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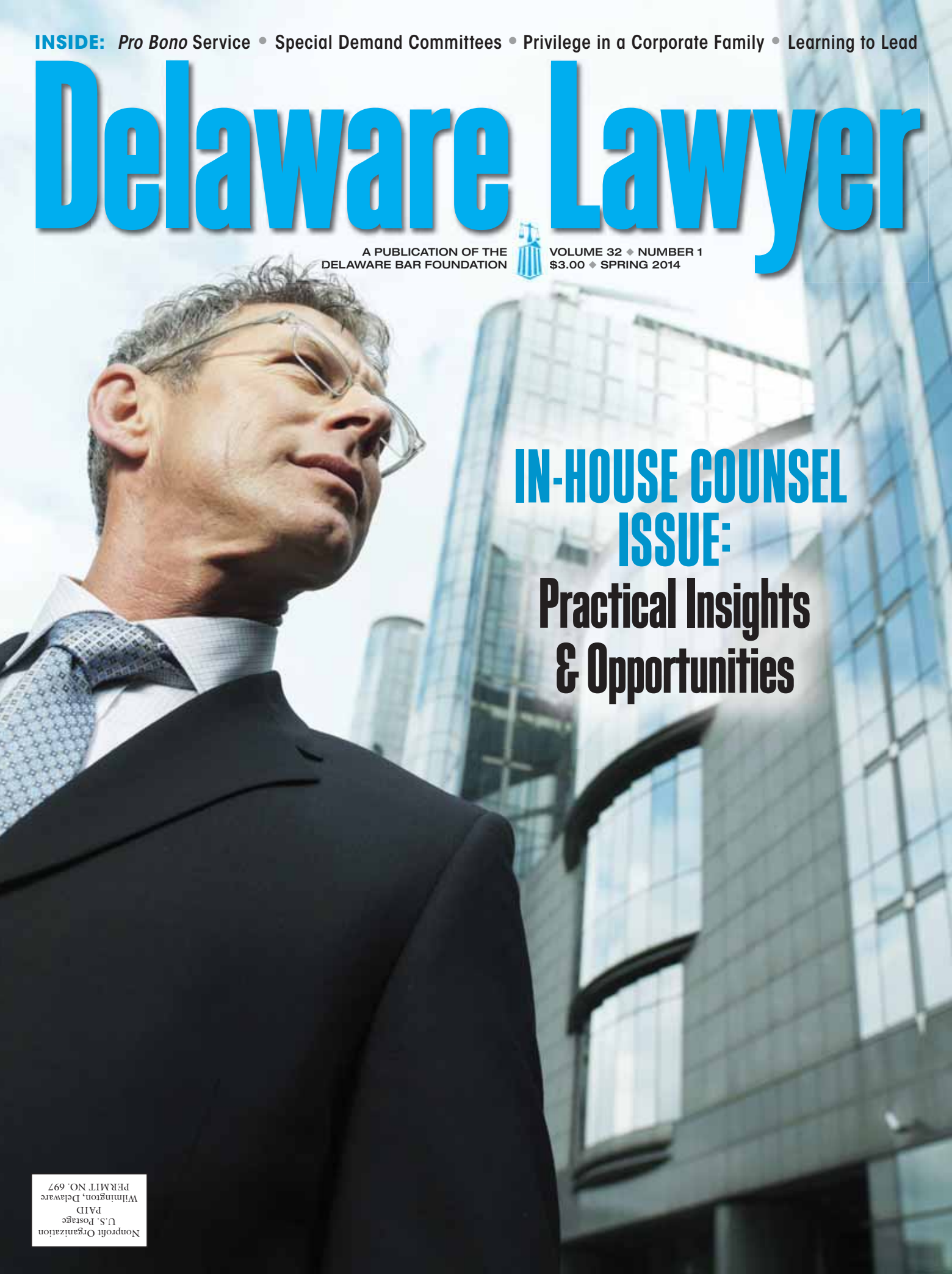

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EDITOR'S NOTE

Kristine M. Wellman

In this issue, *Delaware Lawyer* turns its focus to in-house corporate counsel practice. The Board of Editors and contributing authors were generous with their ideas for building an edition dedicated to this broad theme. I approached the issue with a desire to develop articles that convey practical and actionable steps that in-house counsel can take should they encounter the topics we ultimately selected.

It is my hope that this issue also offers a view into the practice of law within a corporation, and the opportunities for professional enrichment that come along with the experience.

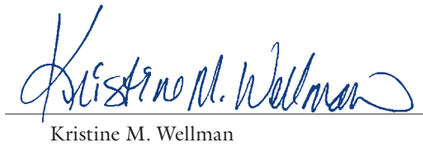
This issue contains a thoughtful piece from Luke Mette, Deputy General Counsel, Litigation, at AstraZeneca, on how in-house counsel can meaningfully commit to sustained *pro bono* representation of indigent clients in Delaware. Luke provides us with practical steps Delaware lawyers can take in the wake of the Delaware Supreme Court's decision in *Hanson v. Morton*.

We decided to take up the topics of establishing special demand committees of corporate boards in response to stockholder demands upon Delaware corporations and protecting the attorney-client privilege in corporate family representations. From the perspective of an in-house counsel, both of these topics require early awareness of potential legal issues and proactive and thoughtful attention to rigorous process.

Elena Norman and Rich Thomas of Young Conaway Stargatt & Taylor, LLP, lend their expertise to the topic of special demand committees. For protecting the privilege, we tapped Jaculin Aaron, a litigation partner at Shearman & Sterling LLP who represented BCE Inc. in the Third Circuit appeal of *In re Teleglobe Communications Corporation*, and Stephen Marzen, who is Senior Counsel for Litigation and Claims at Bechtel Corporation. Stephen also represented BCE Inc. in *In re Teleglobe Communications Corporation* as a litigation partner at Shearman & Sterling LLP.

We close the issue with in-house insights from two familiar DuPont attorneys – one still in the trenches, Karen Cochran, Assistant Chief IP Counsel, and the other just retired after 42 years, Hinton J. Lucas, Jr.

Each of the contributing authors and our profiled *Of Counsel* have impressive legal and personal backgrounds, a serious commitment to humor in the face of publishing deadlines, and a passion for giving back. I am grateful for their time, expertise and support of this issue of *Delaware Lawyer*.



Kristine M. Wellman

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is Deputy General Counsel, Litigation, at AstraZeneca, where he is accountable for managing significant patent litigation, commercial litigation and government investigations throughout the world. He sits on the Legal Senior Management Team that oversees the global AstraZeneca Legal Department. From 1988-1989, Luke clerked for the Honorable Joseph J. Farnan, Jr. He practiced at Morris, Nichols, Arsht & Tunnell from 1989 until 1994.

Elena C. Norman

is a partner in the corporate counseling and litigation section at Young Conaway Stargatt & Taylor, LLP in Wilmington. Elena regularly counsels boards of directors, board committees, executives, stockholders, and in-house and outside counsel on Delaware corporate and commercial matters, and frequently represents parties to litigation, most often in the Delaware Court of Chancery. Her practice focuses primarily on counseling and litigation in connection with merger and acquisition transactions, going-private transactions, corporate stock appraisal, corporate governance, limited liability companies and limited partnerships, and cases involving fraud and breach of contract. Elena also litigates commercial matters in the US District and Bankruptcy Courts. Elena often represents non-US entities in US litigation proceedings, and she frequently writes and speaks on Delaware law and litigation, corporate governance, and cross-border legal issues.

Richard J. Thomas

focuses on corporate, alternative entity, and commercial litigation, primarily in the Delaware Court of Chancery. Rich has experience litigating disputes and advising Delaware business entities concerning a wide variety of fiduciary, statutory and commercial matters, including, among other things, mergers and acquisitions, proxy contests, indemnification proceedings, stockholder access to books and records, complex contractual agreements, and the misuse of confidential information. Rich also has advised special committees conducting prominent investigations, including an investigation by a committee of the board of directors of FINRA concerning whether FINRA should assert claims against its existing and former directors based upon FINRA's 2008-2009 investment losses and compensation practices.

Kristine M. Wellman

is Senior Vice President & Chief Counsel, Corporate Reputation & Governance, for Capital One Financial Corporation where she leads the Corporate Governance Office. Prior to Capital One, Kristine joined the executive team of ING Direct USA in 2010 as General Counsel to advise the bank on its divestiture from its parent, Amsterdam-based ING Group, N.V., as part of ING's global restructuring. Prior to ING, Kristine was Senior Vice President & Deputy General Counsel at BB&T Corporation and was in private practice with the global law firm Squire Sanders. Kristine is a frequent speaker on leadership development topics primarily focused on the advancement of women in law and business.

Luke W. Mette

In-House *Pro Bono* Service: Updates and Challenges

Delaware corporate counsel have broad opportunities for personal and professional growth through *pro bono* work.

For the 20 years that I have been an in-house lawyer at AstraZeneca, I have endeavored to make *pro bono* representation of indigent clients both more accessible and rewarding to in-house lawyers located in Delaware. Two decades of progress and regress leave me with the view that the current state of affairs is, at best, mixed.

Fresh thinking, strong leadership and a renewed commitment borne of genuine compassion will be needed going forward to create an environment where, as a group, Delaware in-house counsel will achieve a higher level of *pro bono* service.

This article discusses two of the most significant developments in 2013 affecting Delaware in-house lawyers interested in representing indigent Delaware clients. The article concludes by offering several practical suggestions for how to improve the current situation.

