



702 Moving Beyond Litigation Management: Putting Your Stamp on Company Activities

Albert C. Peters II
Assistant Counsel
Pennsylvania Turnpike Commission

Meredith B. Stone
Vice President, General Counsel, Americas
NACCO Materials Handling Group, Inc.

Richard S. Veys
Senior Counsel
A.T. Kearney, Inc.

Faculty Biographies

Albert C. Peters, II

Albert C. Peters II is assistant counsel with the Pennsylvania Turnpike Commission. His primary practice areas include contracts, labor and employment, and litigation management. He also conducts training programs in contract management, labor relations, supervisory development, and construction law.

Mr. Peters is president of ACCA's Central Pennsylvania chapter and vice chair of ACCA's Small Law Department Committee.

Mr. Peters is an evening instructor for Penn State Harrisburg where he teaches a four-credit course on business environments (law, ethics, and social responsibility). Mr. Peters is active in coaching and scouting volunteer activities.

Mr. Peters received a BA from the University of Virginia and a JD from the University of Pittsburgh School of Law.

Meredith B. Stone

Meredith B. Stone is vice president, general counsel, Americas for NACCO Materials Handling Group, Inc. She is responsible for all legal matters affecting the Americas Division of NMHG, located in Greenville, NC, with operations throughout North and South America. This includes responsibility for litigation matters, providing advice on and representing the division in corporate transactions, negotiating, drafting and approving contractual commitments, advising and counseling the division on employment law issues, providing preventative legal training to employees, and overseeing the legal compliance of the division in North, South and Central America, including international transactions.

Prior to joining NACCO Materials Handling Group, Inc., Ms. Stone was the vice president, general counsel and secretary for Konica Business Technologies, Inc., a general attorney for the Long Island Railroad Company; an associate attorney with Levine & Robinson, P.C.; and an assistant corporation counsel for the law department of the City of New York.

Ms. Stone is the past president of ACCA's Connecticut Chapter and is also a member of the ABA (Employment Law and Antitrust Sections) and the New York State Bar Association.

Ms. Stone earned a BA from the University of Vermont and JD cum laude from St. John's University School of Law.

Richard S. Veys

Richard S. Veys is senior counsel for A.T. Kearney, Inc., a global management consulting firm, based in Chicago.

Mr. Veys has been an inside attorney for over 15 years. Before joining A.T. Kearney, he was general counsel for XL/Datacomp, Inc. (a Chicago-based subsidiary of Storage Technology Corporation). Prior to that, he was senior attorney for NCR Corporation of Dayton, OH.

Mr. Veys has been an active member of ACCA, serving as a director of the Chicago Chapter for five years, as well as treasurer and president. As immediate past president, he is currently chair of the Chapter's Board of Directors.

Mr. Veys received his undergraduate degree (BA) from the University of Nebraska, and his JD, cum laude, from the University of Illinois College of Law.

BEYOND LITIGATION MANAGEMENT

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What is your Goal?

- **“We don’t have a legal department. That would be a sales prevention department.”**

- **(TAP Pharmaceutical Products, Inc., 1995)***

***TAP Pharmaceutical:**

(the company without the "sales prevention" department)

- Pled guilty to criminal charges of conspiring with doctors to bill Medicare for free samples of cancer drug Lupron.
- Paid record penalties of \$875 million.
- 14 current or former employees indicted.

- ...and hired in-house counsel in 1998.

What is your Goal? ...Not being viewed as the sales prevention department.

- Learn the Business; be part of the Team
- Educate; Communicate; Train
- Be Proactive... not Reactive

Learn the Business

- **Industry**
- **Company Organization & Culture**
- **People; Products; Operations**

Learn the Business: - Industry

- **Learn the language of your industry/company**
 - Terminology and jargon
- **Overall market; market segments**
- **Competitors**
 - Market shares
 - Segments, strengths and weaknesses
- **Your Company's place**
 - Market segments and shares
 - Large Customers/Accounts

Learn the Business - Industry

- **Strategic Plan**
 - Market overview
 - SWOT analysis
- **Trade magazines/ journals**
- **Industry trade associations**
 - Is there a lawyers' committee?
- **Negotiations w/ clients-customers**
- **Employees**

Learn the Business: - Company Org & Culture

- **Important Questions:**
 - Were you specifically hired to do something? What?
 - What are the company attitudes toward Legal?
 - Who are the “showhorses” and “workhorses”?
 - How are decisions made?
 - Who needs to be informed?
 - Are there any unwritten rules?

