



## 505 How to Manage International Legal Staff & Outside Counsel

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## Faculty Biographies

### Edward R. Leydon

Edward R. Leydon is director, international law, at Schering-Plough Corporation in Kenilworth, New Jersey. His responsibilities have included legal affairs for the Japanese operations of the company and for other regions of the world, and legal support of global marketing operations for pharmaceuticals.

Prior to joining Schering-Plough, Mr. Leydon had similar international legal positions at SmithKline Beecham, Rhone-Poulenc Rorer, and Revlon Healthcare. He also worked in the New York and Paris offices of the law firm of Rogers & Wells.

Mr. Leydon is a director of the New Jersey Corporate Counsel Association and the chairman of its international law committee.

Mr. Leydon has a B.A. from Bowdoin College and a J.D. from Duke University School of Law.

### Michael R. Nelson

Michael R. Nelson is legal manager of the financial markets legal team at Abbey National, Britain's 6th largest bank and part of Grupo Santander, the world's 9th largest banking group, located in London. He is part of the legal management team at Abbey and oversees a team of eight lawyers who support Abbey's treasury and capital markets, transaction structuring, asset management, and derivative trading businesses.

Mr. Nelson has worked in Europe as staff lawyer and as manager of in-house legal departments at banks in Luxembourg and in London. His legal career has included the securities clearing and settlement/global custody industry, private banking and retail banking, and he has managed in-house lawyers from seven European Union countries. He has also worked in private practice and began his legal career as a law clerk in the U.S. Bankruptcy Court in the district in which the nation's first Chapter 12 farm bankruptcy was filed.

Mr. Nelson served on the board of ACC Europe. He also served a one-year term as a staff-elected employee member of a pension trustee board of directors. He is an occasional volunteer in a summer program that teaches softball skills to children and their parents in Luxembourg.

He has J.D. and M.A. degrees from the University of Iowa and an LL.M. from the University of Cambridge, England.

### Carrie L. Schiff

Carrie L. Schiff is vice president and general counsel of Flextronics International Ltd., in Niwot, Colorado, the leading Electronics Manufacturing Services (EMS) provider, with a network of facilities in 32 countries on five continents, providing complete design, engineering, and manufacturing services.

Prior to joining Flextronics, Ms. Schiff was the senior vice president, corporate development of USA.Net, Inc., an email outsourcing company. She began her legal career in the Palo Alto office of Cooley Godward, and was a founder and partner in the Boulder office.

Ms. Schiff graduated from the University of Chicago and received her law degree from UCLA.

## ACCA 2005 Annual Meeting

## Panel Discussion #505

## How to Manage International Legal Staff and Outside Counsel?

What are the best practices you should employ when working with outside counsel or your own legal staff outside of the United States?

What are specific considerations in dealing with litigation, government investigations, commercial claims or employment matters in another country?

## Introductions

Edward R. Leydon, Director, International Law, Schering-Plough Corporation

Michael R. Nelson, Legal Manager, Abbey Financial Markets, Abbey National plc

Carrie L. Schiff, Vice President & General Counsel, Flextronics International Ltd

## Part I –Outside Counsel for International Matters

A. Retaining outside counsel *Ed & Mike*

*How do you identify and select counsel that fit your requirements?*

*Do you have any tips for locating good counsel in China, Taiwan, India and Japan?*

*How does the European approach to conflicts of interest differ from the American approach?*

*Global law firms: are they reality or a myth?*

## 1. Retaining the lawyer or the firm

- In Europe there is lots of movement of lawyers between firms so think about what you'd do if your chosen lawyer jumps to another firm; be clear about whether you are retaining the firm or a particular lawyer. (MRN)
- When selecting lawyers in Asia-Pacific countries: focus on hiring the right lawyer (vs the firm); ask about experience representing multinational corporations (MNCs); and check into the connections between local and home offices of global brand name firms. (CS)
- You can approach the engagement process with any lawyers outside of the US the same way you would approach it with a US firm. For example,

if you are looking for counsel to manage a dispute, don't hesitate to ask several firms to "pitch" your business by providing their assessment of the dispute and proposing a strategy. This is especially helpful if you prefer to hire a particular lawyer. (CS)

