otherwise, all E-Commerce matters as to which the Firm is representing GE as of January 13, 2000 and (b) all E-Commerce matters (except to the extent that a lower rate has been agreed to by the parties on such other matters) commenced during the term of this Agreement. The GE Rate shall continue in effect through the term of this Agreement and after the termination or renewal of this Agreement with respect to the preceding matters for the duration of any E-Commerce matter pending on the date of such termination or renewal.

7.3 Annexed hereto as Exhibit A is a list of the Firm's attorneys who will serve as the primary legal resources for E-Commerce Services of the type indicated. Each such lawyer's standard and discounted rates as of January 1, 2000 are listed on Exhibit A. If the Firm or GE proposes to modify the list of primary legal resources, the parties will discuss such possible changes and cooperate to ensure GE receives the highest quality of services available at the Firm. In the event the firm increases the hourly rate of any associate listed on Exhibit A (or who otherwise provides E-Commerce Services to GE) solely due to the duration of time such attorney has practiced with the firm (i.e. a step increase), the GE Rate for such associate shall upon written notice of the Firm to GE as provided below be increased prospectively for future E-Commerce matters to reflect such increase. GE understands that the Firm may from time to time increase its hourly rates on a Firm-wide basis due to inflation or similar cost-of-living adjustments. Accordingly, the GE Rate may be increased for future E-Commerce representations to give effect to such a Firm-wide rate adjustment, provided that over the initial two-year term (and any successive two-year periods, in the event of renewal) of this Agreement, the GE Rate may not be so increased by more than 5% over the GE Rate then in effect. The Firm shall provide GE with 10 days' advance written notice of any increase in the GE Rate.

Notwithstanding anything else in this Agreement, the Firm agrees that the GE Rate will only be increased in the event such increase is applicable to all other clients of the Firm.

7.4 Fees for services that are not included in or that exceed agreed upon task based or other budgets will not be paid absent special circumstances.

7.5 GE has selected certain preferred vendors, a list of which is attached to the Policy in the following areas which, at the request of GE, are to be utilized by the Firm on GE matters: temporary legal staffing; court reporting, legal duplicating; imaging and coding. GE will not be charged any mark-up or administrative fee on these services. The Firm will favorably consider using temporary legal staffing for all appropriate matters, including but not limited to document review and production. GE expects the Firm to raise the issue with lead inside counsel in all cases.

8.0 BILLS AND PAYMENT FOR SERVICES

8.1 Unless otherwise agreed to by the lead GE counsel on the matter, an invoice and a report of the Firm's proposed billing or fees incurred, including the number of hours, if applicable, proposed to be charged by each attorney and legal assistant for work performed by the Firm under this Agreement will be provided to GE monthly within thirty days after the end of the month in which the services were rendered.

8.2 Subject to its right to audit and contest any bill submitted by the Firm, GE shall pay invoices within 60 days from GE's receipt of the invoice, with payment in this time frame being considered timely and not subject to interest.

8.3 GE will only pay for travel time and expenses expended by the Firm to the extent that it has been approved in advance by the cognizant GE counsel and complies with the Policy.

9.0 CONTRACT BENEFIT EXTENSIONS

From time to time, GE may identify opportunities for the Firm to lower its costs on GE matters by taking advantage of terms GE has negotiated with GE's suppliers of goods and services (e.g., photocopying and the like). The Firm agrees to cooperate with GE in identifying such opportunities, and to use its reasonable efforts to obtain such cost savings when they are available.

10.0 PRODUCTIVITY

10.1 GE may from time to time request meetings with the Firm to discuss strategies to decrease costs, increase productivity and achieve other GE goals. The Firm agrees to

make reasonable efforts to meet (in person or by other means as may be mutually agreed upon) on a non-billable basis to discuss these matters.

10.2 GE is pursuing a number of initiatives to enhance productivity and accessibility of resources and information relevant to its lawyers. In addition to the electronic submission of work product as set forth in Paragraph 4.1 above and the technological capabilities referred to in Paragraph 4.3, the Firm agrees to advise GE of technology developments and enhancements it deploys from time to time to increase its productivity in delivering E-Commerce Services to other clients, facilitate lawyer training and experience or assist it in fee budgeting and cost containment.

11.0 QUALITY MEASUREMENTS

The Firm understands that as part of the application of GE's Six Sigma quality methodology to legal processes, GE will be evaluating the performance of the Firm on all matters handled for GE. Such evaluations include, but are not limited to, assessment of compliance with all aspects of work product including timely completion. When requested by GE, the Firm will participate in collecting and providing data that allow for reduction of process variations and achievement of "Six Sigma" Quality as determined by GE.

12.0 EARLY TERMINATION

This Agreement may be terminated by either party, in its sole discretion, upon thirty days written notice provided to the party coordinator identified below. Unless directed by the cognizant GE counsel, any matters for which the Firm has assumed professional responsibility pursuant to this Agreement shall continue to be handled subsequent to such termination in accordance with the terms of this Agreement until the completion of the work.

13.0 DESIGNATED FIRM COORDINATOR

is hereby designated as the Firm's authorized representative for purposes of administration of this Agreement and coordination of legal staffing for all E-Commerce matters handled by the Firm. Contact information for the Firm coordinator is:

14.0 DESIGNATED GE COORDINATOR

is designated as GE's coordinator and authorized representative for administration of this Agreement, it being understood that GE may designate a different or additional persons as its coordinator(s) and representative(s). Contact information:

Questions relating to specific matters for which the Firm has assumed professional responsibility should be directed to the cognizant GE counsel for that matter.

15.0 CONFIDENTIALITY

GE and the Firm shall keep strictly confidential all the terms and conditions, including fee arrangements, hourly rates and discounts, in this Agreement and shall not disclose them to any third party unless obligated by law to do so or with the written consent of the duly authorized representative of the other party. Notwithstanding the foregoing, GE may disclose the identity of the firms participating in the E-Commerce preferred provider program as it deems reasonably necessary or appropriate.

16.0 STATUS OF THE FIRM

The Firm is an independent contractor under this Agreement, as is each principal, partner, agent or employee of the Firm. No principal, partner, agent or employee of the Firm will by virtue of this Agreement, be considered as an employee of GE for any purpose, including but not limited to eligibility for GE benefits or compensation or other rights and privileges afforded to employees of GE. The Firm shall not be considered a partner or joint venturer of GE in connection with any matters for which the Firm has been retained by GE.

17.0 NO WAIVER

Failure to insist upon strict compliance with any of the terms in this Agreement or the Policy (by way of a waiver of a term or of a breach) by either party hereto shall not be deemed to be a continuous waiver in the event of any future breach or waiver of any term in this Agreement or in the Policy.

18.0 THIRD PARTY BENEFICIARY

Nothing in this Agreement, whether express or implied, is intended to confer any rights or remedies under or by reason of this Agreement on any persons other than the parties to this Agreement and their respective successors and assigns.

19.0 ASSIGNMENT

This Agreement may not be assigned or otherwise transferred voluntarily or by operation of law, nor may the obligations hereunder be subcontracted or delegated by the Firm without the express written consent of the GE coordinator or a GE cognizant counsel.

20.0 FIRM COMMUNICATIONS

Subject to Paragraph 15, the Firm shall not refer in its publicity, press releases or other materials or information disseminated outside the Firm to the Firm's participation in the GE E-Commerce Services Preferred Provider program. The Firm may, however, advise clients or prospective clients of its participation in this program and may use GE as a client reference.

21.0 CONFLICT OF LAWS

This Agreement shall be governed by the law of the State of New York without giving effect to its conflict of law provisions.

22.0 ENTIRE AGREEMENT

This Agreement, including the Exhibit, represents the entire agreement and understanding of the parties and all prior or concurrent negotiations and agreements, whether written or oral, with respect to the subject matter hereof are merged herein and superseded hereby. This Agreement, which may be executed in one or more counterparts, may be amended only with the written consent of the party to be bound thereby.

By: _____ By: _____
Name: Name:

Title: _____ Title: _____

THIS AGREEMENT (hereinafter called Agreement) for services is made and entered into as of this _____ day of July, 2002 by and between General Electric Company (hereinafter called GE), a New York corporation with offices at 3135 Easton Turnpike, Fairfield, CT. 06431 on behalf of itself and for the benefit of all its components, subsidiaries, and affiliates (herein referred to collectively as GE), and, a _______ Corporation (hereinafter called SERVICE PROVIDER), whose principal business is located at

WHEREAS the parties are mutually desirous that SERVICE PROVIDER be authorized by GE to perform services in accordance with the provisions hereof; and

WHEREAS SERVICE PROVIDER represents that it has the requisite personnel, competence and legal right to perform such services;

NOW, THEREFORE, in consideration of the premises and the mutual promises hereinafter set forth, the parties agree as follows:

1. SCOPE

SERVICE PROVIDER will provide services to GE in the area and related services described on Schedule A (hereinafter the "Services")

GE agrees that it has designated SERVICE PROVIDER as a "Preferred Provider" of services in the area of Court Reporting and related services, as described on Schedule A, and that it will recommend the use of SERVICE PROVIDER for these services to its internal legal staff, and, where GE considers appropriate, outside law firms providing services to GE.

Except as expressly stated herein, nothing contained herein shall constitute a minimum commitment by GE to use SERVICE PROVIDER services hereunder and SERVICE PROVIDER has not relied on any representation to the contrary.

Services purchased under this Agreement may be used by GE on behalf of itself and for the benefit of all its components, subsidiaries, and affiliates worldwide. Any component, subsidiary, or affiliate of GE worldwide which uses a service, whether right to use passes directly to that entity or not, shall be entitled to all of the rights and benefits afforded under this Agreement and may enforce this Agreement in its own name. It is also agreed that the terms of this agreement, including but not limited to the pricing set forth on Schedule A will apply to any law firm when it is performing legal work for GE, irrespective of whether those services are billed to the law firm or directly to GE.

2. TERM

This Agreement shall take effect on July xx, 2002 and remain in effect until June 30, 2004. The period of this Agreement may be extended by mutual consent, under the same terms and conditions unless amended.

3. INDEPENDENT SERVICE PROVIDER

SERVICE PROVIDER is an independent contractor to GE and this Agreement is not intended to create or constitute a joint venture, partnership, agency or other formal business arrangement of any kind other than an independent contractor arrangement. The employees of SERVICE PROVIDER shall in no event be considered employees or agents of GE, nor shall they be entitled to or be eligible, by reason of the contractual relationship hereby created, to participate in any benefits or privileges given or extended by GE to its employees. Each party will be solely responsible for payment of all compensation owed to its employees, as well as federal and state income tax withholding, Social Security taxes, and unemployment insurance applicable to such personnel as employees of the applicable party. Each party shall bear sole responsibility for any health or disability insurance, retirement benefits, or other welfare or pension benefits (if any) to which such party's employees may be entitled. Each party agrees to defend and indemnify the other against any claims that the indemnified party has failed to pay compensation, tax, insurance, or benefits for employees of the indemnifying party; provided that (a) the indemnified party notifies the indemnifying party in writing within thirty (30) days of the claim; (b) the indemnifying party has sole control of the defense and all related settlement negotiations; and (c) the indemnified party provides the indemnifying party with the assistance, information, and authority reasonably necessary to perform the above; reasonable out-of-pocket expenses incurred by the indemnified party in providing such assistance will be reimbursed by the indemnifying party.

SERVICE PROVIDER shall be responsible for maintaining satisfactory standards of employee conduct and integrity, and shall be responsible for taking such disciplinary action with respect to such employees as may be necessary. GE reserves the right, in its sole discretion, to require SERVICE PROVIDER to remove any employee from the contract work whose continued employment is decided by GE to be contrary to GE's interest.

4. PRICING/ INVOICES/ REPORTS

Services shall be provided in accordance with the pricing set forth on Schedule A, which shall be fixed until June 30, 2004. GE may audit SERVICE PROVIDER's records to determine whether SERVICE PROVIDER has complied with this provision, then and in addition to any other remedy that may be available, GE shall be entitled to the more favorable pricing, terms, warranties and benefits, as well as the cost of the audit. If SERVICE PROVIDER shall, during the Term of this Agreement, enter into arrangements under similar conditions with any other customer providing greater benefits or more favorable terms, this Agreement shall thereupon be deemed amended to provide the same to GE for the remainder of the Term of this Agreement. If during the Term, GE shall receive a bona fide offer, including but not limited to a bona fide offer by auction or exchange, from another supplier to supply Services, on terms substantially the same set forth herein, for any Services at a price below that then in effect for the Services under this Agreement, and GE provides reasonable evidence thereto to SERVICE PROVIDER, SERVICE PROVIDER shall meet such price for the Services for the remainder of the Term of this Agreement. Unless otherwise specified, these prices include all incidental costs and all taxes except those which SERVICE PROVIDER is required by law to collect from GE. These taxes will be paid to SERVICE PROVIDER unless an exemption is available.