Learn the Business: - Company Org & Culture

- **Getting Information:**
 - Listening and watching
 - Meeting people and asking questions [don't forget secretaries]
 - Hallway meetings
 - Asking people what they are working on
 - Organized meetings [board, staff, etc.]
 - Getting involved in projects and committees
 - Chemistry between you and department heads

Learn the Business: - Company Org & Culture

- **Getting Information:**
 - Information Available Internally
 - Organizational chart of departments and committees [Are lawyers in a department or a part of business groups?]
 - Reports [e.g. litigation, outside counsel expenses]
 - Documents and forms
 - Intranet
 - Budget processes
 - Industry publications
 - Information Available Externally [website, annual financial reports, SEC filings]

Learn the Business: - People, Products, Operations

- **Getting to know your client:**
 - **Network within your company**
 - Listen
 - Read
 - Request Feedback
 - **Meet with critical departments**
 - Ask questions
 - **Make your own decisions**
 - **Don't forget the "worker bees"**
 - **Community Involvement**

Learn the Business: - People, Products, Operations

- **Interdepartmental Teams:**
 - **Volunteer**
 - **Attend meetings**
 - **Ask questions**
 - **Attend training sessions by others for others**

Learn the Business: - People, Products, Operations

- **Claim/Litigation Review:**
 - How much autonomy to outside counsel
 - Review current litigation
 - Review recently concluded litigation
 - Find out about “major” litigation in your industry

Learn the Business: - People, Products, Operations

- **Litigation Management:**
 - Take your company's temperature
 - Consider business impact of litigation decisions
 - Cost Management (pay now or later?)
 - Litigation Control – Business Group Buy-In or Approval

Educate; Communicate; Train

- **Making your job easier; make their jobs easier**
- **Too much information v. not enough information:**
 - Provide enough information to enable colleagues to handle routine and repetitive questions on their own, without discouraging them from contacting you on important matters
- **Routine matters:**
 - A non-lawyer is able to handle the situation with little or no legal department involvement
- **Important matters:**
 - Situations where an in-house attorney needs to be involved actively [or simply to monitor]

Educate; Communicate; Train

- **Substantive Training Areas:**
 - Employment Law
 - Antitrust
 - Business Ethics/Compliance
 - Contract Law
 - Regulatory – specific to your industry
 - What has been done before?

Educate; Communicate; Train

- **Planning Your Training Program:**
 - Determine your goals for the program
 - Determine your method of training
 - Tailor your presentation to your audience
 - Remember you will never be able to present everything
 - Enhance your credibility
 - Draft and then shorten – you will run out of time!

Educate; Communicate; Train

- **How to Present:**
 - Know your audience
 - Use Different Methods
 - Consider Pre and Post Tests
 - War Stories – in your industry!
 - Examples of the good, bad and really ugly!
 - Present as “Business” not as “Legal”

Educate; Communicate; Train

- **What to include:**
 - Review your company's standard contracts applicable to your audience
 - Why are the clauses there?
 - What do they mean?
 - What are the risks involved?
 - What are the acceptable alternatives?
 - What does the contract mean to them?

Educate; Communicate; Train

- **Get their attention!**
 - Provide copies of approved agreements
 - Explain how they work
 - Explain how they will make the attendee's life easier (and yours)
 - Explain any personal liability, if this is possible
 - Make it Practical

Educate; Communicate; Train

- **What “Not” to do:**
 - Bore your audience with “legalese”
 - Lecture
 - Make the training academic, instead of practical

Educate; Communicate; Train

- **What to “Do”:**
 - Have a focus
 - Provide guidelines and checklists
 - Be available for questions