The Carpenter-Walsh Delaware *Pro Bono* Inn of Court

Ten years ago, in 2004, Justices Randy Holland and Joseph Walsh mobilized members of the Delaware bench and bar to form the nation's first and only *pro bono* inn – the Delaware *Pro Bono* Inn of Court (*Pro Bono* Inn). Imbued with the Justices' energy and commitment to both *pro bono* work and the inn-of-court concept, the group initially enjoyed excellent attendance during regular meetings. To honor Justice Walsh and Edmund "Ned" Carpenter II, the *Pro Bono* Inn formally changed its name in 2008 to the Carpenter-Walsh Delaware *Pro Bono* Inn of Court.

The mission of the *Pro Bono* Inn always has been to facilitate and heighten the level of *pro bono* representation of indigent clients in Delaware, including by in-house counsel, through the classic inn-of-court method of training, mentoring, educating and networking.

Over the past several years, the *Pro Bono* Inn has conducted a number of first-rate meetings that have combined networking opportunities, hearty dinners and CLE credit in intimate, two-hour evening sessions at the University of Delaware's Goodstay Center in Wilmington. The meetings have been, almost without exception, informative, provocative and entertaining, due largely to Justice Walsh's leadership, the program organizers, the dedicated presenters, an active audience and the inn-of-court concept itself.

However, as I recently mentioned to a joint gathering of Delaware's various inns of court, the *Pro Bono* Inn today lacks something that several of the other Delaware inns seem to have in abundance – attendance. The poor attendance levels have become chronic and truly unfortunate.

Despite the efforts of the *Pro Bono* Inn's Executive Committee to develop new and engaging topics for meetings, the situation, sadly, has not improved and, accordingly, the *Pro Bono* Inn has had to significantly scale back its programming. For 2013-2014, the *Pro Bono* Inn decided to help fund and sponsor a national speaker to address the joint inns of court meeting in March 2014.

This is a transitional year for the *Pro Bono* Inn, and its future will depend largely on an immediate infusion of genuinely interested new members.

Qualified Immunity Under the Delaware Supreme Court's Decision in *Hanson*

One of the many perceived barriers to greater *pro bono* involvement by in-house lawyers and private practitioners alike is the risk of personal professional liability. Many Delaware lawyers, including in-house lawyers, may feel that they lack the competence to undertake certain types of representation. Perhaps more significantly, in-house lawyers (and their employers) typically do not maintain malpractice insurance, because in-house lawyers are not engaged in the private practice of law.

In a June 2013 decision, the Delaware Supreme Court partially addressed this issue in the context of Family Court appointments of in-house counsel in dependency/neglect proceedings. In *Hanson v. Morton*, a Delaware Supreme Court Rule 52 attorney had been appointed by Family Court to represent an indigent parent in a private guardianship proceeding.[1] (For background, a Rule 52 attorney is one who has taken and passed the Delaware Bar Exam, fulfilled all other duties, and been admitted to practice law in Delaware.)

The appointed in-house lawyer moved to withdraw, not on grounds of incompetence or aversion, but rather under Delaware Lawyers' Rule of Professional Conduct 6.2 on grounds that, as in in-house lawyer, neither he nor his employer maintained malpractice insurance, and that consequently the risk of uninsured malpractice exposure posed an unreasonable financial burden.

The Family Court certified two questions to the Delaware Supreme Court (which accepted the certified questions):

(1) Is an attorney serving as in house counsel in "corporate practice," who is appointed by the Family Court to represent an indigent parent in child dependency and neglect proceedings provided with qualified immunity from malpractice liability in his or her role as a court-appointed counsel by the Delaware Tort Claims Act ("Tort Claims Act"), or any other similar protection against malpractice liability such as the [O]ffice of Child Advocate Statute ... , Delaware's Good Samaritan Statute, or any other applicable law?

(2) Whether or not such court appointed counsel is covered by the Tort Claims Act or other applicable law, does lack of malpractice insurance by in-house counsel in "corporate practice" constitute "good cause" to withdraw from court-appointed representation under Delaware Rule of Professional Conduct 6.2?[2]

The Supreme Court in *Hanson* held that: (1) in-house counsel appointed by Family Court enjoy qualified immunity under the Delaware Tort Claims Act; and (2) lack of malpractice insurance is not "good cause" for an attorney to withdraw from court-appointed representation. The Court was not persuaded by arguments that the legislature, rather than the courts, should define the limits of professional immunity (as was done, for example, in the statutory provisions related to the Office of the Child Advocate).

Nor was the Court persuaded by the argument that, in order to establish the application of qualified immunity, a court-appointed in-house lawyer might need to expend significant defense costs if sued. In essence, having extended qualified immunity by common law, the Court concluded that it would not be an unreasonable financial burden for an in-house lawyer to establish the factual and legal predicate for a qualified immunity defense in any particular malpractice case.

Thus, in the wake of *Hanson*, Delaware in-house Rule 52 attorneys who are appointed by Family Court to represent indigent parents enjoy qualified immunity from liability, although they will have to establish the applicability of the immunity on their own if they are sued.

But this only applies to in-house lawyers who are Rule 52 lawyers, not Rule 55.1 attorneys. A Rule 55.1 attorney is a non-Delaware attorney who, pursuant to Delaware Supreme Court Rule 55.1, has been required to apply for a Delaware Certificate of Limited Practice by virtue of his/her employer's physical presence in the state, rendering the in-house attorney subject to the rules governing the practice of law in Delaware.

However, Rule 55.1 in-house lawyers are nonetheless not permitted to appear in court in Delaware, lest they engage in the unauthorized practice of law. There is an exception to this rule, permitting Rule 55.1 lawyers to perform *pro bono* representation, but only if they do so under the auspices of a Delaware organization (such as Delaware Volunteer Legal Services (DVLS) or the Office of the Child Advocate (OCA)) or are supervised by a Delaware Rule 52 attorney.

In short, a Rule 55.1 lawyer either will not be appointed by Family Court in the first place, or, if appointed, either (a) would have to agree to be supervised by a Rule 52 lawyer to avoid engaging in the unauthorized practice of law, or (b) presumably could move to withdraw.

Suggestions Going Forward

So where does all of this leave Delaware's in-house lawyers who are interested in representing indigent clients on a *pro bono* basis? Below is a brief list of practical suggestions.

Join an inn of court. It is my sincere hope that you will join me in ensuring the mission and viability of the *Pro Bono* Inn for its second decade and beyond to support in-house and external Delaware lawyers who are committed to serving Delaware's indigent populations, especially in the wake of *Hanson*. But regardless of the future direction of the *Pro Bono* Inn, there are several other inns of court in Delaware that offer opportunities to get involved, learn and mentor others in areas such as bankruptcy, general litigation, family court and technology. Any Delaware in-house lawyer who wants to improve local connections, build Delaware collegiality and develop skills for *pro bono* representation would benefit from joining any of these inns of court.

Respond to court appointments. If you are a Rule 52 Delaware lawyer who passed the Delaware bar exam and was admitted to the bar, you can expect to receive Family Court appointments in dependency/neglect proceedings. Your legal department may want to consider how to address this development as a group through some formal training. If you are a Rule 55.1 Delaware lawyer, you will likely be viewed as having engaged in the unauthorized practice of law unless you are supervised by a Rule 52 Delaware attorney. I would suggest that a Rule 55.1 lawyer who receives a court appointment either contact Family Court directly and/or Disciplinary Counsel.

Deal with malpractice insurance and immunity. DVLS will add you as an additional insured if you proceed through DVLS's intake system prior to accepting the representation. Otherwise, unless you or your employer maintains malpractice insurance for *pro bono* work, you may want to consider focusing your *pro bono* work in areas that carry qualified immunity – statutory immunity for volunteering through the OCA and, now, a common law extension of qualified immunity if appointed by Family Court in dependency/neglect proceedings.

> Most Local Delaware law firms are more than willing to assist in-house lawyers with *pro bono* representation of indigent clients.

Explore opportunities through DVLS and OCA. Because of the insurance/immunity situation, the best options, in my view, for Delaware in-house lawyers who want to represent indigent clients continue to be:

(1) via DVLS (a) representing respondents on Friday mornings in protection-from-abuse proceedings; and (b) in other matters for which DVLS has an intake, including custody matters, as well as drafting wills, living wills and durable powers of attorney; and (2) via the OCA, representing children in dependency/neglect proceedings.

The staff at both DVLS and the OCA are first-rate individuals who will gladly help you become comfortable with undertaking these types of representations. In addition, just about any Delaware attorney who has volunteered through these organizations would happily offer similar assistance.

Earn CLE credit. Remember that under Continuing Legal Education Rule 8, you can receive CLE credit for performing uncompensated legal services for indigent clients through court appointments or organizations such as DVLS and the OCA.

Be a leader in your legal department. I am convinced that people, not institutions, make the impacts that matter in life. You can move the needle through your own initiative and leadership, regardless of your title. If you wish that your legal department did more *pro bono* work, seize the issue and make it happen yourself. Feel free to call me if you would like my assistance.

Partner with a law firm. I have found that local Delaware law firms are more than willing to assist in-house lawyers with *pro bono* representation of indigent clients – regardless of whether the firm currently represents your corporate employer.

Re-create the informal Delaware in-house network. When I started at AstraZeneca in 1994, the so-called "Committee of 13" General Counsel of some of the largest corporate employers in Delaware would convene periodically to discuss matters of common interest to the Delaware in-house community. Similarly, the Corporate Counsel Section of the Delaware State Bar Association provided a forum for those in-house lawyers who were not at the general counsel level to gather, network and share experiences. Unfortunately, in my view these vehicles of collegiality have lost some of their traction over the years. I would like to see more Delaware in-house lawyers (52s and 55.1s) at all stages in their career, regardless of professional expertise, get together professionally and informally across the employer spectrum to rekindle that sense of community. This can be done face-to-face or through social networking media. Let me know if you are interested, and I will organize it.

