



# **Litigation Assessments and Maximizing Strategic Relationships With Outside Counsel**

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ROBERTO SCALESE: Good afternoon. The Association of Corporate Counsel and SmartPros Legal & Ethics welcome you to today's webcast, "Litigation Assessments and Maximizing Strategic Relationships With Outside Counsel."

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Our presentation today will be moderated by Miriam Smolen, associate general counsel for Fannie Mae. Miriam, take it away.

MIRIAM SMOLEN: Thank you, Roberto. Welcome, everyone, to the first presentation in the Litigation Masters Series that's being sponsored by the Association of Corporate Counsel Litigation Committee and Lex Mundi. I'm Miriam Smolen, chair of the Litigation Committee for the ACC, and this series is a four-parter that's focusing on areas of importance to the in-house litigation community. Each presentation will focus on two key litigation-related issues, and we hope that the in-depth knowledge that our presenters bring will make a difference to your day-to-day practice.

I want to put a little plug in for the three upcoming webcasts in our Litigation Masters Series, and these are all on the ACC Web site as well. You can link to it from the front page, where it lists Litigation Masters, or you can link to it from the Education page or the Litigation Committee page. The first one will be October 8, and we'll be talking about internal investigations and litigation holds. Then November 12, it's D&O [directors and officers] insurance and disclosure issues. And on December 10, it will be arbitration and global litigation issues.

I want to express our thanks to Lex Mundi and its litigation, arbitration, and dispute resolution practice group for their generous sponsorship of this series. They've been a long-time sponsor with ACC. Lex Mundi has 160 law firms worldwide, and they have provided legal expertise for ACC members for many years. Hopefully, you'll be at the annual meeting in Boston coming up in October. Lex Mundi will also be there, and I wanted to express their invitation for you to stop by their [spot in the] exhibit hall at Booth 404.

At this point, what I'd like to do is introduce our speakers today. Our topics are litigation assessments, and for that topic we have two very experienced speakers. Evan Slavitt is the vice president for business and legal affairs for AVX Corporation in Myrtle Beach, South Carolina. Prior to joining AVX, Mr. Slavitt was a trial attorney in private practice in Boston, and also served with the Department of Justice.

He's joined by John McClelland, who is a partner at Armstrong Teasdale in Kansas City. Mr. McClelland concentrates his practice in the areas of municipal law, bankruptcy, energy law, and commercial litigation. John's represented banks and other secured creditors in litigation and has a wide experience in bankruptcy and debt obligation.

Linda Kearney, who will be one of our speakers for the second part of the [program], on maximizing strategic relationships with outside counsel—Linda is a managing associate general counsel for WellPoint in their Austin, Texas office, where she's worked as in-house counsel since 2003. Linda serves on WellPoint's litigation management team and her primary responsibilities include managing significant provider litigation and all litigation for a group of WellPoint subsidiaries. And I'm also happy to note that Linda served as the vice chair of the Litigation Committee for the Association of Corporate Counsel for this past year.

Finally, Linda will be joined by Dan O'Toole, who's a leader of the Armstrong Teasdale litigation practice group. He's located in St. Louis, and his practice concentrates in the area of employment and labor law, where he's defended employers in ligations and arbitrations, including class-action lawsuits, all on a wide variety of employment-related issues.

So we're looking forward to hearing from all four of our panelists.

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MIRIAM SMOLEN: OK, and I'd like to start our presentation by turning it over to John.

JOHN MCCLELLAND: Thank you very much. I appreciate the opportunity to talk to everybody today. As Miriam said, I'm addressing these issues from the point of view of an outside counsel that works with general counsel in mid-to-large-sized banks and other companies. And in working with those general counsel, there are three issues that usually come up in our relationships.

The first one is the understanding of the options that are available when you go into a litigation mode, or have a claim. I think it's important for both the general counsel and the outside counsel to have a clear understanding up front why the claim arose and occurred within the context of the business operations of the bank or the company. Particularly, is this a one-time problem that happened, or is this an ongoing concern where the same type of thing could be happening somewhere in the company the same day?

Once we get past that, then we can really list the options to try to solve this problem, first being always a business solution. We can talk about the options of mediation, arbitration, litigation, and then go into all the subsets of options under litigation—discovery issues, jurisdiction issues, and all of the technicalities that go with that.

The next thing we always have is a budget. And I will say that general counsel are much more protective of their companies in terms of budgets, and that's not a problem—or should not be a problem—for your outside counsel. Regardless of what some people like to say, it is not impossible to set a budget “this early” in a case. It can be done very early on, but it's very important to stay flexible throughout the process.

I have a particular client that repairs heavy equipment. They say when a client brings in a piece of equipment, they want to know right up front how much it's going to cost to fix it. Why can't I do the same? My response is: When they get to fix the equipment, they just fix it. They don't have somebody standing on the other side of the equipment trying as hard as they can to tear it apart at the same time, and that's what I have, because I always have opposing counsel. Nevertheless, I can set a budget, and the one that's proved most effective, or at least most accurate to me, is kind of a rolling three-month budget. Look three months down the road, but update that every month. Obviously, I can go farther, but if you want an accurate budget, that's generally a good timeframe to work in. And of course, it is important to track performance against that budget. You can't work, particularly with a rolling budget like that, without updating and seeing where you are on a month-to-month basis.