Educate; Communicate; Train

- **Types of Training:**
 - **Pull:**
 - Company IntraNet
 - Manuals or form books
 - **Push:**
 - Newsletters; “Legal Briefs”; distribution lists
 - Media-based training (web, CD-ROM, video)
 - **Interactive:**
 - One-on-One Sessions
 - Small Group Sessions – Responsibility Driven
 - Annual Meetings

Educate; Communicate; Train

- **“If I am not visible, things could be done without having been run through legal first. So, I am conscious that it is up to me to raise my visibility. I invite myself to as many meetings as possible, and when I hear in passing that a deal is in the pipeline, I actively seek out whoever I need internally to find out more.”**

- **Jan McDavid, General Counsel, Smart Corporation**

Educate; Communicate; Train

- **Routine and Important Matters -- Knowing where “the line” is:**
 - Sense of history of company problems
 - Sense of moral compass - Expectations of company toward its employees
 - Sense of capability of employees

Educate; Communicate; Train

- **Encouraging contact on the “important” issues:**
 - Show colleagues how to get better results and the problems to avoid
 - Labor arbitrations example
 - Goal: win all discipline arbitrations
 - Aim training at the supervisors who make the facts
 - Conduct training at central and regional offices
 - Memos to district management to explain new arbitration decisions
 - Copy district management on internal, pre-arbitration hearing decisions

Being Proactive

- **Knowing when to put the “attorney” hat on**
- **Tackling “Business” problems**
- **Leveraging resources**
- **Being part of the Team**

Being Proactive

- **Knowing when to put the “attorney” hat on**
 - ...while you may be juggling other business hats
 - **Maintaining the attorney - client privilege**
 - **Hill Street Blues:**
 - “Hey, be careful out there!”

Being Proactive

- **Tackling “Business” problems:**
 - **Look at entire business processes**
 - Identify improvements that would avoid or reduce problems
 - Set priorities

Being Proactive

- **Tackling “Business” problems:**
 - **Employment litigation example**
 - **See; Rob Bekken and Tony Burnham, “Best Practices Help Employers Avoid Employment Litigation” in ACCA Virtual Library**
 - Hiring procedure [applications, interview questions, recruiting pools, background checks]
 - Employee handbook
 - Job descriptions
 - Performance reviews
 - Dispute resolution
 - Litigation management

Being Proactive

- **Crisis Planning:**
 - Don't wait for a problem to come to you – it is too late
 - Anticipate where a problem may start
 - Create a contingency plan
 - Communications
 - Decision making/Responsibility/Authority

Being Proactive

- **ACCA Resources:**
 - **Contracts**
 - "Contract Training Programs for Non-lawyers"
 - **HR**
 - "Avoiding Litigation Landmines"
 - "Why Employees Sue"
 - **Other**
 - Small Law Department Discussion Board
 - Virtual Library [forms]

Being Proactive

- **Leverage Company Resources – creating the time to be proactive**
 - **Litigation; collections; bankruptcies**
 - paralegal
 - A/R or collections specialist
 - **Contracts**
 - contract managers
 - **HR**
 - HR/employee relations generalist
 - **Other**
 - temporary staff; part-timers
 - law clerks or interns

Being Proactive

- **Being part of the Team:**
 - Listen first
 - Show trust in your business people (but don't be naïve)
 - Market your department – not a “no” place
 - Do little things quickly
 - Be accessible
 - Engage in sound business thinking
 - Don't be one of “those lawyers”

APPENDIX

Maintaining the Attorney-Client Privilege

Maintaining attorney - client privilege

- **Elements of the privilege: Wigmore [1904-05 edition]**
 - where legal advice of any kind is sought
 - from professional legal advisers in that capacity
 - the communications relevant to that purpose
 - made in confidence by the client
 - are at the client's instance permanently protected
 - from disclosure by the client or by the legal adviser
 - except that the client waives the protection

Maintaining attorney - client privilege

- Remember that courts in general are leery of privileges because they exclude evidence, and this frustrates the truth-finding function of trials
- “Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances. The President, for example, does not have an absolute privilege against disclosure of materials subpoenaed for a judicial proceeding.” Justice White in *Herbert v. Lando*, 441 U.S. 174, 175, 99 S.Ct. 1635, 1648 (1979).

