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Ill Winds. The recent convictions of high-profile plaintiffs' attorneys were sad occasions for the entire legal profession, and ideological exploitation of these tragedies only further disserve the cause of civil justice, no matter where your sympathies lie on issues like tort reform. Plaintiffs' supporters should eschew conspiratorial interpretations of legal actions well deserved by the culprits. Corporate advocates should likewise recognize the dangers of an excessively partisan response.....**Page 3**

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Friends in Need. The experience of Steve Conklin, legal counsel to the Oregon Health & Science University, offers cautionary lessons for outside counsel. As his institution grapples with restraints in this economy, Conklin is heedful of which firms are responsive and accommodating and which are not. It's an inside/outside dynamic that is particularly characteristic of health care, but buyers in many other challenged industries likewise want to know who their friends really are.....**Back Page**

Security Breaches, Labyrinth of Domestic & International Laws Heating Up Privacy Law

The numbers just keep piling up, and that means more work for lawyers in privacy law, an increasingly hot practice area.

That is, in 2006 someone stole a laptop from The Boeing Co. that held files containing critical information on thousands of the aerospace firm's employees. That pushed the total of US data breach victims past the 100 million mark, and

that's only since 2005 when the Privacy Rights Clearinghouse started counting.

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Of course, there have been many more privacy breaches in the past two years. Sears suffered a major one and was subsequently sued in early 2008. Last year, the retailer The TJX Companies metaphorically left its technological window wide open, which resulted in a massive theft of customer information. That breach could cost TJX more than \$2 billion over the next few years.

Attorney Scott Killingsworth, a partner at Atlanta's Powell Goldstein who practices in the privacy area, offers this "factoid," as he puts it, updating the Clearinghouse's tally: "At *privacy-rights.org* you can read an online table that lists recent—since 2005—data breaches that involve the kind of information that can be used in identity theft. It prints out to 142 pages, and the number of records that have been compromised is more than 230 million. That's what's driving a lot of work in the privacy practice area."

OF COUNSEL

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OF COUNSEL (ISSN 0730-3815) is published monthly by Aspen Publishers, 76 Ninth Avenue, New York, NY 10011. 212-771-0600. Subscription rate, \$527 for one year; single issues cost \$63 (except **OF COUNSEL 700 ANNUAL SURVEY**). To subscribe, call 1-800-638-8437.

For customer service, call 1-800-234-1660. Address correspondence to **OF COUNSEL**, 76 Ninth Avenue, New York, NY 10011. Send address changes to **OF COUNSEL**, Aspen Publishers, Distribution Center, 7201 McKinney Circle, Frederick, MD 21704.

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Indeed, it is. And that's not all. The proliferation of states that have passed privacy-breach notification laws—statutes that require companies to inform consumers that their personal information has been compromised—is also generating work for attorneys in this space. More than 40 states have enacted such notification legislation.

"The advent of data breach notification laws took leakage issues, which were once confined to a fairly narrow set of circumstances," Killingsworth says, "to a legal environment today that's keeping privacy lawyers very busy."

Clearly, just as the free flow of information—financial data, customer files, employee records, personal health charts, among other easily transferable data—has created new business opportunities around the world, so to has this digital info-exchange opened avenues of abuse. This, in turn, has spawned myriad new rules, which has Corporate America calling their attorneys for help with translation and navigation of this regulatory labyrinth.

What this means is that law firms engaged in this arena may need to add attorneys to their privacy and data security practice areas, if they haven't done so already. And, according to at least one consultant, too few firms have done enough to meet this growing client demand. "I work with a lot of firms that have strong privacy practices, and I've asked them if their strategic plans include hiring attorneys who know this field or training their existing attorneys about this practice area," says a consultant with law-firm clients from all over the nation who asked to remain nameless. "Unfortunately, too many of them are behind the curve in this regard."

Global Complexities

That's clearly not the case at San Francisco-based Morrison & Foerster, which has nearly 60 attorneys around the world working in the privacy and information-security area. Miriam Wugmeister, who chairs the department from the firm's New York office and is well-regarded in this field of law, says that the firm is adequately staffed to meet client needs but also expects to expand this practice area.

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From the Editors

EDITORIAL: Plaintiff Kingpins Head to Jail . . .

But Hard Cases, As They Say, Can Make Bad Law

On June 2, 2008, Mel Weiss of Milberg LLP was sentenced to two and a half years in prison for illegally paying clients to file shareholder suits.

His former partner William Lerach did somewhat better. He was sentenced to two years for conspiring to pay kickbacks to plaintiffs. He has just started serving his time.

Meanwhile, on June 27, Dickie Scruggs, formerly one of the nation's most powerful plaintiffs' lawyers, was sentenced to five years in prison for conspiring to bribe a circuit court judge.

The proximity in time with which these brand name plaintiffs' lawyers met their Waterloos will no doubt suggest to fanciful ideologues the likelihood of a conspiracy, or at least a concerted counter-offensive by corporate and other pro-tort reform interests. As Joe Nocera notes in his terrific June 7 *inside nytimes.com* article, Lerach himself made the "absurd claim that he was railroaded by his political opponents."

Absurd indeed! These guys broke the law, period. In the case of Milberg and Weiss, the criminality was inherent in their practice. The Scruggs example may be even more unsavory in some ways. Here was a fabulously successful and fabulously wealthy lawyer who, notwithstanding any predictable crocodile tears for Katrina victims, tried to commit bribery because he apparently wanted to be even more fabulously successful and wealthy. No, greed is not good.

Right now, not just the crimes themselves, but a scurrilous and ill-advised public communications effort by people like Lerach is profoundly disserving the cause of civil justice. As Nocera notes, honest plaintiffs' lawyers are appalled by Lerach's posturing and by his bland assertion that "everybody" gives kickbacks to lead plaintiffs.

The public blathering of men like Lerach, and the eagerness of anti-corporate zealots to believe it, is music to the ears of tort reformers. In fact, it has inspired legislation to force more disclosure by plaintiffs' lawyers and to reduce their fees. US Senator John Cornyn, a Republican from Texas, actually told Nocera that Lerach's statements persuaded him to file legislation to that effect.

Those targeted in the past by men like Lerach and Scruggs have not needed to conspire because the wounds inflicted on plaintiffs' bar are self-inflicted. As such, it is time for more plaintiffs' lawyers to speak out and to unequivocally separate themselves from this mangy pack lest they be vilified by association, and their own efforts to provide clients with the zealous advocacy that they deserve radically undermined as a result.

Conversely, if there was ever a time for the defense bar and its friends and clients to eschew ideology, that time is now. Hopefully, even the most impassioned tort reform advocates can see a larger danger in the present situation—a threat to the level playing field that justice demands—if the hard cases of Weiss and Lerach and Scruggs make bad law in Congress and in state legislatures nationwide.

—Larry Smith

Joe Nocera: In His Own Words

Joe Nocera, who wrote the *New Times* piece about the William Lerach verdict referred to above, has recently published *Good Guys and Bad Guys: Behind the Scenes with the Saints and Scoundrels of American Business*, a collection of his often penetrating business columns.

To get further insight into the ramifications of the Milberg Weiss (now called Milberg LLP) debacle and related matters, *Of Counsel* recently interviewed Nocera. Here's what he had to say.

Of Counsel: What do you think the lasting effects of the Lerach case and verdict will be in terms of the balance between the plaintiff and defense bars?

