DEFINING IN-HOUSE LEADERSHIP:

LYONDELL'S AGGRESSIVE, INTEGRITY-BASED LITIGATION MODEL

BY JOSEPH F. SPEELMAN

We live in a culture of intimidation and acquiescence. Besieged by predatory plaintiffs' attorneys and a maddening proliferation of dubious lawsuits, corporations worry about the consequences of losing, they worry about the costs of winning, they worry about what the newspapers will say, and they worry about what their customers think.

As a result, they're sitting ducks. Some corporations may claim to take a no-prisoners approach to non-meritorious lawsuits of one sort or another, but their proud assertions are often more wishful thinking than matters of record.

I am proud to be the litigation associate general counsel of a company—LyondellBassell (LBI)—that has actually implemented a litigation strategy to forcefully address this pandemic. There are two cornerstones.

First, the company has made winning in and out of court the fundamental priority in dealing with all—repeat, *all*—cases that lack merit. LBI's record confirms that the company has made good on its promise not to compromise and to do whatever it must do to deter legal banditry.

Second, in so doing, LBI has set new criteria in the inside/outside relationship. It was our goal to instill the company's own sense of mission in its legal counselors and, because that mission is of palpable professional and social significance, a true inside/outside partnership has emerged. At LBI we need not disseminate bromides and best practices about what we expect from outside counsel. Our outside counsel are already fiercely loyal to the company and to the concept of winning that drives its strategy.

Therefore take heed how you impawn our person,
How you awake our sleeping sword of war.

—William Shakespeare
"Henry V," Act I, Scene 2

To be sure, all this is easily said and boasted. I believe, though, that there is a larger issue here than the successes of one company. That issue has everything to do with defending corporate integrity where it deserves to be defended. As such, the LBI experience presumably merits broader attention as a useful case study and, to best understand the context in which our litigation approach has evolved, a little background information is helpful.

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Beginnings

Fifteen years ago, when I joined what was then the Lyondell Chemical Company, it was a relatively small commodity chemical company beset with serious problems, including major toxic tort litigation and an ongoing investigation by the US government into its industrial processes.

In a new city with a new company, I felt somewhat isolated. Instinctively, I knew I needed advocates—advocates who were not only capable, who not only enjoy strong reputations, but who would also subscribe to a culture of "winning" as a primary goal. We would demand more than excellent lawyering. I emphasized *deterrence* of litigation through the aggressive and consistent pursuit of victory. As far as I could see, both self-interest and justice precluded settlements based solely on the "cost of litigation" or because the matter is pending in a difficult or unfriendly forum.

Before settling anything, I insist instead on seeing some convincing proof that the client has actually engaged in wrongdoing and blameworthy conduct. The concept of a "nuisance" settlement is anathematic because one "nuisance" settlement leads inexorably to another and the repetitive settlement machine then continues to feed lawsuit abuse. In my view, only vigorous pursuit of rational principles, both at trial and on appeal, yields results consistent with both conscience and shareholder interests.

Fortunately, when I arrived at Lyondell, some trial and appellate attorneys with similar philosophies had already been representing the company in pending controversies. Richard Faulk, now chair of the litigation department at Gardere Wynne Sewell LLP, a large Texas firm, was representing Lyondell in its toxic tort litigation. According to Faulk, our policy was "exactly the medicine needed to defeat and deter the onslaught of litigation facing the chemical industry, including Lyondell."

"There was no reliable evidence that toxic exposures at Lyondell caused any of the plaintiffs' illnesses and deaths," Faulk continues. "The principled refusal to settle resulted in victories that were affirmed on appeal in major precedents." (The scientific evidence developed in those cases ultimately resulted in invitations for Faulk to address the National Academy of Sciences.)

"Principled decisions to resist by fully informed clients liberate and motivate outside counsel to greater creativity, stronger effort, and better results," says Faulk.

Trial Attorney Thomas Hagemann, also a Gardere partner, was representing Lyondell in the government investigation. According to Hagemann, Lyondell's stand resulted in the government's decision not to pursue action against the company. "Lyondell is quite a rarity—a major corporation that has never been indicted or accused by any authority of wrongdoing of any kind," says Hagemann, in large part, he believes, because of the corporate commitment to *preventing* liabilities.

"I've seen this philosophy work consistently in every situation where I've been retained to represent Lyondell," says Hagemann. "Not only have governmental proceedings not been commenced, but the company has never even suffered an award of punitive damages."

Another outstanding advocate, F. Walter Conrad of Baker & Botts in Houston, stepped forward shortly after my arrival to extricate Lyondell from a tangled web of tort claims. A massive suit alleging toxic and environmental pollution of neighborhoods near the Houston Ship Channel was filed against virtually every chemical and oil company in the area. Conrad succeeded in having the Lyondell suit, though accompanied by a media publicity blitz, entirely dismissed.