The next issue we deal with often is the audit letter issue. That's important in the current context because it's something that's in a state of flux. The FASB [Financial Accounting Standards Board] requirements are likely to change—there's been a staff position change at the moment—but it still indicates that a resolution of these issues is

likely; that FAS 5 that governs these issues, while it still controls, is likely to change. That's going to have an impact on what we do in audit letters and how much we disclose. So, it's going to be important for both general counsel and outside counsel to keep current on the status of any changes and make sure we're complying with the current version. Also, to have some input, if you can, on proposed changes, because some of them are not where we'd like to see them, at least from the point of view of an outside counsel who's concerned about disclosing too much to the opposing parties.

The next section we have really is counseling the management and the board of the company. And the first point, I think, here is the most important but also the most difficult for an outside counsel, and that's explaining the nature of the case that you have in business terms.

I think all litigation really is a business problem. Even personal injury cases are a business problem for the maker of the product. Successful business people that you're going to encounter in management and on boards of directors are geared to look for business solutions to business problems. And that's likely to be something that meets the needs of both sides. They are more in the mindset of making deals, not dealing with things that fall apart. They will want to know—and need to know—how the problem arose in the context of this particular deal, and how to fix it.

A quick example: You can walk in and say, "We've been sued for breach of fiduciary duty and RICO," or you can walk in and say, "ABC Company claims that our franchise agreement with them allows us to collect excessive fees and we set it up that way intentionally." That's more a business explanation, where they can understand the problem going forward.

You then have the issue of explaining strategy. That, to me, is not as important in a board presentation, because it can get too complex too quickly. The key part of the strategy for the board is, I think, is to remember the business solution first. Then you can move on to the various legal technicalities of litigation planning, but be careful, again, to not go into too many legal technicalities.

Meaningful participation is the last point, and that is meaningful participation both ways, because that really protects everyone. It protects the board, the general counsel, and outside counsel. [If] you've really had a discussion, I think it's important for outside counsel, as they're participating directly in the presentation to management or the board, to engage and get responses, not just to deliver a report and sit down. Because if you have the responses, then everybody know that everybody really heard the information, and, in the future, if it comes to that, everybody has a good basis for the judgments that they made and the decisions they made.

The last point I have is really instructing outside counsel, and this is what you all tell me. Tactics are, to me, a general counsel or a board decision, because true tactics should be determined on the basis of business considerations, not just the narrow range of considerations that I, as maybe a trial lawyer, would have. There are considerations of how this litigation affects other deals, customers, relationships, public image, [and] disclosure for the purpose of investors. And it's important to have an understanding of that very early on in the litigation, before some kind of mistake is made; before outside counsel does something that causes senior management to say, "How could that have possibly happened? Didn't you know X, or didn't you know Y?"

Establishing goals with an outside counsel is something that more and more general counsel do. It's not something, as an outside counsel, that I'm offended by. I like it.

Timeline goals are important, and business goals may influence timeline goals. It may be, for some business reason, that it's very important to get a deal solved quickly—to close it out this quarter, this year, this week. And that may be for confidential business reasons. You don't have to tell us, as an outside counsel, what that reason is; just tell us it has to be done by that date.

Fee goals are important. Staying on the budget, as long as the budget can be adjusted for unknown things that come up, but it is a perfectly valid measure.

Performance goals are a little tougher. A goal of “settle this case for X dollars,” may not get you the result you want. Particularly early on in a case, it’s hard to predict that kind of thing. On the other hand, this is the age of creative, flexible legal fees and performance goals set up front that actually impact the fees rather than the traditional model of a billed hour at a certain rate, and that’s something that, as an outside counsel, I’m never going to be offended by a suggestion from a client or a general counsel that we consider a performance goal that also affects the fee and the relationship.

Evaluating performance is something that we expect to have happen to us. You should do it early and often. If timelines are not met early on in your dealings with us, it’s not going to get better. If calls and e-mails are not returned promptly from us early on in the relationship, it’s not going to get better. And those are problems that you might as well address up front. Don’t wait for the end of the relationship.

Can you create some kind of a grading report form to grade outside counsel? Yes, you can. If you create it, think about one question: Would you use that to grade your spouse? And the answer probably is going to be no, because in the end, this relationship is a personal relationship. We expect to have you deal with us as members of a team working for your benefit, but also friends, and that you would tell us at any point in time if there’s a problem. If you don’t feel quite right about something we’re doing, great, tell us and we will work through that, or you need to change the relationship. But it should always be on that basis.

And with that, I’m going to ask for the next slide and turn it over to Evan.

EVAN SLAVITT: All right, everybody should strap in. It might be a little bit of a bumpy ride, because what I’m going to try to do is just give an overview of some of the ways you can do litigation assessments. Recognize this is just an overview, and that there’s a lot of detail behind this. But it will give you a sense of where you can go and what kinds of things you can do.

And I’m going to talk about basically three approaches. The pros and cons/pluses and minuses approach, the weighted value approach, and I’m going to talk about decision trees. Because I think that those categories are the three main categories that are active today in evaluating litigation.