ACCA's 2002 ANNUAL MEETING
LEADING THE WAY: TRANSFORMING THE IN-HOUSE PROFESSION

Records and invoicing will be kept by SERVICE PROVIDER at its principal business offices. Unless otherwise agreed in Schedule A, SERVICE PROVIDER will invoice the GE entity (component, subsidiary, affiliate) monthly (using non-repetitive invoice numbers) for the portion of work completed during that billing period. If the GE entity so requests, invoices can be sent instead to the law firm working for GE on a particular matter. Such monthly invoice shall contain sufficient data to verify the Services performed, the rates charged, the case/matter name, the law firm on the case, if known, and the inside GE attorney, plus any permitted expenses. SERVICE PROVIDER shall take reasonable action to become an EDI (Electronic Data Interchange) trading partner with GE or to implement another form of electronic invoicing and payment specified by GE. Upon GE's request, SERVICE PROVIDER shall sign an EDI Trading Partner Agreement or other appropriate agreement with GE within fifteen (15) days from receipt of GE's request. Following such agreement, GE and SERVICE PROVIDER shall establish an implementation schedule which shall call for active electronic invoicing and payment capability within forty-five (45) days from the date on which such agreement is executed. The time for payment of invoices shall run from the date, after the Services are performed, that correct invoices are received by GE. (Invoices are generally paid sixty (60) days after receipt by GE). However, upon mutual agreement between GE and SERVICE PROVIDER, GE will settle payments with SERVICE PROVIDER using a Procurement Credit Card (P-Card). Should GE choose to settle payments with this method, SERVICE PROVIDER agrees to provide GE with Level III billing details, as defined by Master Card standards. Acceptance of final payment of the Purchase Price shall constitute full and complete satisfaction of, and release for, any and all claims by SERVICE PROVIDER against GE arising out of, related to, or connected with the provision of Services under this Agreement.

SERVICE PROVIDER agrees to provide to Suzanne E. Hawkins, Senior Counsel, Legal Operations, GE, 3135 Easton Turnpike, Fairfield, CT, monthly reports showing the total services provided to GE during the previous month and to date under the agreement. This report shall include all amounts invoiced directly to GE or to its law firms, if any. The report shall be in the form agreed upon between the parties, but shall include the following information: GE business/affiliate receiving the services; description of services; case/matter name; fee charged; name of GE inside attorney and name of GE outside law firm, if known. Ms. Hawkins shall also receive a monthly report indicating the savings achieved over standard rates.

5. GE ACQUISITIONS

In the event GE acquires, merges with or forms a joint venture or partnership with all or part of another Company during the term of this Agreement, GE retains the right and SERVICE PROVIDER agrees to renegotiate in good faith the pricing terms of this Agreement. Pricing will be negotiated downward and at no point during negotiation will the other terms and conditions of this Agreement be considered for renegotiations unless agreed upon by GE.

6. GE PROPERTY

Unless otherwise agreed in writing, all documents, tools, equipment, software or material of every description furnished to SERVICE PROVIDER by GE or specially paid for by GE, and any replacement thereof, or any materials affixed or attached thereto, shall be and remain the personal property of GE.

7. NOTICES

Any notice to be given hereunder by either party to this Agreement shall be in writing and shall be sent to the representative of the other party designated by title at its address set forth in the signature block below (i) by certified mail, return receipt requested, or (ii) by courier or hand delivery, or (iii) by facsimile transmission with confirmation, or (iv) next-day delivery service.

8. FORCE MAJEURE

Neither party shall be in default or otherwise liable for any delay in or failure of its performance under this Agreement where such delay or failure arises by reason of any Act of God, or any government or any governmental body, acts of the common enemy, the elements, strikes or labor disputes, or other similar or dissimilar cause beyond the control of such party.

9. STANDARDS

SERVICE PROVIDER shall provide all Services in strict accordance with this Agreement and with a high degree of care, skill, diligence, professional knowledge, judgment, and expertise according to sound work practices and accepted professional and industry standards, in a well-managed, organized, and efficient manner and to the entire satisfaction of GE.

10. WARRANTY

SERVICE PROVIDER warrants that its Services hereunder will be performed by qualified individuals in a professional and workmanlike manner conforming to generally accepted industry standards and practices, and in strict accordance with all applicable law, regulations, codes and standards of government agencies or authorities having jurisdiction. The foregoing warranty is exclusive and in lieu of all other warranties, whether express or implied, including the implied warranties of merchantability and fitness for a particular purpose. In order to receive warranty remedies, GE must report deficiencies in the Services to SERVICE PROVIDER in writing within ninety (90) days of when GE discovered, or should have discovered that SERVICE PROVIDER breached its warranty in the performance of Services.

For any breach of the above warranty, GE's exclusive remedy, and SERVICE PROVIDER's entire liability, shall be the reperformance of the Services. If SERVICE PROVIDER is unable to perform the Services as warranted, GE shall be entitled to recover the fees paid to SERVICE PROVIDER for the deficient Services and for those Services provided under this Agreement arising from or related to the deficient Services which GE cannot reasonably use as a consequence of SERVICE PROVIDER's inability to perform the Services as warranted

11. SIX SIGMA QUALITY

SERVICE PROVIDER agrees that the quality of the Work related to the Products and Services supplied hereunder is an essential component of this Agreement. SERVICE PROVIDER warrants that the Work related to the Services supplied hereunder shall consistently be of a standard of quality at least equivalent to the Quality Attributes as defined by GE and SERVICE PROVIDER. Within (90) days of the signing of an Agreement, both parties to this Agreement shall jointly establish a quality baseline by

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selecting and identifying one or more Critical to Quality (CTQs) Attributes of each Service or Product. GE may, solely at GE's option, jointly re-establish the quality baseline at any time after the first twelve (12) months following the signing of this Agreement.

12. PATENT AND COPYRIGHT INFRINGEMENT

SERVICE PROVIDER shall indemnify and hold harmless GE against any claims, suit, or proceeding brought against GE and any liability arising therefrom based on a claim that any article, equipment, material, invention, mark, name, diagram, drawing, design, apparatus, process, or work of authorship (including computer programs and documentation), or any part thereof, furnished hereunder, or that the use of any such item or part thereof, constitutes an infringement of any patent, copyright, trademark, or proprietary interest. SERVICE PROVIDER shall defend, at its sole expense, every such claim, suit, or proceeding. SERVICE PROVIDER shall pay all judgments, losses, damages, penalties, costs, fines and expenses awarded against GE in every such claim, suit, or proceeding and indemnify and hold harmless GE against all loss, damage, or expense which it may incur by reason thereof. If the use of such item, or any part thereof, shall in any suit or proceeding be held to constitute an infringement and the use thereof be enjoined, SERVICE PROVIDER shall, at its sole expense, either procure for GE the right to continue to use such item or part thereof, replace it with non-infringing items, or so modify it that it becomes non-infringing. Any substituted non-infringing items shall be in quality and performance equal to or better than the items replaced.

13. COMPLIANCE WITH LAWS

SERVICE PROVIDER shall procure and keep effective all necessary permits and licenses required in performance of the work and shall obey and abide by all applicable laws, regulations, ordinances, and other rules of the United States of America (and other countries where services are provided), of the state, territory, or subdivisions thereof where the Services hereunder are provided, and of any other duly constituted public authority. SERVICE PROVIDER shall also comply with any provisions, representations or agreements, or contractual clauses required thereby to be included or incorporated by reference or operation of law in the contract, including but not limited to those relating to equal opportunity, disabled and Vietnam veterans and handicapped workers. Any Work performed under this Agreement will fully comply with the provisions of the Federal Occupational Safety and Health Act of 1970 and with any rules and regulations pursuant to the Act.

14. NON-EXCLUSIVITY

It is expressly understood and agreed that this Agreement does not grant SERVICE PROVIDER an exclusive privilege to provide to GE any or all of the services provided for in this Agreement and GE may contract with others for the procurement of comparable services. Further, when GE needs require it, SERVICE PROVIDER shall reasonably cooperate with any such supplier.

15. CONFIDENTIAL INFORMATION

By virtue of this Agreement, the parties may have access to information that is confidential to one another ("Confidential Information"), including but not limited to information concerning GE's legal matters, law firms, legal expenses, employees, organization, activities, policies, or products and including any written reports, conclusions, or reporting data and analysis prepared by SERVICE PROVIDER and provided to GE under this Agreement. It is the express intent of this Section that SERVICE PROVIDER not disclose to any third party any information it learns concerning the business of GE in the performance of Services hereunder. SERVICE PROVIDER agrees at GE's request to have all employees, where appropriate, execute confidentiality agreements provided by GE.

SERVICE PROVIDER agreed that for a period of three (3) years following the date of disclosure thereof to it, SERVICE PROVIDER will not disclose to any third party or itself use, except in the performance of this Agreement, any confidential information which may be made available to it in connection with the performance of this Agreement, except as may be specifically authorized in writing by a duly authorized representative of GE. As used herein, the term "confidential information" means and includes all information, whether oral or written or in the form of documents, drawings, specifications, data or otherwise, relating to GE's business except the following:

A. Information actually known to SERVICE PROVIDER prior to its disclosure under this Agreement or internally developed without breach of any confidential arrangement.

B. Information which SERVICE PROVIDER can demonstrate was available to general public or general industry knowledge at the time of its disclosure to SERVICE PROVIDER; or which thereafter becomes available to the public or becomes general industry knowledge, without a breach of this Agreement by the SERVICE PROVIDER.

C. Information which SERVICE PROVIDER can demonstrate was legally furnished to SERVICE PROVIDER by a third party having the right to so disclose without restriction on its further disclosure.

16. ON-SITE SERVICE PROVIDER EMPLOYEE(S)

If SERVICE PROVIDER is to provide services or perform work on GE's premises under this Agreement, SERVICE PROVIDER's employees shall work in harmony with all other GE employees, and contractors, if any, engaged in any work on the premises. Further, SERVICE PROVIDER's employees and subcontractors, if any, shall comply with all GE's rules, regulations, and policies regarding personnel practices in the work place as well as all applicable security procedures, and fitness for duty requirements, including but not limited to, its policy on drugs and alcohol. SERVICE PROVIDER agrees not to assign to work on GE's premises any SERVICE PROVIDER employee not suitable to GE and to remove from GE's premises immediately in the case of misconduct, any SERVICE PROVIDER at GE's request.

17. SUBCONTRACTING

SERVICE PROVIDER shall not assign or sublet the services, rights or obligations to be performed hereunder, in whole or in part, without GE's prior written approval, with the exception of court reporting services which may be performed by an affiliated company subject to the terms and conditions of this Agreement. Any proposed subcontractor shall be satisfactory to GE, in its sole discretion, and agree to comply with the terms and conditions of this Agreement.

18. INDEMNIFICATION

SERVICE PROVIDER shall indemnify, hold harmless and defend GE, at SERVICE PROVIDER's expense, against every claim, suit, proceeding, judgment, loss, damage, penalty, cost, fine, or expense resulting from a breach of applicable law, rule or regulation or of any of the warranties or undertakings contained in this agreement. However, if SERVICE PROVIDER and GE are both named as defendants in an action, and no patent conflict exists, SERVICE PROVIDER may use the same law firm to defend GE and SERVICE PROVIDER. SERVICE PROVIDER's liability hereunder shall extend to all damages caused by the breach of said warranties. Any attempt by SERVICE PROVIDER to limit, disclaim, or restrict any such warranties or remedies of GE, by acknowledgment or otherwise, in accepting or performing this Agreement, shall be null, void, and ineffective without GE's written consent.

19. INSURANCE

Prior to the start of any work, SERVICE PROVIDER shall at its own expense procure and maintain during the term of this Agreement all insurance coverage as appropriate for the Services to be performed and as per GE's request. Evidence of such coverage will be provided upon GE's request. Said insurance, however, is in no manner to relieve or release SERVICE PROVIDER, its agents, subcontractors, and invitees from, or to limit their liability as to, any and all obligations herein assumed or risks indemnified against. SERVICE PROVIDER waives all rights to recovery against GE or GE's agents, employees, or representative for any loss, damage, or injury of any nature whatsoever to SERVICE PROVIDER's property.

20. TERMINATION

This Agreement may be terminated by either party in writing, at any time without cause before the expiration of this Agreement by giving 30 days' written notice to the other party, or by either party if a written notice of default sent by such party is not cured within 15 days of such notice, such notice to be sent to the representative of such other party designated by title and address below.

21. WAIVER/SEVERABILITY

Failure of either party to enforce any of the provisions hereof shall not be construed as a waiver of such provisions or of the right thereafter to enforce such provisions. If any provisions of this Agreement shall be held to be invalid, void, or unenforceable, the remaining provisions hereof shall not be affected or impaired, and such remaining provisions shall remain in full force and effect.

22. ADVERTISING/PUBLICATIONS

SERVICE PROVIDER or its agents agrees that no acknowledgment or other information concerning this Agreement and the services provided hereunder will be made public or used in any advertising, brochure or publicity by SERVICE PROVIDER without the prior written agreement of GE. Further, SERVICE PROVIDER or its agents shall not use GE's name, photographs, logo, trademark, or other identifying characteristics or that of any of its subsidiaries or affiliates without GE's prior written approval. SERVICE PROVIDER may orally advise a prospective client on an individual basis about the existence of the Preferred Provider relationship with GE, and advise a prospective client in writing to that effect with GE's advance approval, and with the advance approval of said individuals, provide names of individuals at GE who have used said services as references.

23. HEADINGS

The headings or sub-headings assigned to the sections in this Agreement are for convenience only and may not accurately or fully describe all of the requirements of a section. The headings or sub-headings do not limit or modify the scope and applicability of the sections.

24. GOVERNING LAW

This Agreement shall be interpreted in accordance with the substantive law, but not the choice of law rules, of the State of New York.