Joe Nocera: Well, it's not just Lerach. It's Lerach, and Mel Weiss [a name partner of Milberg Weiss who plead guilty to corruption charges], and Dickie Scruggs who is going to jail for five years, and another case in Kentucky [involving a plaintiff's attorney]. If it were just one guy, you could make the rogue-operator argument. But because there are a bunch of them and some are among the most famous plaintiffs' lawyers in the country, it really has given the enemies of the plaintiffs bar a weapon with which to box them around the head.

So you're seeing Republicans trying to make political hay, calling for investigations into the plaintiffs' bar. I think you might see some tightening of some rules. Of course, it's pretty clear that the Supreme Court is not all that sympathetic to plaintiffs' issues, in general. So the fact that these guys turn out to be crooked only strengthens that hand as well.

OC: Several plaintiffs' attorneys have come out and strongly denounced what Lerach and others were doing. Will their voices carry or will people dismiss that as looking out for their own interests?

JN: These things go in tides. Right now the excesses of the plaintiffs' bar are what everyone is shining a light on. Anything that plays into those excesses gets a lot of scrutiny, a lot of attention. At the moment, the corporate malfeasance, the Enron stuff, is at an ebb. Nobody's really focusing

on that. The next time there's a corporate scandal, the plaintiffs' bar will be in the driver's seat and the defense bar will be on the defensive.

OC: You know that you mentioned the Dickie Scruggs conviction. That case is different in a lot of ways, obviously because there's a judge involved. How significantly different is it from the whole mess at Milberg Weiss?

JN: The difference is that I truly don't think that many plaintiffs' lawyers are trying to bribe judges to get a higher fee. Whereas Lerach had, in effect, Potemkin plaintiffs on retainer just so he could run into court and file the first lawsuit. I suspect that there were other lawyers doing the same thing because the whole game then was to be the first in the courtroom and the way to do that was to have the first plaintiff. So I suspect that was more widespread. But that practice no longer exists. Now, instead, you have a big pension fund with lots of different stocks lined up so that you can run to the courtroom [on behalf of] pension funds instead of individuals.

OC: I talk to a lot of defense attorneys and many of them (they won't say this on the record) indicate that they like to lie low when it comes to tort reform because the more tort reform, the less work they have. What's the sense you get from the attorneys you talk to and write about?

JN: The thing is, it's not an attorney issue. Plaintiffs speak out against tort reform, and defense attorneys are in a different position because they work for corporations, and the corporations are the ones that will have to pay. This is a Corporate America versus plaintiffs' attorney issue. It's at the top of the list for corporate lobbies. But the Democrats control Congress so the efforts to hold hearings about the Milberg Weiss [situation] will not succeed. ■

—Steven T. Taylor

Playing to Win . . .

Cutting Through the Clutter of Litigation “Management”

Wars are caused by undefended wealth.

—Ernest Hemmingway

As the Associate General Counsel of a global corporation, I am besieged by sundry consultants all hoping—as their email, voice mail, cold call, and written correspondences promise—to help us manage our litigation burden for greater cost efficiency.

Meanwhile, the legal press almost daily features the latest wisdom on this subject, sometimes even using the example of a large chemical or manufacturing company just like ours. Some poor tree died so that I can read all about “seamless” but elaborately multilayered processes defined by convenient acronyms at every stage.

One is thankful for these explications of the otherwise inexplicable. Sometimes, though, I am sufficiently self-deceived to believe that the men and women responsible for the disposition of sizable litigation—sizable in both severity and volume—might still stand a chance of surviving, and even succeeding, without the programmatic new strategies that predictably drive down the pike every 20 minutes.

Conflict Avoidance

Since the ascendancy of the mass tort phenomenon (and the tobacco cases that unlevelled the playing field for decades), US businesses have been forced to deal with lengthy litigation driven by skyrocketing costs. While they ponder perplexing alternatives to presumably ease the cost burdens, it is now an instinct of corporate leaders to seek alternatives to legal action, making it go away in the present and hoping that it will not reappear in the future.

It’s the most commonplace “strategy,” yet the one guaranteed to incur long-term exposure and perpetually accelerating costs. Companies struggle with litigation on a case-by-case basis without any thought as to how their struggles

are perceived by the very people who bring these actions.

On the defense side, the guiding objective is to combat rising litigation costs and control the legal department budget. The idea is simple: Reduce costs by putting downward pressure on that budget. As resources are slashed, the managers can declare victory because the clients and, presumably, the shareholders will cast approving eyes in the general direction of the bottom line.

Another related approach is to impose rigid timelines. It is often an equally disastrous approach, as many companies have begun requiring that all new litigation be resolved or at least gotten off the desk of the managing attorney within a specified period. The direct effect is quicker settlements, which are usually much higher than they need to be.

Make no mistake: Timelines are music to the ears of plaintiffs’ lawyers, who naturally respond by filing more lawsuits that will be equally governed by internal pressures to settle.

Broader View

The solution must be based on a more comprehensive perspective and a persistent eye toward longer-term numbers. The first step toward such a solution is to figure out the TCL—the actual Total Cost of Litigation—on an ongoing basis. TCL reflects the total amount of all settlements, judgments, fines and penalties, attorney fees and expenses, discovery costs, and related litigation expense, minus reimbursements, indemnities, and recoveries.

Only when you actually know this number can you take decisive steps to reduce it.

This TCL should be included in a monthly briefing report from the litigation chief to senior management. By this means, everyone in the company who needs to stay up-to-date on litigation costs can do so. And let’s keep it

merciful; five or six pages in 12-point type should be more than enough to convey and explain the data. In fact, clients are disserved when they're overwhelmed with unnecessary data that beclouds the key points.

Understand the importance of TCL for the client as a component in corporate planning, and how any number of business operations can or cannot be expanded in light of such longer-term cost factors. At most companies, senior managers see only the daily cost fluctuations of daily litigation management. How can such numbers possibly assist senior managers in thinking about future acquisitions, geographical expansion, or new product lines?

At any given juncture, TCL as a guiding number will encourage another very happy result: a corporate resolve not to settle, but to fight. It is one thing to fight because you think that the case against you has no merit. Such motive is altogether commendable, but it is all to the better when that decision is backed up by data showing that it also makes more economic sense to fight rather than surrender.

Rules of Engagement

Once the decision is made—based on both the substance of the matter and the long-term economic effect—to fight, fight like you mean it. Be efficient and aggressive. Do not compartmentalize litigation but lobby to have your litigation strategy incorporated as an integral component of corporate strategy. In more instances than might be expected, senior business leaders will be most receptive to a decisive approach geared to long-term cost reduction versus daily bandages.

Keep a watchful eye on plaintiffs' counsel, not only as your adversaries but also as potential allies. TCL is directly affected by how the company uses its own resources to protect its rights and capture its assets. As your advocates in business-to-business disputes, plaintiffs' lawyers are highly attractive because they are flexible on fee arrangements, they instinctively think in terms of shared risk, and, depending on the arrangement, their own money is at risk.

By employing top plaintiffs' lawyers in our cases, combined with refusing to automatically

settle cases filed against us, LyondellBassell has reduced TCL by a stunning 80 percent. A TCL of "0" is usually unheard of, but we have proven that it is obtainable. To be sure, profit-centered litigation departments are not pipe dreams and the LyondellBassell example does not have to be idiosyncratic.

In dealing with all outside counsel, seek and establish on their part a palpable investment in, and irreducible responsibility for, the well being of the company. Don't nickel-and-dime them. Don't rate-shop for marginal savings. Flat fee arrangements are ideal as they mitigate the day-to-day grubbing that comes with billable hours and the sense of us-versus-them that hourly fees engender.