All right, pros and cons: fairly straightforward. You set up a chart, and you figure out what your options are—usually settlement and litigate. You, along with your business people, figure out what your key factors are. What are the things that you care about most? And you list those factors, and then you go through them and you try to figure out which are the benefits of settlement and which are the benefits of litigation. And in the sort of sample I’ve given, litigation cost is obviously lower with settlement, public relations often is better with settlement, and the company’s less burdened. On the other hand, in this pretend company, settling does not accomplish their policy issues and they haven’t actually figured out what the total cost is going to be yet. But nonetheless, this is a way of making concrete and teasing out the specific factors and the specific points so that they can be compared, rather than just talking in very general terms —“Well, settlement is good,” or “Litigation is tough,” or “We can do this,” or “We can do that”—because I think the more specific you can be, the better the understanding is.

Related to pros and cons is the ever-popular pluses and minuses. Basically, it’s the same concept except that now you can do a little bit more in terms of putting some weights on things. So, you’ll notice that there’s a double plus in litigation cost, because that’s a way of showing that that is really, really a benefit, not just something of a benefit. On litigation, in this pretend example, I’ve done two pluses in policy issues, so that the company can see that—or your managers or the CEO can see that—while settlement is really good from these three perspectives, it’s really bad from a policy point of view.

What's the benefit of doing that? Well again, you're teasing out the specific issues and you're letting the CEO make the decision: Which is more important, the policy or the cost? That way, later on down the road, when he or she starts to complain about the cost, you can in some gentle way remind them that that is because they made that decision, and that's the reason that we're going down that particular pathway. And I find that to be very useful; not the reminding part, but the part that allows the business people to make a business decision, to understand that it's their job to evaluate these factors. They can't just turn to you and say, "What should we do?" because you have to turn to them and say, "Well, what's important to you?"

More detailed than these are the—well, let me talk about the advantages of this. The nice thing about pros and cons and pluses and minuses [is that] it is qualitative, not quantitative, so you're just doing it in a sort of "This is good; this is bad" way. But it is very simple and intuitive, it's very easy to explain, business people use this kind of approach all the time, and it's very quick to put together. You can just do it on a piece of paper. You can do it on a big easel. You don't have to do it in any kind of formal way. So, it is a good technique. I tend not to use it as much, but I think that it is better than simply going in with the amorphous "We've been sued, and this is what we might do, and it could cost us some money" kind of approach.

So, moving on. The next approach is a weighted value approach. Now, this requires that you use an Excel spreadsheet or that you be very good with numbers. In the bottom, by the way, I've done what the calculation would look like in an Excel spreadsheet. But what I've done in this pretend case is: I've said, "OK, there's a 70 percent chance that the company is going to lose." There are three kinds of damages. Let's say one is RICO damages, one is contract damages, and one is sort of a low reimbursement of something damages. And then I make a professional judgment—or I have outside counsel make a professional judgment—as to what the likelihood is of each of these possible outcomes. I plug that into the formula, and what I get is: I get a value of the case.

Now, this is not what the case is actually going to turn out to be. The case, as you'll see, will either be \$1.25 million, \$800,000, one \$100,000 or \$0. It will never be \$507,000. But that is sort of a weighted average; a weighted value of the case. So, on average, if you did this case a lot of times—which, of course, you don't get to do—it will generate an average value of \$507,000. Now, that you can compare to, say, a settlement offer. In this case, the other side has offered that the company pay it \$400,000 to resolve the case. So, now you can actually compare two numbers—\$507,000 and \$400,000—and see that the settlement, compared to the current judgments on what's going to happen, is an advantageous settlement. Now you need to get your business people not to focus on the last \$7,500. It's just because of the math you'll get numbers that seem precise, and in fact, when I do presentations, I generally round, even though the Excel can calculate it in detail.

The advantages of this: It's similar to business strategy evaluation in the sense that there are lots of business strategy models that do exactly the same thing, so many businessmen have seen approaches this way. It allows an actual direct comparison because you have numbers. You can now look at a settlement number and a litigation number.

It also allows you to tweak your judgments about the litigation factors and see what kind of effect they have on the outcome. Sometimes, it turns out that one outcome, although it looks really big—they've sued us for a \$100 million—the probability of that is so small that, practically, it can be ignored. You can also use this to establish a baseline at the beginning of the case. This is what the case looked like when the complaint was filed. Six months later, you do the same approach and it allows you to see what has changed and allows you to go back to the outside counsel and say, "Why has your evaluation of liability changed?" or "Why has this number changed on the damages?"

It is, in fact, fairly easily done in Excel or any other spreadsheet. It does require some explanation to some managers and outside counsel (people who have grown up in the non-numbers side of business or the non-numbers side of the law). But nonetheless, I think that you can see that you can do it.

Decision trees are simply another way of doing exactly the same thing but doing it visually. Here, the flow is from left to right. The first question is, “Is the company liable?” Yes: 70 percent. No: 30 percent. Then, if it is liable, what are the possible outcomes? And again, you have the three outcomes. And then what you’ll get is: You’ll get a likelihood of each outcome and the weighted value of each of those branches, and that will add up to the total value of the case.