25. LIMITATION OF LIABILITY

GE's total liability to SERVICE PROVIDER for all claims or suits of any kind, whether based upon contract, tort (including negligence), warranty, strict liability, or otherwise, for any losses, damages, costs or expenses of any kind whatsoever arising out of, resulting from, or related to the performance or breach of this Agreement shall, under no circumstances, exceed the amount due from GE for services rendered under this Agreement. GE shall not, under any circumstances, be liable for any special, indirect, incidental, punitive, or consequential losses, damages, costs, or expenses whatsoever. Any action against GE arising out of, resulting from, or related to the performance or breach of this Agreement shall be filed not later than one year after the cause of action has accrued.

26. SUCCESSORS AND ASSIGNS

This Agreement shall inure to the benefit of, and shall be binding upon, the parties hereto and their respective successors and permitted assigns. Assignment of this Agreement or any interest or obligation hereunder or any payment to become due hereunder by SERVICE PROVIDER without GE'S prior written consent shall be void and unenforceable.

27. SURVIVAL OF OBLIGATIONS

SERVICE PROVIDER's obligations under this Agreement, which by their nature would continue beyond the termination, cancellation or expiration of this Agreement (including without limitation any obligation to indemnify GE hereunder) shall survive termination, cancellation or expiration of this Agreement.

28. ENTIRE AGREEMENT

This Agreement and the Schedules attached hereto constitutes the entire agreement between the parties and shall supersede all prior offers, negotiations, exceptions and understandings, whether oral or written, between the parties hereto relating to the products and services called for hereunder. No modification of any provision of this Agreement shall be binding upon GE or SERVICE PROVIDER unless evidenced in writing and duly signed by both parties.

IN WITNESS WHEREOF, each of the parties hereto has caused this Agreement to be executed by its duly authorized officer or representative.

GENERAL ELECTRIC COMPANY

By: _____	**By:** _____
Name:	**Name:** _____
Title:	**Title:** _____
Date: _____	**Date:** _____
Address:	**Address:** _____
	_____

CONSULTING AGREEMENT

This Consulting Agreement ("this Agreement") made by and between SUPERVALU INC., a Delaware corporation having a place of business at 11840 Valley View Road, Eden Prairie, Minnesota ("SUPERVALU") and _____ ("Consultant").

Background

A. SUPERVALU desires to engage Consultant to render consulting and advisory services for SUPERVALU in connection with certain litigation and other legal transactions for SUPERVALU.

B. The Consultant has legal knowledge relating to litigation and other legal transactions and is willing to perform such services for SUPERVALU subject to the terms and conditions of this Agreement.

Terms and Conditions

SUPERVALU and Consultant agree as follows:

1. **Appointment**.

1.1. Consultant Appointed. SUPERVALU hereby appoints, retains and hires the Consultant as a temporary independent contractor litigation attorney as of the Effective Date of this Agreement as specified in Exhibit A.

1.2. Scope of Services. Consultant shall perform consulting services for, and at the request of, SUPERVALU or such affiliates of SUPERVALU as SUPERVALU may designate. All such services shall be rendered personally by Consultant.

1.3. Supervisor. During the term of this Agreement, Consultant shall report to the Director of Litigation.

2. **Term**.

2.1. Term and Renewal. This Agreement shall be in force as of the Effective Date and continue unless sooner terminated as provided in this Section 2.

2.2. Termination Without Cause. This Agreement shall be subject to termination by SUPERVALU or Consultant at any time upon providing at least ten (10) business days' written notice to SUPERVALU or to Consultant, as the case may be.

2.3. Termination for Cause. Notwithstanding the above, this Agreement may be terminated immediately prior to the expiration of the term:

(a) by SUPERVALU providing notice in writing to the Consultant in the event the Consultant shall have committed any breach of his, her, or its obligations hereunder; or

(b) by Consultant providing notice in writing to SUPERVALU in the event SUPERVALU shall have committed any breach of its obligations hereunder.

2.4. Effect of Termination. Notwithstanding anything to the contrary in this Agreement, Consultant's obligations under Section 5 and 6 and paragraph 8.3 shall survive termination of this Agreement.

3. **Compensation**.

3.1. Compensation. SUPERVALU shall pay to Consultant a consulting fee of $_____ per hour for the consulting services performed pursuant to Section 1 of this Agreement.

3.2. Reporting and Payment. Each week or every two (2) weeks, Consultant shall submit an invoice for work performed and an attached Work Report in a form similar to Exhibit A. Each such invoice submitted shall show, in reasonable detail, the reasonable expenses incurred during such period plus an amount equal to the sum of the number of hours worked by Consultant (as listed on Exhibit A). Payment of invoices shall be in the normal course of business upon receipt of an invoice therefor.

3.3. Overtime. In no event shall Consultant be entitled to overtime pay unless the same shall be expressly authorized by SUPERVALU.

4. **Confidential Information**.

4.1. Confidential Information Defined. the term "Confidential Information" shall mean any and all information that is disclosed by SUPERVALU to Consultant including, without limitation, the specific nature of Consultant's projects and all work product generated in connection with this Agreement. Confidential Information shall expressly include any and all information derived from the foregoing Confidential Information.

4.2. Obligations. Consultant shall keep the Confidential Information in strict confidence and shall not disclose it to any person, firm or corporation, nor use the Confidential Information for any purpose other than for the performance of this Agreement without the prior written consent of SUPERVALU. Consultant shall protect and safeguard the Confidential Information by using the same degree of care, but no less than a reasonable degree of care, to prevent the unauthorized use, dissemination or publication of the Confidential Information as Consultant uses to protect its own confidential or proprietary information of a like nature. Consultant shall limit the disclosure of the Confidential Information to officers, employees or agents of Consultant who need to know such information in order to perform in accordance with the terms of this Agreement. The obligations of confidentiality shall extend for a period of five (5) years from the date of disclosure of any such information and shall survive termination of this Agreement.

4.3. Exceptions. The obligations of confidentiality contained in paragraph 4.2 shall not apply to any information which (a) is rightfully received by Consultant from a third party having the right to disclose such information; (b) is or hereafter becomes public knowledge through no act or fault of Consultant; (c) is proven by written evidence to have been independently developed by Consultant without any reference to the Confidential Information; or (d) is disclosed pursuant to law or any governmental or court order, provided the Consultant shall first have given notice to SUPERVALU of such order and made a reasonable effort to obtain a protective order.

5. **Mediation/Arbitration**.

Any controversy, claim, or dispute of whatever nature arising between the parties (a "Dispute") shall be resolved by mediation or, failing mediation, by binding arbitration. This agreement to mediate or arbitrate shall continue in full force and effect despite the expiration, rescission, or termination of this Agreement.

Either party may begin the mediation process by giving a written notice to the other party setting forth the nature of the Dispute. The parties shall attempt in good faith to resolve the Dispute by mediation within 60 days of receipt of that notice.

If the Dispute has not been resolved by mediation as provided above, or if a party fails to participate in a mediation, then the Dispute shall be resolved by binding arbitration in Minneapolis, Minnesota. The arbitration shall be undertaken pursuant to the substantive laws of the State of Minnesota and the Federal Arbitration Act, and the decision of the arbitrator(s) shall be enforceable in any court of competent jurisdiction. The parties knowingly and voluntarily waive their rights to have their dispute tried and adjudicated by a judge or jury.

Any party may demand arbitration as provided above by sending written notice to the other party. The arbitration and the selection of the arbitrator(s) shall be conducted in accordance with such rules as may be agreed upon by the parties, or, failing agreement within 30 days after arbitration is demanded, under the Commercial Arbitration Rules of the American Arbitration Association, as such rules may be modified by this agreement. In any Dispute which involves more than one million dollars in damages, three arbitrators shall be used. Unless the parties agree otherwise, they shall be limited in their discovery to directly relevant documents. The arbitrator(s) shall resolve any discovery disputes.

The arbitrator(s) shall have the authority to award actual money damages (with interest on unpaid amounts from the date due), specific performance, and temporary injunctive relief, but the arbitrator(s) shall not have the authority to award exemplary or punitive damages, and the parties expressly waive any claimed right to receive money damages in excess of its actual compensatory damages. The costs of arbitration, but not the costs and expenses of the parties, shall be shared equally by the parties. If a party fails to proceed with arbitration, unsuccessfully challenges the arbitration award, or fails to comply with the arbitration award, the other party is entitled to costs, including reasonable attorney's fees, for having to compel arbitration or defend or enforce the award. Except as otherwise required by law, the parties agree to maintain as confidential all information or documents obtained during the arbitration process, including the resolution of the Dispute.

Notwithstanding the above, the parties recognize that certain business relationships could give rise to the need for one or more of the parties to seek emergency,

provisional, or summary relief to repossess and sell or otherwise dispose of goods and/or fixtures, to prevent the sale or transfer of goods and/or fixtures, or to protect real or personal property from injury, and for temporary injunctive relief. Immediately following the issuance of any such relief, the parties agree to the stay of any judicial proceedings pending mediation or arbitration of all underlying Disputes.

This agreement to arbitrate shall continue in full force and effect despite the expiration, rescission or termination of this Agreement.

6. **General Provisions**.

6.1. Entire Agreement and Modification. This Agreement, including attached Exhibit A evidences the entire understanding and agreement of the parties hereto relative to the consulting arrangement between Consultant and SUPERVALU and the other matters discussed herein. This Agreement supersedes any and all other agreements and understandings, whether written or oral, relative to the matters discussed herein. No modification, amendment, supplement to or waiver of this Agreement shall be binding upon the parties hereto unless made in writing and duly signed by both parties.

6.2. Status of Consultant. In rendering services pursuant to this Agreement, Consultant shall be acting as an independent contractor and not as an employee or agent of SUPERVALU. Consultant shall not be entitled to receive any health insurance, life insurance or any other fringe benefit generally made available to SUPERVALU employees. As an independent contractor, Consultant shall have no authority, express or implied, to commit or obligate SUPERVALU in any manner whatsoever, except as specifically necessary for the resolution of litigation and as approved in advance by SUPERVALU. Nothing contained in this Agreement shall be construed or applied to create a partnership, agency or joint venture relationship between Consultant and SUPERVALU. Consultant is liable for the payment of all taxes applicable to any compensation paid to Consultant hereunder, and SUPERVALU shall not withhold or pay any federal, state or local income, social security, unemployment or workers' compensation taxes related to such compensation.

IN WITNESS THEREOF, the parties have executed this Agreement as of the day and year written below.

SUPERVALU:

SUPERVALU INC.
P.O. Box 990
Minneapolis, MN 55440

By:_____
Name:_____
Title:_____
Dated:_____

CONSULTANT:

_____

Dated:_____

Kimberly J. Myrdahl
(952) 828-4159
Fax: (952) 828-4403
E-Mail: kim.myrdahl@supervalu.com

August 30, 2002

Name
Company
Address
City, State and Zip

RE: SUPERVALU

Dear Mr./Ms.:

I am looking forward to working with you in your representation of SUPERVALU INC. in connection with the above-referenced matter. As in-house counsel, I will be principally responsible for managing this litigation.

Enclosed is a copy of SUPERVALU's Policy on Billings for Outside Counsel, which you may already have. Please review the policy and get back to me if you have any questions or concerns.

The following paragraphs summarize some of the procedures SUPERVALU requests that its local counsel follow as we work together towards resolving this matter. If any of the following procedures pose problems for you, please call to discuss the situation with me.

CASE REVIEW: Please plan to discuss strategy decisions with me and keep me informed of developments in the case. I prefer to review pleadings, discovery responses, and other important documents prior to their filing with the court. I also want to be consulted about substantial research projects or the preparation of internal memoranda prior to the work being performed. If there should be particular pieces of correspondence that are substantive, I would appreciate receiving copies of them as well.

DEPOSITIONS: I may want to attend the depositions of key witnesses in order to assess the dynamics involved in the case. When the time comes to schedule such a deposition, please consult with me. I do not need summaries of depositions, and I expect that computerized reporting of depositions eliminate any need for costly summaries and indexing.

STAFFING: SUPERVALU prefers to have one principal attorney on a case. With respect to this case, I understand that you will be the primary attorney. If there is another attorney or professional who will work on the case, I ask that you discuss the arrangement and scope of work with me.

BILLING: I understand that your hourly rate is $_____. I would appreciate it if you kept me informed of the billing rate of any other personnel used on the case.

BUDGET: Enclosed is a form SUPERVALU uses to formulate a budget for planning purposes. With respect to this case, I do not believe we need to complete a budget until there is more known about the intention of the other parties. However, the form may be helpful to you in planning how to proceed.

Again, if you have any questions about any of these matters, please give me a call. I look forward to working with you.

Very truly yours,

SUPERVALU INC.

Kimberly J. Myrdahl
Director of Litigation

KJM/lae
Enclosures
cc:

SUPERVALU INC.

POLICY ON BILLINGS FROM OUTSIDE COUNSEL

1. Purpose: This policy is intended to benefit both SUPERVALU INC. and subsidiaries (collectively, "SUPERVALU") as well as outside counsel by (a) clarifying billing procedures to assist in the budgeting and control of expenses, and (b) facilitating prompt payment of statements submitted in accordance with this policy.

2. Billing Procedures:

2.1 Fees. An hourly rate or other fee arrangement must be agreed upon in advance in a separate written engagement letter and cannot be changed without prior written consent from SUPERVALU. Time spent preparing, revising or negotiating invoices is not billable. If a fee arrangement is on an hourly basis, billing should be on a one-tenth of an hour interval unless the engagement letter indicates otherwise.