Examine each lawsuit on its merits and always measure what you see against TCL. A stubborn refusal to settle cases may increase internal costs at the outset, but again, keep your eye on the prize, which is a marked decrease in costs otherwise swollen by one settlement after another.

Remember, too, that the greatest economic rewards cannot be measured except by comparing litigation volume in prior years—if in those years the company was simply rolling over—to current caseloads. The good news for aggressive plaintiffs' lawyers is that there will always be greener fields to ravage once they see how much they have to invest, and the risk that they have to run, in continuing to target your client.

Bottom Line

Finally, you are a corporate leader, not just a lawyer on salary. As such, you must defend your client's core values, which are at stake in all the litigation that crosses your desk. We've talked about the economic justification for taking lawsuits to court. At the same time, your instinct should be to fight anyway, if you think that you're right and opposing counsel is simply flying the Jolly Roger.

Remember all the imponderables at stake. Everyone in the company has a stake in the case when the corporation is being accused of something for which it is not responsible or when its reputation is being assailed. Not just shareholders; you're drawing a line in the sand on behalf of

thousands of managers, employees, and anyone else who has chosen to be a part of the corporation that you represent.

It is indeed this moral dimension of “litigation management” that makes it so maddening when US companies buckle under. No wonder outside counsel seems slack and cynical or that these lawyers-for-hire are frequently disappointing their clients. By their lights, how much should they really care when the clients don’t seem to?

No wonder the public distrusts corporations. When they are passive about defending lawsuits, they are passive about defending their own brands and reputations. The moral result is a quick-buck culture in which the quick buck that comes from the unconscionable settlement of lawsuits is no better than the quick buck that comes from selling lousy products and services.

The moral antidote is a culture based on winning, and a strategy to vindicate the honest principles that inform successful business enterprises.

Winning cultures celebrate victors and victories. We should reward successful litigation

just as we reward public safety initiatives or environmental achievements. At the same time, there need be no scapegoats when cases go south. Losing is a learning experience under any circumstances. As one criminal attorney once quipped, “If you ain’t losing, you ain’t playing.” At LyondellBassell, we have seen the effect of this approach—of rewarding victory and learning from defeat—in the quality and commitment of our outside counsel. They are excited about working with us, and the results show it. I am proud of them.

If history proves anything, it proves that peace must be won, not bought. On the other hand, you can certainly buy war. Just spend a few bucks on a bunch of fancy litigation matrices while investing constantly in the stopgaps of quick settlement.

The alternative is to find firm ground and stand there. It’s never easy, but it is simple. ■

—Joseph F. Speelman

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From the LAB . . .

Deciding to Downsize and Managing the Tough Process Ahead

Of Counsel is proud to present the first of a regular series of articles based on the work of the Managing Partner Leadership Advisory Board (LAB).

LAB was created by international law practice management consultant Patrick J. McKenna and Baker & Daniels' Chair Emeritus Brian K. Burke to offer recently appointed managing partners a forum in which to pose questions about issues of leadership importance. LAB responses derive from its members' many years' experience as law firm leaders.

Along with McKenna and Burke, the LAB includes the following current and former law firm leaders: Angelo Arcadipane (Dickstein Shapiro LLP); John Bouma (Snell & Wilmer LLP); Ben F. Johnson, III (Alston & Bird LLP); John R. Sapp (Michael Best & Friedrich LLP); Keith B. Simmons (Bass Berry & Sims PLC); William J. Strickland (McGuire Woods LLP); and Harry P. Trueheart, III (Nixon Peabody LLP).

QUESTION

Over the past three months our firm has responded to the current economic downturn by taking action on our collections, ratcheting up our marketing efforts, and shifting under-employed attorneys to different practice areas. Nevertheless, by the end of May, with billings down dramatically and our juniors costing us \$160,000 in salaries alone, we have decided that we cannot passively ride out these difficulties. We need to make some hard decisions.

Therefore, in late June, we quietly began de-equitizing some of our under-productive partners and reluctantly announcing layoffs, of both associates and staff. We are a firm that has never had to take this kind of painful action in the past, and I fully expect that it will take its toll on firm morale and productivity.

How can I help people adjust to these new realities and get things back on track?

RESPONSE

You are not the first law firm to undergo this ordeal and you certainly won't be the last. We suggest that you pause for just a moment before you proceed to downsize

Associate and Staff Issues

While we are not sure how many associates may be involved, many firms facing hard times have found that, by accelerating performance reviews, shortening transition periods, and providing out-placement services in appropriate circumstances, they have been able to manage associate head-count without having to initiate layoffs.

This multifaceted process may cost a little more, but it (1) safeguards against a trashing in the blogs, which hurts morale and future recruiting; (2) avoids the "am I next?" syndrome among associates; (3) corrects perceptions that, since the firm has no loyalty, neither should they; and (4) minimizes the chance of making possible lifetime enemies among lawyers who may eventually end up in-house at some distinguished corporation.

If you look at your annual attrition, you will see that (as in any firm of substantial size) it is more an issue of timing than numbers. After all, a fair number of associates will leave in any event. If you can accelerate that attrition, you protect against a "layoff environment." Controlled hiring is the other side of this equation as it is essential to simultaneously reduce lateral recruitment.

The bottom line is that layoffs should be undertaken only as an absolute last resort.

Like associates, staff attrition can be managed less drastically by cutting off new hires, reassigning employees, and accelerating performance reviews. Here, too, the number of direct layoffs needed may not be as great as anticipated nor justify publicly conspicuous action.

Partnership and De-Equitization Issues

Dealing with downsizing partners is more complex. De-equitization may be somewhat controversial but it is a fact of life in the market these days.

The argument against it is: Why keep disappointed and demoralized partners around the firm? Their presence can only be a negative one. Also, salaried partners may be too expensive for the work that they are doing anyway and therefore unprofitable or not sufficiently profitable even in their reduced status.

The arguments for de-equitization are numerous. For example, non-equity slots better suit partners who are “role players.” They provide a more “honest” recognition of contributions. They allow retention of talented lawyers who are already integrated into important client relationships, and so forth.

In any event, a lot of firms are going this route, so someone must think that it works. What de-equitization does not do, in and of itself, is make your firm more profitable. De-equitization may facilitate reallocation of income, but that is a separate undertaking. A recession can be a catalyst for a de-equitization program, but justifying the program around a single event such as an economic downturn might (unless the firm is in extreme circumstances) send a negative message to the partnership, depending on the firm’s culture.

Most firms encourage partners to take an ownership interest and expect them to roll with the ups and downs. Most firms look at performance over the medium term at least and take a more subjective perspective as well. Tying status changes to short-term economic events can send a very different, and confusing, message about the very meaning and terms of partnership itself.

A Potential Firestorm

If drastic action is required for the financial health of your firm and you are absolutely going to have to downsize, you must assume that the situation will become public either externally or internally, or both, and be prepared. It will be very difficult to do it quietly.

You should have a detailed plan to execute the layoffs or de-equitization and to manage internal and external public relations. You need to be very candid with your partners and employees. It is a good idea to get it over with as quickly as possible. Don’t let it drag on and die a death by a thousand lashes.

The question is then how best to actually do it.

Some senior officer (yourself as Managing Partner, your Personnel Director, a Practice Group Leader, etc.) should meet with each individual, preferably in or near their own office or workplace (which is less intimidating). In all instances, the individuals who are being laid off or choose to resign should be offered professional transition assistance and given a generous severance package (including extended health care).