- Coordinate with your local management in the evaluation and selection of local counsel. (EL)

## 2. Selection for local, national or regional requirements

- In the EU it's difficult to avoid retaining a separate firm in each country. Except for London-based firms, few have offices in multiple jurisdictions, and some cross-border offices may practice in only specialized areas of law, not offering full service. Prominent national firms will be happy to pass your work to "best friend" firms in other countries. Ask about those relationships up front. (MRN)
- You may want to select a firm for its local expertise in a particular subject area or industry. (EL)
- For a multi-country deal, you may want to select a lead counsel and let them have a strong role in the selection of local counsel where necessary for that particular transaction, such as obtaining anti-trust clearance. (EL)

## 3. Conflicts of interest

- The approach to conflicts of interest in the UK, particularly in corporate law, mergers and banking, is more liberal than the American approach. Firms take a narrower view of what is or might be a conflict and consequently are more willing to take work that might require them to act at odds with your company's commercial interests. Ask about this prior to each instruction. Firms will compartmentalize the work so that different lawyers will be assigned to the other client's work, but do not be afraid to move work to a different firm if you believe it is appropriate to do so. (MRN)
- Since industries tend to gravitate towards the same law firms in each country, it is wise to have an alternate firm in the event that your regular counsel represents an opposing party. This is particularly the case for trademark and patent matters. (EL)

## 4. Law firm references

- In some countries (e.g., Luxembourg), firms are not allowed to identify other clients by name. My advice is: always get a personal reference, if possible from an ACC member. (MRN)

- Where clients are listed, the references can be out of date or misleading. Use your own network to verify. (EL)

#### B. Working with outside counsel *Carrie & Mike*

*How do you manage outside counsel in another country? Is it any different from managing U.S. counsel?*

*Do your international outside counsel agree to the same types of alternative billing arrangements as your U.S.-based outside counsel? Do they provide the same amount of detail in bills?*

*Does it make a difference if you do not have in-house counsel support in the particular jurisdiction managing the outside firm?*

##### 1. Establishing a working relationship

- It is difficult to over-state the importance of a face-to-face meeting. It may not always be practical but it is the best way to establish a relationship with professionals who will be handling your company's most sensitive matters in a foreign language and possibly before foreign courts. (MRN & CS)
- When you engage new counsel, take the time to educate them about your business. Most lawyers will agree to do this for free as part of their investment in the relationship. (CS)
- Invite outside counsel to your headquarters and to visit your plants. Send them your annual reports and product press releases. (EL)

##### 2. Project based support vs general outside counsel support

- If you are engaging outside counsel on a project basis, be careful about how you define the scope of the engagement. Learn what you can from prospective counsel about the requirements of the project through the engagement process. (CS)
- Often the HR function will require specialized employment counsel on a routine basis. This can be a smaller, specialist firm selected with the HR Manager. (EL)
- In smaller countries and cities, a full-service firm may not be available, and you will seek a specialist attorney for your construction project, or environmental advice or real estate transaction. (EL)

##### 3. Billing and reporting arrangements and management of assignments

- Do not hesitate to ask for the same discounts or special fee arrangements that you use with your US counsel. (CS)
- Whether in-house counsel or local site managers are responsible for the day-to-day management of the relationship with outside local counsel generally turns on who is paying the bills. However, for major outside counsel relationships it is important to maintain some relationship between in-house counsel and the firm in order to address corporate-level concerns. (CS)
- Law firms in Europe are increasingly open to providing time records with bills. But unless you ask for this you probably won't receive it. (MRN)
- Be sure to specify the frequency of billing. Some local counsel may bill on a once-a-year basis. Others may insist on a monthly retainer – which may be a good deal for you. (EL)
- Inquire whether Value Added Tax or other charges will be added to your bill, and if so, at what rate. This may depend upon where the services are provided and which legal entity is to be billed. Will a Notary Public or Notaire be involved in your matter and how are those services to be billed? (EL)