2.2 Expenses. SUPERVALU will not pay any mark-up or profit on any expense items. SUPERVALU will reimburse the following actual expenses when they are reasonable and necessary in performing the tasks assigned to outside counsel; postage, messenger and other express delivery services (when necessary); photocopying (the invoice should state the number of pages and the cost per page - not to exceed $.10 per page); long distance and cellular telephone charges based on actual usage on SUPERVALU's behalf. SUPERVALU will pay only the long distance telephone charge incurred in sending facsimiles. Any single disbursement in excess of $500, including volume copying, must be approved in advance by SUPERVALU. Other expenditures, such as secretarial overtime and word processing charges will not be paid. All expenses should be separately itemized.

2.3 Travel. All out-of-town travel as well as arrangements and billing during travel must be approved by SUPERVALU in advance. When such travel has been approved in advance, SUPERVALU will reimburse coach class air expense, and reasonable expenses and disbursements when separately itemized by category.

2.4 Research. SUPERVALU must approve in advance the scope and cost of any research in excess of five hours required in the course of the representation.

2.5 Interoffice Conferences. SUPERVALU discourages excessive billing for interoffice conferences. In particular, billing for interoffice conferences to transfer matters is viewed as inappropriate.

3. Invoice Procedures:

3.1 Separate Billing Matters. Except for very minor matters, each project should be invoiced as a separate matter and not as "miscellaneous" or "general."

3.2 Invoice Format. All invoices should be submitted on a monthly basis and indicate the name of the matter. In the case of real estate transactions, the invoice should indicate the SUPERVALU facility number as well as the city and state of the real estate. In the case of non-real estate matters, the invoice should contain the SUPERVALU file number, names of other parties, if applicable, and the matter name as designated by the responsible SUPERVALU attorney. Each entry on the invoice should contain the following detail: date of service, billing party performing service, specific description of services rendered, time spent, and charge. If the service performed includes a

contact with a SUPERVALU employee, the description of services rendered should state the name of the SUPERVALU employee. Each invoice should also include a summary identifying the full name, billing rate, associate, partner or paralegal status of each billing party and the number of hours for each billing party included in that invoice.

3.3 Account and Budget Summaries. When requested by SUPERVALU, each invoice should be accompanied by a summary of past and current billings and payments in that matter.

3.4 Payment and Compliance. Statements submitted in accordance with this procedure will be paid promptly by SUPERVALU. Non-conforming statements will either be reviewed and discussed with outside counsel or returned with the request that it be revised to conform to this policy. No interest shall accrue on invoices unless they are in the format required under this Policy and have remained unpaid for more than 30 days.

4. General Matters:

4.1 Engagement Attorney Involvement. SUPERVALU has retained the attorney identified in the engagement letter, not a firm, and the named attorney is expected to remain primarily responsible for and involved in the handling of the matter. SUPERVALU should be consulted before involving other lawyers or paralegals. However, efficient use of associates and paralegals is encouraged, and need not be cleared in advance if the work performed can be done more efficiently and without duplication of time or expenses. The attorney named in the engagement letter is expected to review the invoices prior to submission to SUPERVALU.

4.2 SUPERVALU Attorney Contact. SUPERVALU's contact with the outside counsel is the attorney in the SUPERVALU Legal Department named in the engagement letter. For any item set forth in this policy or in the performance of the legal services which requires prior approval of SUPERVALU, that approval may be given only by the stated SUPERVALU attorney or other member of the Legal Department.

4.3 Forms. Any forms (whether paper or electronic) provided to outside counsel by SUPERVALU shall remain SUPERVALU's property and may not be used without its permission.

4.4 Selection of Outside Experts. SUPERVALU shall control the selection of all outside consultants, experts, professionals and other vendors.

4.5 Return of Files. At the conclusion of the matter, outside counsel shall provide to SUPERVALU an original execution copy of each document signed in a transaction, original marked-up title commitment and policies and photocopies of all other relevant due diligence materials as required by SUPERVALU. All prior documents and files provided by SUPERVALU shall be returned to it at the conclusion of the matter.

4.6 Public Comment. No public comment should be made on SUPERVALU matters. Please refer any media inquiries to the responsible SUPERVALU attorney.

4.7 Reporting Improprieties. SUPERVALU intends to strictly comply with all applicable laws, rules and regulations governing its business as dictated by its corporate compliance program. Any suspicion of illegal or unethical conduct on the part of any SUPERVALU employee should be promptly reported to the SUPERVALU legal department or our compliance hotline at 1-800-241-5689.

SUPERVALU INC. LITIGATION COST ESTIMATE WORKSHEET
CONFIDENTIAL/ATTORNEY-CLIENT PRIVILEDGE

CASE NAME:				
Assumptions:				
Time estimates are in person - hours				
Partner/Associate/Paralegal	Partner:	Associate:	Paralegal:	Actual Fees Billed
Hourly Billing Rate =	$ -	$ -	$ -	
Phase I - L100				
Case Assessment, Development & Administration				
L110 Fact Investigation/Development				$ -
L120 Analysis/Strategy				$ -
L130 Experts/Consultants				$ -
L140 Document/File Management				$ -
L150 Budgeting				$ -
L160 Settlement/Non-Binding ADR				$ -
L190 Other Case Assessment, Development & Administration				$ -
Budgeted Time Value Subtotal	0	0	0	
Budgeted Dollar Value Subtotal				
Budgeted Total Dollars Value				$ -
Phase II - L200				
Pretrial Pleadings and Motions				
L210 Pleadings				$ -
L220 Preliminary Injunctions/Provisional Remedies				$ -
L230 Court-Mandated Conferences				$ -
L240 Dispositive Motions				$ -
L250 Other Written Motions & Submissions				$ -
L260 Class-Action Certification & Notice				$ -
				$ -
Budgeted Time Value Subtotal	0	0	0	
Budgeted Dollar Value Subtotal				
BudgetedTotal Dollars Value	$ -			$ -
Phase III - L300				
Discovery				
L310 Written Discovery				$ -
L320 Document Production				$ -
L330 Depositions				$ -
L340 Expert Discovery				$ -
L350 Discovery Motions				$ -
L390 Other Discovery				$ -
Budgeted Time Value Subtotal	0		0	
Budgeted Dollar Value Subtotal				
Budgeted Total Dollars Value				$ -
Phase IV - L400				
Trial Preparation and Trial				
L410 Fact Witnesses				$ -
L420 Expert Witnesses				$ -
L430 Written Motions & Submissions				$ -
L440 Other Trial Preparation & Support				$ -
L450 Trial & Hearing				$ -
L460 Post-Trial Motions & Submissions				$ -
L470 Enforcement				$ -
Budgeted Time Value Subtotal	0	0	0	
Budgeted Dollar Value Subtotal				
Budgeted Total Dollars Value	$ -			$ -
Phase V - L500				
Appeal				
L510 Appellate Motions & Submissions				$ -
L520 Appellate Briefs				$ -
L530 Oral Argument				$ -
Budgeted Time Value Subtotal	0	0	0	
Budgeted Dollar Value Subtotal				
Budgeted Total Dollars Value				$ -
E600 Expenses				
Case Assessment, Development & Administration				Actual Expenses Billed
E101 Copying				$ -
E102 Outside Printing				$ -
E103 Word Processing				$ -
E104 Facsimile				$ -
E105 Telephone				$ -
E106 On-Line Research				$ -
E107 Delivery Services/Messengers				$ -
E108 Postage				$ -
E109 Local Travel				$ -
E110 Out-of-Town Travel				$ -
E111 Meals				$ -
E112 Court Fees				$ -
E113 Subpoena Fees				$ -
E114 Witness Fees				$ -
E115 Deposition Transcripts				$ -
E116 Trial Transcripts				$ -
E117 Trial Exhibits				$ -
E118 Litigation Support Vendors				$ -
E119 Experts				$ -
E120 Private Investigators				$ -
E121 Arbitrators/Mediators				$ -
E122 Local Counsel				$ -
E123 Other Professionals				$ -
E124 Other				$ -
				$ -
Total Budgeted Expenses	$ -			
Total Budgeted Attorneys' Fees	-			
LITIGATION BUDGET TOTAL	$ -			
ACTUAL FEES & EXPENSES BILLED	$ -			

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- Robert S. Risoleo, Sullivan & Cromwell Memoranda, "*Advanced Doing Deals 2003: Dealmaking in the New Transactional Marketplace*," Practicing Law Institute, June 19-20, 2003, 1377 PLI/Corp 529, Order No. B0-01UN.
- Alston & Bird LLP Sarbanes-Oxley and Corporate Governance Resource Center, *available at* www.alston.com
- Gibson, Dunn & Crutcher LLP Sarbanes-Oxley Resource Center, *available at* www.gibsondunn.com/news/firm/detail/id/526/?pubItemId=6638
- Weil Gotshal & Manges LLP Sarbanes Oxley Act and Corporate Governance Web Page *available at* www.weil.com/weil/soxa.html
- Alan Greenwood and Steve Lauer, " *Ethics and Compliance Programs: How to Demonstrate their Effectiveness*," Law Journal Newsletters (October 2004).

VIII. Conclusion

Supreme Court Justice Potter Stewart said ethics is "knowing the difference between what you have the right to do and what is the right thing to do." In-house legal practice can present many difficult ethical questions for lawyers. Knowing what to do when these issues arise is invaluable to safeguarding the client's best interests during these times of reform and change. When confronted with ethical considerations, in-house counsel should consult the applicable state ethical rules. While most states have adopted a version of the ABA Rules, many states have significantly altered their ethical rules. In-house counsel should also familiarize themselves with the standards of professional conduct for attorneys established by the SEC pursuant to Section 307 of the Sarbanes-Oxley Act. As the recent corporate scandals have demonstrated, turning a blind eye to ethical considerations may not only be damaging one's career and subject the lawyer to suspension or withdrawal of one's license, but can also land the lawyer in jail, and make him or her liable for up to millions of dollars in fines. Ethical lapses by in-house counsel can significantly contribute to the downfall of the corporate entity by causing irreparable harm to financial markets and shareholder investments, and undermining investor confidence.

In-house Counsel Ethics
Association of Corporate Counsel Updated March 2005

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IX. Appendix

Selected ABA Model Rules of Professional Conduct. Copyright © 2005. American Bar Association

Model Rule 1.13 Organization as Client[246]

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

[246] ABA Model Rules of Professional Conduct, at Rule 1.13: Organization as Client, *available at* http://www.abanet.org/cpr/mrpc/new_rule1_13.pdf

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Model Rule 1.7: Conflict Of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

Model Rule 1.8: Conflict Of Interest: Prohibited Transactions with Clients

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;
(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
(3) information relating to representation of a client is protected as required by Rule 1.6.

(g)A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or
(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Model Rule 1.9: Duties To Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Model Rule 1.6: Confidentiality of Information[247]

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, or the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

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[247] ABA Model Rules of Professional Conduct, at Rule 1.6: Confidentiality of Information, (ABA) *available at* http://www.abanet.org/cpr/mrpc/new_rule1_6.pdf

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

Model Rule 5: Unauthorized Practice of Law; Multi-jurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:
(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or
(2) are services that the lawyer is authorized to provide by federal or other law of this jurisdiction.

Model Rule 1.16: Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;
(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1)withdrawal can be accomplished without material adverse effect on the interests of the client;
(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
(3) the client has used the lawyer's services to perpetrate a crime or fraud;
(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

whether, if such a risk does theoretically exist, the client is nonetheless satisfied that protective measures can be taken, such as using different personnel or bringing in another firm to handle particular issues, to ensure that this risk will not become a reality. There are relatively few situations in which conflicts waivers should be given if corporate counsel cannot be satisfied here.

E. How Related or Unrelated Is the Work?

This question is implicit in several of the prior questions. Clients are understandably and quite properly more willing to grant conflicts waivers for work that is altogether unrelated to the work that a lawyer or firm is doing for them than for work that may be related in some way—whether because the same kinds of issues are involved, because the same lawyers or company personnel are involved, or because there is overlapping confidential client information.

F. How Broad Is the Consent?

Future or blanket conflicts waivers are permitted in some, if not necessarily all, jurisdictions. The two critical questions are whether the subsequent conflict is subject to waiver (in which case an advance waiver is no better than a present one) and whether the disclosure provided an adequate basis for the future consent. *See, e.g., Visa U.S.A., Inc. v. First Data Corp.*, 241 F.Supp.2d 1100 (N.D.Cal.2003) (enforcing fairly detailed future conflicts waiver against fairly sophisticated client that consulted counsel before signing); ABA Formal Op. 93-372; Cal. Eth. Op. 1989-115, 1989 WL 253263; N.C. Eth. Op. 8, 1999 WL 33262185; N.Y.C.L.A. Eth. Op. 724, 1998 WL 39561; Or Eth. Op. No. 1991-122, 1991 WL 279213. Although there are many circumstances in which a blanket conflicts waiver is both necessary and appropriate, there are others in which in-house counsel may at least wish to consider whether a more limited waiver would be more in keeping with client interests. At a minimum, raising this question with outside counsel may help flesh out what is and is not at stake in a particular conflicts waiver request.

G. How Good Is Outside Counsel's Disclosure?

Some states require written conflicts waivers. *See, e.g.,* Or. DR 10-101(B); Wash. RPC 1.7. Others do not. Even in those states in which no writing is required, however, the better practice from both outside counsel's and the client's point of view is for outside counsel to submit a written request for a waiver. *Cf.* ABA Formal Op. 93-372.