While these severance packages may prove costly, such an approach is both financially smart and will save a lot of pain and suffering.

In the case of de-equalized partners, one approach that can work well is to offer the partner the option to resign with generous severance. In this way, the partner can market himself or herself as an equity partner. Depending on firm culture, you may also wish to offer partners certain office conveniences to facilitate their transition, such as work space, use of a secretary, computer, etc.

Caution must be exercised in this regard, however, as it may be disruptive in any culture to have disgruntled former equity partners around the office for too long.

Survivor Syndrome

Downsizing is a very emotional experience for *everyone* involved. On the partner end of the equation, the action raises the performance bar for the survivors. Some of them can be expected to now feel threatened in light of their own performance levels.

On the associate side, there is the belief that the lawyers and employees who are not laid off will feel relieved and perhaps even grateful to still have their jobs. While that may be true in some cases, people are just as likely to go into shock when cutbacks result in the severing of long-term

working relationships. They experience a deep sense of personal loss when friends leave and positions are eliminated. It feels very much like a death in the family, and the situation demands compassion and some time for mourning and closure.

Many survivors freeze like deer in the headlights. Their familiar patterns are broken and the momentum of their comfortable daily routines is interrupted. Not knowing what to do, people wait to see what happens. They wait for leadership; for someone to guide them. You need to support this human need to cope with shock and fear, providing a sense of optimism, direction, and mission that will ease them through the often painful transition from any layoffs.

Moving On

Eventually, of course, it is necessary to move on. As managing partner, your role is to address the emotional and practical fallout so that the firm can constructively go forward.

Here are some points to consider:

- Your decisions as to which lawyers and staff to downsize/de-equitize should be made quickly, as the plan is sure to leak soon, and implemented within a few days. To every extent possible, cut once and cut deep.
- Be painfully honest about your firm's realities and your future expectations. Don't say "the worst is behind us" or "there should be no further layoffs" unless you are absolutely sure that is the case. If your people relax their guard only to get more shocking news later, they will be much slower to trust any of your future assertions.

- Communicate, communicate, and then communicate some more. If people don't hear anything, they fear the news is so bad that no one wants to tell them. They begin to make up things and the rumor mill takes over. So bore them to tears with as much detail as often as possible. In your outreach, talk about pulling together through the transitional hard times, describe activities to keep building the business, lay out plans for the future, and identify positive developments that will help move people past the event.
- Exude optimism. Don't deny the trauma and pain occurring, but find the bright spots and emphasize those rather than dwelling on the losses. Minimize criticism and fault-finding. Celebrate every success, no matter how minor. Create a sense that "we are all in this together and need each other to make it." Acknowledge that everyone's contribution is essential and their input is valued. Do everything you can to build teamwork.
- Develop a sense for the firm's future that draws people together. Specifics can be refined as you go along, but it is essential that people have a clear and understandable picture of where the firm is going. It is also important that they see something in it for themselves.
- Invest time and effort coaching individual partners and encouraging them to work on building and marketing their skills.

In summary, if you absolutely must downsize, try to do it once, do it quickly, and with abundant sensitivity and generosity.

No pink slips. No midnight emails. ■

Contact the Managing Partner Leadership Advisory Board (LAB) by emailing Patrick McKenna at Patrick.mckenna@attglobal.net.

True Practice Management . . .

A Recipe for Ongoing Strategic Development

The corporate world spends a lot of time managing brands. Sometimes they may get a bit carried away with it, but the concept of thinking about which areas of your business should be accentuated certainly does make sense. Indeed, it makes particular sense in comparison to the way many law firms handle the allocation of strategic resources, where the group that screams the loudest gets the attention.

At many law firms it is politically incorrect to say that any practice area is of greater value to the firm than another. But the truth is that there are some practices that, by the nature of their position in the marketplace and how they interact with client businesses, deserve a greater allocation of resources and attention than others.

For starters, there are three distinct types of practices. The first, and to my mind the most valuable, are the Feeder practices. These are practices that, by the nature of what they do and the level in the client organizations at which they work, provide the greatest potential of feeding work to other practice areas.

A second type is Free Standing practices. These practices attract their own clients but rarely spin off significant work for other practice areas.

The third type is Dependent practices. As the name implies, these practices, without a strongly dominant competitive position, are unlikely to attract much business on their own and, therefore, depend on Feeder practices to provide their work.

Feeder Practices

As noted, Feeder practices are by their nature in a position to generate more work for the firm. Feeder practices typically work directly with the board of directors or the owner of a business, or at least, they are intimates at the General Counsel level. They also tend to be practices in which the business objective of the legal activity is to further the client's strategic objectives rather than to simply remediate a legal problem.

The king of Feeder practices is corporate, both at a transactional and governance level. In the transactional practice, corporate lawyers deal with issues that spin off work to almost every other practice group. Equally important, a successful corporate practice is likely to consistently fill plates to maximize utilization.

For example, we worked with a firm that had a strong corporate relationship with a large closely held company. "Eli" was the lead corporate partner with the client and also sat on the client's board of directors. Every time a project was mentioned at a board meeting or during any other communication with the client, Eli would write the subject on a file folder and toss it on the couch in his office. When associates were short on work, they were advised to "work Eli's couch" where they could always find something in their area of practice to absorb their time.

Every practice offers the opportunity to cross-sell another practice to a client. But Feeder practices go beyond cross-selling in their capacity to morph a project from one discipline into another. It is a rare corporate transaction that does not require some attention to the client's employment contracts, pension plans, environmental liabilities, tax concerns, real estate holdings, pending litigation, and, for that matter, almost every other area of practice.

There's a hierarchy of Feeder practices, every one of which probably has some feeder opportunities. I believe that the top Feeder practices are (in rough order of the value of the work spun off): corporate M&A, corporate governance, real estate transactional, health care, corporate securities, bankruptcy (debtor), and IP transactional.

Both the Feeder and the Fed must be primed to make the collaborative dynamic pay off. Most important, the responsible partner must be constantly on the lookout for feeder opportunities. For example, transactional attorneys may be able to fit a boilerplate environmental clause into a purchase agreement on their own. However, by not involving an environmental lawyer, they

underestimate the value of the intellectual capital invested in that clause and miss the insight of an environmental attorney who can also point out several other issues that the client should consider. In other words, the spin-off work should itself lead to more spin-off work.

At the same time, the lawyer who receives the Feeder work must be sufficiently aggressive to present to the client other observed problems or needs rather than simply performing the task assigned. Again, each feed should leverages more feed.

Free Standing Practices

Typically, these Free Standing practices:

- Are quite self-reliant and use little of the firm's resources (library, IT, marketing, etc.);
- Have little interaction with the rest of the firm in terms of exchanging work;
- Are sometimes housed separately as subsidiary operations;
- May involve fee earners who are not lawyers;
- Are sometimes controversial and viewed as being at cross purposes with the rest of the firm's practices; and
- Sometimes bill on a different basis from the rest of the firm

The quintessential high-end Free Standing practice is government affairs. Typically, the lobbying practice has little to do with the rest of the firm, and in fact, some of its highest fee earners may not even be attorneys.

Government affairs is probably the practice that is most frequently isolated as a separate business organization (often as a means of sharing profits with non-lawyer fee earners). It is among the most controversial of practices within law firms, both because of the general distrust in which lobbyists are held and because of its possible representation of unpopular business interests. However, any controversial aspects of the practice are usually mitigated by the immense profitability of many government affairs practices.

