905 250 Things You Should Know as In-house Counsel

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Previously, Mr. Burchinow served as senior vice president and general counsel of ITT Commercial Distribution Finance Corp. in St. Louis and its successor, Deutsche Financial Services Corp. The company was ultimately acquired by General Electric Capital, and renamed GE Commercial Distribution Finance, during which period Mr. Burchinow served as operations counsel. He served as senior attorney at Continental Bank, NA in Chicago and in private practice in Chicago and Boston.

Mr. Burchinow is a member of ABA and ACC. He has performed pro bono work for The World Wildlife Fund and volunteer work for local schools.

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Mr. Toedt is a former member of the Council of the ABA's Section of Intellectual Property Law, and served as principal drafter of the Section's Model Software License Provisions project. He has spoken at several ACC annual meetings since joining the association when he went in-house. He was previously the editor and principal contributing author of The Law And Business Of Computer Software, a one-volume treatise published by West Group.

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GC Rules: OVER 350 Things I Wish I'd Known My First Year as General Counsel

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

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

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

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

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

Any views expressed here are the present, personal views of the respective contributors and not necessarily those of other contributors nor of any contributor's organization and/or clients.

GETTING UP TO SPEED

Documents to Review

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

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

2. Consider creating a rough timeline/document index for some of the significant events described in the above documents—product releases, person-

nel changes, etc. It can be a valuable learning exercise, and the timeline/index can be a useful tool.

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

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

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

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

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

Digging In

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

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

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

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

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

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

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

People To Talk to First

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

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

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

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

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

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

CONTRACTING ISSUES

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

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

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

23. In contract negotiations, no matter what your substantive differences, always be unfailingly courteous to the people on the other side. You never know what the future holds; the negotiation adversary whom you offend today may later be in a position to tell a prospective customer that your company can't be dealt with—or to tell a prospective future employer that you're a real jerk and shouldn't be hired.

Sales Contracts

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

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

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

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

Contract Drafting

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

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

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

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

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

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

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

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

Example

Awkward:

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

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

Better:

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

37. Items 34 through 36 can be very helpful in litigation. They can provide your trial counsel with

ready-made exhibits as well as raw material for briefs and/or expert testimony.

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

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

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

Contract Review

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

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

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

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

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

Contract Markups

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

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

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

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

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

General Services Administration Contracts

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

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

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

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

E-commerce Issues in Traditional Contracting

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

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

56. Remember that virtually every company has to think about applying e-commerce/internet issues to their day-to-day practices, above and beyond contracting issues:

- Human Resources (internet and email usage; new issues for sexual harassment and discrimination claims, including hostile work environment)
- Chatrooms (and related liabilities for employee participation)
- Securities law (internet significantly changes securities law and insider trading review; and you must exercise caution in applying existing principles to website content, postings (in general and during an offering), hyperlinks, chatrooms, etc.)

Other Contract Issues

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

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

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

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

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

their opinion on a "one-off" deal.

EMPLOYMENT MATTERS

Recruiting

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

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

64. Your recruiting practices should take into account the Americans with Disabilities Act. See generally:

- *www.eeoc.gov/facts/fs-ada.html* (an overview by the Equal Employment Opportunity Commission [EEOC]); and
- *www.smartagreements.com/bltopics/Bltopi31.html* (a brief overview).

65. Comply with the Fair Credit Reporting Act (FCRA) in doing credit checks on recruits. Two useful (government) websites are:

- FCRA consumer rights: *www.ftc.gov/bcp/conline/pubs/credit/freereports.htm*; and
- FCRA employer responsibilities: *www.ftc.gov/bcp/conline/pubs/buspubs/credempl.htm*.

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

- *www.privacyrights.org/fs/fs16-bck.htm*.

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

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

69. Employment contract form: Review your company's forms and policies periodically (consider calendaring it on a regular basis). Pay particular attention to:

- Invention-assignment clauses,
- Confidentiality clauses, and
- Non-competition, non-solicitation clauses.

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

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

Terminations and Layoffs

72. Age discrimination: Specific age-discrimination disclosures are required for people over 40 in the event of a layoff. See generally:

- *www.eeoc.gov/types/age.html*.

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

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

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

Exit Interviews

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

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

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

References for Former Employees

79. Be careful in giving references for former employees. See generally:

- *www.nolo.com/article.cfm/objectID/97BCA0D9-5222-4019-8672595419DA6AAE/catID/62C89F2D-3064-4440-BB0EAF183A66D240/111/259/188/ART*.

Non-competition Clauses and Inevitable Disclosure Rule

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

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

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

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

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

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

Other Employment Issues

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

86. Drug-Free Workplace Act—see generally:

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

87. Family Medical Leave Act—see generally:

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

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

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

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

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

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

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

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

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

95. In establishing employment policies, do a cost-benefit analysis—for example, will setting up a hot line for employee complaints provide enough

benefit to justify the (hard and soft) costs?

MARKETING

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

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

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

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

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

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

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

INTELLECTUAL PROPERTY

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

Trade Secrets

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

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

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

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

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

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

Patents

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

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

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

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

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

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

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

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

Copyrights

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

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

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

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

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

Trademarks

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

123. Trademark searching:

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

124. Once your company is reasonably sure it intends to use a new trademark, file an "intent to use" federal registration application. If you think you know what you're doing in trademark law (some-

times a dangerous assumption), you can file a registration application yourself at the U.S. Patent and Trademark Office's website, *www.uspto.gov/teas/index.html*. (Note: intent-to-use applications are generally not assignable without losing their benefits except as part of the transfer of the business.)