So, here you’ll see that there’s only a 21 percent chance of the big number hitting, which means that four out of five times, the company will not be seeing that number. And that’s useful to allow people to put that kind of number in perspective. So, this is another way of simply presenting the information, and I find that this way of presenting it visually allows people to follow it even if they’re not particularly sophisticated in either probabilities or doing mathematics. It simply presents the information clearly. Next slide.

So again, the math is the same, but the visual presentation is sharper. And again, many business people are familiar with decision trees, so that they will see this as you talking their language. It has many of the same advantages of the calculation. I believe it actually allows better discussion of strategy with outside counsel because many outside counsel are simply not used to thinking this way. And this allows me to walk through with them their analysis, how it affects things, and allows me to sort of communicate what they say to me and then what I have to then explain to management.

Next slide. OK.

There are some problems. There are some disadvantages of the quantitative valuation. First of all, recognize that the value you get is an explicit value that relates to this particular case. You have to take into account what might happen if you settle cases. Are there going to be more cases? In the same way that somebody who’s playing poker, who calls a particular bet, has to take into account what people after him or her are going to do. It does not address policy issues particularly well, and public relations issues are also not particularly well-addressed by this. You have to kind of layer those on. It can address legal fees, but that’s a mathematical bridge too far for this presentation. But if people are curious, there are models and techniques out there to fold in legal fees, to take them into account as well.

Which leads us to the question portion of this [section].

MIRIAM SMOLEN: Great. Evan and John, we do have a couple of questions here. Of course, assessing litigation cost is always a topic of great interest to inside counsel and there’s a question on that which is, “Should outside counsel be able to assess or approximate litigation costs even in large-scale cases with multiple parties?” This particular questioner has litigation with over 15 parties, and obviously it’s very difficult for inside counsel to put a value when outside counsel is not able to give a good approximation, even in these complicated cases.

JOHN MCCLELLAND: Well, I would address that and say it is possible to do it. The degree of accuracy is going to be mixed. You have to be ready to adjust that. But even in a multi-party case, early on, there are just experience-based numbers you can put to the problem. It’s not an impossible task.

EVAN SLAVITT: I tend to agree. I think that you—as long as you’re willing to be approximately right, rather than precisely wrong—you can at least generate a range of costs and use that to start as a starting point to figure out what the strategy might be.

MIRIAM SMOLEN: We have another question on the product that’s generated from the models that Evan talked about—the decision tree and the weighted value models. And the question is about whether or not that information impacts an audit letter. Do you have to do a more detailed disclosure because now you’ve produced this more detailed numerical evaluation?

JOHN MCCLELLAND: Under the current FAS 5, my view is no, because all we’re doing is: We are taking the

judgments that we already make in qualitative terms and we're running them through a model. So, we're still able to say, at most stages of the litigation, that within the constraints of what the accounting firms are asking for, that we give our usual response: The litigation is in too early a stage to predict the outcome. Because what they want to know is not probabilities; they want to know if we can predict an outcome. So, at the current stage of the FAS 5 rules, my view is that it doesn't actually change anything, because all you're doing is you're teasing out the specific judgments that go into the general judgment. You're not actually increasing or decreasing the certainty of the outcome. If we get the new FAS 5, then everybody's going to have to figure out how to do that, and while I hope we don't get it, then these tools will almost become mandatory.

MIRIAM SMOLEN: And another question. People are interested in the actual decision tree process. Are there programs out there that kind of lead you through the steps of these litigation decision trees?

EVAN SLAVITT: The answer is: Yes, there are. They sit right on top of the spreadsheet program. The one I use is called P-Tree. But there are number of other competing programs out there, and essentially they let you just put in the information you know, and they will automatically generate the probabilities, the pictures, and pretty much everything else, so that it turns out that this is a relatively painless approach.

MIRIAM SMOLEN: And there's one final question back on assessing litigation costs, and this actually, I think, will lead nicely into the second part of [the] presentation, because this is more subjective than objective. What do you do to encourage outside counsel to not be too optimistic? The questioner tends to see very optimistic outside counsel with regards to litigation evaluation, and the thought is that there's a sense they don't want to be more, let's say, realistic because it may look they have lost confidence in their own skills. So there's some issues around assuring that the client remains happy with the overly confident outside counsel.

EVAN SLAVITT: This is Evan; let me address it first. I find that actually this is a better way of doing this, because rather than having them come to a quick bottom line—"It's a slam dunk and you'll recover \$1 million"—it allows them to look at each stage, and then you find out that, at any given stage, the best they're ever going to say is [that] you have an 80 percent chance of winning or losing or something like that. And then the cumulative probabilities predict the overall outcome. So, they can be as optimistic as they can realistically be, and it may still turn out that the case has a significant problem that you might want to deal with it.

I also find that, [in] dealing with opposing counsel in mediations, this forces them to tell their own client that maybe things aren't quite as rosy as they might appear.

JOHN MCCLELLAND: I would agree with that. I think getting to this assessment stage as early as you can really takes away some of the pressure that outside counsel might feel to say something that's overly optimistic and gives them a basis for a truthful answer, and it also gives you some insurance from the inside that a process has been followed.