Other Free Standing practices include specialized regulatory practices, international trade, plaintiff's personal injury, domestic relations,

sports and entertainment law, and white-collar crime defense.

Interestingly, there are other groups of Free Standing practices that operate at a much lower level of profitability and are highly commoditized. As work becomes more price-sensitive, they often take on many of the characteristics of a Free Standing practice to the extent that they use an exclusive group of people within the firm, exchange very little work with other practices, are also controversial within the firm, and are often compartmentalized. Examples include insurance defense, bank loan documentation, individual tax return preparation, and residential real estate closings.

Dependent Practices

The practices that are the beneficiaries of the Feeder practices are Dependent practices incapable of generating sufficient quantities of their own work. At the same time, these practices are rarely able to spin off work to other practices.

Occasionally we see a Dependent practice transform itself to Free Standing. For example, at most firms, employee benefits is the ultimate Dependent practice. But a few firms have been able to build reasonably self-sustaining ERISA practices where the bulk of the group's work comes directly from its own clients.

In such situations, it is almost always the case that the practice has achieved a level of dominance in its marketplace. In other words, the combination of its critical mass, name recognition, individual marquee lawyer brands, and client base permits them to attract a volume of work on their own.

Tax and environmental law are other examples of Dependent practices, but the most dependent of all is general commercial litigation, and unless a firm is able to build a dominant litigation practice, it's going to get more dependent. On the whole, commercial litigation work at general practice firms comes from three sources: referrals from Feeder practices within the firm, work generated directly from the client due to the firm's reputation or aggressive marketing, and work referred from other law firms outside the specialized marketplace.

However, the difficulty is that, unless a litigation practice can differentiate itself based on its market dominance or special expertise, the work that comes directly from clients goes to dominant firms. And, because there are so few cases going to trial these days, referrals from firms outside the marketplace have dramatically decreased. (More often now, the lawyers at those firms would rather get on a plane and try the cases themselves.) As a result, to maintain a strong and viable litigation capability, it is essential that a firm's corporate practice refer a large volume of work.

Unfortunately, at many general practice firms the size of the firm's Feeder practices are declining in proportion to the size of the firm's litigation practice. In the early 1990s it was typical for a firm to have a mix of 60 percent transactional and 40 percent litigation. However, the consolidation of clients, the movement of sophisticated transactional work to capital market cities, and the reduction of the number of transactional lawyers during each economic downturn have led us to a reversal of this proportion.

Indeed, many firms are now substantially more dependent on their litigation practices for ongoing revenue streams without maintaining the transactional practices to create the Feeder work. The result is significant under-utilization (low billable hours) and the acceptance of increasing amounts of highly price-sensitive work.

Strategic Implications

So what does it all mean for general practice law firms? Consider a few implicit choices that need to be made.

1. If a firm is contemplating expanding the number of lawyers in its commercial litigation practice through an acquisition or a merger, it ought to consider the source of future

litigation work. Unless the firm is growing its Feeder practices proportionately to the number of litigators, growing the litigation practice may yield a short-term source of cash flow but is likely to be a long-term disaster.

2. If a firm is already in a position where its Dependent practices outweigh the volume of work available from Feeder practices, it has a couple of strategic choices. It may identify areas in which these Dependent practices are close to having a dominant position and where the firm can reasonably expect to generate a significant volume of work directly from clients and then focus its resources in these areas. The alternative is to seek a merger with a firm that has a sustainable cluster of Feeder practices.
3. Building an outlier practice, like insurance defense litigation, into a Free Standing practice is a tempting option to fill plates with billable hours. The issue, however, is the impact on Feeder Practices that may offset any increase in utilization, that is, don't kill the firm's brand with incompatible practice growth.
4. Build Dependent practices with the objective of supporting Feeder practices. In other words, figure out what the Feeder practices need from a Dependent practice and focus on providing those resources rather than trying to develop direct client relationships.

The bottom line: Understand the nature and role of each practice and build on that vision. ■

—Ed Wesemann

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Women Rainmakers . . .

What's Different, What Isn't?

Selling is all about building relationships, and as you may have noticed, the way that women relate to people often differs from the way that men do. So it's not surprising that, as the number of female decision-makers has increased in both corporations and law firms, there has been a corresponding rise in interest in building on female relationships as a business development strategy.

In 2006, Latham & Watkins organized a group called Women Enriching Business (WEB) to "concentrate on business development issues and opportunities particularly relevant to women." WEB has extended Latham's range of networking events beyond the traditional golf courses and baseball games to jewelry stores, florists, and cooking schools.

While Latham partner Erica Steinberger stresses that WEB events are not just for women, she also points out that positioning them can be tricky because "there's such a fine line between events that appeal to women and events that some may be insulted by. I have one client that I go shopping with to our favorite shoe store. On her last trip to New York, she bought seven pairs, and we had the whole store helping. We had a blast. But I have other female clients who would be offended if I suggested that sort of afternoon. You've got to think about who the client is, and what she or he would really enjoy doing."

Steinberger offers another example of a male client, a managing director at an international investment bank, who loves to cook. Steinberger invited that client and his wife to a one-night course at a cooking school. "You should do this for my firm instead of those big expensive dinners you offer us," he advised after a few crucial pointers on perfecting ravioli.

A Touch of Class

WEB also recently organized a cocktail reception at an upscale jewelry store near Latham's Paris office. More than 200 clients, contacts, and lawyers found it an unusually attractive place to

meet, chat, and build relationships. With most networking events, only a small percentage of the people who are invited actually attend. In this case, the unusual setting led to a very high percentage of acceptances.

One client was so impressed that she suggested that Latham lawyers meet with a women's group at her company to discuss the possibility of jointly hosting events. To date, WEB has formed strategic partnerships with more than a dozen groups, including women's initiatives at consulting firms, the Financial Women's Association, the National Association of Women Judges, and the National Association of Women Lawyers. There was also a "flavors of fall" cooking demonstration in San Francisco, a flower-arranging event in Chicago, and a jewelry night in London.

In addition, for the past two years Latham has co-sponsored *Fortune* magazine's "Most Powerful Women Summit," an invitation-only event for 300 top female business leaders. Last year's conference included such panelists as Anne Mulcahy (Chairman and CEO of Xerox), Meg Whitman (President and CEO of eBay), Julia Stewart (Chairman and CEO of IHOP), writer Nora Ephron, and CBS News correspondent Lesley Stahl. There were many opportunities for relaxed networking, including spa treatments, "yoga by the sea," and a tennis clinic conducted by Billie Jean King.

In addition to networking events, WEB has started several programs to provide women attorneys with business development training. The first was a multi-city tour offering a two-hour workshop called "Branding Yourself—Mastering the Style of Success." More recently, the group has been working with my company coaching key partners to bring in new business more efficiently.

Real Problems, Real Solutions

While many law firms have experimented with women's initiatives, only a few have had this type of success. When *BusinessWeek* wrote last year

about “What Works in Women’s Networks” (6/18/07, p.58), the article began by noting that most efforts fail. “Corporate women’s networks frequently get a bad rap—for good reason. The groups frequently toil on the fringes, hosting ‘lunch and learns’ and book clubs that rarely provide the skills or exposure women need to rise in the ranks.”

The article cited three key success factors:

1. Tackle real business problems.
2. Get customers in on the act.
3. Bridge the gender divide (that is, get men involved as well).

Latham’s program does all three. It focuses on the real business problem of generating new business; works with customers in its networking events; and invites men to participate, both lawyers and clients.