Maintaining attorney - client privilege

- A sampling of cases with instructive fact patterns: legal advice or business advice?
- Investigations [Upjohn]
- Business planning/corporate reorganization [Adlman]
- Internal memos [Rossi]
- Negotiations and transactions
 - Georgia Pacific v. GAF
 - Satcomm v. Orbcomm

Maintaining attorney - client privilege: Investigations

- Upjohn v. U.S., 101 S.Ct. 677 (1981)
- General counsel and outside counsel prepared a letter and questionnaire sent over the signature of the chairman of the board. Recipients were directed to return the questionnaire to the general counsel.
- Court: “. . . the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.”

Maintaining attorney - client privilege: Business planning/ reorganization

- U.S. v. Adlman, 68 F.3d 1495 (2nd Cir. 1995)
- Attorney employed as VP of Taxes consulted with accounting firm partner regarding a planned combination of two subsidiary corporations. Partner then prepared a detailed and technical tax analysis of the reorganization.
- Parent corporation argued that the analysis fit within the privilege because it was rendered to the VP of Taxes to assist the VP in giving legal advice to the parent corporation.

Maintaining attorney - client privilege: Business planning/ reorganization

- U.S. v. Adlman, 68 F.3d 1495 (2nd Cir. 1995) continued
- The court, in rejecting the claim of the privilege, considered that the accounting firm's handling of the matter was revealing:
 - The billing statements lumped the reorganization advice with other accounting and advisory services.
 - The accounting firm also sent a copy of its recommendations and conclusions directly to the corporation's management.

Maintaining attorney - client privilege: Internal memos

- Rossi v. Blue Cross and Blue Shield, 540 N.E.2d 703 (N.Y. 1989)
- Staff counsel prepared and sent a memo to the staff medical director. Staff counsel copied the superiors of both [VP/General Counsel and VP of Professional Affairs]
- Court's test:
 - Communications from client to attorney must be made for the purpose of obtaining legal advice and directed to an attorney for that purpose.
 - Communications from an attorney to the client must be made for the purpose of facilitating the rendition of legal advice or services in the course of a professional relationship.

Maintaining attorney - client privilege: Internal Memos

- Rossi v. Blue Cross and Blue Shield, 540 N.E.2d 703 (N.Y. 1989) continued
- Court: "So long as the communication is primarily or predominantly of a legal character, the privilege is not lost merely by reason of the fact that it also refers to certain nonlegal matters . . . Indeed, the nature of a lawyer's role is such that legal advice may often include reference to other relevant considerations."

Maintaining attorney - client privilege: Negotiating and terminating contracts

- Georgia Pacific v. GAF, 1996 U.S. Dist. LEXIS 671 (S.D.N.Y. 1996)
- In-house environmental counsel met with an executive and fellow in-house counsel regarding negotiations; advised that certain provisions might not cover certain claims; recommended how he would negotiate.
- The court rejected the claim of the privilege.
- Selected quotes from the court:
 - "acted as negotiator"
 - "business judgments of environmental risk"
 - "divorced from legal advice"

Maintaining attorney - client privilege: Negotiating and terminating contracts

- Satcomm v. Orbcomm, 1999 U.S. Dist. LEXIS 1553 (S.D.N.Y. 1999)
- Executive committee, including VP/General Counsel, met to discuss legal options regarding other contracting party's nonperformance of an agreement.
- VP/General Counsel's affidavit to court described purpose of the meeting, stated that she attended to render legal advice, and stated that conversations consisted of confidential communications to obtain her legal advice or that legal advice from her.

Maintaining attorney - client privilege: Negotiating and terminating contracts

- Satcomm v. Orbcomm, 1999 U.S. Dist. LEXIS 1553 (S.D.N.Y. 1999) continued
- Court's conclusion: Orbcomm provided sufficient information to invoke the attorney-client privilege
 - Meeting dealt exclusively with legal options in a contracts dispute, which involved the VP/General Counsel's main legal duties
 - VP/General Counsel attended the meeting to render legal advice on that issue
 - All conversations were directed to that end
 - No suggestion that meeting had a general business purpose that only touched tangentially on the legal issue