

206 Ten Things You Should Know Your First Year as General Counsel

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Prior to joining Vignette, Mr. Robinson was in-house for two years at Fair, Isaac and Company, a software and credit scoring technology company in San Rafael, California. His focus while at Fair, Isaac was in software licensing and technology transactions, all internet-related matters, and data privacy related matters. Before joining Fair, Isaac, he was an associate at Pillsbury Madison & Sutro in San Francisco, working in its energy and commercial transactions group. Before law school, he served for six years as an officer in the U.S. Navy.

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Before joining BindView, Mr. Toedt, a member of the Texas and California bars, was a partner and member of the policy committee at Arnold, White & Durkee (now Howrey Simon Arnold & White), one of the nation's largest intellectual property firms, practicing in the firm's Houston office. While at AW&D he concentrated on patent litigation, technology licensing, and patent prosecution, primarily in software-related matters. Between college and law school he served as a U.S. Navy nuclear engineering officer.

Mr. Toedt is a former member of the Council of the ABA's Section of Intellectual Property Law. As chairman of the Section's Committee on Computer Programs, he served as principal drafter of the Model Software License Provisions project. He is the editor and principal contributing author of *The Law and Business of Computer Software*, a one-volume treatise published by West Group.

Mr. Toedt received his BA with high honors and his JD from the University of Texas at Austin, where he was an associate editor of the *Texas Law Review*.

Some Things I'm Glad I Knew – Or Wish I'd Known – My First Year as General Counsel

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Introduction

The original draft of this paper was prepared for an upcoming panel discussion at the annual meeting of the American Corporate Counsel Association in October 2001. Yellow-highlighting indicates topics that the panelists think would be particularly worthwhile to discuss.

Please feel free to forward this paper to others who might be interested. We are interested in seeing this paper become something like “open source” software, i.e., a living, growing resource document with many contributors. We haven't yet figured out just how that should happen, but the general idea is that we want this document to be widely available to in-house counsel. So, **if you have any pointers for new general counsel, or some “what if” questions to ponder, or suggestions for further reading** (preferably on the Web), **that you are willing to let us adapt for use in this paper** and in any future versions / publications, 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.

References to Web sites are for general information only and not necessarily intended as an endorsement or recommendation. Some of the cited Web sites are maintained by government agencies, e.g., the EEOC, and will therefore have a certain “tilt” to their perspectives.

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 as a New General Counsel

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):
 - 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
 - the last few proxy statements
 - the exhibits to your SEC filings (are they up to date?)
 - the audit-committee charter
 - 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.
 - the articles of incorporation and any amendments thereto
 - the by-laws and amendments thereto
 - stock-option plans
 - employment contracts, stock-option agreements, and change-of-control agreements for key executives
 - separation agreements for recently-departed executives
2. Consider creating a rough time-line / document index for some of the significant events described in the above documents – product releases, personnel changes, etc. It can be a valuable learning exercise, and the time-line / 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, audit-committee meeting schedule
 - 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.

Topics to Dig Into

5. Revenue recognition: Learn the basics. Ask your accounting people what the revenue-recognition hot buttons are for your industry segment.
6. Learn the business of the company, including gross margins of products, the technology, the position of the company in the industry, etc.
7. Learn how the company's products are made, inventoried, distributed and sold.
8. Spend some time on the assembly line or factory floor (if applicable).

9. 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 When First You Come on Board

10. 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, or if any are already being worked on. Ask if they see any issues or problems on the horizon.
11. 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.
12. Get to know the audit partner and audit manager at your company's outside accounting firm.
13. 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.

Contracting Issues

14. 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.
15. 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.
16. 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.)
17. 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

18. 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.
19. 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 mark-up 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.
20. 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.

Contract *Drafting*

21. Understand what your client's objectives are. Then try to ensure that the proposed contract achieves those objectives.
22. How long should a contract be? The usual answer is “long enough.”
23. 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.”
24. 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.
25. Try to anticipate problems in contract performance, and put in some “outs” for your client.
26. “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.

27. 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.]”

BETTER:

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.