Pillars of Success

When discussing the success of the WEB program, and others like it, the question is raised: “What’s different for women rainmakers?” The best data comes from the groundbreaking research in this area, “LSSO’s Women Lawyers Study: Sales and Business Development Issues,” which was directed by Catherine Alman MacDonagh of the Legal Sales and Service Organization (LSSO) and analyzed by Marcie Borgal Shunk of the BTI Consulting Group.

For the first time, based on a survey of 426 women lawyers (published in *The Complete Lawyer*), “four guiding principles of success” for female rainmakers are clearly identified:

1. Have the right attitude: “a certain optimism, an element of persistence, and an ability to be resilient.”
2. Take the lead: Women lawyers with leadership positions, both inside and outside the firm, generated more new business.
3. Invest time wisely: “Every hour dedicated weekly to developing existing clients and attracting new business yields female attorneys nearly \$30,000 in additional origination revenue, regardless of category (equity partner, non-equity partner, counsel or senior associate).”

4. Know the power of client service: Women lawyers who agreed with the statement “client service has no impact” on new business reported far lower annual originations (less than \$600,000) than those who believed that “client service differentiates” (more than \$800,000).

Power of Positive Thinking

To me, the most interesting principle is the first one: the attitudes of successful female rainmakers, especially their optimism. It’s easy to see why optimism is important. Would you hire a lawyer who seemed unsure of herself?

A few years ago, I wrote a book called *AdverSelling* that summarized key principles used by sales professionals. Chapter 7, titled “Be optimistic and credible,” opened with a quote from Teddy Roosevelt: “Whenever you are asked if you can do a job, tell ‘em, ‘Certainly I can!’ Then get busy and find out how to do it.”

Many lawyers, both female and male, find pessimism easier than optimism, perhaps because their job often requires anticipating all the things that can go wrong. But researchers have consistently found that, in sales, optimism is linked to success.

In the 1980s, for example, Metropolitan Life Insurance commissioned psychologist Martin Seligman to identify the characteristics of successful insurance agents. At that time, half the agents that Met Life hired quit in their first 12 months, and 80 percent left within four years.

The researchers expected to find that the ones who quit sold less insurance right from the start. In fact, they found that, in the first year, sales were quite similar for the agents who later quit and for those who stayed.

What was different was the way in which they interpreted their failures.

The sales agents who were successful in the long term were consistently optimistic. When they lost a sale, they never said it was because “selling life insurance is hard” or “I’m no good at it.” Instead, every unsuccessful sale was an exception: “that guy was too busy” or “they

just happened to be eating when I called.” The salespeople who lasted were always convinced that success was just around the corner. And so it was.

Last fall, when I was working with Latham’s WEB group, several female rainmakers raised the idea that this type of self-confidence, even arrogance, seems to come easier to men than to women. For many reasons, I would prefer not to speculate about male/female differences. But I am looking forward to the day when LSSO publishes follow-up research on male/female differences, and whether firms are perceived as doing enough to support female attorneys. (MacDonagh is currently leading the design of LSSO’s next women

lawyers’ survey, which is expected to launch this summer.)

In the meantime, are business development tactics likely to become more gender-specific? It’s too early to tell, but one thing seems certain: The influence of female decision-makers is continuing to grow in corporate America, and so too is the influence of female rainmakers at law firms. ■

—Jim Hassett

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Data Security

Continued from page 2

Wugmeister has seen a significant transformation in the privacy field since she joined MoFo 13 years ago as an employment lawyer. “There used to be only pockets where people thought about privacy issues,” she says. “Employment lawyers dealt with issues regarding people’s medical information, which had to be separate from their regular personnel file. But lately, of course, we’ve seen a dramatic change.”

Much of this shift is a result of the globalization of the economy, coupled with jurisdictional differences in the law. “I got involved in this area from a global perspective,” Wugmeister says. “Large international organizations were trying to centralize, at first, their human resource data. At the time, a lot of the US companies would say, ‘I’ll just take my tech policy and roll that out globally.’ But we had to tell them that they couldn’t do that because the various laws in these different countries forbid you from doing exactly what your tech-use policy allows you to do.”

Privacy law outside the United States tends to allow individuals the right to be told what information is being collected about them, how it will be used, and with whom it will be shared. People have notice, consent, and access rights. That’s especially true within the European Union, where many of Morrison & Foerster’s clients operate.

“In the EU, people look at privacy as a fundamental human right,” Wugmeister says. “That comes from the historic misuse of information by the fascistic governments during World War II. Here in the United States, we haven’t held this view that it’s a fundamental right”

But with all the new state privacy legislation, that’s beginning to change. What’s more, because companies are required, under these state statutes, to disclose any privacy compromises, there’s more media attention being paid to breaches. Consequently, companies have boosted their data security budgets.

“You read about breaches like the one at TJX more often,” Wugmeister says. “But it’s not that

companies are less secure now; they just have to tell you when it does happen. So because of these laws, the increase in technology and data security spending has been dramatic. Companies don’t want to end up on the front page of the *New York Times*.”

How do MoFo lawyers help their clients comply with the cornucopia of regulations both here and abroad? One way, international in scope, is to help global companies upgrade their IT systems to conform with security requirements in all the countries in which they operate. That’s increasingly important because it’s often too expensive and too confusing for a company to have multiple IT systems.

“A question that a client asked me this week,” Wugmeister explains, “which is typical, was: ‘We’re in many different countries. We’re trying to have one global IT infrastructure. How do I know that the data security requirements that I’m putting into my IT systems are sufficient on a global basis? So tell me what are my obligations in Spain, Japan, Argentina, and the US? How do they compare and what do I need to worry about?’”

That’s a tall order. Wugmeister and her team answer that query by offering comparative analyses of the laws in those countries and then by making recommendations, often working with outside IT specialists, as to how to upgrade the client’s technology to comply with the various security obligations.

From DC to LA

Seattle-based Davis Wright Tremaine is another firm that’s anticipating adding attorneys to handle its clients’ security and privacy concerns. Currently, some 25 lawyers work with these issues in a variety of industries. The firm, which has gained a stellar privacy-law reputation, in part by successfully representing the ACLU in a case in Michigan and Amazon.com in a Wisconsin case, serves national cable companies in its Washington, DC, office, financial institutions in New York, telecom and wireless corporations in San Francisco, and health-care facilities in Seattle, Portland, and Los Angeles.

The firm’s health-care lawyers have long been busy with privacy issues because, like the financial

services industry, health-care organizations have had to comply with tight data security standards for several years. For example, Congress passed the Gramm-Leach-Bliley Act in 1999, which regulates the financial-services sector, and the Health Insurance Portability and Accountability Act in 2000 for the health-care industry. Both contain privacy-protection components.

“The health-care law generally has been much farther along in addressing the breach and data security issues than other areas of industry,” says Bruce Johnson, head of Davis Wright’s privacy and security law group. “Our health-care lawyers are busy, and we expect to hire more attorneys in this area. Also, when we get a new administration that may be pushing for a national health-care system, this will come to the fore in a big way. It already is and will continue to be a major growth area.”

Like Morrison & Foerster, Powell Goldstein, and other firms active in privacy law, Davis Wright privacy attorneys are seeing an increased workload as a result of the enactment of state breach notification laws. “Because these laws have come up so quickly from all over the United States,” Johnson says, “more and more clients want to know how and when to anticipate these types of problems and whether they should institute additional procedures to make sure that they have dealt adequately with information security and encryption.”