MIRIAM SMOLEN: Well, that is great. Thank you so much, Evan and John, and that question does lead us in nicely right into the next session, which is "Maximizing Strategic Relationships With Outside Counsel" and I'd like to turn this over to Linda and Dan.

LINDA KEARNEY: Thanks, Miriam. This is Linda. Let me just give a bit of background—so that you know my perspective going into this discussion—about my company. The company I work for is a Fortune 50 company with 100 inside counsel, approximately 30 litigation attorneys, and we are very decentralized. The in-house counsel is spread out in at least 16 different states. So, that gives you a tidbit of background about us.

About three years ago, we underwent a massive convergence process, and at that time we discovered that we were

using around 250 law firms to handle litigation nationwide, and the way we were set up was that each in-house counsel had discretion to retain whatever outside counsel they deemed most appropriate for each individual matter he or she was handling. And so, again, [we had] very decentralized control over the use of outside counsel.

What I found to be the case is that that meant few law firms really understood all of the issues facing the entire enterprise. And the problem with that is that it meant every time I hired a new law firm or hired a law firm I had used in the past, but maybe hadn't used them frequently, it meant that I had to go back and give an overview of the company. [I had to] explain the operations, explain how it functions, explain the goals and the risk tolerance of the company, and also had to weave into that litigation—to case they were handling—an understanding of how that particular litigation case perhaps had larger impact or significance to the company beyond that single case. Next slide.

So, with that many different outside counsel, we really lacked, I think, a lot of the efficiencies, as I had just explained. Also, we weren't able to capture a lot of added value, and what I meant by added value was outside counsel coming in and providing training opportunities both to in-house counsel and to the business units, and then also having outside counsel come in and meet with the legal department and give the legal department an opportunity to bring in different executives from the business side to understand our company's operations, and to sort of partner with them. So, we also had—well, the next two points really go to what I had just talked about, that the relationships were really with the individual lawyers within the legal department and not with the legal department as a whole.

So, the idea was to create a system that solved some of those problems. So we used a pretty extensive RFI [request for information] and RFP [request for proposal] that we went through. It took about a year and a half to go through the process. Ultimately, we ended up selecting 14 law firms to serve as panel firms; three of them are national law firms and 11 were state-based law firms, and you'll see in just a couple of minutes here how we divided that up. And we defined "national" based on subject matter that tended to be more national in scope and state law firms to handle matters more state-focused. We entered into two-year agreements with those firms and I'll talk a little bit more about the details of those relationships as we go forward. But I wanted to turn it over to Dan for a moment and ask him, from outside counsel's perspective, what other types of relationships he's seen and how well they've worked.

OK, let's go ahead and go to the next slide, then, if we could, Miriam. Thank you.

One of the questions is: Does the number of firms we regularly use affect the relationship? Too many firms—and [for] some of this I'll provide a little bit of detail about those—too few firms don't allow for enough competition, and also we had a lot of concerns that too few firms would create problems for us when a conflict arose, particularly with the national law firms. If you have one national law firm and some pretty significant litigation, and there are multiple parties involved in that litigation, or it's an issue that involves other companies, that firm may be conflicted out. And if that's the case, you now have lost all of those efficiencies by virtue of having only one law firm, because now you're going to have to retain somebody else who doesn't have that history and that relationship with the company.

Too many firms create the same inefficiencies that I had just talked about and doesn't really foster or allow for the creation of that partnership and also becomes just difficult to manage. From a practical standpoint, the more firms you have, the more invoices you have coming in from different parties, and the more entities or companies you have to explain billing processes to and other types of administrative requirements within the legal department. More companies—more law firms—you have to collect accruals from and all of those sort of logistics, which make it a bit more unwieldy.

Dan, we were just talking about too many firms or too few firms, and I wanted to ask you, as outside counsel, your perspective on whether there's a need for competition among law firms.

DAN O'TOOLE: This is a hugely important issue, and I can tell you from a personal perspective and being involved in a number of these relationships, that the best thing—one of the best things, I should say—that the in-house counsel can

do is to foster a sense of competition between the firms that they use as outside attorneys. You need, certainly, to have enough firms out there so that there's a true sense of competition. And the firms that I've dealt with—the outside corporations I have dealt with—they've done a good job of fostering competition.

For example, they will have us down to headquarters once a year, in which you will be presented with an evaluation that will show how you performed according to a ranking of peer firms. And that is very beneficial for me in terms of motivating me, because as the practice group leader and the relationship partner for that client, I do not want to go down to headquarters and be told that we're at the bottom of the barrel. It is a huge motivator for me, number one. Secondly, another thing that in-house counsel has done: I even have one relationship where they have a “network firm of the year” award. So, that at the meeting that they have once a year of all the outside law firms, they actually present an award to the firm that has gone above and beyond, and I can tell you, sitting there, when they're getting ready to make that announcement, you want to be the one that gets his or her name called, and that really motivates you and how you deal with the client on a day-to-day basis.

LINDA KEARNEY: All right, thank you. Next slide, Miriam.