28. Consider explaining why certain contract provisions are included, or why they are drafted in a certain way (e.g., because of a compromise between the parties).
29. Items 24 through 28 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.
30. If you can't specify outcome in a contract (e.g., because the parties don't know what the desired outcome is), consider specifying an agreed process for deciding later what the outcome should be.
31. Be careful about “evergreen” automatic renewals – they can also cause revenue-recognition problems. Consider calendaring the non-renewal notice deadline(s).
32. 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

33. (Intentionally repeated from 21:) Understand what your client's objectives are. Then try to ensure that the proposed contract achieves those objectives.
34. 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?
35. 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 periodi-

cally 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.

36. No-assignment clauses can be problematic for both vendors and customers. So can exclusivity, noncompete, and nonsolicit clauses.
37. Licenses and other grants of rights need to be considered very carefully, including thinking through retained rights.

Contract *Markups*

38. Redline all markups with Word revision marks (or equivalent)
39. A corollary to # 32: Date every page of every markup, to help avoid phone conferences where the parties are inadvertently working from different drafts.
40. 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.)
41. If you follow # 40, 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.
42. Strongly discourage your business people from keeping private stashes of form contracts on their hard disks, etc. 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, and that contain outdated commitments that your company no longer is willing to make.

General Services Administration (GSA) Contracts

43. 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.
44. If your company has a GSA contract, review it.
45. Is the GSA contract up to date, i.e., does it reflect what your company's current practices are? If so, consider filing an amendment to the business-practices disclosure.
46. Have there been any audits of the GSA contract by the Office of Federal Contract Compliance Programs (OFCCP)?

Other Contract Issues

47. 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’s 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 had been left out of the contract.
48. 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.”*]
49. 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.
50. 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 who they provide similar services to, since you don't want to pay for a service such as a design that they can turn around & sell to your competitor.
51. 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 one so that they won’t be basing their opinion on a “one-off” deal.

Employment Matters

Recruiting

52. 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.
53. 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.
54. Interviews: Be careful what questions get asked of recruits – asking certain questions can lead to discrimination claims. Useful Web sites include:

<http://chef.fab.albany.edu/deptment/ohrm/operations/recruitment/legal/>

<http://www.hrs.virginia.edu/test/samples/legillegquest.html>

55. Your recruiting practices should take into account the Americans with Disabilities Act: See generally, e.g.:

<http://www.eeoc.gov/facts/fs-ada.html> (an overview by the Equal Employment Opportunity Commission [EEOC])

<http://www.smartagreements.com/bltopics/Bltopi31.html> (a brief overview)

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

FCRA consumer rights: <http://www.ftc.gov/bcp/online/pubs/credit/fcra.htm>

FCRA employer responsibilities: <http://www.ftc.gov/bcp/online/pubs/buspubs/credempl.htm>

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

http://www.uslaw.com/library/article/care15Background.html?area_id=43

<http://www.privacyrights.org/fs/fs16-bck.htm>

58. 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 porno, etc., and the handling of proprietary information and material.
59. Periodically sit in on new-hire orientation sessions – find out what your supervisors and HR people are actually telling people.
60. Employment contract form: Review your company's forms and policies periodically (consider calendaring it on a regular basis). Pay particular attention to:
- Invention-assignment clause
 - Confidentiality clause
 - Non-competition, non-solicitation clauses
61. Change of control contracts – review them. Which executives get them? Is there a policy?
62. Stock options: For general information, see <http://www.nceo.org/options/index.html>.

Terminations and Layoffs

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

<http://www.nolo.com/encyclopedia/articles/emp/emp2.html> -- a frequently-asked questions file (targeted at employees and reflecting the employee point of view)

<http://www.gigalaw.com/articles/2001/towns-2001-01-p1.html> – a short article on age discrimination for high-tech companies
64. 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 <http://www.smartagreements.com/bltopics/Bltopi32.html>.
65. 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.
66. 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

67. See <http://sacramento.bcentral.com/sacramento/stories/1997/08/04/smallb6.html> for an overview of exit interview procedures.
68. 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 noncompetition clause, it’s nice to have an obvious breach of contract to put in front of the judge and/or jury.
69. Exit interviews: Have a “friendly” witness there to avoid later “he said / she said” controversies.