##### 4. Communications

- Insist on the firm providing all legal advice in English. Even small firms in small places will be able to provide advice in English. (MRN)
- If you have the language capabilities in your Law Dept., you may be able to use them to good effect and avoid translation/interpretation expenses. (EL)
- Not all legal boilerplate needs to be translated. Know when to rely on local counsel to cut through the paperwork and summarize for management. (EL)

##### 5. Training

- Training can go both ways. Your outside counsel can be invited to train your in-house lawyers and management, and your outside counsel can be invited to training sessions which your company is conducting, or be wired into your training programs accessible over the Internet. (EL)
- Consider inviting key outside counsel to your Law Dept. meetings. (EL)

## 6. Lawyer exchanges and seconding

- These are very common in London. Secondments can be used to fill temporary needs in a legal department, normally at discounts to hourly rates. Stories are beginning to circulate in London about in-house lawyers being rotated back into a law firm for a short period in order to sharpen skills in a specific area of practice. (MRN)
- Some firms may be delighted to send their young associates to your headquarters Law Dept. for an internship, and will even help to subsidize the experience. (EL)

## 7. Outside counsel as corporate officer, director or shareholder

- This has frequently been done in international subsidiaries to satisfy residence or nationality requirements. The key issue is to be able to terminate this relationship, if and when required. It also usually involves compensation for this role.

**Part II – International In-House Counsel**A. Hiring inside counsel *Carrie & Mike*

*When do you know you need to hire in-house counsel for a particular jurisdiction?*

*Are there restrictions on the unlicensed practice of law by foreign lawyers in other jurisdictions?*

*How many lawyers should you have?*

*How do you find qualified candidates?*

*Who should be part of the selection and hiring process?*

*Where do you find market rates for in-house counsel in a particular jurisdiction?*

*What are the benefits and challenges of the “unified legal department” model vs. the decentralized model?*

## 1. The international law department – organization, hierarchy vs. flat structures

- In the UK, flat structures are very common, leaving little opportunity for career progression into management; such opportunities usually mean having to move to another company. (MRN)
- Depends on many factors: the demands of the business; the role of the legal department at the company; the structure of the company's other 'overhead' functions, etc... (CS)

- Don't let organizational structures get in the way of ensuring that you have effective internal processes and controls. (CS)

## 2. Headquarters lawyers, regional counsel and country counsel

- Generally use the same metrics you would for determining your hiring needs in the US – how much capacity do you need, where do you need it and what is the most cost-effective way to get it. (CS)
- Lawyers in remote offices may “go native”: if the business within which they sit operates very independently of head office, the lawyers are likely to behave the same way. Creating and operating a unified legal department model across continents and time zones requires travel for department meetings and/or video conferences (with consequent cost). (MRN)
- Lawyers may have different roles and titles, and be looked upon differently in other countries. Non-lawyers may be performing certain legal functions. (EL)

## 3. US Expats, local attorneys or third country nationals

- Many lawyers qualified in EU member states are working in-house in other countries. If the type of work they do permits such mobility, it can be considered a career development opportunity. (MRN)
- There is a European Union Directive (98/5/EC) on the cross-border recognition of legal qualifications. The Directive allows a lawyer qualified in member state “A” to practice the law of member state “A” in member state “B” or to practice “European law” in member state “B”. The directive also requires member states to establish a simplified procedure for lawyers to become qualified to practice the law of the host state where they live and work. In practice, the simplified procedure is not very simple and lawyers with multiple country qualifications are rare. (MRN)
- There are many good foreign candidates graduating every year with MCL degrees from US law schools. You may consider hiring them for a period of time at your US location before they return to a law firm or your affiliate in their home country. (EL)