Re-commit to genuine compassion for others. Finally, and most importantly, it is far too easy to articulate a host of common excuses for why we don't

volunteer to do more *pro bono* work. But these excuses melt away if we genuinely commit ourselves to help others who are less fortunate. If you volunteer because you think it will make you look good in your boss's eyes or will enhance your resume, I would suggest you reconsider your motivations. Rather, consider volunteering out of genuine compassion, in the true sense of the word – suffering with. Suffer with the abused or neglected child. Suffer with the beaten spouse. Suffer with the dying grandfather. If you do, I would bet that *pro bono* representation will come to you easily and often.

Moreover, there is a good chance that you will develop as a professional and as a person by taking on a *pro bono* case in an area outside your comfort zone. As lawyers, it is always a good thing to learn a new area of the law. And you just might find that the representation will affect you profoundly as a human being.

To this day, there are real-life human stories from these types of cases that I simply cannot get out of my mind. Some of the encounters are gut-wrenching and some are uplifting, but all of these cases have made me more humble and thankful.

Conclusion

At the same time that the number of sustainable professional and social networking opportunities for Delaware's in-house lawyers appears to be on the decline, the likelihood that an in-house lawyer will be appointed by Family Court to represent an indigent client is increasing. These trends, although not inexorable, are persistent.

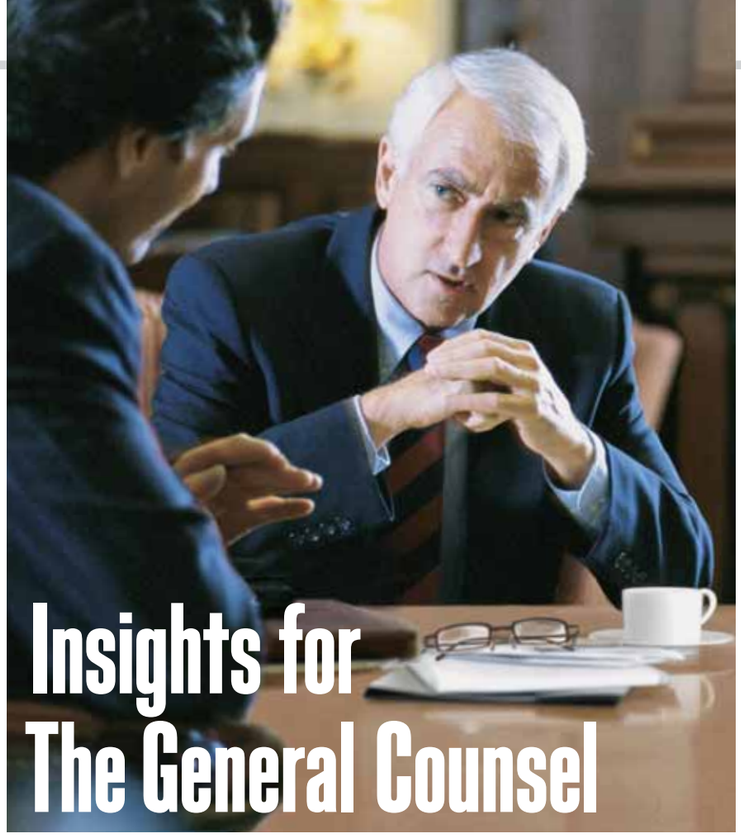
Rather than fight or deny either trend, I suggest that we adapt and look inward at our own motivations. Once you find genuine motivation (for example, to help others), look outward again, and you will find a number Delaware lawyers, departments, firms and organizations that are similarly motivated and willing to help. Let us resume there. ◆

FOOTNOTES

1. 67 A.3d 437 (Del. 2013).
2. *Id.* at 439 (footnote omitted).

Elena C. Norman
& Richard J. Thomas

Special Demand Committees: Practical Insights for The General Counsel



When a stockholder demands an investigation of a Delaware corporation, the General Counsel faces a unique set of requirements.

For even experienced general counsel, the receipt of a stockholder demand urging that the corporation investigate legal claims against its directors, officers, employees or others poses challenges. Responding to such a demand often calls for delicate balancing, as general counsel must ensure that the board of directors takes the appropriate steps to respond to the demand without directing or managing the board's response.

This presents particular challenges given the general counsel's usual role as the trusted advisor to the board regarding legal issues. The purpose of this article is to provide general counsel and other legal practitioners with basic information about the creation and use of a special committee to investigate stockholder demands,[1] focusing on the importance of creating and maintaining a special committee whose members are disinterested and independent.

Stockholder Demands and Demand Committees

When a stockholder of a Delaware corporation believes that the corporation may have a legal claim against its directors, officers, employees or others, as an alternative to filing a lawsuit on behalf of the corporation and pleading "demand futility," the stockholder can submit a demand to the corporation's board of directors, requesting that the corporation investigate and pursue the potential claim.

"The effect of a demand is to place control of the derivative litigation in the hands of the board of directors."[2] "While a board of directors has a duty to act on an informed basis in responding to a demand,"[3] there "is neither a prescribed procedure that a board must follow in carrying out these tasks nor a set amount of time these tasks must take."[4]

If the board ignores the demand, or if "there is reason to doubt that the board acted independently or with due care in responding to the demand, the stockholder may have the basis *ex post* to claim wrongful refusal."[5] "The stockholder then has the right to bring the underlying action with the same standing which the stockholder would have had, *ex ante*, if demand had been excused as futile."[6]

A board may, in some situations, already have enough information to consider the demand without further inquiry. More often, however, the board will need to investigate the issues raised in the demand. If the board believes that an investigation is necessary, one of its first steps is to determine who is going to investigate the demand. As a practical matter, it usually makes sense to appoint a subset of the full board.

Thus, a board in receipt of a demand typically forms by resolution a special committee (often referred to as a "demand committee"), generally consisting of between two and four members, to conduct an investigation. The demand committee usually (and ideally) is granted full power to investigate the allegations made in the demand and to evaluate whether the corporation has any viable claims and, if so, whether those claims should be pursued in court. The demand committee will also make recommendations to the board about how to proceed.

The demand committee's investigation usually consists of the following steps: (1) retention of independent counsel, (2) request for and review of relevant corporate documents, (3) interviews with individuals most likely to have information relevant to the allegations made in the demand, and (4) provision of a written report to the full board summarizing the information obtained during the investigation, reporting the demand committee's conclusions and the bases for those conclusions, and recommending how the full board should proceed.

If conducted properly, demand committee investigations can provide a great benefit to the corporation. A recommendation by a demand committee that the demand be refused (that is, that no legal action be taken) will be entitled to the presumption of the business judgment rule.[7] In other words, a reviewing court will respect the recommendation of the demand committee unless a stockholder plaintiff can show that the members of the committee were self-interested, lacked independence, acted in bad faith, or otherwise failed to conduct a proper investigation.[8]

If the demand committee determines (and the full board agrees) that the allegations in the demand may have merit, and that the corporation has viable claims that it should pursue, the board can authorize the corporation to initiate and control a lawsuit, or can permit the stockholder making the demand to pursue derivative litigation on the corporation's behalf.[9]

Disinterestedness and Independence: The Legal Backdrop

For a demand committee to be effective, and to issue a recommendation that is entitled to judicial deference, it is critical that its members be disinterested and independent. "Disinterested" and "independent" have the same general meanings in the context of a demand committee that they have in the context of the full board of directors. The case law provides that to be disinterested generally means to have no material personal interest in the outcome of the investigation. To be independent generally means to be free of personal, familial or business relationships with persons who have an interest in the outcome of the investigation.

When a stockholder makes a demand on the board instead of pursuing derivative litigation, he or she is deemed to concede the disinterestedness and independence of a majority of the board.[10] This does not mean, however, that the stockholder is forever foreclosed from challenging the demand committee's investigation or that the stockholder cannot later challenge the disinterestedness and independence of the demand committee. As the Delaware Supreme Court has explained:

> If a demand is made, the stockholder has spent one – but only one – "arrow" in the "quiver." The spent "arrow" is the right to claim that demand is excused. The stockholder does not, by making demand, waive the right to claim that demand has been wrongfully refused.

Simply because the composition of the board provides no basis *ex ante* for the stockholder to claim with particularity and consistently with Rule 11 that it is reasonable to doubt that a majority of the board is either interested or not independent, it does not necessarily follow *ex post* that the board in fact acted independently, disinterestedly or with due care in response to the demand. A board or a committee of the board may appear to be independent, but may not always act independently. If a demand is made and rejected, the board rejecting the demand is entitled to the presumption of the business judgment rule unless the stockholder can allege facts with particularity creating a reasonable doubt that the board is entitled to the benefit of the presumption.[11]

Thus, for a demand committee to be effective, the full board, the demand committee and other corporate representatives must ensure that the demand committee is disinterested and independent. All directors and members of management should be sensitive to and refrain from taking actions that, with the benefit of hindsight, could cast doubt on the committee's disinterestedness and independence – even if such actions would represent best practices in other contexts.

Ensuring the Disinterestedness and Independence of the Demand Committee

Selection of the Committee Members. The most important step toward ensuring the demand committee's disinterestedness and independence is the careful selection of committee members. General counsel should assist the board in identifying potential members by describing the investigation process and explaining the meaning and importance of disinterestedness and independence.