These results were additionally significant because they only further encouraged me to more fully shift away from "economic" adjustment of liabilities to a culture of confrontation that stresses the facts, law, and basic notions of right and wrong. Attorneys can make a difference, but it's up to clients to empower them to do so. Reputations mean

You Pay Less If You Fight

LyondellBasell's philosophy was borne out in mid-October, 2008, when it filed a motion to settle its interest in the in major MTBE litigation involving 70 suits, filed by water suppliers in 15 states, against various companies alleging that a gasoline additive contaminated groundwater. Nine major oil companies settled in May for $422 million. LyondellBasell asserted that it didn't belong in the litigation and, in mid-October, paid $449,000, essentially nothing, to resolve these cases.

nothing unless they produce results, and clients, not outside counsel, ultimately decide whether principles are vindicated or sacrificed. You can never buy peace, but you most assuredly can buy war—in the form of endless litigation.

A Growing Enterprise

As time passed, Lyondell grew into a substantially larger company. Initially, the purchase of ARCO Chemical Company, while a benefit in many respects, brought another litigation challenge—this time a mass tort problem involving methyl tertiary butyl ether (MTBE), a gasoline additive designed to reduce air pollution.

Lawsuits were filed throughout the United States, alleging that MTBE polluted groundwater when gasoline leaked from underground storage tanks. Although Lyondell never owned retail gasoline stations, nor owned, operated, or controlled any of the storage tanks that allegedly leaked, Lyondell was sued simply because it manufactured MTBE.

But events took another fortuitous turn when I met Alan Hoffman, now co-chair of Philadelphia-based Blank Rome LLP, a firm with historical ties to ARCO Chemical. Like Faulk, Hagemann, and Conrad, Hoffman proved to be a "fit" with our victory culture and was retained to serve as national coordinating counsel. With William Kayatta, a highly respected New England trial lawyer, added to the team, Lyondell defeated the first MTBE mass tort suit that had been filed in Maine.

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Almost every other MTBE case has ended in victory for Lyondell, as did a recent California case where, on the eve of trial, the court found no basis for liability.

According to Hoffman, we had grasped that Lyondell, "as a mere manufacturer, was not liable when large integrated oil companies, who knew MTBE's characteristics, unilaterally decided to blend it into gasoline and sell it through their distributors and retail outlets." Lyondell's defense was thus a common sense assertion of right and wrong, and the company again refused to compromise. Although the MTBE controversy remains pending, Hoffman says the decision has made a "big difference" by "distinguishing Lyondell from the persons actually responsible for the alleged pollution."

Lyondell has paid out nothing in 70 percent of the MTBE cases resolved to date, which is a far, far better result than any other defendant in related cases can claim. Most recently, while virtually all major gasoline refineries paid over $420 million to settle 60 MTBE cases, LBI paid an extraordinarily de minimus amount (less than $500,000), in settling those same cases. As Hoffman stated, "that is better than zero. Everyone now knows Lyondell does not belong in any of these cases."

More growth occurred when Lyondell acquired Millennium Chemicals, a strategic acquisition that diversified Lyondell's products and strengthened its competitive advantages. The deal also saddled Lyondell with Millennium's docket of lead paint litigation, including an emerging "pub-

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lic nuisance" initiative pushed by a number of public authorities in Rhode Island, New Jersey, California, Wisconsin, and Ohio, along with their contingent fee outside counsel.

Shortly after the deal closed in 2005, Millennium and its codefendants were struck with an adverse verdict in Rhode Island, and the controversy re-emerged as a potential mass tort event.

Lyondell's litigation team was convinced that no principled resolution short of winning was possible, and that the consequences of a capitulatory settlement could, in fact, be disastrous for all American business interests. Led by Michael Nilan of Minneapolis' Halleland Lewis Nilan & Johnson as national coordinating counsel, and with Kayatta arguing the appeal, Lyondell turned the tide against public nuisance litigation over the next two years. In July of 2008, the Rhode Island Supreme Court granted full judgment in Millennium's favor, ending this case, finally, with a victory. Since the Millennium acquisition, the predatory public nuisance claims have now been firmly rejected by the Supreme Courts of Missouri, New Jersey, Ohio, and Rhode Island.

> Wherever possible, **financial data** as well as substantive **legal** and **business issues** are regularly **disclosed** to the department's 20 **employees**, including legal assistants and support staff as well as attorneys.

Trials have produced defense verdicts in Minnesota and Wisconsin, and, most importantly, a California court held that public nuisance claims by public authorities cannot be prosecuted by private contingent fee counsel. "The controversy is far from over," says Nilan, "but the defense has won major victories that have fully reversed the momentum our adversaries gained in Rhode Island's trial court decision."

Like many refiners and chemical companies, LBI has attracted a substantial number of asbestos claims—not as an asbestos manufacturer, but only as a premises owner. Again, we shunned "cost of defense" settlements from the beginning, insisting that liability, if any, be based on proof that LBI actually did something wrong.

Faulk, his partner Jose Berlanga, and Fred Schulz of the Wildman Harrell firm in Chicago, has successfully handled the lion's share of LBI's asbestos docket. According to Schulz, the LBI philosophy not only ensures that he has "all the resources and support" he needs to "assess the case" but also that outside counsel will not be "second-guessed" when the company decides to try a case.