To meet the rising client needs, Johnson will be looking for tech-savvy attorneys who understand digital systems, how the Internet works, how data moves, just how fast it can be transferred, and how easily it can disappear. Also, the lawyers he wants to recruit, he says, must be able to deal with the clients at the technical level, not just the general counsel level.

Johnson also seeks talent who fully realize the extent to which privacy law overlaps many different practice areas, an understanding that’s not always easy to find. “I see a lack of significant recognition in the marketplace that this is a multi-disciplinary practice area,” he says. “Therefore, people will come in as health-care lawyers and privacy is tagged onto it or finance attorneys and privacy may be part of that under Gramm-Leach-Bliley, but the overarching privacy representation is something that I think is still not being taught as a concept.”

Having said that, he adds, that he’s got his eye on a group of laterals who are both very interested to learn how multi-faceted this area is and want to get involved in this type of representation. As of this writing, he has not yet recruited this group.

In terms of generating new clients, Johnson and his team use many of the typical marketing techniques—writing, speaking, and blogging—but more and more they’re finding that privacy audits are both serving clients well and opening doors for additional work. During these audits, an attorney visits clients to explore what types of security systems are in place, what type of data they keep, what promises they’ve made, and where they send the data—all of this to find out what the privacy risks are.

“It’s a useful tool to be able to provide a good solid audit of clients’ needs,” he says. “Clearly, if you point out areas of risk and the client sees you as someone who is knowledgeable, he or she will be interested in retaining you.”

“An Ounce of Prevention”

At Powell Goldstein, Killingsworth says that the privacy practice is divided into two. The first is the compliance end, prophylactic in nature in that attorneys help clients understand their legal obligations and assist them in creating information security, developing policies, and training their employees—all the things that prevent information from leaking.

The other part is damage control and remediation, which come after a privacy breach has occurred. Unfortunately, Killingsworth says, too often clients ask for help at this stage. “Ideally, what you’d like to see is a lot of legal work on the compliance side and a smaller amount on the damage control,” he explains. “It doesn’t work that way. People are reluctant to pony up and face these issues with lawyers on the front end.

“So there’s a data breach, people get embarrassed, they have to notify thousands of consumers, and then they come to the lawyers and say, ‘Gosh, we probably need a better program for dealing with this.’ As a result, you do the compliance side on the back end.”

While prudent corporate C-Suite leaders and general counsel learn from the increasing reports of security breaches and take prophylactic measures, many still hold off spending time and money for prevention, maintaining an it-won't-happen-to-us approach.

“People listen and they nod, but when it comes to spending money, this often doesn't rise to level

of all the other critical things that are fighting for the budget, especially in a down economy,” Killingsworth says. “It's hard to make people feel that they have to do it today, with today's budget. When they have a compliance failure and it costs them millions of dollars, then a [prevention] budget appears.” ■

—Steven T. Taylor

Of Counsel Profile

Continued from page 24

of oncologists, the challenges posed by budget constraints, and what he looks for and what annoys him about outside counsel. What follows is that excerpted interview.

Of Counsel: As you know, we always start these interviews the same way: Why did you become a lawyer?

Steve Conklin: That's the open-ended question, isn't it? [chuckles] A few events led to my going to law school and becoming a lawyer. I was working for Blue Cross of California after I graduated from college. For my job there, I dealt with a lot of contracts between major corporations and the national Blue Cross Blue Shield Association. I also dealt a little with our in-house lawyers. But by and large, I handled most of these contracts myself and thought that I could use some training in this regard.

Without thinking about it much more than that, I enrolled at San Diego State University to try to get my MBA. The classes in a lot of the California schools are, as it's called, "impacted," which means that they have more students enrolled than they have slots for students in the classroom. There were 65 students for only 30 slots, and I thought, "This is ridiculous."

So I went to the University of San Diego to look at its MBA program and happened to pass by the law school. I found that the price of law school was about the price for an MBA. And I had thought about that as a potential career alternative. I realized that I was doing stuff that involved contracts and that I liked it. So I decided to take the LSAT and see if I could get in. I took the test, got into the University of San Diego Law School, and there you have it.

OC: What was your first gig out of law school?

SC: I did employment litigation with [Portland-based] Crispin & Associates and later went to Cooney & Crew [in Lake Oswego, OR]. While in

private practice, I became aware of this opportunity at OHSU and the job description was, well, me. It was the exact description of the kind of lawyer I was and the kind of law that I was practicing, which was largely health-care regulatory. So much of what I did involved a couple specific health-care regulations, and OHSU wanted a lawyer who was knowledgeable about these regulations.

In addition, I had worked with an OHSU physician in doing some joint educational programs for the Oregon Medical Association. Because I worked closely with him, I felt like I got to know OHSU a little bit. When I heard about the job opening, in 2004, I asked the physician if he thought that it would interest me, and he said, "Get your resume over there right now."

The Deal Helps Fight Cancer

OC: So in the nearly four years that you've been at OHSU, what's been the matter or case that has been a highlight for you? To use a baseball metaphor, what's your SportsCenter "Web Gem" highlight?

SC: [Pauses] I'm not sure that I've made it onto the highlight reel [laughs]. You know, we just purchased the assets of a very well-regarded local oncology group. It's been a four-month process and negotiation, but we just finished it; we shook hands over it earlier this week. It may seem like a garden-variety deal for transactional attorneys, but it's the first time that OHSU has ever created an arrangement with a large community of physicians like this. It's significant in that it's ground-breaking [for the university].

OC: And you played a major role in this, didn't you?

SC: Yes, I was the counsel for OHSU for the transaction, so I was involved every step of the way, every meeting.

OC: Before we start talking about your experience at OHSU in dealing with outside counsel, what gives you satisfaction as an attorney at the university, and, conversely, what's a pain in the neck; what makes you grimace?

SC: It gets to be kind of cliché. That is, I suppose that when readers read or people hear

folks talk about “the mission” of a health-care organization like OHSU, they might roll their eyes and say, “Yeah, right.” But I take it very seriously, and I think that the other people here at OHSU do as well, including those here in the legal department. We recognize that this organization provides state-of-the-art health care to a lot of people here in Oregon, a lot of people who are critically ill, those who have complex diseases. It can be very rewarding to be part of the team—sometimes in a fairly peripheral or ancillary role and sometimes very directly—that helps patients and their circumstances.

There are times when there is a challenging patient circumstance, maybe because of family dynamics, maybe because of a regulatory hurdle. If you’re able to handle it and make somebody feel better, emotionally, physically, or both, that’s a cool thing to do.

You know the asset purchase that I just referred to is one way to view the transaction. The other is: Now we join forces with very accomplished and respected oncologists who will be key members at OHSU. Who knows, maybe we helped create a synergy that can knock off some of the cancer to-dos that we face. Everyone around here is excited, not from a transactional standpoint, but because we have oncologists on our team who will help us tackle cancer.

OC: That’s a great answer. Now, what do you grind your teeth about?

SC: Ahhhh, well, quite frankly, what I grind my teeth about is literally what keeps me busy, what keeps me in a job. And that is the complexity of the regulations that govern health care. Often, they’re so difficult to understand for health-care practitioners, and even for that matter most legal practitioners, that sometimes this regulatory labyrinth gets in the way of doing things.

Facing Budget Constraints

OC: On the front page of *The Oregonian* this week there was a big story about OHSU’s budget and how it’s tighter these days. Does that put pressure on you and the rest of the legal team to find ways to trim outside legal costs?