In certain circumstances it may be preferable that, aside from explaining the applicable law, the general counsel

not be involved in selecting which specific members of the board serve on the committee, particularly where the general counsel is a potential target of the demand. It may be beneficial to seek guidance from company counsel in such circumstances.

Although a stockholder serving a demand on a corporation concedes the disinterestedness and independence of the *majority* of the board, *individual* directors may still be interested or lack independence. The board must carefully consider the specific circumstances of each director when deciding who will serve on the demand committee.

The overarching question that must be answered for each prospective member of the demand committee is whether he or she is "incapable, due to personal interest or domination and control, of objectively evaluating [the] demand ... that the Board assert the corporation's claims that are raised by plaintiffs or otherwise remedy the alleged injury[.]"[12]

A prospective demand committee member may be considered "interested" and should not serve on the demand committee if he or she has an interest in the outcome of the investigation that is not equally shared with the stockholders generally.[13] To be disqualifying, the interest must be of "sufficiently material importance, in the context of the director's economic circumstances" to make it "improbable that the director could perform her fiduciary duties" to stockholders "without being influenced by her overriding personal interest[.]"[14]

A disqualifying interest may exist, for example, where a director received a unique personal benefit as a result of the actions challenged by the demand. Importantly, the mere fact that a director approved the challenged decision is not, alone, a disqualifying interest unless the decision in question was so egregious on its face that there is a substantial likelihood that the director will be found liable.[15]

A director may be considered to lack independence from someone who is the target of or otherwise has a material interest in the outcome of the investigation, and thus the director should not serve on the demand committee, where "financial ties, familial affinity [or] a particularly close or intimate personal or business affinity" with the interested person would render the director "more willing to risk his or her reputation than risk the relationship with the interested" person.[16]

"Mere allegations that" a director and an interested person "move in the same business and social circles, or a characterization that they are close friends, is not enough to negate independence[.]"[17] But where the friendship or relationship arguably "give[s] rise to a sense of obligation or loyalty," doubt can be cast on independence.[18]

The "independence of [a committee] member may be impaired if that member feels he owes something to an interested director. That sense of obligation does not have to be financial in nature."[19] For example, in *In re Oracle Corp. Derivative Litigation*, the Court of Chancery found a lack of independence where the members of a special litigation committee, both professors at Stanford University, were asked to investigate a board member who was a fellow professor at Stanford, and where one of the committee members had been taught by the alleged wrongdoer and had remained in contact with him over the years.

The Court noted that the former student would "find it difficult to assess [the alleged wrongdoer's] conduct without pondering his own association with [the alleged wrongdoer] and their mutual affiliations."[20]

Selection of Independent Counsel and Advisors. Once the demand committee has been organized with disinterested and independent members, one of its first tasks should be to select independent counsel. General counsel's role in the selection of independent counsel should be limited.[21]

This is not to say that general counsel or the corporation's outside counsel cannot have any involvement at all. It is usually appropriate, for example, for general counsel to offer a list of suggestions of attorneys or law firms known to have experience with demand investigations.[22] But the list should include multiple options, and once such suggestions have been made, the demand committee itself should interview the prospective attorneys and make the final selection without the involvement of general counsel or other company representatives.[23]

Compensation for Members of the Demand Committee. "Directors serving on a special committee are entitled to reasonable compensation for their efforts."[24] What this means in practice often requires delicate judgment calls. For example, while an argument can be made that directors on the demand committee would be more likely to be considered "independent" if they did not receive compensation for service on the committee, this may not be perceived as equitable from the perspective of committee members – particularly if the company is one in which board members are typically compensated for service beyond regular board service.

If compensation is to be paid, it should not be contingent on the outcome of the investigation. Although there is no specific requirement about how compensation must be structured, it often consists of either a flat fee or payments based on the number of meetings held or months worked.[25] The latter may be preferred where it is particularly difficult to gauge in advance the amount of work the investigation will require.

Whether the amount of the compensation is reasonable depends on many factors, including the size of the company, the seriousness and complexity of the claims being investigated, the likely number of documents to be reviewed and witnesses to be interviewed, and the expected length of the investigation. The amount of compensation paid to directors in general and the amount paid for service on other committees may provide some guidance to compensating the demand committee members.

These issues are easier for the general counsel to confront when the company has policies in place regarding compensation for members of demand committees and special committees. Accordingly, companies that do not have policies may want to consider adopting such policies before there is a need to appoint a demand committee or a special committee.

Interactions Between the Demand Committee and General Counsel. Once the demand committee begins its investigation, the corporation's general counsel and other corporate representatives should limit their involvement in the investigation. Even where general counsel is not a subject of the investigation, he or she should avoid becoming involved in the investigation process.

The general counsel should avoid checking in with committee members or independent counsel regarding the progress or the substance of the investigation – even though such monitoring is, in other contexts, exactly what an effective general counsel would do.[26] If the general counsel receives requests to provide a status report to executive management or the full board, the general counsel should reiterate the importance of independence.

General counsel should avoid questioning or attempting to limit the type and amount of work performed by independent counsel that has been approved by the demand committee. Absent unusual circumstances, general counsel should not challenge or question the need for or propriety of tasks listed in the bills of independent counsel if the demand committee or its chairperson has approved payment for those tasks.[27] Otherwise, it may appear that general counsel is attempting to limit the depth or scope of the investigation.

While care must be taken to avoid even the appearance that general counsel is attempting to manage or influence the investigation, general counsel can provide certain types of administrative support to the demand committee at the committee's request. Once the demand committee determines what company documents it would like to review as part of the investigation, it is appropriate for the demand committee to direct those requests to the general counsel's office, which can coordinate the gathering and production of the documents.[28]

General counsel also may assist the committee in scheduling interviews with company personnel or in locating former directors or employees that the committee wishes to interview. General counsel also may coordinate the payment of independent counsel's bills that have been approved by the demand committee or its chairperson.

To the extent possible, communications between the demand committee and general counsel that relate to the investigation should be made through independent counsel for the demand committee.

Internal Demand Committee Communications. Although some of the internal e-mail correspondence between the members of the demand committee may be protected by the attorney-client privilege or the work product doctrine,[29] the members of the demand committee should operate on the assumption that all of their communications, including even their communications with independent counsel, ultimately will be made available to a stockholder who challenges the committee's recommendation.

Demand committee members therefore should refrain from making statements in e-mails that could cast doubt on their disinterestedness or independence, including premature statements about the merits of the claims or complaints about the burdens of service on the demand committee.

Most discussions about the investigation process and the merits of the allegations in the demand will take place during committee meetings. The corporation's general counsel and other corporate representatives should not join the demand committee meetings. To the extent that members of the demand committee have questions or concerns at other times, they should be encouraged to call independent counsel to discuss them.

Conclusion

An effective general counsel will no doubt endeavor at all times to be responsive to executive management and board members, and to stay on top of important legal issues. When a demand committee investigates a stockholder demand, however, the general counsel should maintain distance from the process to enable an independent investigation to take place.

While this may call for the general counsel to depart from typical methods of oversight, the general counsel as well as executive management and board members should understand that this will enable the corporation to implement a process that is most likely to be entitled to judicial deference at the end of the day. ◆

The authors wish to thank C. Barr Flinn and John Paschetto for their helpful comments during the drafting process.

FOOTNOTES

1. This article focuses on the special committee organized to consider a pre-suit demand. Such a committee differs in certain respects from a special litigation committee (SLC), which is a committee appointed by a conflicted board to investigate claims raised in a stockholder derivative suit. The two types of committees are subject to different levels of review: while a demand committee is presumed to be disinterested and independent, with the burden of proof on the stockholder plaintiff to show otherwise, an SLC has the burden of establishing its own disinterestedness and independence by "a yardstick that must be ... 'above reproach.'" *Beam v. Stewart*, 845 A.2d 1040, 1055 (Del. 2004). Nevertheless, disinterestedness and independence have the same meaning in the SLC context as in the demand committee context. Cases involving SLCs can therefore be highly instructive in the demand committee setting, and several such cases are discussed in this article.
2. *Spiegel v. Buntrock*, 571 A.2d 767, 775 (Del. 1990).
3. *Levine v. Smith*, 591 A.2d 194, 214 (Del. 1991).
4. *Canadian Commer. Workers Indus. Pension Plan v. Alden*, No. 1184-N, 2006 Del. Ch. LEXIS 42, at *45-46 (Del. Ch. Feb. 22, 2006).
5. *Grimes v. Donald*, 673 A.2d 1207, 1219 (Del. 1996).
6. *Id.*
7. *Scattered Corp. v. Chicago Stock Exch.*, 701 A.2d 70, 73 (Del. 1997).
8. *See id.*
9. *Cf. Am. Int'l Group, Inc. v. Greenberg*, 965 A.2d 763, 809 (Del. Ch. 2009) (explaining

that where an SLC determines that the claims in a derivative suit should go forward, it can prosecute the claims or permit the stockholder plaintiff to continue pursuing them).

10. *Scattered*, 701 A.2d at 73.

11. *Grimes*, 673 A.2d at 1218-19 (footnotes omitted).

12. *Brehm v. Eisner*, 746 A.2d 244, 257 (Del. 2000).

13. *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993).

14. *In re Gen. Motors Class H S'holders Litig.*, 734 A.2d 611, 617 (Del. Ch. 1999).

15. *See Aronson v. Lewis*, 473 A.2d 805, 815 (Del. 1984) (explaining that demand is not futile simply because a majority of the board approved the challenged transaction).

16. *Beam*, 845 A.2d at 1051-52.

17. *Id.* at 1051.