References for Former Employees

70. Be careful in giving references for former employees. See generally: http://www.hrnext.com/content/view.cfm?articles_id=2185&tools_id=1
71. Here’s a decent checklist for giving references: http://www.iniku.com/member/content/magazine/small_business/cchtoolkit/ask_alice/093_99askalice.nsp

Noncompetition Clauses; “Inevitable Disclosure”

72. For a general discussion of noncompetition clauses, see generally, e.g.:

<http://www.lucaslaw.com/NONCOMPETITION%20CLAUSES.htm> or

http://www.law.pitt.edu/law_review/vol62i1/Orsini-new.pdf

73. In some jurisdictions, “noncompetes” 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).
74. On the other hand, noncompetition clauses are alive and well in many jurisdictions if the clause is “reasonable” and the factual circumstances are right.
75. The “inevitable disclosure” doctrine can sometimes be used as a substitute for a noncompetition 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).
76. 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 noncompete 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

77. 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.
78. Drug-Free Workplace Act – see generally, e.g.,:
 - <http://www4.law.cornell.edu/uscode/41/ch10.html#PC10> (text of statutory requirements)
 - <http://www.elaws.dol.gov/asp/drugfree/screen4.htm> (Justice Department FAQ file, plus an “Advisor” -- a simple Web-based decision tree to help companies determine whether they are covered by the Act)

79. Family Medical Leave Act – see generally, e.g.:
- <http://www.dol.gov/dol/esa/public/regs/compliance/whd/1421.htm> (Labor Dept. guide)
- <http://www.west.net/~bpbooks/fmla.html>
- <http://www.uiowa.edu/~hrpersvc/relations/summary.html>
- http://www.unlv.edu/Human_Resources/Benefits/fmlasum.html
80. Immigration – H1B visas – see generally, e.g., <http://www.myvisa.com/>
81. Fair Labor Standards Act overtime pay requirements – see generally, e.g.,:
- <http://www.dol.gov/dol/asp/public/programs/handbook/minwage.htm> (Labor Dept. guide)
- <http://www.dol.gov/dol/esa/public/regs/compliance/whd/hrg.htm> (another Labor Dept. guide)
82. Train your management and HR people. Outside counsel will be delighted to help, possibly for free.
83. See if your insurance carrier (especially your employment-practices liability carrier) will give you free HR training for management (e.g., on-line training).
84. The company should have an established sexual harassment policy that is included in the employee handbook.
85. 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.
86. 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 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. . . .
87. 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

88. 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.

89. 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.”
90. 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 complain for copyright infringement or unfair competition.
91. False-advertising basics: See http://www.lawnotes.com/false_advertising.htm.
92. 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 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*, ___ U.S. ___, 121 S. Ct. 1355, 149 L.Ed.2d 285 (2001).
93. 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 # 174). “Our product does the best job of doing X.” “Our product ensures that this good thing will happen.”
94. All categorical statements are bad – including this one.
95. Consider selectively using tailored forward-looking-statement language in press releases and other public documents (Web sites?) – see also # 133 et seq.

Intellectual Property

Trade Secrets

96. 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.
97. Review the company’s standard nondisclosure agreement form(s) (NDAs). Consider making them available on the company intranet.
 98. Strongly encourage company personnel to get a signed NDA in hand before disclosing company confidential information.
 99. Make it clear that all NDAs that are not on an approved form should be approved by you before being signed.
 100. For a brief frequently-asked questions file concerning trade-secret law, see <http://www.lawnotes.com/tradsec.html>.

Patents

101. 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.)
102. 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.
103. 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.
104. 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 <http://www.lawnotes.com/patent/deadline/deadline.html> (deadlines for filing a patent application).
105. 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.
106. Review/establish a patent incentive program if intellectual property and talented scientists / engineers are important to your company's business.