The type of work that's assigned to a firm can also affect the relationship you have. As I indicated earlier, we broke ours down into national law firms and state law firms. And for national law firms, those are firms that tended to handle matters of political [and] financial significance, cases that had far-reaching business implications, or might result in a lot of publicity. And with those firms, because of the nature of what they're handling and because they're handling matters that tend to affect a large part of the enterprise, as opposed to one discrete part or one subsidiary, we would—the idea is [to] give those firms greater access and greater information about the enterprise as a whole.

Conversely, state law firms are handling matters that tend to be the more—not that they're not significant cases; they may very well be financially significant cases or involve publicity within the state—but they tend to be cases that are more of the routine litigation that we would have as a company and tend to be, or affect, a particular entity within a state and be based more on state laws.

Two of the really key pieces that I hope you'll see woven throughout this is that communication and setting expectations are absolutely critical. And so, we wanted to let the firms know at the outset [that] these are the types of cases that we are looking to you to handle and also laying out for them what our expectations are in terms of getting to know the company and understanding its operations and its goals.

Dan, from your perspective, what do you expect a company to tell you about the types of cases you're going to be handling going forward?

DAN O'TOOLE: I actually prefer that a company be very clear with me as to what types of matters I'm going to be expected to handle for them and the types of matters that I can be expected, or I can expect, to handle on behalf of the corporation. If a lawsuit, for example, is filed, and, in a lot of these situations, I think it's very important for the corporation to make it clear what geographic area I'm going to be responsible for as the attorney who is going to be representing that corporation. And that serves a lot of different purposes. Number one, this I think is a benefit to the in-house attorney, so that every time a lawsuit is filed in a certain jurisdiction, the in-house attorney is not inundated with calls from other persons—outside attorneys with whom the in-house attorney has a relationship, all of whom are vying for that piece of business. That's got to be something that is a distraction and is a difficult decision for in-house attorneys, and I've heard in-house attorneys lament about the fact that, “There was just this lawsuit filed and I've gotten 13 calls on the lawsuit already.”

The other thing it does, though, is: It helps me within my firm, because if I represent client X, and let's say I represent client X in labor and employment matters, and somebody in my firm notices that client X has now been sued in a product liability action. If I've gotten clear instructions from the in-house attorney that I am responsible for labor and

employment matters and this other firm is responsible for product liability, and that's clear to me, I've got an automatic defense, number one, against the other member of my firm who's bugging me, [saying] "Sell my practice group to your client." That helps me fend them off, but it also, again, protects you from the calls that you're going to be getting when I'm trying to cross-sell business to you, which is all the rage in firms now, of course.

LINDA KEARNEY: Next slide. In terms of the structure of the legal department, I think the larger the legal department you have, whether it's centralized or decentralized, necessitates having really good internal protocols and policies and procedures in terms of management of outside counsel, and how all of that's going to work, and how outside counsel is retained, and if you're going to go outside of a certain panel of firms, that there be some process to get approval to do that. And part of the reason that those protocols and that control is necessary, because again, if you're going to continue to foster and develop a partnership, there has to be a clear idea for the outside counsel and for the in-house counsel about who is managing that relationship and what the expectations are going to be. So, if you have the national law firm, for instance, there ought to be one in-house counsel who is responsible for being the point person in-house with that law firm. So, if there are issues that arise, problems, concerns—whether they are substantive about the handling of the case, or whether they are of a billing nature—there is one person to whom information can flow.

Dan, what's your perspective on centralized control?

DAN O'TOOLE: Again, I think it's a critical component of adequately managing the relationship, and I think you need to say nothing more than that if there's one person who is responsible for managing the relationship with the law firm, it makes it much easier to detect if the law firm is not performing up to expectations. If the relationship is decentralized and no one feels like they have the primary responsibility for monitoring a firm's performance, you're not protected as much as you can be against inadequate performance.

LINDA KEARNEY: Next slide. The volume of work plays two roles. One is, obviously, it's financial, to the extent that you agree to commit a certain volume of work—or percentage of your work—over to a law firm or small group of law firms, then there's an understanding that the law firm is going to realize income as a result of that. But the other benefit out of the volume is really that communication. To the extent that you are actively involved with a law firm and you are having regular communications with them via e-mail or phone call—every month, every couple of weeks, whatever the case may be—again, there's going to be a greater recognition of what are the issues that you're currently facing, and you're going to continue to build that familiarity and that relationship, which is going to lead to far greater efficiency, and it's going to lead to easier communication in critiquing, when the time comes.

The other benefit you get from that increased communication and regular contact with the law firm is the ability of them to spot issues and identify trends. At some point in time in a partnership, you move beyond just a law firm handling a particular matter that's been turned over to them, but you get the benefit of the law firm saying, "Hey, you guys may not be aware of this yet, but I've seen this trend occurring. I've been watching the industry. I have other clients in the industry"—whatever the case may be—"and this is what I see developing. So, take a look at your own business operations to identify whether or not you may have some of those issues and be proactive in trying to make sure that your business processes are appropriate."