Corporate counsel who are asked to consider a waiver request should ask themselves whether the combined oral and written disclosures by outside counsel adequately explain the kind or kinds of conflict and the nature of the problem or problems that could result from them. We are concerned that an outside lawyer who does not explain a conflict in a manner that effectively brings home the essential points to in-house counsel may not fully understand the conflict at issue and why someone should care about it. We are also concerned that a lawyer who does not understand a conflict may be less likely to take the steps that are necessary to protect the client's interests.

VI. Conclusion

Both corporate and outside counsel are human beings, and conflicts waivers often come down to a matter of personal relationships. That is as it should be. As we hope we have shown, however, more is at stake than the personalities of the particular individuals involved. Both client interests and the substantive rules of conflicts law should be considered before a decision is made.

Conflicts and Waivers
Association of Corporate Counsel updated January 2005

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VII. Appendix

Selected ABA Model Rules of Professional Conduct (2004). Please note: these are the ABA's present model rules and are not necessarily in force as written below in any particular jurisdictions. In addition, the interpretation of these rules can differ from jurisdiction to jurisdiction.

Rule 1.7 Conflict Of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial

VII. Whistleblowers

A. Protection for Whistleblowers

Sarbanes-Oxley creates a new claim for employees, including attorneys, fired or treated adversely because of a complaint or report of conduct by a company that violates Sarbanes-Oxley.[68] If an attorney who was formerly employed or retained by an issuer who has reported evidence of a material violation reasonably believes that he or she has been discharged on the basis of his or her report, such attorney may notify the board of directors of such discharge. In-house attorneys may further avail themselves of the benefit of Section 806 of Sarbanes-Oxley Act, which offers whistleblower protection. However, given the traditional limitations on wrongful discharge, and respecting a client's fundamental right to choose counsel, it remains to be seen if this provision will be of significant value to in-house counsel who shed light upon corporate misfeasance.

On February 15th, 2005 Administrative Law Judge Stephen Purcell ordered Cardinal Bankshares Inc. to reinstate its former chief financial officer, David Welch, and pay him nearly $65,000 in back pay and damages.[69] The significance is that Welch, became the first person to win protection as a whistleblower under the Sarbanes-Oxley Act, passed by Congress in 2002 in the wake of corporate scandals at Enron, WorldCom and other firms.

Since the law took effect in mid-2002, workers have filed 144 claims with the Department of Labor, alleging that their employers retaliated against them for calling attention to financial mismanagement. Welch is one of just three workers to win protection so far. Another 16 cases have ended in settlements.[70] While the case will be appealed in federal court, it suggests that the Whistle-blower provisions of Sarbanes will be enforced by the courts.

For legislative materials, see:

- Securities and Exchange Commission Final Rule: Implementation of Standards of Professional Conduct for Attorneys, 17 C.F.R. pt. 205 (2002), *available at*: http://www.sec.gov/rules/final/33-8185.htm
- Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, Section 307 (2002), *available at*: http://www.acca.com/legres/enron/sarbanesoxley.pdf

B. Whistle-blowing/Noisy Withdrawal

A pertinent question is will an attorney face any culpability if, after having reported the matter all the way 'up the ladder'—from his supervising attorney to the CLO, CEO and directors—the attorney learns that no action was taken?

In response to practitioner comments, state ethics regulators and foreign lawyers, the SEC deferred and/or eliminated some of the most controversial provisions that many believe were beyond the

[68] 18 U.S.C. 1514A.

[69] Welch v. Cardinal Bankshares, Corp., Case No. 2003-SOX-15 (U.S. DOL ALJ Jan. 28, 2004)

[70] Adrian Gelfer, *Judge Orders Reinstatement for First Sarbanes-Oxley Whistleblower,* AP News (Feb. 23rd, 2005), available at: http://www.law.com/jsp/article.jsp?id=1108992919634

spirit of Sarbanes-Oxley. Initially, the SEC required that any attorney dissatisfied with the client's response must make "a noisy withdrawal."[71] Under the SEC's alternative rule, however, the corporation, rather than the reporting attorney, is required to notify the SEC regarding the circumstances of withdrawal. The following chart compares the requirements under the initial proposal with those contained in the proposed alternative rule.[72] Also note that the proposed alternative requires the corporation to file a form 8-K.

	Originally Proposed Rules	**Alternative Rule**
Circumstance	Reporting attorney who has not received an appropriate response in a reasonable time	Reporting attorney who has not received an appropriate response in a reasonable time
Standard	Reporting attorney believes the material violation is either ongoing or is about to occur and is likely to result in substantial injury to the company or investors	There is substantial evidence that a material violation is ongoing or about to occur
Attorney Requirement "withdrawal"	Under these circumstances, attorney must withdraw from representation.	Under such narrow circumstances, reporting attorney MUST: • Withdraw from representation; • Immediately cease to engage in any matter regarding the alleged violation; *and*
Reporting Firm Attorney:		• Firm Attorney: Notify the company in writing that the company has not provided an appropriate response in a reasonable time
Reporting In-house Counsel "withdrawal"	In House Counsel: may, but is not required to withdraw from representation.	In-house Counsel: Notify the board stating that he or she will not be allowed to continue to work for the client on related issues for professional reasons, but does not need to resign.
SEC Notification	Reporting attorney MUST notify the SEC within one business day that the withdrawal was based on business considerations AND disaffirm any false or materially misleading submissions to the SEC that s/he has helped prepare.	Reporting attorney NOT required to notify the SEC of the withdrawal, but is permitted to do so if the company did not report the attorney's notice.
Company Requirement		Company must, upon receiving such written notice from reporting attorney, report such notice and related circumstances on Form 8-k, 20-F or 40-F, within two business days of receipt.

[71] In-house counsel would not have been required to "withdraw from representing the issuer and notify the SEC within one business day of such withdrawal and indicate that the withdrawal was based on professional considerations"; instead they would have to "promptly disaffirm to the SEC any statement that the attorney has participated in preparing that the attorney reasonably believes is or may be false or misleading that has been filed with the SEC."

[72] A discussion of the proposed rules is available at www.sec.gov/rules/proposed/33-8186.htm#P143_25228.

In a speech to the ABA Business Law Section on April 3, 2004, SEC General Counsel Giovanni Prezioso said that although the Commission has not yet decided whether to proceed with a mandatory "noisy withdrawal" rule, it is closely monitoring attorney compliance with the new "up the ladder" rule as well as the bar's efforts to address the concerns raised by Congress in enacting Section 307.[73] It would appear that so long as Model Rules 1.13 and 1.6 are effective, they SEC will not attempt to enact regulations mandating a "noisy withdrawal."

For list format of noisy withdrawal alternatives, see:

- Attorney-Client Privilege in the Corporate Setting Fact Sheet, at 25, Quinn Emanuel Urquhart Oliver & Hedges, LLP, *at*: http://www.acca.com/chapters/socal/program/corpattyclient.pdf

For recommendations on noisy withdrawal alternatives, see:

- Barry Nagler and M. Elizabeth Wall, *ACC's Second Comment Recommendations on Noisy Withdrawal*, File No. S7-45-03 (April 7, 2003), *available at*: www.acca.com/advocacy/307comments2.pdf.

For information on the SEC rules on the new attorney standards and its alternative proposal of creating a Form 8-K public reporting requirement by the board, see:

- Stanley Keller, *SEC Implements Standards of Professional Conduct for Attorneys*, ACC and Palmer & Dodge LLP, *available at*: http://www.acca.com/legres/corpresponsibility/307/summary.pdf

Critics comment that any permissive withdrawal should allow a reporting attorney to withdraw from representing its client on the matter at issue, but continue representation otherwise. For a discussion, see:

- Robert S. Risoleo, Sullivan & Cromwell Memoranda, *Advanced Doing Deals 2003: Dealmaking in the New Transactional Marketplace*, Practicing Law Institute (June 19-20, 2003), 1377 PLI/CORP 529, Order No. B0-01UN.

[73] Giovanni P. Prezios Public Statement by SEC Official: Remarks before the American Bar Association Section of Business Law 2004 Spring Meeting, (April 3rd, 2004), available at: www.sec.gov/news/speech/spch040304gpp.htm

VIII. Attorney-Client Privilege Issues

A. Confidentiality & Model Rule 1.6

The issue of confidentiality in the representation of the corporation as a client is complex, especially since the corporation can only act through its agents—namely corporate executives and board members. The recent changes in the SEC Rules regarding attorney confidences further complicate matters. The purpose of the revised ABA Rule is to help "prevent a client from using a lawyer's services to commit a crime or fraud that results in substantial financial injury to innocent third parties."[74]

The ABA modified Rule 1.6 of the Model Rules on Professional Responsibility to allow attorneys to report evidence of a client corporation's ongoing or future financial fraud if and only if the fraud is reasonably likely to have a significant financial impact on third parties and if the lawyer's services have been used by the client in the commission of such a fraud.[75] However, state regulations differ on how attorneys should respond in this situation. As states may impose more rigorous attorney standards, the SEC does not preempt this field entirely; however, it certainly prevails where there is a conflict. In particular, such a conflict will exist in states that do not allow attorneys to break client confidences to prevent financial harm or fraud.

The SEC Rules permit an attorney to reveal confidences to the Commission, without the issuer's consent, under the following circumstances:

- to prevent the company from committing a material violation that is likely to cause substantial injury to the financial interests of that company or its investors,
- to prevent the issuer from committing perjury during a Commission or administrative investigation, or
- to rectify the consequences of a material violation by the issuer that has caused, or may cause, substantial injury to the financial interests of the company or its investors.

Thus, a lawyer may disclose to the Commission certain civil violations not rising to level of a crime, if such violations have been reported "up the ladder" and a response has been inadequate. Although this may conflict with a state rule that may require such reporting, the SEC has stated that the SEC rules would prevail in such instances.[76] In effect, this position would entail federalizing the SEC rules on ethics. Further, under the SEC Rule 205.6(c), a lawyer may not be liable for complying with the SEC Rules in good faith, even if such an action would be inconsistent with the standard of conduct dictated by state rules. Meanwhile, several states question whether Congress intended to extend power to the SEC to allow a breach of attorney-client privilege in states, such as Washington and California, which do not authorize such a breach of confidences.

[74] ACCA Comment Letter to ABA on Corporate Responsibility, July 29, 2003, *available at* www.acca.com/public/accapolicy/aba_corpresp.pdf

[75] See ABA Model Rules

[76] *See* 17 C.F.R. pt. 207, §20151

B. Reporting Up the Ladder: SEC Regulations and Model Rule 1.13

The SEC Rules contain another important provision relating to confidentiality: Rule 205.3(d)(2) allows an attorney to reveal confidential information related to the attorney's representation if they ***reasonably*** believe such revelations are necessary to:

(1) prevent a material violation that will injure the company or stockholders
(2) prevent perjury,
(3) to rectify the consequences of a material violation.

In the same manner, Model Rule 1.13 allows attorneys to reveal information to prevent a violation that is reasonably certain to result in substantial injury to the organization and most likely shareholders. Model Rule 1.13 requires corporate attorneys to report law violations by officers and employees up-the-ladder within the organization and, if necessary, to report corporate violations outside the organization. The Model Rule provides that if a lawyer representing a corporation knows that a corporate officer / corporate employee is engaged in a violation of law that is likely to result in "substantial injury to the organization", the lawyer must proceed in a manner that is in the best interest of the organization.[77]

Unless the lawyer reasonably believes that it is not necessary to do so, they must also refer the matter to a higher authority in the organization that can act on behalf of the organization. I the up-the-ladder provisions of Model Rule 1.13(b) fail, the Model Rules, allow the lawyer to reveal information relating to the representation, whether or not Model Rule 1.6 might prevent such disclosure.[78] This provision specifically allows lawyers to reveal confidential client information outside the organization.

Both of these provisions, the SEC rule and the ABA Model Rule, override Model Rule 1.6 and its state counterparts, which in some will prevent the revelation of information.

The SEC Rule augments and provides greater clarity than the ABA Model Rule. It specifies when attorneys have the option to report out, without making such reporting mandatory. The rule corresponds to ethics rules adopted by "the vast majority of states," even though it is slightly broader than the Model Rule 1.13.[79]

SEC Rule 205.3(d)(2) is a permissive rule, not a mandatory one. Attorneys may reveal to the Commission information that will help "prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest of property of the issuer or investors."[80] This corresponds closely with Model Rule 1.13, which states that a lawyer may reveal information "if the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization."[81]

[77] Model Rule 1.13(b)

[78] Model Rule 1.13(c)

[79] *See* New Release, ACCA, ABA Adopts New Model Rules Affecting In-house Practice, (Aug. 15, 2004), *available at*: http://www/acca.com/protected/comments/abamodelrules.pdf.

[80] See SEC Rule 205.3(d)(2)

[81] Model Rule 1.13(b)

C. Impact on Attorney-Client Relations

The role of the attorney is not only to defend clients after a crime has been committed, but to prevent their commission through effective communication with the client regarding the specific aspects of applicable laws. The sheer complexity of Sarbanes-Oxley and related state securities laws will help ensure that clients will continue to seek out legal advice, regardless of the new reporting requirements. In the post-Enron world lawyers will need to be constantly on the lookout for client misconduct, or the perception that there is misconduct, if they hope to effectively protect the company and ultimately, themselves.

The SEC Rule and the Model Rule may likely serve to strengthen the relationship between attorneys and their true clients: corporations. Model Rule 1.13 provides that a corporation is the client to whom duties of confidentiality are owed, not the organization's directors, officers, or employees.[82] An attorney is justified, and reasonably obligated, to inform the client (the company) that it's agent are acting in a detrimental manner.