SC: Yes, there’s no question about it. Without a doubt that creates a mandate that we spend less, and part of our spending includes outside counsel fees. We’ll have to be sure that we don’t grow, and in fact we’ll need to reduce the amount that we spend on outside counsel. In an environment where there’s an increasing workload, coupled with a decreased outside counsel budget, obviously that creates a dynamic that’s not perfect, to say the least.

OC: Now, I may have brought you to this in a backwards way, but since we’re talking about trimming budgets, how do you fire a law firm? Then let’s talk about what you look for when you hire one. So how do you get rid of lawyers who aren’t doing what you want them to do at the right price?

SC: At OHSU, we tend to use a variety of law firms. We don’t select just one, despite that there are several very good full-service law firms in town. We spread the work around. For discreet and particular projects, if we don’t get the results that we want at the end of a project—we generally stick with a firm through the end of a project—we won’t select that firm for the next project.

Depending on the circumstance or the type of work that we may need a law firm for, we choose our outside counsel [on different criteria]. Sometimes it may be based on prior experience with that firm or others’ prior experience with the firm. Right now, I have to put out a request for qualifications for some law firms because we have one now, unfortunately, that’s not doing what we asked it to do.

OC: So of course there are different needs, depending on what type of work you need done, but generally what are those attributes that you look for in outside counsel?

SC: Experience. Reputation. And reputation is a quick way for us to know that others are happy with what they’ve done in the past. Also, if we have to deal with other parties, they will know that, because we retained the law firm of So & So, we’re serious about achieving our objectives.

Cringing Over Outside Legal Fees

OC: When we talked the other day, you said that you’ve had some bad experiences with

private-practice attorneys. Can you explain what you meant?

SC: When I said that what was fresh in my mind was receiving a bill, the first such bill from a firm we haven't used much (they had been recommended), and I was very surprised by the total amount. What was even more surprising was the amount of time, and therefore money, that was spent performing legal research.

Now I know, having gone to law school and practiced law for as long as I have, including litigation, that doing a job right requires some research. But when you have a firm, one that's been recommended as having experience in a particular area, send you a bill [with an itemization] of such a significant, if not overwhelming, amount of time devoted to research—basic areas of the law, basic law-school-exam-type questions—it doesn't play well.

OC: Did you see that this sort of basic stuff was being billed out as partner hours?

SC: No, it was an associate under the direction of a partner. Right now, we're in discussions with the firm about that high bill. I have to take some responsibility because I was relying on one of the attorneys who reports to me to oversee the matter, and I probably should have been a little more instructive about what we want and what we don't want. Sometimes when you assume, well, you know.

OC: Yes, I do. Often we hear of clients complaining about their law firms being unresponsive, or at least about their failure to respond in a timely manner. In fact, *Of Counsel* ran a story a couple of years ago about a firm that branded itself as a partnership that responds in 24 hours or less or they'd buy the client an expensive lunch. Do you have trouble with the responsiveness of your outside counsel?

SC: For me, it would be the pot calling the kettle black.

OC: [laughs] I appreciate your candor.

SC: Well, I have to be honest. The budget constraints, with the amount of work we have, lead to some very busy in-house lawyers at OHSU. Often we're the ones who are looking for little

snippets of time to be able to communicate. For the most part, the outside lawyers we've worked with have been pretty responsive.

OC: When is money not an issue? When do you retain a large expensive law firm with little regard for how much those lawyers charge?

SC: First of all, we always start with this basic premise: OHSU is a public corporation. We have a sense of fiscal responsibility that is different from and greater than some other institutions. Our default position is that we're going to do a project as budget-minded as possible. Having said that, we're not going to compromise the quality of the product. We will look for top-drawer attorneys, whether they practice at a big firm or some other setting. If they are the most knowledgeable, expert, and efficient—double-underline "efficient"—we will place them high on the list of firms or lawyers we may retain.

We certainly have some needs that require the very best lawyers. Bond financing, for example, is very complex. There are not a lot of lawyers walking around who do it right. But they also tend to be pretty expensive. You just can't call any law firm in town and find a bond financing expert. So you have to go with the folks who are knowledgeable, and often they're going to charge top dollar.

There are other times when you know that you're going after one of the higher-priced law firms or attorneys but you also know that the efficiency that they're going to provide you makes the return on the investment well worth it.

OC: Recently, we've been covering a trend that has emerged within the legal profession: the outsourcing of legal work by law firms to private companies who can do some types of work cheaply and yet very well, too. Do you know if this is happening with any of the work that you ask your outside counsel to do? And, if so how do you feel about that?

SC: I've not heard of that happening with our outside counsel. But I must say that I'd be a little circumspect about how any of our outside lawyers share information and work with third parties and whether we're still maintaining [the confidentiality] that we anticipated that we had at the start of the engagement.

Communication Is Key

OC: In addition to the efficiency that you've talked about, what else helps sustain a solid inside-outside relationship? What else makes things seamless?

SC: Well, I think you said it before: communication. We like to know what's happening and how they are doing their work. The example that I cited earlier about being surprised looking at all those attorney fees for research relates to this subject, too. One of the reasons that it didn't resonate well, particularly initially, was because we got a bill and I hadn't seen any work product

at all. The memos and all the various correspondence, which we were being billed for, weren't sitting on any of our desks.

So to have constant communication about what work is being done within the budget is very important. We like to set a budget up front. Having been an outside counsel, I know that this is very difficult to do, but the client says, "How much is this going to cost?" Now the really, really honest answer is, "I have no idea." But you want them to have a good estimate. That's why we gravitate toward experience and efficiency. ■

—Steven T. Taylor

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In-House Attorney for Prestigious Hospital Shares His Views on Outside Counsel & More

The English language leans a lot on the lexicon that the game of baseball has delivered. After all, we often say or hear that someone has “stepped up to the plate” or “touched all the bases.” Maybe life has “thrown us a curve ball,” and we realize that we have to “play hardball.”

Earlier this summer, Portland, OR-based attorney Steve Conklin, who is, by the way, also a premier Little League baseball coach, “hit the ball out of the park” when he helped the Oregon Health & Science University (OHSU) acquire an outpatient cancer business, Pacific Oncology. The transaction was the first of its kind for OHSU, the prestigious medical facility that, among other things, has earned a worldwide reputation for revolutionary cancer research and treatments. As legal counsel for OHSU, Conklin played a leading role in getting the deal done.

Whether on the ball field or in the boardroom or deposition room, Conklin brings a steady yet passionate style to the task at hand. He’s going to need that demeanor as OHSU, like many health facilities (and, for that matter, like many organizations of all kinds in today’s economy), recently announced that it’s facing significant budget cuts.

The hospital and research center suffered a substantial operating loss for the fiscal year that ended on June 30, and OHSU officials are worried that a recent court decision might affect its financial health for years to come. That is, in late 2007, the Oregon Supreme Court ruled that a \$200,000 cap on tort liability is unconstitutional in many instances. As a result, OHSU and other Oregon hospitals will likely pay more in medical malpractice costs.

For Conklin and his legal team, the fiscal belt-tightening means that they will have to find ways to put their own cap on legal costs. That translates into performing the arduous job of cutting corners without leaving OHSU legally exposed. Consequently, the in-house legal department will continue to look for, or perhaps demand, more efficiency from the private-practice law firms that the university retains.

Recently, *Of Counsel* talked to the articulate, witty, and humble Conklin about his sideways entrance into the legal profession (initially he chose a path toward an MBA rather than a law degree), his career, the impact of the acquisition

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Aspen Publishers
Of Counsel
Distribution Center
7201 McKinney Circle
Frederick, MD 21704