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

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

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

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

Internet Domain Names

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

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

IP Enforcement Considerations

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

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

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

CORPORATE LAW ISSUES

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

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

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

SECURITIES LAW ISSUES FOR PUBLIC COMPANIES

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

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

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

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

Insider Trading

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

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

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

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

Regulation FD (prohibiting "selective disclosure")

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

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

Press Releases and Other Public Disclosures

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Regulation G

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

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

non-GAAP financial measures is properly publicly disclosed.

LITIGATION & OTHER DISPUTES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

185. No matter what the outcome, litigation *invariably* soaks up lots of management bandwidth.

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

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

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

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

EMAILS

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

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

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

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

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

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

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

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

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

RISK MANAGEMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ADMINISTERING YOUR DEPARTMENT

General Management Tips

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

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

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

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

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

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

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

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

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

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

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

223. Have a mission! Create a mission statement that guides the legal department's activities. Review it periodically and ask yourself, are you and your colleagues spending your time in line with your stated mission? It can be as simple as: The Legal Department's mission is to efficiently and effectively administer the legal affairs of the Company by internally providing professional, timely, and useful legal advice and services, arranging and actively managing the services of outside counsel as needed; to minimize liability exposure by recommending and implementing appropriate policies, practices, and procedures; and to administer such legal affairs in the most cost-efficient manner reasonable so as to contribute to the Companywide team effort to maximize the Company's return to its stockholders.

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

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

Budgeting

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

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

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

CORPORATE DYNAMICS AND RELATED ISSUES

Dealing with Management

229. Make friends and develop allies.

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

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

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

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

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

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

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

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

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

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

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

241. Whenever possible, make your colleagues in the business units look good. When you do this, the legal department by default looks good too. You

will find that you will become better informed, will be accepted into their company, and will enjoy a smoother work flow.

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

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

Employees' Personal Legal Problems

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

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

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

Communicating Plainly

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

248. Try to speak in English when giving advice.

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

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

USING OUTSIDE COUNSEL

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

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

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

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

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

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

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

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

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

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

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

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

263. Initial items to consider in using outside counsel:

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

264. Things to consider in selecting outside counsel:

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

265. Develop a mandate for the law firm:

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

266. Evaluate the law firm's work:

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

CORPORATE SECRETARY/BOARD-RELATIONS MANAGEMENT

Play an Active Role, Anticipate Needs, and Be Knowledgeable

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

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

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

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

271. Keep everything you do as simple as possible. This applies to everything about the Board meeting: the process (the agenda, the format of the board book) as well as the substance (avoid legalistic language). Find a formula that works, and stick to it. The format of the meeting preparation and

Board briefing books should be simple, understandable, and taken for granted, so that the Board can concentrate on the substance. Familiarity in Board meetings is a good thing (leave the creativity for the actual presentations and management performance).

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

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

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

Be Prepared

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

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

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

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

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

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

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

Address Legal Concerns Without Over-Lawyering

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

283. Try to take care of legal concerns and necessary procedures in the least-intrusive method possible, so that it appears effortless to the Board. Example: Send Board members monthly § 16 reporting reminders, and file their forms for them.

Establish a Board Routine that Works

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

285. Prepare a draft agenda and draft board materials.

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

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

288. Keep a tickler as to future approvals needed.

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

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

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

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

Keep the Board Educated and Informed

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

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

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

Be Detail-Oriented, Dependable, and Well-Organized

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

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

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

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

Strike the Correct Balance in the Board Meetings

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

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

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

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

Always Follow Up on Board Questions and Requests

303. Maintain an "action item" list of requests made by Board members during the Board meeting that require follow up. Circulate the list immediately following the Board meeting to executives who

would be responsible for addressing the Board task. Recirculate the list before the next Board meeting as a reminder.

COMPLIANCE PROGRAMS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

INTERNATIONAL BUSINESS

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

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

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

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

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

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

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

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

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

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

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

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

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

GET ORGANIZED: FILING SYSTEM AND RECORD RETENTION

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

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

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

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

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

PROFESSIONAL & PERSONAL DEVELOPMENT

CLE

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

337. Join ACC and participate in local chapter meetings.

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

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

Stress Management

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

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

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

Managing Your Career—and Your Life

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

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

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

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

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

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

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

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

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

352. All jobs end. Prepare now.

353. Remember that you have a life.

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

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

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

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

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

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

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

359. A key supplier goes bankrupt.

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

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

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

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

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

365. You are served with a search warrant.

366. The EPA inspector arrives to check your emissions.

367. The IRS auditor arrives to review your returns.

368. The state tax auditor arrives to review your withholding and full-time, part-time, and consultant agreements.

369. A shareholder group files a Form 13-D stating that they have purchased X percent of your company's common stock and demands that your top management and board of directors resign.

370. Your CEO resigns.

371. Your CEO has a heart attack.

372. You get a call at 2 a.m. from the local police, telling you that your CEO (or her son) is in jail and refuses to submit to a blood alcohol test.

373. Your CEO asks you to do something unethical.