18. *London v. Tyrrell*, No. 3321-CC, 2010 Del. Ch. LEXIS 54, at *49 (Del. Ch. March 11, 2010).

19. *Id.* at *49 (footnotes omitted).

20. 824 A.2d 917, 943 (Del. Ch. 2003) (finding also that SLC members, both Stanford professors, were not independent from one of the targets of the investigation because he was an "extremely generous and influential Stanford alumnus").

21. *See Kahn v. Tremont*, 694 A.2d 422, 429 (Del. 1997).

22. *See generally* Gregory Varallo *et al.*, *Special Committees: Law and Practice* 240 (2011).

23. *See id.*

24. *SEPTA v. Volgenau*, No. 6354-VCN, 2013 Del. Ch. LEXIS 197, at *51 (Del. Ch. Aug. 5, 2013).

25. Varallo *et al.*, *supra* note 23, at 45.

26. *Id.*

27. *Id.* at 241.

28. *Id.* at 242.

29. Attorney-client privilege and the work product doctrine in the context of demand committees can involve complex issues that are beyond the scope of this article. Boards of directors in receipt of demands and demand committees formed to investigate demands should request that their respective counsel explain the various privilege and work product issues that can arise in the demand context. The board's and the demand committee's respective counsel can explain, for example, that while communications between the board and its counsel, and the demand committee and its counsel, are generally privileged, that privilege may arguably be waived when information (such as, for example, the committee's report) is shared between the demand committee and the full board, at least in situations where members of the board are targets of the investigation. *See Ryan v. Gifford*, No. 2213-CC, 2008 Del. Ch. LEXIS 2 (Del. Ch. Jan. 2, 2008); *Ryan v. Gifford*, No. 2213-CC, 2007 Del. Ch.

Jaculin Aaron
& Stephen Marzen

Privilege in Corporate Family Representations

What happens to the parent's privilege when a subsidiary is sold, spun-off, or becomes insolvent?

Lawyers in an in-house legal department may represent multiple entities in the corporate group, including the parent corporation and certain of its subsidiaries. For the most part, this arrangement will not present problems for in-house counsel, with one major exception: when one of the members of a corporate group leaves the control of the parent company, through a sale, spinoff or insolvency proceeding. This article discusses the risks this poses and what in-house counsel might do to manage the risks.*

General Rules

The attorney-client privilege of the corporation remains with the corporation and is controlled by whatever person or entity has control of the corporation. As the U.S. Supreme Court explained in *Commodity Futures Trading Commission v. Weintraub*:

> [W]hen control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well. New managers installed as a result of a takeover, merger, loss of confidence by shareholders, or simply normal succession, may waive the attorney-client privilege with the ordinary course, a parent corporation can ultimately control a respect to communications made by former officers and directors.[1]

Ordinarily, a parent corporation can ultimately control a subsidiary's attorney-client privilege, but not after control of the subsidiary has passed to a third party. When that occurs, the possible consequences for the attorney-client privilege involving the subsidiary will depend on how the attorney-client relationships were structured.

Joint Representation. If there was a joint representation of parent and subsidiary (by in-house or outside counsel), then following a change in control, (i) neither the parent nor the subsidiary can unilaterally waive the privilege, except (probably) as to its own communications concerning only itself, and (ii) there is no privilege as between the co-clients (the parent and the subsidiary) if they become adverse – that is, each can obtain discovery of the privileged information relating to the joint representation and use privileged information against the other.[2]

Separate Representation of the Parent and the Subsidiary. The existence and scope of a joint representation (as opposed to separate representations) of a parent and subsidiary is determined in light of the surrounding circumstances, including the intentions and expectations of the parties.[3] In some instances, one in-house lawyer may represent only the subsidiary in a matter, and a different in-house lawyer may represent the parent with respect to the same or a related matter.

The sharing of privileged information among those lawyers may be protected as against the rest of the world by the "common interest" privilege (also known as the "community of interest" or "allied lawyers" privilege). This doctrine may be invoked when two clients have at least a substantially similar legal interest, although some courts require an identical interest. It differs from the joint privilege in that the common interest privilege applies only when clients are represented by separate counsel and the privilege only covers communications with lawyers, not between the clients themselves.[4]

Privileged information exchanged pursuant to a common interest agreement might later be used by one party against the other, unless (possibly) an express agreement governing the common interest arrangement forbids it.[5] A common interest arrangement, however, would not give a party the right to discovery of privileged information not actually exchanged.

Sale or Merger of a Corporate Entity

While the rules governing joint representations and common interest arrangements are reasonably well settled, the case law addressing the disposition of the privilege when there has been a transfer in control of a subsidiary is not.

In 1996, the New York Court of Appeals held in *Tekni-Plex, Inc. v. Meyner & Landis* that in a sale of a business (including via a merger agreement), the privilege arising from general business communications remains with the business under the new owner because it "continue[d] the business operations of the pre-merger entity[,]" but the seller retains the privilege relating to the sale transaction itself.[6]

The court found that the structure of the transaction and the language in the merger agreement aligned the seller and the "old" corporation against the buyer and the "new" corporation, noting in particular the seller's contractual indemnification of the buyer for misrepresentations made by the "old" corporation. As a result, the seller would retain the privilege for attorney-client communications related to the merger transaction in the event of a dispute.

Otherwise, the court reasoned, the seller would have to defend the transaction without the benefit of the legal advice the seller received when negotiating the transaction, and future sellers could become reluctant to communicate openly with counsel knowing that "privileged communications . . . concerning the negotiations might be available to the buyer for use against the sold corporation in any ensuing litigation."[7]

In 2013, Chancellor Strine of the Delaware Court of Chancery (now Chief Justice of the Delaware Supreme Court) reached a different conclusion, holding that in a sale of a corporation done by means of a reverse merger the attorney-client privilege remains, in its entirety, with the surviving corporation.

In *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, the court held that this result was compelled by the language of section 259 of the Delaware General Corporation Law, which provides that after a merger, "'all property, rights, *privileges*, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation[.]'"[8] The court observed that *Tekni-Plex*, although involving a Delaware corporation sold via a merger agreement, had not considered the effect of DGCL § 259, and the language of the statute ("all . . . privileges") precluded the splitting of the merged corporation's privilege between corporation and the seller.[9]

The court in *Great Hill* pointed out, however, that the parties could exercise their "contractual freedom" to "negotiate[] special contractual agreements to protect themselves and prevent certain aspects of the privilege from transferring to the surviving corporation in the merger."[10]

Asset Sales

The case law on the control of the privilege following an asset sale (as opposed to the sale of stock or merger of an entity) is also unsettled. The language and rationale of *Tekni-Plex* suggests that a similar rule would apply, at least if the buyer purchased assets constituting an operating business and continued the business after the sale, and some courts have reached this conclusion.[11] Other courts have held that no privilege passes to the buyer in an asset sale.[12]

Insolvency Proceedings

As the Supreme Court held in *Weintraub*, the trustee in bankruptcy succeeds to and controls the debtor corporation's privilege. As a result, in the case of a co-client relationship involving a parent and its subsidiary that later files bankruptcy, the trustee would control the subsidiary's rights with respect to the joint privilege and would be able to use the privileged information.

This can be a significant issue for a parent corporation because the trustee in bankruptcy, acting on behalf of the creditors, may be energetic and resourceful in investigating and pursuing potential claims against third parties, including the parent corporation. In doing so, the trustee may push its claims of privilege to encompass as much information as possible and to use that

information to assert a claim against the parent corporation.[13]

The passing of rights under a co-client privilege to a third party following a transfer of control over a subsidiary (or even of an operating business) can create significant risks and disadvantages for a parent corporation.

First, as noted above, to the extent that in-house (or external) counsel has jointly represented the parent and a subsidiary in connection with a matter, the privileged communications generated in the course of that representation can be used against the parent in litigation by the new manager of the subsidiary.

Second, the parent corporation will not have sole control over the joint privilege, so that even if the parent considers it advisable to waive the privilege in certain circumstances, it will not be able to do so without the consent of the subsidiary (except possibly with respect to the parent's separate communications with counsel).

Third, as a practical matter, it may be difficult to prevent the new controller of the subsidiary from effectively waiving the privilege, even though the law would not permit it to do so.

Potential Ways to Protect the Parent's Privilege

In principle, the parent corporation's privilege might be preserved in one of three ways:

- avoiding joint representation through representation by separate in-house counsel for parent and subsidiary;
- avoiding joint representation through separate representation by in-house counsel for the parent and outside counsel for the subsidiary; and
- accepting joint representation, but with the subsidiary agreeing that the parent will control the joint privilege, agreeing not to use jointly privileged information against the parent, and waiving any conflict to joint counsel representing the parent after interests become adverse.

Unfortunately, the three ways to avoid or mitigate the risks of joint representation may be limited in their effectiveness, practicality, or both.

Representation by Separate In-House Counsel for Parent and Subsidiary. The Third Circuit in *In re Teleglobe Communications Corp.* suggested that the parent corporation may reduce the risks it faces in joint representations with its subsidiary by limiting the number and scope of such representations. Although it is critical for in-house counsel to be keenly attuned as to how to structure representations within a controlled corporate group, as a practical matter, a corporate law department may find it challenging to limit joint representations in daily operations.

Questions from internal clients do not generate new matter forms or trigger conflicts checks, as they do with outside counsel. Instead, internal business clients require prompt legal advice from in-house counsel.

In a large corporate legal department, in-house counsel may not know which entity employs the business person asking for legal advice and may advise both the parent corporation and the subsidiary. In a small corporate law department, in-house counsel may be the only lawyer or one of the few lawyers available to provide legal advice and may again advise both the parent corporation and the subsidiary.