In the end, it is likely that clients (the individuals who represent the company) do not rely on confidentiality rules as much as lawyers believe. Limiting the privilege will probably not change revelations of clients' confidences or affect their relationship with in-house counsel.

Model Rule 1.13 implies that in-house counsel and corporate attorneys must reevaluate their roles in corporations. Before Enron, Worldcom, etc. corporate law viewed in-house lawyer as advocates whose duty was zealous representation of clients, including corporate directors and officers.[83] The passage of Model Rule 1.13 imposes upon counsel new responsibilities. Model Rule 1.13 reminds corporate lawyers of individual responsibility to maintain their professional role and to not cross over from their position of company advocate to partner to a client. These new limitations on the applicability of the in house lawyer's role as an advocate may help lead to better corporate compliance.

For discussion on preemption issues, see:

- Stanley Keller, *SEC Implements Standards of Professional Conduct for Attorneys*, ACC and Palmer & Dodge LLP, *available at*: http://www.acca.com/legres/corpresponsibility/307/summary.pdf
- Chi Soo Kim and Elizabeth Laffittee, *The Potential Effects of SEC Regulation of Attorney Conduct Under the Sarbanes-Oxley Act*, 16 GEOJLE 707 (2003) (discussing preemption issues).
- Mathew S. Rosengart, *Protecting the Corporation and Yourself After Enron and Sarbanes-Oxley: A Primer for Lawyers Practicing Before the SEC and DOJ*, 2003 THE FEDERAL LAWYER 34.
- Washington State Bar Interim Ethics Opin. (July 26, 2003), (challenging SEC's position on preemption) *available at*: www.wsba.org/lawyers/groups/ethics2003/formalopinion.doc

[82] Model Rule 1.13(c).

[83] Jonathan C. Lipson, *Standing Up and Standing Out: The Sarbanes-Oxley Regulations and Model Rule 1.13: Redundant or Complementary?*, The Georgetown Journal of Legal Ethics, (Summer 2004).

IX. Privately Held Companies and Non-Profits

Although the impetus for drafting model rules and policies is to regulate lawyers at public companies, many private companies are looking at adopting similar guidelines. This is attributed in large part, to the emerging perspective among state legislatures, state bars, and stakeholders that lawyers representing all companies, public and private, should be concerned about corporate responsibility.

It is worth noting that public and private companies alike have to adhere to whistleblower provision under Sarbanes-Oxley, under which employees must be permitted to anonymously notify regulators of any potential wrongdoing within a company. As Chief Justice Veasey of Delaware's, Supreme Court stated:

> "I do think the changes in corporate governance that we're seeing through the voluntary best practices codes, for example … have created a new set of expectations for directors. And that is changing how courts look at these issues." [84]

In addition, privately held companies must take many of the steps required to demonstrate compliance with Sarbanes-Oxley if they decided to go public or agreed to merge with a public company. Both issues illustrate the current impact SOX can have on any private company operating in today's marketplace.

A study by Foley & Lardner LLP found that private companies and nonprofit organizations are embracing many of the reforms imposed on public companies by the Sarbanes-Oxley Act. The study found that "87 percent of private firms and nonprofits said the reforms mandated by Sarbanes-Oxley are having an impact on their operations, up from 77 percent in 2004."[85] Examples of the impact include:

- 75 percent of those surveyed now require board approval of non-audit services provided by the organization's auditor
- Almost 68 percent also said they require their CEO and CFO to certify financial results
- 72 percent said they had put protections in place for whistle-blowers[86]

Additionally, the study found that nonprofits are more amenable than private companies to restricting executive compensation, with 59 percent of nonprofit respondents saying they planned to implement such restrictions, compared to only 38 percent of for-profit companies.[87]

Sarbanes-Oxley, and the related regulations by the SEC and PCAOB, has significantly the legal practice in many areas of corporate governance and financial compliance for public companies. As states and the federal government continue to evaluate the effects of Sarbanes-Oxley, private and non-profit companies should expect that several of these requirements will be extended to them. In

[84] Chief Justice Veasey, Supreme Court of Delaware, "What's Wrong with Executive Compensation," Harvard Business Review, pp. 68, 76 (January 2003)

[85] Paul Broude, Richard Prebill, Foley & Lardner, LLP, *The Impact of Sarbanes-Oxley on Private & Nonprofit Companies*, Presentation at the 2005 National Directors Institute (March 10th, 2005)

[86] Id.

[87] Id

one example, California passed the nations first governance law for nonprofits, which, in part requires charities that do business in the state and have revenues exceeding $2 million to form audit and compensation committees.[88] In 2005, at least 8 states (including New York, New Jersey, and Arkansas) have also considered extending provisions of Sarbanes-Oxley into the non-profit sector.

By taking action now to comply voluntarily with as many of these requirements is reasonable, larger private companies (or those companies which desire to go public or being acquired) can ease their transition into the public sector or the future of corporate regulation. At the same time, these companies can reduce their litigation exposure.

To view best practices of corporate governance policies of privately held companies and non-profit organizations, as well as discussion on why private company lawyers should be concerned about Sarbanes-Oxley, see:

- *Leading Practices in Codes of Business Conduct and Ethics: What Companies are Doing, Best Practices Profiles Series*, ACC (August 2003), *at*: http://www.acca.com/protected/article/ethics/lead_ethics.pdf
- *Hot Topics in Representing Nonprofits*, ACCA's 2003 Annual Meeting, Course Materials (November 2003), *available at*: http://www.acca.com/education03/am/cm/509.pdf
- Susan Hackett, *It's Private Companies' Turn to Dance the Sarbox Shuffle*, ACCA Paper (August 2003), *available at*: www.acca.com/public/article/corpresp/sarbox_shuffle.pdf.
- Harvey Goldschmid, Comm. Speech, Securities and Exchange Commission, Orison S. Marden Lecture, Association of the Bar of the City of New York (November 17, 2003) (discussing non-profits and non-publicly traded companies), *available at*: http://www.sec.gov/news/speech/spch111703hjg.htm
- Paul Broude, Richard Prebill, Foley & Lardner, LLP, *The Impact of Sarbanes-Oxley on Private & Nonprofit Companies*, Presentation at the 2005 National Directors Institute (March 10th, 2005), available at: /www.foley.com/files/tbl_s60WorkingGroups/FileUpload627/69/privatestudydraft3-04-05.pdf
- Jeffrey S. Cronn, *Sarbanes-Oxley trickles down to nonprofits,* The Business Journal – Portland, (April 1, 2005)
- Thomas Hoffman, *Direct and indirect impact of Sarbanes-Oxley hits private companies*: *Companies considering IPOs or mergers must now address accountability issues,* Computerworld (July 25th, 2003); available at: computerworld.com/governmenttopics/government/legalissues/story/0,10801,83457,00.html
- Linda Kelso, *Voluntarily, private companies get into oversight act*, Jacksonville Business Journal (May 6, 2005), available at: jacksonville.bizjournals.com/jacksonville/stories/2005/05/09/focus3.html

[88] Abby Jones, Nonprofits Prepare for Governance Rules: Tax-exempt groups begin to institute new compliance practices in the wake of Sarbanes-Oxley, Legal Times, p. 24, (Feb. 21, 2005).

X. Document Retention Procedures

A. Introduction to Document Retention

Managing records is an important challenge within a corporation, regardless of its size. This is especially true in light of the Sarbanes-Oxley Act and the related Securities and Exchange Commission's rules on Management's Report in Exchange Act Periodic Reports.[89] The impetus for records management, in addition to compliance with the Sarbanes-Oxley mandates, is to restore investor confidence. Thus, the new rules add additional requirements and consequence components, emphasizing the importance of records.

B. How Does the Sarbanes-Oxley Act Affect Companies' Document Retention Obligations?

The Act, as well as the regulations which were implemented following its passage, imposed new requirements and duties on affected companies. These include:

(1) Criminalization of the Destruction, Alteration and Falsification of Records in Federal Investigations, Bankruptcy Cases and Official Proceedings - Sections 802 and 1102 of the Act amended the federal obstruction of justice statute, Title 18 of the United States Code (Crimes and Criminal Procedure), to significantly increase penalties for the destruction, alteration and falsification of records in certain circumstances.

(2) Section 802 provides for a fine and/or imprisonment up to 20 years for anyone who knowingly "alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry" in any record or document with intent to impede, obstruct or influence the investigation or administration of any matter within the jurisdiction of a federal department or agency or any bankruptcy case. 18 U.S.C. § 1519.

(3) Section 1102 establishes the same penalty as Section 802 for anyone who corruptly "alters, destroys, mutilates, or conceals" a record or document with intent to impair its integrity or availability for use in an official proceeding. 18 U.S.C. § 1512(c). Significantly, the official proceeding need not be pending or about to be instituted at the time of the offense. Id. § 1512(f)(1).

(4) New Federal Sentencing Guidelines Related to Obstruction of Justice. Section 805 of the Act commands the Sentencing Commission to review and amend the Sentencing Guidelines to ensure that the base offense level and sentencing enhancements are sufficient to deter and punish obstruction of justice. The Commission has proposed amendments that would increase the base offense level for obstruction-of-justice offenses by two and create a two-level enhancement for the destruction, alteration or fabrication of records in certain circumstances. 68 Fed. Reg. 2615 (proposed January 17, 2003). If adopted, these changes would increase the penalties for anyone convicted of these offenses.

[89] *See supra* note 61.

(5) Broader Record Retention Requirements for Auditors of Public Companies. Section 101(a) of the Act establishes a Public Company Accounting Oversight Board to oversee the audit of public companies, and Section 103(a)(2)(A)(i) commands the Board to adopt auditing standards that require accounting firms to "prepare, and maintain for a period of not less than seven years, audit work papers, and other information related to any audit report, in sufficient detail to support the conclusions reached in such report." In addition, Section 802 of the Act amends Title 18 of the United States Code to require auditors of publicly held companies to maintain "all audit or review workpapers" and directs the SEC to enact related regulations. 18 U.S.C. § 1520(a)(1) and (2). The SEC regulations, which apply to all audits or reviews completed on or after October 31, 2003, establish a seven-year retention period for "records relevant to the audit or review, including workpapers and other documents that form the basis of the audit or review, and memoranda, correspondence, communications, other documents, and records (including electronic records), which (1) are created, sent or received in connection with the audit or review, and (2) contain conclusions, opinions, analyses, or financial data related to the audit or review." 17 C.F.R. § 210.2-06(a). In addition to the audit or review of financial statements of publicly traded companies, the retention requirement applies also to the audit or review of financial statements of registered investment companies. Id. Knowing or willful violation of Section 802 (a)(1) of the Act or the related SEC regulations is punishable by fine and up to 10 years of imprisonment. 18 U.S.C. § 1520(b).

For more guidance on records retention practices in light of Sarbanes-Oxley, see:

- *Leading Practices in Information Management and Records Retention Programs: What Companies are Doing*, Best Practices Profiles Series, ACC (August 2003), *available at:* http://www.acca.com/protected/article/records/lead_infomgnt.pdf
- *Records Retention Enforced Corporate Records Programs*, ACC InfoPAK (December 2003), *available at*: http://www.acca.com/infopaks/recretent.html
- Document Retention After Sarbanes-Oxley, http://www.perkinscoie.com/content/ren/updates/corp/093003.htm

XI. Sanctions and Other Standards of Professional Conduct

The following points address applicable sanctions that apply to attorneys who fail to comply with Sarbanes-Oxley:[90]

- Violators of the rules are subject to civil penalties and remedies, including administrative disciplinary proceedings that could result in a censure or a suspension or bar from practicing before the SEC.
- Attorneys who comply in good faith with the rules are not subject to discipline under inconsistent state rules.
- Foreign attorneys (who do not qualify as "non-appearing foreign attorneys") are exempt from the rules to the extent their own laws would prohibit compliance.
- The rules do not provide for criminal liability and expressly state that no private right of action is established.
- The rules set forth a minimum standard of professional conduct for attorneys appearing before the SEC; these standards are meant to supplement, but not replace, applicable state standards.
- Where a state standard actually conflicts with the standard in the rules, the rules govern.

The Sarbanes-Oxley Act has also added numerous criminal sanctions to the SEC's enforcement arsenal. These include:

- The Corporate Responsibility Act (Title III)
- The Corporate and Criminal Fraud Accountability Act (Title VIII)
- The White-Collar Crime Penalty Enhancements Act of 2002 (Title IX)
- The Corporate Fraud Accountability Act of 2002 (Title XI).

(1) The Corporate Responsibility Act (Title III)

In §302, "Corporate Responsibility for Financial Reports", the CEO and the CFO are required to prepare a statement to accompany the audit report to certify the

> "appropriateness of the financial statements and disclosures contained in the periodic report, and that those financial statements and disclosures fairly present, in all material respects, the operations and financial condition of the issuer."

A violation must be knowing and intentional to give rise to liability. As an example of how this standard may provide accused officers with a defense, one need only look at the HealthSouth lawsuit. Richard M. Scrushy, former chairman and CEO of HealthSouth Corporation, has argued that his financial executives were the ones responsible for his company's $2.5 billion accounting fraud. Scrushy has claimed that he only signed off on fraudulent accounting figures because he "unknowingly" trusted the five CFOs who had served under him. His argument may serve to provide him with a non-guilty verdict.

[90] *See supra*, note 47.