107. 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.
108. For general information about patents, see: http://www.lawnotes.com/patent/faq_pat.html (a frequently-asked questions file with numerous cross-links).
109. For a glossary of selected patent-law terms, see <http://www.lawnotes.com/patent/glossary.html>
110. For an overview of patent infringement litigation, see <http://www.lawnotes.com/patent/lawsuit.html>.

Copyrights

111. Copyright happens *automatically* when an “original work of authorship” is “fixed in a tangible medium of expression.”
112. 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.
113. Modifying someone else's copyrighted material can be just as much an infringement as slavishly copying it. (See also # 111.)
114. For a general survey of copyright law, see http://www.lawnotes.com/cpyright/copr_faq.html.

Trademarks

115. 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 <http://www.theregister.co.uk/content/50/16640.html> for an entertaining account of that particular match-up.
116. Trademark searching:

<http://www.uspto.gov/web/menu/tm.html> -- USPTO site for *preliminary* U.S. searches (covers only registered marks and registration applications, not unregistered uses or state registrations)

http://oami.eu.int/search/trademark/la/en_tm_search.cfm - EU Community Trademark (CTM) searches

<http://www.thomson-thomson.com/> -- Thomson & Thomson commercial search agency (you must have an account with them)

117. 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 (sometimes a dangerous assumption), you can file a registration application yourself at the U.S. Patent and Trademark Office’s Web site, <http://www.uspto.gov/teas/index.html>.
118. Don’t assume that a U.S. trademark registration application will protect you in foreign countries.
119. Pay attention to the six-month deadline for filing foreign trademark registration application with the same priority date as your U.S. application.
120. 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).
121. For a brief overview of some key points of trademark law, see generally <http://www.lawnotes.com/trademk.html>.

Internet Domain Names

122. Get with Marketing to figure out which domain names you want to register in which countries.
123. Keep in mind that a lot of different new “root-level” domain names are coming on stream (e.g., .biz, .info, etc.) See generally <http://www.internic.net/faq.html>.

IP Enforcement Considerations

124. Figure out what your branding and patent protection strategy really is, and which trademarks and patents you intend to enforce, and against whom.
125. 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 goods the brand is intended to cover (including areas of natural expansion).
126. 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

127. 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.
128. Become familiar with each of the earlier major corporate transactions, qualifications to do business in different states, resolutions, etc.
129. Docket key dates so that you are not blind-sided, e.g., by a franchise-tax deadline, etc.

Securities-Laws Issues for Public Companies

130. See <http://www.seclaw.com/secrules.htm> for an on-line version of many securities-law statutes, regulations, and forms.

Insider Trading

131. Review – or draft – your company's written insider-trading policy.
132. Sample insider-trading policy: http://www.genesismanagers.com/GUM_Cl.nsf/Doc/PolicyIT.html

Regulation FD (prohibiting “selective disclosure”)

133. Text of Regulation FD: <http://www.sec.gov/rules/final/33-7881.htm>
134. Selected SEC interpretations of Regulation FD, in frequently-asked-questions format: <http://www.sec.gov/interps/telephone/phonesupplement4.htm>
135. Ten Tips for Dealing with Regulation FD: <http://www.niri.org/publications/alerts/RegFDTips.cfm>

Press Releases and Other Public Disclosures

136. Include appropriately-tailored forward-looking-statement language in your press releases and other public disclosures.
137. See <http://www.bassberry.com/resources/corp/012099/5.html> for general suggestions about forecasts, projections, and other forward-looking statements.
138. Avoid boilerplate in drafting cautionary language for forward-looking statements. Tailor the cautionary language to be reasonably specific.
139. Familiarize yourself with the kinds of information that might be deemed “material” for your company or your industry segment.

140. Get familiar with the different judicial views concerning when updated material information must be disclosed to the market. See <http://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.
141. See nos. 93-94 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.

Exchange-Act Reporting – Filing of Forms 10-K, 10-Q, 8-K, etc.