Joint representations become virtually inescapable if the corporate law department is centrally managed and organized primarily by substantive expertise rather than legal entity. In an organization with substantive centers of excellence, the in-house expert in a particular legal specialty may well be the only lawyer competent to advise both the parent and the subsidiary.

Moreover, the legal compliance responsibilities of the parent corporation limit its ability to avoid joint representations with its subsidiary. The parent corporation has legal and practical responsibility for anti-corruption, anti-money-laundering, anti-boycott and other compliance throughout the corporate group. In advising and investigating those matters, the in-house compliance lawyers typically jointly represent both the parent corporation and the front-line subsidiary.

Separate Representation by In-House Counsel for the Parent and Outside Counsel for the Subsidiary. In theory, in-house counsel could represent the parent corporation and outside counsel could be retained to represent the subsidiary. With separate counsel, the parent and subsidiary could rely on the community-of-interest/allied-lawyers privilege to convey privileged information. But the community-of-interest/allied-lawyers exception provides for the preservation of the privilege as between the lawyers, not necessarily communications between lawyers for the parent and employees of the subsidiary.[14]

Moreover, the practical constraints are substantial: internal deadlines generally do not permit outside counsel to be retained on day-to-day discrete matters and internal legal budgets might not afford the retention of general outside counsel for a subsidiary.

If the parent and subsidiary must, as a practical matter, be jointly represented by in-house counsel, the question arises whether the risks to the parent in that arrangement may be mitigated by contract.

Contract Provisions or Waivers. The subsidiary could sign a written contract to forgo control of the joint privilege with its parent corporation, not use jointly privileged information against the parent, and waive any conflict to joint counsel representing the parent if and after interests between it and its parent become adverse.

Those "default" rules of the law governing lawyers could be altered in a written agreement between the parent and subsidiary in the ordinary course of business. They could also be altered in a stock or asset purchase and sale agreement between the parent and the buyer of the subsidiary in a sale-of-control transaction (as is frequently done).[15] A sample provision might read as follows:

> The attorney-client privilege, attorney work-product protection, and expectation of client confidence arising from legal counsel's joint representation of the Subsidiary and Parent, and all information and documents covered by such privilege or protection, shall be subject to the sole control of the Parent, may be waived only by the Parent, and may not be used by the Subsidiary against the Parent in any circumstances.

From the parent corporation's perspective, the contractual change in the default joint-representation rules mitigates the risks of that arrangement. The question is whether such a provision is valid and enforceable.

"According to the Restatement, it is permissible for co-clients to agree in advance to shield information from one another in subsequent adverse litigation, though the drafters concede finding no direct authority for that proposition." Some courts have declined to enforce them, particularly bankruptcy courts with respect to pre-bankruptcy waivers executed by the subsidiary.[17]

Even in a sale-of-control transaction, where the buyer is separately represented, the buyer may be reluctant to agree to a broad provision reserving control of the joint parent/subsidiary privilege to the parent post-transaction. The buyer may want to retain access to use privileged information generated in the course of operating the business, particularly as to regulatory matters and pending, imminent and reasonably foreseeable litigation.

Depending on the circumstances, a buyer may be more willing to agree to a provision that the parent will retain control of privileged communications relating to the transaction itself, consistent with the New York Court of Appeals' approach in *Tekni-Plex*.

A Practical Way Forward: A Risk-Based Approach

In the absence of an easy way to avoid in-house counsel jointly representing the parent corporation and its subsidiaries, or contractually extinguishing the risks of such joint representations, in-house counsel has no choice but to remain vigilant to the circumstances in which such joint representations pose special risks and act appropriately to protect the parent's privilege.

Circumstances that may warrant additional measures to protect the parent's privilege include when the parent begins to consider exiting certain businesses or divesting certain subsidiaries and when a subsidiary begins to encounter substantial operating, financial or legal problems, such that bankruptcy becomes more than a remote possibility.

In those circumstances, protection of the parent's privilege may require in-house counsel to ensure that she represents only the parent corporation and not the affected subsidiary. Because a corporate legal department may be treated like a law firm for purposes of conflict-of-interest rules,[18] the subsidiary may need to retain separate outside counsel to represent it on matters in which it may become adverse to the parent corporation.

To avoid disqualification of the parent's in-house lawyers, care should be taken to identify the respective lawyers' clients and the scope of their representations. Ideally, the existence and scope of those representations should be documented.

Lastly, to permit lawyers for the parent and subsidiary to share selected privileged information, a community of interest agreement should be drawn up between counsel for the subsidiary and parent.

Although separate counsel and attention to the formalities of separate representation take time and money, employing those measures, at a minimum in circumstances in which joint representations pose special risks, will mitigate those burdens. Proactive in-house counsel who employ those safeguards thoughtfully in such situations will help protect the parent's privilege. ◆

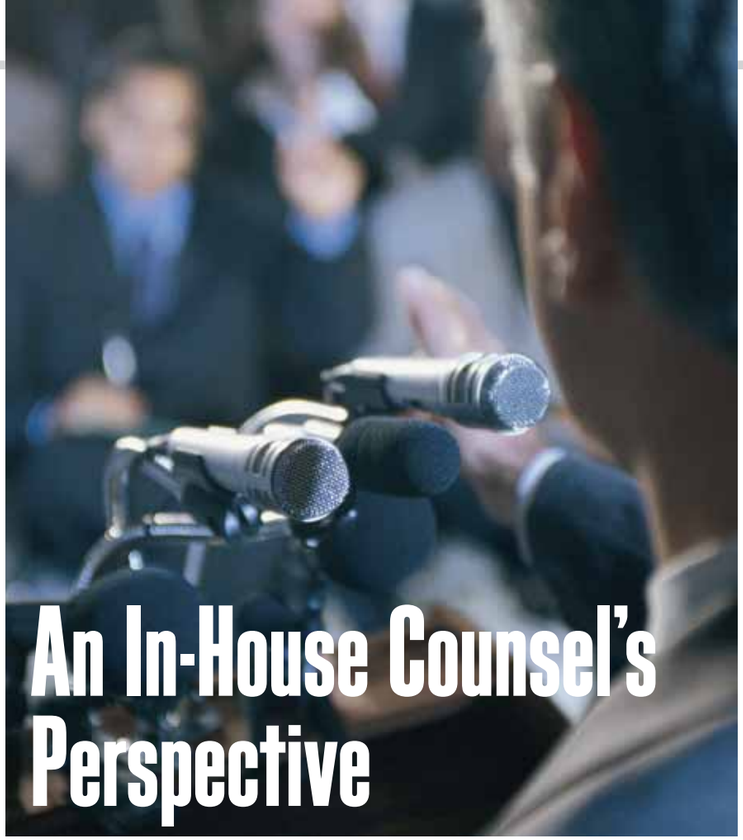
** The thoughts expressed in this article do not necessarily represent the views of Shearman & Sterling LLP or Bechtel Corporation.*

FOOTNOTES

1. 471 U.S. 343, 349 (1985).
2. *See, e.g., In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 365-66 (3d Cir. 2007); Restatement (Third) of the Law Governing Lawyers § 75 (2000).
3. *In re Teleglobe*, 493 F.3d at 362-63.
4. *Id.* at 364; D.R.E. 502(b)(3).
5. A lawyer representing a party in a common interest arrangement may be prohibited by ethical rules from using privileged information against the party whose lawyer provided it pursuant to the common interest arrangement.
6. 674 N.E.2d 663, 670 (N.Y. 1996).
7. *Id.* at 671-72.
8. 80 A.3d 155, 156 (Del. Ch. 2013) (quoting 8 *Del. C.* § 259 (emphasis added)).
9. *Id.* at 159-60.
10. *Id.* at 160-61.
11. *See Soverain Software LLC v. Gap, Inc.*, 340 F. Supp. 2d 760, 763 (E.D. Tex. 2004) (the sale of assets constituting an operating business will transfer the attorney-client privilege associated with the business where "the practical consequences of the transaction result in the transfer of control of the business and the continuation of the business under new management").
12. *Am. Int'l Specialty Lines Ins. Co. v. NWI-I, Inc.*, 240 F.R.D. 401, 408 (N.D. Ill. 2007) ("Absent control of the corporation . . . the attorney-client privilege does not pass to a successor entity, even with respect to the assets that were transferred to that successor."); *Zenith Elec. Corp. v. WH-TV Broad. Corp.*, No. 01 C 4366, 2003 WL 21911066, at *1 (N.D. Ill. Aug. 7, 2003) (a buyer purchased certain assets from the seller and then in subsequent litigation sought to assert the attorney-client privilege as to communications relating to those assets; held that "the mere transfer of some assets . . . does not transfer the attorney-client privilege" despite specific language in the asset purchase agreement purporting to transfer the privilege).
13. *See, e.g., In re Teleglobe*, *supra* note 2.
14. The Third Circuit suggested that such communications might be privileged: "Indeed, in some of these circumstances in-house counsel may not need to represent the subsidiaries at all. When a parent company directs its subsidiaries' employees to provide information to its in-house counsel that is critical to their representation of the parent, the communication may be privileged under *Upjohn* because of in-house counsel's representation of the parent alone, thus obviating any need for these attorneys to represent the subsidiary as well." *In re Teleglobe*, 493 F.3d at 373 n.27 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981)). The Supreme Court in *Upjohn* did not address that question directly.
15. *See Great Hill*, 80 A.3d at 160.
16. *In re Teleglobe*, 499 F.3d at 366 (citing Restatement (Third) of the Law Governing Lawyers § 75 reporter's note cmt. d (2000)).
17. *See In re Fundamental Long Term Care, Inc.*, 489 B.R. 451, 472-73 (Bankr. M.D. Fla. 2013); *In re Ginn-LA St. Lucie Ltd.*, LLLP, 439 B.R. 801, 805-06 (Bankr. S.D. Fla. 2010); *In re Mirant Corp.*, 326 B.R. 646, 652 (Bankr. N.D. Tex. 2005).
18. *See, e.g.*, Model R. Prof. Conduct 1.0(c) (2013) ("'Firm' or 'law firm' denotes [among other entities] lawyers employed in a legal services organization or the legal department of a corporation or other organization.").