Also, the volume of work impacts the extent to which the firm is willing to give the added value. And the added value is, again, those training sessions, those in-person meetings, and then also those one-off phone calls, which you might call counseling hours. [It's] the ability to pick up the phone and call the firm and say, "We have an issue. It's not in litigation. We're hoping to avoid litigation, and can you give me some advice?" You spend 10 or 15 minutes, 20 minutes, on the phone, and in a partnership, oftentimes that time never ends up on an invoice.

So, Dan, is there anything from your perspective you wanted to add about the benefits you see in having that close working relationship with the company?

DAN O'TOOLE: Well, one of the terms you used, Linda, repeatedly is "partnership," and in-house counsel, I think everyone would agree, have a significant benefit to having an outside attorney who has invested time or whose team has invested time in learning the company, becoming more familiar with it, understanding its problems, so you don't have to explain to me or reinvent the wheel for me every time you make contact with an attorney. That's a huge benefit to in-house counsel.

You've got to understand, though, that if you want this partnership, in order to have any real prayer of working, it's got to be a two-way street. A partnership is just that; it's two working together. And if there's not the volume of business there that allows the outside firm to justify investing time in the client, it makes it difficult for that to happen. I simply can't invest all the mental energy and time that it takes to understand a client if I get a call to handle work for that client once every two years and we may work on a case together.

On the other hand, I've got a client right now who we do all of their work in a multi-state area. Day after day, I am dealing with this client. We recently took a field trip out to one of their facilities. We took six lawyers out there, no charge to the company, toured the place and saw what was going on. Another of my associates, who just joined and is part of that client team, recently spent an entire day shadowing one of the employees in the company to learn how that specific employee performed that job, which—that job, in particular, is a job that tends to be involved in a lot of litigation that's filed against the company. And so, with the volume of business, and knowing that you're going to be giving me the next case that comes along, I am much more inclined and able to justify to the people I've got to report to why we're investing a lot of time in this client. I think it's critical.

LINDA KEARNEY: All right, on the next slide, one of the key aspects of this relationship with outside counsel is to have a relationship partner at the law firm, and that is one partner who is the go-to person, similar to what I had talked about on the in-house counsel side. And that relationship partner is going to oversee billing issues. They're going to report on added value that the firm provides annually. For instance, we've asked our law firms—particularly the national law firms—at the end of the year to, say, give us a summary of all of the value of everything you've given to us that isn't seen in an invoice. All those counseling hours that aren't put on invoices, all of the time they spend coming to quarterly meetings, where we spend a day and a half with, typically, three partners at each of three law firms. They come in. We have dinner the night before. We meet all day. We have presentations, both by the law firms and then also presentations by the business clients to share information. And all of that time and expense is absorbed by the law firms, so report that back to us as well. They're going to be responsible for ensuring the proper handling of the matters inside the firm, and they're going to really be the go-to person for any and all purposes.

One of the things that I think is critically important for the relationship partner—and some do this better than others—is: Their job is not to be the sole contact or sole known lawyer at the law firm with the company, but it's to be sort of the head lawyer, but to help us get to know the other lawyers at the law firm. We need to know the associates. We need to know some of the other partners that are behind the scenes doing our work. Because while the primary relationship is with the relationship partner, our relationship, in order to grow and develop and further solidify, needs to be with those other lawyers as well. And we need to develop confidence in them. Dan, your experience in dealing with [and] acting as a relationship partner—has it been beneficial?

DAN O'TOOLE: The relationship partner is another portion of this equation that is critical. Number one, it allows me, frankly—and I am a relationship partner in a couple of these setups—it allows me to do what Linda said was critical, which is to share the client a little more. And I don't know necessarily why this is, but I think it's a recognition, frankly, of my role with this client, and so, knowing that I am recognized as having this role with the client, I am much more open, I think, to saying, "Here, you do this. You do that. You deal with these people," because they know what my role is with the client. That's as a practical matter.

The other thing is that it helps me, as the relationship partner of the group of attorneys within my firm, to better direct the attorneys in my firm so that we can accomplish the best results for the client. What I don't want to have is: I don't

want to have a team where there is any question about who the leader is, because attorneys are different. We do things different ways. And one attorney may think that something's important, another attorney may not, and what you don't want to have is team members who can go to the parent, for example, who is most likely to give them a dollar at the concession stand. You need to know what the marching orders are. And so that is critical to avoid mixed signals. And that relationship partner, too, establishes with the in-house attorney a clear channel of communication so that the in-house attorney can tell the relationship partner what is important, and then the relationship partner, having that status, then directs the law firm.

LINDA KEARNEY: And Dan had mentioned the concept of teams, and what we've asked each law firm to do is to give us—and it's actually a list that they provide to us of the core team members, and those are both associates and partners who are designated as regularly working on our work. And the relationship partner can add lawyers to it or take them away over time as appropriate, and share that information with in-house counsel. But the idea is to have a dedicated team so that you understand who those lawyers are and you understand the depth of the knowledge and experience that's available there for you. Dan, for your partners and associates at the firm, what do you see as the effect on them of being part of a designated team?