The criminal fraud provisions of this section make a distinction between a CEO who "knowingly" signs off on inaccurate financial statements and one who does so "willfully and knowingly." "Knowing violations" are punishable by up to 10 years in jail and $1 million in fines, while those individuals who sign inaccurate statements "willfully and knowingly" face 20 years and a $5 million fine.

The Sarbanes-Oxley Act also allows for the redirection of civil penalties paid by violations. Previously, all civil penalties were paid into the U.S. Treasury. Under the §308, "Fair Funds for Investors" provision, the SEC has the authority to direct civil penalties to defrauded investors. Examples of the use of this provision:

- WorldCom, Inc., agreed to satisfy its civil penalty obligation by paying $500 million in cash and $250 million in stock to defrauded investors.
- Merrill Lynch will pay investors $80 million,
- JP Morgan Chase ($135 million), and
- Citigroup ($120 million).

(2) The Corporate and Criminal Fraud Accountability Act (Title VIII)

"Anyone who knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States can be fined, imprisoned for up to 20 years, or both"[91]

§807 states that anyone who knowingly executes, or attempts to execute, a scheme or artifice to defraud any person in connection with a securities issue or attempts to obtain, by means of false or fraudulent pretenses, representations, promises, money, or property, in connection with the purchase or sale of any security, can be fined, or imprisoned up to 25 years, or both.

(3) The White-Collar Crime Penalty Enhancements Act of 2002 (Title IX)

Individual corporate officers or employees who certify a financial statement (required under §302) knowing that the periodic report accompanying the statement does not comply with this section can be fined up to $1 million, imprisoned up to 10 years, or both. If found to have done so "willfully," the penalty shall be increased to a fine up to $5 million and imprisonment up to 20 years, or both.[92]

(3) The Corporate Fraud Accountability Act of 2002 (Title XI)

§1102 of Title XI can also be used to prosecute corporate officials. Individuals who corruptly alter, destroy, mutilate, or conceal a document with the "intent to impair the object's use in an official proceeding", can be fined, imprisoned up to 20 years, or both. This rule also applies to those who obstruct, influence, or impede any official proceeding, Under §1106 fines rose from up to $1 million / 10 years to $5 million and up to 20 years in prison. The SEC also was provided with the authority to prohibit any person who has violated section 10(b) or the rules or regulations from serving as an officer or director of a registered company. [93]

For additional information regarding attorney sanctions, the following materials may be insightful:

- Attorney-Client Privilege in the Corporate Setting, Fact Sheet, at 27, Quinn Emanuel Urquhart Oliver & Hedges, LLP, *available at*: http://www.acca.com/chapters/socal/program/corpattyclient.pdf.
- Stanley Keller, SEC Implements Standards of Professional Conduct for Attorneys, ACC and Palmer & Dodge LLP, *available at*: http://www.acca.com/legres/corpresponsibility/307/summary.pdf

[92] 17 CFR §906

[93] 17 CFR § 1105

XII.Additional Resources

ACC Resources

Green Eye Shades For Lawyers: A Toolkit, *ACC Docket* 23, no.3 (March 2005): 62-67 http://www.acca.com/protected/pubs/docket/mar05/toolkit.pdf

Danette Wineberg and Philip H. Rudolph, Corporate Responsibility: What Every Lawyer Should Know, ACC Docket 22, no. 5 (May 2004): 68-83 available at http://www.acca.com/protected/pubs/docket/may04/social.pdf

Peter Connor, If The Other Hat Fits- Wear it: A Guide To Effective Business Partnering, *ACC Docket*, 22, no. 9 (October 2004): 88-102 available at http://www.acca.com/protected/pubs/docket/oct04/partner.pdf

John K. Villa, Investigative Attorneys and the Reporting Obligations Under the SEC's Professional Conduct Rules, ACC Docket 22, no. 4 (April 2004): 133-137 available at http://www.acca.com/protected/pubs/docket/apr04/ethics.pdf

John K. Villa, Ethics & Privilege: Hidden Storms for Those in Safe Harbors: The SEC's Professional Conduct Rules and the Federal Preemption Doctrine, *ACC Docket* 22, no.2 (February 2004): 81-85 available at http://www.acca.com/protected/pubs/docket/feb04/ethics.pdf

Broc Romanek and Kenneth Winer, The New Sarbanes-Oxley Responsibility Standards, *ACCA Docket* 21, no. 5 (May 2003): 40-55, available at: http://www.acca.com/protected/pubs/docket/mj03/standard1.php

Richard F. Ober Jr. and Michael Parish, Maybe You Need a Lawyer: Does the Sarbanes-Oxley Act Make the SEC Your Client? *ACC Docket* 21, no. 4 (April 2003): 70-85, available at: http://www.acca.com/protected/pubs/docket/am03/client2.php

Joanne L. Bober, J. Alberto Gonzalez-Pita, et al. Closing Program: When "Jeopardy" Is No Longer a Game Show: Safeguarding Against Personal, Professional, & Fiduciary Liability, 2004 ACC Annual Meeting presentation, available at http://www.acca.com/am/04/cmpublic/closing.pdf

Lisa Change, Selena L. LaCroix, et al., Whistle While You Work: Ethical, Fiduciary, & Other Dilemmas Facing Over SOX'ed In-house Lawyers, 2004 ACC Annual Meeting presentation, available at http://www.acca.com/am/04/cm/308.pdf

Margaret M. Forman, Kerry A. Galvin, et al., Defining the Role of In-house Lawyers in Governance, 2004 ACC Annual Meeting presentation, available at http://www.acca.com/am/04/cm/711.pdf

Other Resources

- ABA Model Rules of Professional Conduct, at Rule 1.13: Organization as Client, *available at*: http://www.abanet.org/cpr/mrpc/new_rule1_13.pdf
- ABA Model Rules of Professional Conduct, at Rule 1.6: Confidentiality of Information, *available at*: http://www.abanet.org/cpr/mrpc/new_rule1_6.pdf
- American Bar Association's Revised Model Rules of Professional Conduct 1.6 & 1.13, News Release (August 20, 2003), *available at*: http://www.acca.com/protected/comments/professionalconduct.pdf
- ABA Adopts New Model Rules Affecting In-House Practice, News Release, ACCA (August 15, 2003), *available at*: http://www.acca.com/protected/comments/abamodelrules.pdf
- Brett B. Coffee, *Professionals, Core Values and Sarbanes-Oxley: A Critique,* The Attorney-CPA (Oct. 2004)
- Kathryn M. Fenton, Counseling the Corporation Post-Sarbanes-Oxley: Ethics and Professionalism Issues For In-house and Outside Counsel, Jones Day, *available at*: http://www.acca.com/protected/legres/corpresp/counselingcorporation.pdf
- Phillip E. Karmel, Bryan Cave LLP, *SEC Disclosure Requirements for Environmental Liabilities and the Impact of Sarbanes-Oxley Act*, Practicing Law Institute, 499 PLI/REAL 203 (November 2003)
- Giovanni P. Prezioso, Public Statement by SEC Official: Letter Regarding Washington State Bar Association's Proposed Opinion on the Effect of the SEC's Attorney Conduct Rules, Gen. Couns. Mem. (July 23, 2003) *available at*: www.sec.gov/news/speech/spch072303gpp.htm
- Securities and Exchange Commission Final Rule: Implementation of Standards of Professional Conduct for Attorneys, 17 C.F.R. pt. 205 (2002), *available at*: http://www.sec.gov/rules/final/33-8185.htm
- Laurence Stuart, *In-House Counsel as Corporate Cop–Up the Ladder or Down the Chute*, (Baker & McKenzie 2003), *available at*: http://www.acca.com/protected/legres/ethics/corpcop.pdf

In-house Counsel Standards Under Sarbanes-Oxley
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XIII. Sample Policies

A. Sample: Procedures For Complaints Regarding Accounting, Internal Accounting Controls Or Auditing Matters[94]

Introduction

The Audit Committee of Company, Inc. (the "Company") seeks to facilitate disclosure regarding accounting and auditing matters, encourage proper individual conduct and alert the Audit Committee to potential problems relating to accounting or auditing matters before they have serious consequences. Accordingly, the Audit Committee has established the following procedures for the receipt, retention and treatment of complaints received by the Company regarding accounting, internal accounting controls or auditing matters, and for the confidential, anonymous submission by employees of concerns regarding questionable accounting or auditing matters.

Procedures for Complaints

A. Scope of Matters Covered by These Procedures

These procedures relate to complaints or concerns regarding accounting, internal accounting controls or auditing matters of the Company ("Complaints"), including, without limitation, the following:

- fraud or deliberate error in the preparation, evaluation, review or audit of any financial statement of the Company;
- fraud or deliberate error in the recording or maintaining of financial records of the Company;
- deficiencies in or noncompliance with the Company's internal accounting controls;
- misrepresentations or false statements to or by an officer of the Company or an accountant regarding a matter contained in the financial records, financial reports or audit reports of the Company; or
- deviation from reporting of the Company's financial condition as required by applicable laws and regulations.

B. Submission and Receipt of Complaints

1. In General

A person with a Complaint should promptly report the Complaint in writing to the Company's General Counsel. Complaints may, however, be submitted telephonically or in person. Electronic submissions may be emailed to [_____@companyname.com]. The General Counsel will maintain the confidentiality and anonymity of persons making Complaints to the fullest extent reasonably practicable within the legitimate needs of law and any ensuing evaluation or investigation.

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[94] Available at http://www.acca.com/protected/policy/corpresp/complaints.pdf.

2. Anonymous Complaints Hotline

Employees who have Complaints may, rather than submitting such Complaints directly to the General Counsel, submit them confidentially and anonymously by contacting [Anonymous Complaints Hotline Provider]. [Provider] is an independent third party that the Company has hired to receive anonymous Complaints from Company employees and coordinate the delivery of such Complaints to the Audit Committee or appropriate Company personnel. [Provider] may be reached by telephone at _____. The address for writing to [Provider] is: _____. Employees may also contact [Provider] by e-mail at _____.

C. Content of Complaints

To assist the Company in the response to or investigation of a Complaint, the Complaint should be factual rather than speculative, and contain as much specific information as possible to allow for proper assessment of the nature, extent and urgency of the matter that is the subject of the Complaint. It is less likely that the Company will be able to conduct an investigation based on a Complaint that contains unspecified wrongdoing or broad allegations without verifiable evidentiary support. Without limiting the foregoing, the Complaint should, to the extent possible, contain the following information:

- the alleged event, matter or issue that is the subject of the Complaint;
- the name of each person involved;
- if the Complaint involves a specific event or events, the approximate date and location of each event; and
- any additional information, documentation or other evidence available to support the Complaint.

D. Retention of Complaints

Written copies of all Complaints shall be kept in a Complaint file. [Copies of Complaints and the Complaint file shall be maintained in accordance with the Company's document retention policy.]

E. Treatment of Complaints

A copy of all Complaints shall promptly be forwarded to the Audit Committee. The General Counsel shall evaluate each Complaint and may, in consultation with the Audit Committee, conduct an investigation based upon a Complaint. The Audit Committee may, in its discretion, appoint a person other than the General Counsel to initiate and direct an investigation, including an outside attorney or consultant. The Audit Committee may, at any time, request a briefing regarding any investigation of a Complaint and any findings regarding a Complaint. The Audit Committee shall have full authority to determine the corrective action, if any, to be taken in response to a Complaint and to direct additional investigation of any Complaint.

F. Confidentiality/Anonymity

The Company shall maintain the confidentiality or anonymity of the person making the Complaint to the fullest extent reasonably practicable within the legitimate needs of law and of any ensuing evaluation or investigation. Legal or business requirements may not allow for complete anonymity. Also, it may not be possible to proceed with or properly conduct an investigation unless the complainant identifies himself or herself. In general it is less likely that an investigation

will be initiated in response to an anonymous Complaint due to the difficulty of interviewing anonymous complainants and evaluating the credibility of their Complaints. In addition, persons making Complaints should be cautioned that their identity might become known for reasons outside of the control of the Company. The identity of other persons subject to or participating in any inquiry or investigation relating to a Complaint shall be maintained in confidence subject to the same limitations.

G. Protections from Retaliation

Employees are entitled to protection from retaliation for having, in good faith, made a Complaint, disclosed information relating to a Complaint or otherwise participated in an investigation relating to a Complaint. The Company shall not discharge, demote, suspend, threaten, harass or in any manner discriminate against an employee in the terms and conditions of employment based upon any lawful actions of such employee with respect to good faith reporting of Complaints, participation in a related investigation or otherwise as specified in Section 806 of the Sarbanes-Oxley Act of 2002. An employee's right to protection from retaliation does not extend immunity for any complicity in the matters that are the subject of the Complaint or an ensuing investigation.

These procedures are in no way intended to limit the rights of employees to report alleged violations relating to accounting or auditing matters to proper governmental and regulatory authorities.

B. Sample: Whistle Blowing Policy and Procedures[95]

It is the policy of _____Corporation and that of its Board of Directors that no employee shall be discharged or discriminated against with respect to compensation, terms, conditions or privileges of employment because the employee (or any person acting pursuant to the request of the employee) informs either management, the Board of Directors, the Securities and Exchange Commission, or the U. S. Attorney General regarding a possible violation of any law or regulation by the Company or any director, officer or employee, or for expressing any concerns about any questionable accounting, internal accounting controls or auditing matters.