142. 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
 - the annual 10-K filing
 - the annual report to shareholders
 - the annual shareholder meeting and its proxy statement
143. *Schedule* sufficient blocks of time to work on the 10-K / 10-Q / proxy statement.
144. Set up detailed assignment lists for the work necessary for the 10-K / 10-Q / proxy statement.
145. Periodically review the risk factors in your 10-K and 10-Q reports; update them as appropriate.
146. Remind each new member of the board of directors, and each new section-16 officer, to file a Form 3 report within 10 days after he or she moves into the new position. See <http://www.sec.gov/divisions/corpfin/forms/form3.htm> for the SEC's instructions.
147. Send out monthly reminders to board members and section-16 officers to file Form 4 reports. See <http://www.sec.gov/divisions/corpfin/forms/form4.htm> for the SEC's instructions.
148. Send out annual reminders to board members and section-16 officers to file Form 5 reports. See <http://www.sec.gov/divisions/corpfin/forms/form5.htm> for the SEC's instructions.
149. Set up an internal process for handling requests by pre-IPO investors to sell their restricted stock under Rule 144.

Litigation & Other Disputes

150. 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 some-

one 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).

151. 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.
152. 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.
153. ADR: Know the differences between arbitration vs. mediation vs. early neutral evaluation.
154. Before going down the litigation path, make certain that you become well aware 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.
155. 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.
156. 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).
157. 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.
158. In a lawsuit, truth is the goal – but in the end, admissible evidence is what matters.
159. 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.
160. 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.)
161. Jurors usually have the last word on factual matters. Suppose that 5 bishops swear that the light was green and only 1 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.

162. Just because you're right doesn't mean you'll win.
163. 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.
164. 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.
165. 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.)
166. Juries can have a tendency to believe, “the defendant must be guilty of something, otherwise they wouldn't have us here.”
167. No matter what the outcome, litigation invariably soaks up lots of management bandwidth.
168. 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.
169. 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).
170. 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.
171. Delay seldom helps defendants as much as it increases expenses.

Emails

172. Be careful what you put into an email. Don't assume that everyone who reads your email will understand the context.
173. 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.
174. 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!”
175. 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.

176. 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).
177. Try to get buy-in throughout the organization for whatever email policy you establish – but how do you go about doing that?
178. 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.)
179. 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.
180. 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

181. 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.
182. Insurance policies – review their coverage levels and exclusions. Can claims be made during a renewal term for events that occurred in a prior term?
183. Get to know your company's outside insurance rep. Consider asking for a briefing on existing insurance policies and their coverage limits / exclusions.
184. 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.)
185. 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.
186. Disaster plan – does your company have one? Does the Legal Department?

See <http://www.disasterplan.com/yellowpages/Displan.html> for an overview of things to think about for disaster-recovery planning.

See <http://www.disasterplan.com/> to see links to some sample disaster-recovery plans.

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

188. 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?)
189. Have an electronic set of key forms available off site (e.g., on a notebook computer).
190. Some legal departments burn weekly CD copies of the entire “legal” section of the server.

Administering Your Department

General Management Tips

191. 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.
192. Schedule specific time to work on specific projects, otherwise your day will be nibbled away.
193. Manage projects by using detailed assignment lists, with assigned personnel and target dates.
194. Push for paperless – if nothing else, scan in key hard-copy documents into Adobe PDF files.
195. Immediately investigate how to use technology (intranet, etc.) to announce your presence and provide information for business processes.
196. Make information and forms available to the employees on-line to save yourself some time.
197. 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.
198. 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*]
199. Remember the 80-20 rule: 80% of the revenue comes from 20% of the customers; 80% of the problems come from 20% of the employees; etc., etc. This is also known as the Pareto Principle, about which see <http://www.ideabridge.com/ideabridgecom/whitepapers/32.htm> or <http://www.4hb.com/08jcparetoprinciple.html>.

Budgeting

200. 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.).
201. 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.

202. 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

203. Make friends and develop allies.
204. Think – and ask questions – like a CEO, but remember that you're not.
205. 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.
206. Identify your principal internal clients and make every effort to respond quickly and accurately.
207. Be conservative in your opinions as a rule, but be willing to identify other options along with associated risks.
208. 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.)
209. 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).
210. Try to stay neutral in corporate power struggles. But there may be times when you have no choice but to back one horse or another – and then live with the consequences.
211. Make nice to everyone. It's a great information source.
212. 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).