## 4. Resumés, pay &amp; benefits

- Resumés (in Europe, a “curriculum vitae” or “CV”) differ widely, as does legal education and early career training. Try to familiarize yourself with

how lawyers become qualified in a particular country before looking at candidates' resumé. That way, you may be able to spot problems (e.g., that it took a candidate 4 years to complete a 3 year course of study) that would not otherwise be apparent. (MRN)

- For example, a German lawyer will be called Dr. and his or her resumé can easily be 15 or more pages long and will contain copies of degree certificates. (MRN)
- Pay and benefits are VERY sensitive to local conditions. Each country has its own quirks and lawyers generally do not look enviously over the border at what lawyers in neighboring countries commonly receive or are entitled to receive. (MRN)
- It's a generalization, but Europe is a high-cost, high-tax place to live and work. It is VERY expensive in dollar terms and salaries will appear shockingly high when converted to USD. It does not necessarily follow that lawyers are generously paid in their local markets. (MRN)
- Work with recruiters. (CS) In my experience, the time recruiters save you by locating and pre-screening candidates is always worth the fee. (MRN)

#### B. Managing the international law department *Ed & Mike*

*What management challenges do you face supervising attorneys who are not in the same country? How do you overcome them?*

*How do you address the attorney-client privilege issue if you have EU attorneys?*

*What do you do to foster good working relationships among the attorneys on your staff?*

*How do you navigate tensions between "business English" and local lawyers working in their own language?*

##### 1. Reporting arrangements

- In Europe it is common for in-house lawyers in branch/satellite offices to report to the Business Head, not to the general counsel in the head office (which is sometimes perceived as an unnecessarily rigid American approach). (MRN)
- Where is the budget for the international lawyers, and will they be handling one or more countries, or be located in a regional office? (EL)

##### 2. Communications

- Do everything you can to facilitate communication among your in-house counsel. Make sure that the individuals who work together or who work on similar transactions have an opportunity to meet face to face. Encourage people to break down barriers by talking instead of relying on email. If in-house counsel communicate with each other well, your Legal Department will operate like the mythical global law firm. (CS)
- Instant Messaging (IM) is a great tool for facilitating communication because you know who is on-line. (CS)
- Legal departments in Europe almost always sit in open plan offices. There are obvious difficulties with (a) speaker phones and (b) trying to find a quiet place to concentrate! (MRN)
- Remember the little things that can make a big difference: (a) "10/4/05" means 10 April 2005 in Europe; (b) be aware not just of legal jargon but also of American jargon, which can be very confusing to non-Americans; and (c) be aware of absences for national holidays and Saints' Days, and the month of August in France, for compulsory military service in Switzerland, etc.....

##### 3. Language issues

- English is the world's business language and almost all foreign-qualified lawyers from senior to junior are very comfortable working and writing in English. (MRN)
- Try to have a variety of language skills in your International Law Dept., at every level. (EL)
- Don't be afraid of receiving and working with documents in a foreign language. If you are offered a translation, ask for the original as well.
- Be sensitive to the fact that English may be a second language to the foreign party and the opposing counsel. This can lead to awkward misunderstandings and ambiguous drafting. (EL)

##### 4. Cross-border moves

- Consider foreign assignments for your US attorneys, and vice versa. (EL)
- Bring in your foreign in-house counsel for training and for 6-month assignments. (EL)

## 5. Training and professional development

- Make training a part of every Law Dept. meeting and of your teleconferences. (EL)
- If your company is registered in the US, then you need to make sure that your in-house counsel understand the US legal concept of the role of the lawyer as “gatekeeper”. Keep in mind that this requires that non-US counsel have the ability to make judgments based on US norms, which may be very different from acceptable standards in their home jurisdiction. (CS)
- Take advantage of internet training programs. (EL)