In connection with the above, the Audit Committee of the Board of Directors has established the following procedures:

Under the Code of Ethical Conduct, employees are encouraged to discuss any concerns they have regarding compliance with laws and regulations or other violations of the Code of Ethical Conduct, directly with their manager or, in the alternative, with the General Counsel, who acts as the Company's ethics officer. However, employees may also submit at any time any concerns regarding questionable accounting, internal accounting controls or auditing matters, or any other possible violations of law, by submitting them anonymously in writing to "Executive Offices - Internal Communications", _____. Communications addressed in this manner will be opened by the Company's Assistant Secretary, who will discard the envelope without reading the contents and then forward the contents to the Corporate Secretary. The Corporate Secretary will review the contents and report on them directly to the Audit Committee of the Board of Directors.

In the alternative, employees or third parties who wish to express any concerns directly to the Board of Directors may do so by sending them in writing addressed to "Non-management Directors", care of the Corporate Secretary at the Company's headquarters at_____.

The Corporate Secretary will document and retain all complaints or concerns expressed by employees or third parties regarding possible violations of law or questionable accounting, internal accounting controls or auditing matters and shall report such complaints or concerns directly to the Audit Committee of the Board of Directors.

C. Sample "Up-the-ladder" Company Policy[96]

Date: June 4th, 2005

Subject: Sarbanes-Oxley "Up the Ladder" Reporting

From: The Office of the General Counsel

To: All Members of the Company Legal Team

As you all are aware, Section 307 of the Sarbanes-Oxley Act required the U.S. Securities and Exchange Commission ("SEC") to adopt "standards of professional conduct for attorneys."

The SEC has issued final rules, codified at 17 CFR Part 205, which become effective August 5, 2003. The full text of the rules is available at www.sec.gov/rules/.

This memo is for the purpose of making you aware of these rules and informing you of Company's (including any subsidiary) policies in this regard.

1. The SEC rule requires attorneys who become aware of "evidence of a material violation" by the company or "any officer, director, employee or agent" of the company to report that matter as required by the rule. See 17 CRF § 205.3(b)(1).

2. There are two alternative methods of reporting set forth in the rules.

A. An attorney should report evidence of a material violation to a "supervisory attorney." For Johnson Controls, this would mean that outside counsel and our in-house Group Counsels, Staff Attorneys or other attorneys should report violations to the appropriate business unit General Counsel. A list of the business unit General Counsels with contact information, is attached. If the business unit General Counsel cannot provide an "appropriate response" within a reasonable time, either the business unit General Counsel or the reporting attorney should report the matter to the Office of General Counsel of the Corporation.

B. An attorney may also report evidence of a material violation directly to the Qualified Legal Compliance Committee (QLCC) of the Board of Directors. A list of the current members of this committee is also attached. Although the QLCC is an alternative allowed under the rules, it is our expectation (and strong preference), that

[95] Available at http://www.acca.com/protected/policy/corpresp/procedures.pdf.

[96] Sample "Up-the-ladder" Policy Memo from Legal Department regarding Sarbanes-Oxley "Up the Ladder" Reporting, available at: http://www.acca.com/protected/forms/corpresp/jci_qlcc.pdf.

most matters be reported up through the Law Department as outlined in the first alternative.

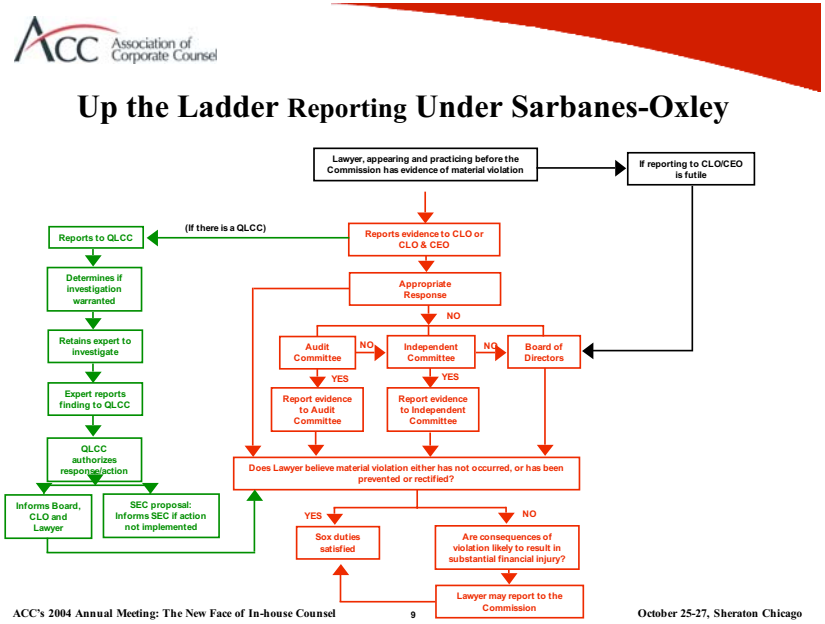
3. The SEC rule applies to all in-house lawyers employed by Johnson Controls, Inc. or any of its subsidiaries and to U.S. admitted outside counsel. There are certain exceptions which may exempt non-US admitted outside counsel. However, the principles reflected in the new SEC rule are consistent with Johnson Controls' policy and we expect our outside lawyers in all jurisdictions to report matters of serious concern they encounter in the course of their representation to appropriate members of JCI management and to the local representative of the JCI Law Department.

4. We will require annual certifications from all of our in-house attorneys that they are familiar with the SEC rules (as amended and modified from time to time) and agree to abide by them. Please sign the attached certification and return it to Sue Christianson by September 30, 2005.

Person, Senior Vice President,

Person, Deputy General Secretary and General Counsel Counsel and Assistant Secretary

D. Up-The-Ladder-Chart Under Sarbanes-Oxley[97]



[97] In-house Counsel Standards Under Sarbanes-Oxley, Association of Corporate Counsel, June 2005 http://www.acca.com/arp/04/

Successful Partnering Between Inside and Outside Counsel
Robert L. Haig, Editor in Chief
Database updated October 2003

Chapter 35. Internal Investigations
by, Thomas P. Hester, William H. Baker, and, Steven F. Molo

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§ 35:33. FORM: ENGAGEMENT LETTER FOR EXPERTS

Dear [expert]:

This will confirm the arrangement agreed to between our firm and you whereby you will assist us in rendering legal advice to our client, Stone Age Micro.com. You are authorized to send your bills directly to Madeline Alexander, Senior Vice President and General Counsel at Stone Age.

You have agreed that our firm will use the following individuals at the rates set forth below in connection with this matter:

[Insert Rates and Individuals]

You will work at our firm's exclusive direction in providing [expertise] services as may be relevant to our representation of Stone Age in the [describe matter] and will report to us. All communications between you and Stone Age, as well as communications between you and any attorney, agent or employee acting in its behalf, shall be regarded as confidential and made solely for the purpose of assisting counsel in giving legal advice to Stone Age. You will not disclose to anyone, without our written permission, the nature or content of any oral or written communication, nor any information gained from the inspection of any record or documents submitted to you; and that you will not permit inspection of any papers or documents without our permission. You will treat all material provided to you or generated by you in the course of this engagement as highly confidential.

All work papers, memoranda, charts, records or other documents, regardless of their nature and the source from which they emanate, shall be held by you solely for our convenience and subject to our unqualified right to instruct you with respect to possession and control. Work papers prepared by you, or under your direction, belong to this law firm.

You will immediately notify this law firm of the happening of any one of the following events: (a) the exhibition or surrender of any documents or records prepared by or submitted to you or someone under your direction, in a manner not expressly authorized by this law firm; (b) request by anyone to examine, inspect, or copy such documents or records; (c) any effort to obtain any theories, opinions, facts, data, information or other materials within your possession, custody or control which have been disclosed or provided to you or generated by you in connection with this engagement; (d) any attempt to serve, or the actual service of, any request for production of any documents or records. Upon request you will immediately return all documents, records and work papers to us.

Nothing in this agreement shall be construed as prohibiting a disclosure pursuant to a court order.

Please indicate your acceptance of the terms of this letter by signing one of the enclosed copies and returning it to me. [FN1]

Very truly yours,

_____
Counsel

Accepted by:

_____
[Expert]

[FN1]. *See* Dan K. Webb, Robert W. Tarun, Steven F. Molo, Corporate Internal Investigations § 10.04[4] (1993). *See also* Chapter 72 "Environmental Law" at *infra* § 72:48 for an illusrative engagement letter for a consultant.

SPARTNER § 35:33
END OF DOCUMENT

Getting the Best Results Cost Efficiently -Working with Outside Counsel in Canada & the US

Monday, June 26, 2006

4:00 PM - 5:30 PM

Gavin Birer

Biography - Gavin Birer

- VP, Legal & Business Affairs
  Travelex Americas (4 years)
- McMillan Binch and Goodman and Carr (3 ½ years)
- Business Development Role (3 years)
- Called to Bar:
  - South Africa - 1996
  - Ontario - 2001
- LLB (South Africa)
- LLB Certificate of Qualification National Committee on Accreditation
- LLM (E-Business Law) Osgoode Hall Law School

Overview

- Overview of Travelex/Legal Dept.
- Outside counsel profile
- Role as in-house counsel
- Requirements for engagements with outside counsel
- Billing
- Questions/Open Discussion

Overview of Travelex/Legal Dept.

- World's largest non-bank foreign exchange provider
  - Commercial foreign exchange
  - Retail foreign exchange
  - Outsourcing
- Approx 6000 employees globally
- Travelex Americas – Canada, U.S and Mexico
- Americas Legal Dept
  - VP Legal & Business Affairs (report to President)
  - Legal Counsel (report to VP)
  - Assistant

Outside Counsel

- Travelex uses a wide range of firms
- Canada
  - Two large firms
  - One small firm
- US
  - Three large firms
  - One medium sized firm

Role as in-house counsel

- CEO of Reebok once quipped to his general counsel:

"I hate lawyers – not you, Jack; you don't count."

Role as in-house counsel

- What is the role of in-house counsel?
  - Primarily – advance the needs of the corporation
  - Until the 1970's – essentially a conduit between the corporation and outside counsel
    - Work – mostly routine
  - Today - role has evolved
    - full scale legal services
    - involvement in business decisions

Role as in-house counsel

- Role includes
  - Compliance
  - Risk management
  - Managing litigation
  - Trusted adviser
  - Corporate Commercial/M&A
  - Controlling legal costs
  - Selecting and managing outside counsel

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Role as in-house counsel

- Law firm selection criteria?
  - Technical legal skills
  - Value added services (e.g training)
  - Flexibility
  - Accessibility and responsiveness
  - Predictable pricing/value for money
  - Can the firm apply the law to the facts and render practical legal advice?

Requirements for engagements with outside counsel

- Engagement letter
  - Governs relationship
  - Clarifies parties' expectations
  - Is subject to ethical rules and law of contract
  - Should not simply be a matter of "filling in the blanks"

Requirements for engagements cont.

- Engagement letters should include
  - Objectives
  - Scope of work and timetable for delivery
  - Responsible lawyer(s)
  - Fee/billing arrangements
  - Staffing guidelines
- Outside counsel guidelines
  - Frequency of bills (e.g monthly)
  - Format of bills (e.g no bundling)
  - Changes in rates and fees
  - Staffing, etc

Requirements for engagements cont.

- Examples of Bundling
  - **8.50 hours**

    Office conference regarding evaluating reverse-FOIA issues in connection with airport procurements; exchange email correspondence regarding same; review applicable open records legislation regarding same.

  - **5.50 hours**

    Review and revise discovery responses; telephone conference with client; direct additional associate research on Plaintiff's motion to strike affirmative defenses; review same; continue drafting and revising brief; review client documents.

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Billing

- Traditional – hourly billing
  - Not dependent on the type of service

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Billing

- Alternative – all other forms of billing
  - Discounted hourly rates
  - Blended hourly rates
  - Bulk (volume) hourly rates
  - Partner - based rates
  - Capped rates
  - Value/retrospective (task based) billing
  - Contingency billing
  - Incentive billing
  - Phased billing
  - Fixed fee billing
  - Retainers

Billing

- The Challenge:
  - 84% of in-house counsel rely on hourly rates for a median of 75% of their outside counsel work*
  - 4.9% of in-house counsel reported no resistance from firms to alternative billing*

[* http://www.acca.com/Surveys/partner/2004]

Billing

- Firms:
  - Favour hourly rate billing
  - Reluctant to switch to alternative billing
  - Only agree to discounts based on volume
- When should you use Alternative Billing?
  - Type of project/work
  - Goals
  - Budget
  - Firm willing to negotiate alternative billing

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Billing

- General Principles
  - Customize your fee arrangements
    - Avoid a "one size fits all" approach
    - examples:
      - complex litigation (contingent fee)
      - Routine litigation (fixed fee)
      - Transactions (bulk hourly rate/incentive fee)
  - Be prepared to share the risk with counsel
  - Search for a predictable fee arrangement that both parties can accept
  - Change your fee arrangements – if circumstances change

Billing

- Be sensitive to counsel's needs
- The success of your relationship with counsel depends on a mutual understanding of objectives
- Work with counsel to align your goals and avoid conflicting interests
- Continually monitor the effectiveness of your fee arrangements with counsel
- Continuity with counsel will assist you with alternative billing
- Document your fee arrangements clearly

Alternatives?

- There are alternatives in appropriate circumstances
  - Contract/temp lawyers
  - Part time lawyers
  - Offshore legal services

Conclusion

- The key to effective relationship
  - **Communication** – firm understands your business, your drivers and your objectives
  - **Credibility** – you trust what firm says
  - **Reliability** – firm delivers the right service at the right time and at the right price
  - **Commitment** – firm is focused on your best interests