Karen Cochran

Leadership and Law: An In-House Counsel's Perspective



Little formal education or professional training exists to support the legal leader managing a team.

I have been practicing law for 15 years, most of which have been in the area of in-house intellectual property. During that time I have led a variety of legal in-house teams in a managerial capacity in different companies, countries and technical areas and across sites and staffing levels. In the environment of corporate change, I've developed successors, downsized teams and managed legal teams across and outside of the United States.

Regardless of the different settings, I have come to understand that legal organizations share common challenges in the area of talent and leadership development, succession planning and performance management – considerations that are critical for the future growth, vibrancy and evolution of our profession.

Placing greater attention on leadership for the legal profession is at the heart of creating engaged, productive teams, as well as developing exceptional legal talent, business acumen and strong communication skills. These competencies are non-negotiable as our global markets become increasingly complex and competitive, and cannot be the sole purview of our non-lawyer counterparts.

Leadership in the Legal Profession

In her article *Lawyers and Leadership*, Professor Deborah Rhode of Stanford Law School contemplates leadership in the legal profession:

> [N]o other occupation accounts for such a large proportion of leaders. The legal profession has supplied a majority of American presidents, and in recent decades, almost half of Congress, and 10 percent of S&P 500 companies' CEOs. Lawyers occupy leadership roles as governors, state legislators, judges, prosecutors, general counsel, law firm managing partners, and heads of government and nonprofit organizations. In advising influential clients, or chairing community and charitable boards, lawyers are also "leaders of leaders." Even members of the bar who do not land in top positions frequently play leadership roles in teams, committees, campaigns, and other group efforts. Moreover, many of the decision making, organizational, interpersonal, and ethical skills that are critical for leadership positions are important for professionals at all levels.[1]

Lawyers in leadership roles have been commonplace throughout history. Law firms and in-house legal departments alike promote lawyers into management roles with a varied range of focus on leadership. Improving the visibility of leadership within the legal profession, its importance and how the profession can support leadership development can contribute to preparing our current and future leaders for the challenges of a dynamic environment.

There exists a near-endless wealth of educational resources to support the legal profession in our practice of the law. Online resources allow for rapid information availability and guidance on nearly all practice areas, all of which can be secured in moments.

Another field of dense educational resource offerings is the area of "leadership." From books to blogs, articles to courses, information on leadership is broadly available for the new to highly seasoned leader.

With this lawyer-leadership link through history, I took to the bookshelf shortly after assuming my first in-house legal management role. True to my technical roots, I took what might be considered a predictable patent attorney approach when I assumed my first management role and planned to immerse myself in the books. Although I had seen several impressive leaders in my pre-lawyer career through the years (whose behavior I still proudly try to model), I logically expected a wealth of textbook resources on the subject of leadership for lawyers.

The scientist inside me was poised for plenty of reading as I took to preparing for my new management job. If I could learn from texts the technical aspects required to carry out my patent attorney work, I'd also find what I needed for legal leadership in the books.

What I found, however, was a surprising lack of practical guidance. I turned to the garden variety business leadership writings. These were helpful, but none uniquely considered the needed competencies, challenges, etc., facing the in-house counsel who is expected to operate in a corporate environment and display the requisite leadership to accomplish the increasing demands of business goals, while maintaining a high level of technical expertise.

Ultimately, my search on legal leadership yielded limited results. The concept of the "Leading Lawyer" instead conjured up images of Top 10 lists of outstanding legal practitioners, premier law firms and successful outcomes rather than the actual leadership of attorneys. Law schools were often silent on the subject of leadership, focusing solely on legal skills[2] and academic analyses of leadership for lawyers.

The criticality of practical leadership skills and the value they bring to in-house legal staff in our daily operating environment are underestimated and represent an untapped resource for in-house legal departments and law firms alike. As I embarked on my legal leadership experience, I quickly learned – sadly by trial and error at times – that it can be the difference between a high performing, engaged and creative team that exceeds delivery expectations and a disconnected group of professionals and administrative staff that reactively manage daily work that comes their way from their clients.

The Legal Leadership Dilemma

After participating in a variety of legal team reorganizational efforts and leadership shifts in the in-house intellectual property patent team setting, I noticed a common theme of the modestly-addressed leadership challenge in each of these experiences. Increased ownership of all aspects of managerial responsibilities leaves the legal manager shifting attention between core legal support and delivering the "soft skills" of leadership: communicating a vision of corporate client and legal department, maintaining staff engagement through change and challenge, and general performance management and talent development. Little to no formal education or professional training existed to support the legal leader in the leadership aspects of a managerial role.

My first experience leading a team of patent attorneys and support staff was no different from this description. On reflection, I probably fit the mold of most in-house promotions – solid independent contributor to be trusted with moving to the next level. It's been the algorithm for how our profession gets the service job done and creates its in-house organizational structure, but that approach is often devoid of consideration of how that individual leads others.

Lawyers in new management roles find themselves caught up in the dilemma of addressing the range of client needs while attempting to develop leadership skills through sources that fail to address the unique challenges of leadership in the in-house corporate setting. Well-intentioned conventional leadership guidance leaves unsuspecting new in-house lawyer leaders trying to incorporate the key tenets of leadership and address and own the quality of legal service output from their teams while simultaneously balancing the corporate pressures of staying within budgets and emphasizing efficiency and productivity.

Moreover, with reduction of hierarchical layers, in-house lawyer leaders can have relatively flat teams comprised of more than 20 professional direct reports while simultaneously being responsible for their teams' engagement, quality delivery and career development.

Sadly these individuals are often not prepared to handle the leadership challenges that lie ahead, which in some circumstances can result in career setbacks

despite the initial well-intentioned career opportunity to lead a team.

Strengthening Legal Organizations Through Leadership

Identifying and cultivating leadership skills across a legal organization does not have to be isolated to the individuals that are managing. The objective of law departments is to deliver quality legal services to their corporate clients but also operate in a team environment. Focusing on leadership at all levels of the organization can help legal functions not only create a vibrant cultural environment but also deliver top-tier legal services.

Successful leadership in the legal profession will call upon lawyers to develop innovative ways of problem solving and working across boundaries – teams, departments, organizations, companies, firms, countries. These skills go beyond the skills we have been taught in law school or even through mentoring in the early stages of our careers. Leadership and legal skills do not have to be mutually exclusive, though, but can coexist as areas of expertise that legal leaders can bring to their clients.

Here are a few points to support identifying and strengthening leadership within legal departments.

Recognize the Value of Leadership

The sheer recognition of the importance or essentialness of the legal leader can support advancement of leadership in a legal organization. This effort, however, can be difficult because of the nature of the legal profession.

Herb Rubenstein, Founder and Executive Director of THE LEEEGH, Inc., and author of *Leadership for Lawyers*,[3] provides rationales for why the legal profession does not place enough value on developing leadership skills. Rubenstein puts forward seven points as to why formal legal leadership development does not garner sufficient investment – from the nature of the legal profession as a specialized vocation, to the fact that management of others is not commonplace to the lawyer's role.[4]

A few of Rubenstein's key points are summarized here:

- The "Elite": A law school education reinforces the approach under which many lawyers already see themselves as leaders simply by virtue of being a lawyer. It is the professional view of what Rubenstein characterizes as "part of the elite of society." He goes on to confirm the truism that, in fact, many lawyers have little to no training in leadership development except what they learn through trial and error.
- Specialized Vocation: A second barrier resides in the view that the legal profession is a specialized vocation that does not benefit from leadership development training.
- Independent Work: Lawyers often work alone with significant autonomy or on a regular basis with only a few partners, associates or staff. This leaves many lawyers doubting they need leadership development because they don't actually lead anyone on a daily basis.
- Communication as a Lawyer v. Leader: Lawyers are often superior communicators; however, communication in leadership also includes active listening skills needed to lead and develop subordinates or communicate collaboratively with peers and subordinates.

Rubenstein goes on to note the consequence for lawyers from leadership shortcomings as compared to that of their non-lawyer leader counterparts – failure to develop long-range strategic plans for their legal organizations.

As a legal specialist, I related to Rubenstein's "blocker" rationales for the legal profession's approach to leadership – notably the ones I highlight here. The elite and specialized points really resonated with me (at least in my aspirations), and I saw them resonate with my direct reports.

More frequently than I care to admit I had patent attorneys in my team who would begin reporting to me with the expectation that I should be the legal expert of the team; otherwise, as a leader, I had little to no value. It was viewed as an unusual concept for me to take the position that I was seeking to build a team of individuals more legally experienced and technically sharper than myself. Clearly articulating and demonstrating leadership competencies was and still is part of my first order of business when I inherit or assemble a team.

Often a challenging business environment provides the opportunity for a range of management qualities to be valued in different ways. Leadership is no exception. I found my leadership skills tested memorably on a couple of occasions that allowed me to show even the toughest of lawyer skeptics on my teams that leadership has its place in the legal profession – and is every bit as critical as in the non-legal setting.