DAN O'TOOLE: I think it has a number of benefits. One, of course, and because these corporations with whom you have these relationships tend to be significant clients of the firm, and the fact of the matter is: It's a nice designation that you can give, and there's a certain amount of pride as to being a member of these teams. The benefit to you, though, as in-house counsel, though, I believe, is that we, as attorneys—outside attorneys—deal with lots and lots and lots of clients. And we do this day after day after day. If you are part of a team, and I can assign work to someone as part of my team—and especially when you're doing the work over and over and building the relationships with the in-house counsel—I think it bestows upon the person doing the work an extra sense of responsibility above and beyond what they already have. And they've got a real sense of responsibility for the success of that client and the continuing success of the client, knowing that, as a team member, that this is a valuable client to the firm, and they want to keep this going and they don't want to let the rest of their team down, also.

LINDA KEARNEY: And there was one comment made earlier about a scorecard, and I just want to finish, from my perspective, with what I think is one of the linchpins of this, and that is evaluation of the relationship. And what we do is: Twice a year, we have a written questionnaire that we submit to in-house counsel for them to complete, and there are certain criteria on there against which the in-house counsel is to evaluate the performance of the outside counsel. And that criteria was established or developed in-house, but also outside counsel commented on it and provided whatever edits and additions and changes they thought were appropriate, and so both sides understand what they're being reviewed against.

Those are completed, and then we get together in an effort—at the completion of those—and meet and go through those and talk about how the law firms performed. And the idea is: We talk about how they performed, they talk about how we performed in-house, and we figure out a way to, hopefully, make things better, more efficient, and make the relationship work more smoothly. So, those are my comments. Dan, I didn't know if you wanted to—I know you talked about it a little bit, the scorecard—I don't know if there [were] any other comments that you had that you wanted to add.

MIRIAM SMOLEN: Let me ask one question that's come in, and you could both comment on that. There were a number of questions about the evaluations. One was if you could discuss what some of the criteria were that you use, on the inside perspective. And then, outside, what are some comments that are most helpful to the outside counsel? And there was another question on whether, when you do all these evaluations, you're also evaluating rates. So, not just the total amount that ends up getting paid, but kind of measuring the firms against each other on rates and whether that is something that you then negotiate again after you do [this] round of evaluations?

DAN O'TOOLE: I could take the first crack at that. First of all, with the rate issue: No, that has not been the case that we are necessarily evaluated against other firms with respect to rates, and that is, I think, a result as much as anything

from the fact that in the relationships that I am in, these are typically national companies, and so it doesn't do a whole heck of a lot of good to compare the rate of Armstrong Teasdale as a Midwestern firm against the rate of coastal firms, for example. The other criteria on these scorecards, though: Much of it is the nuts and bolts of legal practice. The in-house attorneys who are polled as part of the scorecard process are asked questions in terms of: How does this firm rate in the timeliness of returning phone calls? How does this firm rate in the clarity of the reports they send us? How does this firm rate in terms of the usefulness of the advice that they give us? Are they one of these firms [where] the people that we're dealing with waffle and they tell you about 100 things you ought to be afraid of, or do they tell you, "Here's a couple of risks, but here's a course of action that is pragmatic that I am offering to the company, and that I suggest we handle."

It's those types of real nuts and bolts, and it's nothing really more complicated than what you, as an in-house attorney, would sit down and say, "What it is that drives me nuts about a law firm when I am dealing with them?" It's not getting back to me promptly; it's giving me muddled responses; it's not understanding my business and giving me practical advice that I can use and implement with the business people.

LINDA KEARNEY: It is. I would agree with that. And then we add on comments like knowledge of substantive legal areas, how well they work with outside counsel, at least as far as we can tell. We add a category about results—what we think about the results they have obtained for us. So, but it is a lot of those timeliness and responsiveness issues as well. So, it's a long list.

With regard to the rates, we set our rates for a two-year period of time with the firm, so whatever we've negotiated, that's what stays in place. We then, at the end of that two years, will go through another RFP process, at which time we have the opportunity to renegotiate—both sides do—going forward.

What we do talk about at the meeting, though, is efficiencies in billing. We can't affect the rates but we can talk about how can we keep these fees lower, and that is: How can we both work more efficiently? What can we do in-house to make your job easier to get information to you? And then in terms of some of the detailed billing issues, those are monthly discussions with the relationship partner, so that hopefully those are dealt with on an ongoing basis.

MIRIAM SMOLEN: Well, this is great. The information that the two of you have provided and the earlier session, I think, have been incredibly useful, and I am certainly hoping that our audience agrees. I want to thank again John, Evan, Linda and Dan for putting all the work into this presentation and for participating today. Again, I want to remind our audience that this was the first in the Litigation Masters Series, and we have three more coming up. I'll remind you again of the dates. October 8, the Internal Investigations and Litigation Holds session will be held. November 12 is D&O Insurance and Disclosure Issues. And December 10 is Arbitration and Global Litigation Issues. Again, we couldn't have done this without the sponsorship and support of Lex Mundi and its private counsel affiliates. Thank you so much, Armstrong Teasdale.

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ROBERTO SCALESE: On behalf of the Association of Corporate Counsel and SmartPros Legal & Ethics, thank you again for listening to today's program.

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Thank you again. This program is now concluded. Have a great day.

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