Employees' Personal Legal Problems

213. 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.
214. 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.
215. 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 noncompetition obligations.

Communicating Plainly

216. 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.
217. Try to speak in English when giving advice.
218. Write your documents as if you were writing a letter to your sisters. (Adapted from Warren Buffett's introduction to A Plain English Handbook, <http://www.sec.gov/pdf/handbook.pdf>)

Using Outside Counsel

219. 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.
220. 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.
221. 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.
222. Remember that you are now the client. Be active in knowing the competency of the partners and associates assigned to your individual matters.
223. Act quickly when you are not satisfied with the work of a particular attorney.
224. Get to know your options with other law firms – sometimes your loyalty to a particular firm will not serve the company's interests.

225. 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.
226. 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.
227. Since you will be accountable for the decisions made by outside counsel, make sure that you are consulted as often as you feel necessary.
228. 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 & can garner the necessary resources quickly if needed. Ask that they be the billing lawyer so that they are in control of all matters.
229. Initial items to consider in using outside counsel:
- Discuss need for outside counsel with business person
 - Identify needed skills, governmental contacts, location, firm size, fees and sophistication
 - Determine if costs can be passed on to another party or insurance company
230. 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
 - Would a “beauty contest” be useful, or not?
 - Consider whether to establish or strengthen a strategic relationship with a law firm
 - Have counsel run conflicts check and perform internal conflicts check
 - Interview the top two or three candidates
231. 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
 - Develop a project list and timetable

232. 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?
 - Conduct a post-closing feedback session.

Professional & Personal Development

CLE, etc.

233. 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.
234. Join ACCA and participate in local chapter meetings.
235. Read the ACCA DOCKET – it contains some of the best practical articles around.
236. Subscribe to appropriate legal newsletters for your areas of practice / expertise (BNA, CCH, etc.). Make the time to read them.

Stress Management

237. 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."
238. Learn about ergonomics. Find out what your health insurance will cover, then *do it*.

Managing Your Career – and Your Life

239. 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).
240. Negotiate your own employment contract and change-of-control provisions. Search for examples of executive employment contracts at www.10kwizard.com.
241. 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.

242. 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.
243. 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.
244. One contributor suggests: If you get loads of vacation as your salary “trade-off” (the contributor in question gets 5 weeks a year), use it; if you work for a “rocky” company, they might try “make you” use it, or to say that you can't use it, but make it clear that you are, and you will.
245. Cross-train yourself to expand your skill set.
246. 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.
247. Look for speaking opportunities at bar associations, high schools, civic groups, etc.
248. All jobs end. Prepare now.
249. Remember that you have a life.
250. 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 Think About: What Do You Do When

These topics are intended for future expansion of this paper, but for now they are just placeholders.

251. You get a letter from the SEC requesting “clarifications” of your financial statements from previous fiscal quarters.
252. 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..
253. You are told the company will encourage telecommuting to save office expenses/boost morale.
254. The CEO tells you he wants to RIF 20% of the workforce.
255. A key supplier goes bankrupt.
256. A key customer can't pay – or wants to renegotiate its contract.
257. The CEO tells you he wants to outsource a critical business function.
258. The CEO asks you why you don't have a robust patent program like the competitor down the street.
259. The products team tells you they just incorporated a feature/product that makes your product subject to export regulations.
260. 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.
261. You are served with a search warrant.
262. The EPA inspector arrives to check your emissions.
263. The IRS auditor arrives to review your returns.
264. The state tax auditor arrives to review your withholding and full-time, part-time, and consultant agreements.
265. A shareholder group files a Form 13-D stating that they have purchased X% of your company's common stock and demands that your top management and board of directors resign.
266. Your CEO resigns.
267. Your CEO has a heart attack.

268. 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/etc.
269. Your CEO asks you to do something unethical.

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