In one situation my client significantly slashed my budget, so much so that I had no option but to slowly eliminate more than half of my staff and dramatically reduce resources. Maintaining the corporate vision for my team, ensuring respectful treatment of exiting staff, engaging remaining staff and simply accomplishing the legal priorities of our client all seemed severely conflicting and nearly impossible to advance simultaneously.

Disappointment and lack of focus prevailed, and I quickly realized I was in the center of a situation where leadership mattered most. I dedicated my efforts to thoughtfully creating a plan that engaged my team's input and heavily emphasized supporting the remaining staff, retaining and developing our strongest lawyers and making the tough calls to bring clarity through uncertainty.

The results far exceeded my expectations, and the modest-sized team that emerged from the ashes proves to this day to be the most impressive and highest performing team in my career to date. They delivered a volume and quality in legal support to the client – and in a more diverse range – than the originally constituted larger team. It was a stunning tribute to the value of leadership in mobilizing a team, working toward a vision and executing a plan.

That situation (along with a few others I will carry in my memory throughout my career) emphasizes to me the value of intentional focus on leadership development. Helping to advance the corporate vision and values, meeting business objectives and transforming a talented group of lawyers into a high-performing, engaged and collaborative in-house team, are daily and commonplace leadership activities that are an essential part of delivering in-house legal service at its optimum.

Recruiting With Leadership in Mind

For a legal leader, one of the most difficult challenges is building your in-house team. While in-house legal recruitment is another area where limited guidance exists for the legal leader, there are nevertheless successful leaders in the in-house world that have a wealth of useful experience and knowledge in this area.

Every individual is critical for a well-functioning team. Recruiting for leadership skills in addition to technical legal skills demonstrates an organization's commitment to the importance of leadership. Former Qwest General Counsel Rich Baer identified hallmarks of great in-house counsel:

- They help clients communicate more effectively.
- They help clients think more critically.
- They build consensus throughout the organization.
- They serve as the conscience of the company.[5]

Tom Sager, General Counsel for DuPont, shares similar thoughts on what are the makings of top in-house counsel. In working within the DuPont legal team, we hear Tom often emphasize that our strongest in-house lawyers evidence a knowledge of their business that enables them to contribute in ways far beyond the traditional practice of law. They are able to discern – regardless of their practice area – where they can add value to the business. This is true for our IP professionals, commercial lawyers, litigators and specialists.

A good recruitment process that looks holistically at candidates beyond strong legal skills will support building a team that reflects solid leadership characteristics like those highlighted above. It not only supports attracting and retaining based on both strong legal and leadership skills, but also demonstrates the in-house department's commitment to leadership. Well-crafted interview questions driving at a candidate's historical handling of matters have assisted my past recruiting efforts and given me insight that open-ended questions can't always provide.

After my share of recruitment experiences, I am an advocate for approaching the interview and screening process as a means for not only evaluating new team members, but also developing my existing team. I have engaged my direct reports in the recruiting process, recognizing that we are critically adding to our team. While I am sensitive to competing interests, I have witnessed first-hand the advancement of leadership skills in my team as they engaged in the recruiting process.

From my experience, it is important and rewarding to consider leadership skills in the recruitment process. Operating in teams in-house is a must for accomplishing goals that the individual alone cannot achieve – and we are increasingly expecting our law firm counterparts to be willing and able to work in teams with lawyers in-house and from other firms.

Along with evaluating the necessary legal skills, consider a recruiting process, as well as an outside counsel selection process, that takes into account an individual's or firm's approach to leadership.

Leadership Development – It Matters

My leadership experience has taught me that leadership development doesn't have to come from a textbook, but it does begin with curiosity and willingness to be open to viewing the management role as not only a legal service provider but also a leader. Reflecting on my career, I see that individual motivation to grow and nurture my leadership skills played a significant role because I had a passion for this subject on a substantive and operational level.

In hindsight, however, despite all that I've learned in the trenches, a little less trial and error would have been welcomed. Intentional focus and dedicated resources must be allocated to the leadership and talent development pipeline in our legal organizations.

One of the most rewarding aspects of my leadership journey has been being a part of the careers of the individuals I have had the opportunity and honor to lead. A few months ago a lawyer I previously managed met me for lunch and shared some of his recent accomplishments. It was an impressive array of work that had its early roots within a focused career development plan.

While I am confident he would have excelled in a range of settings, it was his recognition of leadership involvement in his development opportunities and the value it brought to his career and his client that reminded me yet again of the impact we can have on each and every individual on a team, and in turn what I as a legal leader can bring to my organization that has real value.

Undoubtedly, I have more to learn on the subject of leadership, and that's exactly the way I like it. ◆

FOOTNOTES

1. Deborah L. Rhode, *Lawyers and Leadership*, 20 Professional Lawyer, no. 3, 2010, at 1 (footnotes omitted).

2. Ben W. Heineman, Jr., *Lawyers as Leaders*, 116 Yale L.J. Pocket Part 266, 267 (2007), http://yalelawjournal.org/images/pdfs/102.pdf.

3. Herb Rubenstein, *Leadership for Lawyers* (2d ed. 2008).

4. Herb Rubenstein, *Why Leadership Development Is Such a Hard Sell in the Legal Profession*, http://www.leadershipforattorneys.org/articles/3-H_Why-Leadership-Development.pdf (last visited 3/4/14).

5. Mary Swanton, *Best Practices for Building Strong Legal Departments*, Inside Counsel, June 1, 2011, at page 53.

Kristine M. Wellman

OF COUNSEL: Hinton J. Lucas, Jr.

I had the pleasure of speaking with Hinton J. Lucas, Jr., for *Of Counsel*. Hinton recently retired from DuPont after 42 years.

When I arrived in Wilmington, Hinton was one of the first in-house counsels to reach out to me. He introduced himself, welcomed me and offered to assist in any way that he could. He later very effectively convinced me to support one of his many charitable community endeavors, which I gladly did.

Our paths crossed again when Hinton served as Chairman of the Board of the Delaware State Chamber of Commerce. We were chatting at a reception and I started peppering him with questions about his career at DuPont. It was then that I learned how interesting Hinton's path was into the DuPont Legal Department.

Hinton was born and raised in North Carolina. Upon graduation from college, he joined DuPont in Seaford, Delaware, as a first-line then second-line supervisor. After three years, Hinton transferred to Wilmington as a technical service representative and then advanced to technical marketing manager.

Although Hinton enjoyed his business career, he had a desire to pursue law. With eight years invested with DuPont, he approached his management and negotiated a leave of absence to attend law school that included a summer clerkship position in the DuPont Legal Department throughout law school.

What intrigued me about this juncture in Hinton's career is that he was willing to take some reasonable career risk, figured out a creative way to remain with his employer, and was comfortable starting over.

After eight years in business with contacts all over the company, he started anew at square one as a legal intern. Hinton took the long view and so did DuPont.

Hinton's first role in the Legal Department was in the Labor and Employment Division. A natural next step was his move into the Environmental and Commercial Divisions.

Later, Hinton agreed to take on a role that was more removed from his past business and legal experience up to that point. He transitioned into Government Affairs, working on legislative and regulatory relations and issues. Hinton advocated for the company for four years in that capacity, built strong relationships and honed even more diverse skills.

DuPont later tapped Hinton to step outside of the Legal Department to fill different company needs, one of which was a two-year assignment as Director of Human Resources.

Upon his retirement, Hinton sat on the global leadership team for the Legal Department and oversaw the areas of Labor, Employment, Benefits, Sourcing & Logistics, Real Estate, Immigration and Corporate Contributions, plus all corresponding litigation. In addition, he served as Chief Administrative Counsel with responsibility for the Legal Department's Divisions of I.T., Administrative Services, and Finance & Budgeting.

I asked Hinton about the impact of those early years in the business and the relationships he built through regulatory relations, and he said they were invaluable to his ability to understand DuPont's businesses at a deeper level and partner with his business clients to craft practical legal solutions to enable them to achieve their business objectives.

In our dialogue, Hinton and I acknowledged and reflected that his path is not typical for an in-house counsel and he was fortunate in his career to have opportunities present themselves at the right moments for both he and DuPont.

It is interesting that throughout my interview, I endeavored to persuade Hinton to share key career accomplishments, big wins for his clients or his impact on the legal community. Hinton modestly deflected all attempts to focus on his achievements and, instead, offered a number of insights.

On the subject of the most important attributes that in-house counsel should look for in outside counsel, Hinton said: "It is really very simple: know the company's culture and values, deeply understand our business, keep the lines of communication open, and partner with in-house counsel as if you are an extension of their team."

When I asked him what he would most miss about his tenure with DuPont, without missing a beat, Hinton said the people within the DuPont Legal Department and those in DuPont overall, mentoring lawyers and others, and serving his business clients.

I pressed Hinton on his retirement plans in North Carolina, lamenting that the loss to the Wilmington community would be North Carolina's gain. "No, no, no," he said. "I am still heavily engaged in Wilmington charitable and economic development activities and mentoring lawyers." He assured me I still would see him around town from time to time.

Finally, thinking about Luke Mette's article on *pro bono* service, I asked Hinton how he managed to balance his professional obligations, family and active community service (as I considered all the emails in my inbox, my articles on effective time management, and how to squeeze another hour out of my day). I was curious if, in his view, today's business environment is more challenging on those dimensions than when he began his career.

Hinton replied, no, that in his judgment today's world is much more conducive because of the flexibility technology offers, despite the perceived "always on" mentality. "It is all about your priorities and making the commitment." ◆

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