## 6. Staffing and managing large assignments – the lawyer as “Air Traffic Controller”

- Bring in specialized counsel for the big transactions, who may or may not coordinate with your regular local counsel. (EL)

## 7. Managing documents

- American-style contracts and boilerplate are not always necessary. (EL)
- Where should the files and contracts be maintained? (EL)

## 8. Importance of local employment law to the employment lifecycle (esp. disciplinary matters)

- Europe’s highly regulated labor markets have many traps for legal department managers, especially for Americans who are unfamiliar with the structure and logic of EU employment law. In-house lawyers are covered by these EU employment laws. Advice: always involve local HR (MRN)
- Use specialized labor counsel. (EL)

**Part III - Cross-Cultural Issues and Certain Hot Topics**A. Cross-Cultural Issues *Carrie and Ed*

*What are the most important things I should know about the difference between common law and civil law jurisdictions and how it should influence the management of in-house and outside counsel?*

*Are lawyers different if they have been educated and practiced primarily in a common law vs civil law jurisdiction?*

*Is there a difference between the role of the lawyer in the US and outside of the US?*

*How do you reconcile different work ethics and expectations?*

## 1. Common Law vs. Civil Law jurisdictions

- In civil law jurisdictions, most contract boilerplate is codified and will not appear in the agreement. (MRN)
- In civil law jurisdictions litigation is conducted by what can be termed a “neutral inquisition” method. (MRN)
- As a consequence, in civil law jurisdictions there is little pre-trial discovery in litigation matters. (MRN)
- It is common in Europe to see contracts written in English but governed by foreign (civil) law. In general, the enforceability of such contracts as between commercial counterparties is never questioned but contracts with consumers will have to be in their own language. (MRN)

2. Differing legal roles and expectations outside the US *Carrie and Mike*

- Be aware that, depending on the location (i.e., cultural factors) and industry, the business expectation in Europe can be that the in-house lawyer’s role is that of a business partner, a facilitator, almost to the exclusion of any role as part of a control function. This has obvious impacts on internal relationships, and not all lawyers can operate comfortably or effectively in such an environment. (MRN)
- Be aware of the different life styles, longer vacations and unusual holidays, different expectations and work ethic, and anti-lawyer bias. (EL)
- Be aware that US laws will apply to the activities of your regional counsel. (CS)

3. Changing legal context of the European Union *Mike and Ed*

- The European Union is now comprised of 25 member states, only two of which (UK, Ireland) are based on common law legal systems. Even within the EU, little is known across borders of the strengths or weaknesses of the legal system of the 10 newest EU members (Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia). (MRN)

- A European Union Directive has the force of law but must be implemented by Member States into their local law. Inevitably, during the implementation process changes are made such that Directives will have peculiarities in each country; they are intended to create uniform legal standards across the EU but in practice they never quite achieve uniformity. (MRN)
- U.S. law firms now have offices in most European capital cities and most of those offices will have some local law capacity. U.S. firms are driving up salaries for junior lawyers and, consequently, hourly rates. In some locations and in some practice areas they are competing head to head with local firms. (MRN)
- Consolidation: cross-border law firm mergers are continuing as firms are trying to offer multi-jurisdictional service to multi-national clients. (MRN)

#### 4. Perceptions of Americans and American lawyers *All*

- Yes, U.S. lawyers have a bad reputation overseas but my personal experience is that being an American lawyer living abroad has been a door-opener. Americans are perceived as having an excellent work ethic, a “can-do” attitude and very fair in business and personnel matters. (MRN)
- In my experience, the bad reputation is generally attributed to our thoroughness in executing transactions. The classic examples are the “American style” M&A contract vs the European style contract. (CS)

#### B. Hot Topics – How to provide the legal expertise for: *All*

##### (i) Cross-border data privacy *Mike*

- a European Union directive on data protection requires each EU member state to have a data protection officer and a data protection registry. All businesses collecting and processing personal data (i.e., information from which the identity of a human being can be determined) must register and data must be processed in compliance with the standards set by the directive. People have a right of access to their own personal data. This right of access is occasionally used as the equivalent to discovery. (MRN)
- Where personal data is to be transferred or processed outside the EU in countries whose data protection standards are deemed inadequate, and this includes the U.S., each person must give his consent. A safe harbor, negotiated between the EU and the U.S. Department of Commerce, is

available to companies that basically agree to comply with EU standards. (MRN)

##### (ii) Foreign Corrupt Practices and Foreign Trade Laws *Ed*

- Educate all lawyers concerning the changing US requirements and enforcement actions, and the role of the Law Department in monitoring and compliance. (EL)

##### (iii) Employment issues *Ed & Mike*

- Employment law in Europe is highly regulated and very technical. It is a practice area that is very commonly kept in-house. In-house employment lawyers can compete on even terms with outside counsel in terms of legal/technical knowledge, at greatly reduced cost and with much higher value-added knowledge of the company and its HR practices. (MRN)
- Use specialized labor counsel in each jurisdiction. (EL)

##### (iv) Commercial contracts *Carrie*

- There are stereotypes about how contracts are negotiated in different countries. In my personal experience, it's important not to presume that those stereotypes are real. Instead, understand the style and inclinations of the party with whom you are negotiating and use that information to determine your approach. (CS)
- As with employment law, negotiation of commercial contracts is a practice area that is very commonly kept in-house. The understanding of the company's business model and practices that is necessary to successfully negotiate a commercial agreement and the information learned about the other party and the transaction itself are valuable assets that companies want to retain for future negotiations. (CS)

##### (v) Government investigations *Ed*

- Have a crisis management plan in place and prepare to be able to locate counsel, managers and information quickly. (EL)
- Use specialized counsel for the matter and outside experts as necessary. (EL)

##### (vi) International litigation/dispute resolution (including commercial claims) *Carrie*



- It can be very difficult to assess a cross border dispute and develop a comprehensive strategy for managing and resolving it. For example, a dispute that crosses civil and common law jurisdictions will require that you factor in the differences between the adversarial process available in the common law jurisdiction and the “neutral inquisition” method used in the civil law jurisdiction. These differences affect how and whether you can conduct discovery and get access to the other party’s evidence, whether the evidence will be submitted primarily through written submissions or via contemporaneous documentary evidence, whether there will be live witness testimony, etc... (CS)
- The legal team (in-house and outside counsel) must understand the company culture and the culture of the jurisdiction(s) of the dispute. (CS)
- Keep your business colleagues involved in the dispute – don’t let them “throw it over the wall”. (CS)
- Ask questions of your outside counsel and opinion shop. (CS)

#### ACCA 2005 Annual Meeting

##### Panel Discussion #505

##### How to Manage International Legal Staff and Outside Counsel?

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Choosing Outside Counsel [to come from Ed]

**Data Protection**

Data protection safe harbor: [www.export.gov/safeharbor/SafeHarborInfo.htm](http://www.export.gov/safeharbor/SafeHarborInfo.htm)

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## How to Manage International Legal Staff & Outside Counsel – Panel #505

**Edward R. Leydon**

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ACC's 2005 Annual Meeting: Legal Underdog to Corporate Superhero—Using Compliance for a Competitive Advantage

October 17-19, Marriott Wardman Park Hotel



## Overview of Presentation

- Introductions
- Panel Discussion – Open for Questions
- Supplementary Outline and Bibliography



## Outside Counsel for International Matters

- Retaining Outside Counsel
- Working with Outside Counsel



## International In-House Counsel

- Hiring
- Managing

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## Cross-Cultural Issues and Certain Hot Topics

- Cross-Cultural Issues
- Cross-Border Data Privacy
- Foreign Corrupt Practices and Foreign Trade Laws
- Employment Issues
- Commercial Contracts
- Government Investigations
- Litigation/Disputes

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