As a result of LBI's resolute stand, the overall cost of its asbestos litigation remains comparatively slight, especially when you consider the extent to which costs for other defendants have ballooned—in some cases ironically forcing bankruptcy on companies that settled cases for strictly "economic" reasons. By contrast, compare the overall asbestos burden of the companies that LBI has acquired, such as Millennium Petrochemicals, before and after the acquisition. In each instance, those overall costs declined precipitously after LBI assumed control.

Finally, LBI's litigation docket is not limited to defending cases. Increasingly, the company's expansion has also required Lyondell to regularly vindicate claims it holds as a plaintiff. To that end, I have tapped top plaintiffs' firms to pursue its interests in disputes with national and international opponents, and have recovered several hundred million dollars on the company's affirmative claims against third parties.

One of the most rewarding relationships for LBI is with Houston's Susman Godfrey—a striking partnership for a company that was simultaneously being so aggressive on the defense side. The relationship dates back to 1999 when partners Lee Godfrey and Vineet Bhatia were hired to advise Lyondell on a potential breach of contract claim that a joint venture refinery, Lyondell-CITGO Refinery, had against PDVSA, the Venezuelan national oil company. The dispute arose after PDVSA failed to deliver the required amounts of crude oil under a supply agreement.

Suit was filed in the Southern District of New York in 2002. By that time, Bhatia and Godfrey had already won a $20 million-plus arbitration award for Lyondell against British Petroleum. The PDVSA lawsuit, however, presented unique challenges because it essentially pitted Lyondell against a foreign government that was also a business partner controlling the supply of crude oil to the refinery.

After several years of litigation and a number of difficult trips to Venezuela, the case was ultimately resolved after Lyondell filed a motion for summary judgment and obtained an adverse inference based on PDVSA's refusal to provide certain documents. The ultimate settlement terms are confidential but I can say that we were extremely pleased with the result.

Lesson: Aggressive integrity-based litigation management happens on both sides of the aisle. Lyondell's relationship with our outside counsel can also be seen as a signal moment in a major legal profession trend, in which more corporations are now breaking down the barriers between the defense and plaintiffs, bars when it serves their interests to do so.

Late in 2007, the acquisition and merger with Lyondell Chemical Company by Dutch chemical company Bassell formed a global juggernaut called LyondellBassell—the third-largest independent chemical enterprise on the planet. Previously in charge of litigation, security, and compliance at Lyondell, I then became associate general counsel for litigation, security, and compliance for the newly created entity.

As a result of this new appointment, the litigation management model that I had already promulgated on a national basis now assumes a more international relevance, with, hopefully, impact well beyond LyondellBassell. To be sure, I intended this "model" to represent a great deal more than a mission statement or a goals agenda or a case assessment tool or a set of directives to outside counsel.

Reducing Overall Litigation Costs

On the one hand, LBI's approach has deterred litigation and saved significant amounts in the attendant costs of current cases even as it deters related future or copycat cases altogether. It's a mantra with me: "We pay our own attorneys, not the opposing attorneys!" At the same time, our in-house practice takes ownership of, and responsibility for, the *overall* costs of litigation, not merely attorney's fees. By looking beyond the obvious immediate litigation expenses, LBI gains a strategic perspective that benefits the entire company at multiple levels.

All too often at many companies, the costs of judgments and settlements are allocated to, and divided between, several corporate departments, therefore diluted effectively enough to relieve everyone of all responsibility or accountability for the total economic impact. By contrast, at LBI, I provide an annual accounting of the total financial gain or loss the company sustains as a result of any litigation matter.

As a result, for better or worse, the impacts of decisions made to try or settle lawsuits are easily understood.

We pursue significant cost control in other ways as well. For example, our "partnering agreements" pay select outside firms a negotiated annual fee for handling all litigation in specified areas such as toxic tort and personal injury litigation. Such an agreement with Gardere has worked well for years. "Historically we've been able to forecast annual fees fairly accurately and, if a problem develops, it is reconciled with payments by LBI or credits from Gardere at the end of each fiscal year," explains Faulk.

Predictability is the key to managing outside counsel fees. These arrangements enable us to avoid surprises. Compelling outside counsel to perform below the flat fee—and thus make more money only if they are more efficient—is the best way to reduce litigation fees and expenses. The trust built through the extended relationship allows us to work together as partners and, to some extent, makes outside counsel share the risk of Lyondell's litigation burden. Two of the other firms that we use, Blank Rome and Wildman Harrold, have similar partnering agreements.

Bottom line: total litigation costs for Lyondell have been reduced by 80 percent—a result that is all the more noteworthy in an industry where litigation costs have been escalating. In fact, the financial burden of litigation on LBI over the past several years has been virtually *eliminated*.

LBI's decision to pursue affirmative claims by retaining plaintiffs' counsel, as opposed to relying on large institutional firms, also yields economies. To pursue plaintiffs' claims effectively, your attorneys have to think like plain-

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tiff's attorneys. Hourly billing, with its potential for waste as lawyers are incentivized to spin wheels looking underneath every stone, is not necessarily in the company's best interests. There are more efficient ways to prosecute lawsuits, and no one understands that better than the great plaintiffs' attorneys.

Bottom line: LBI's victories as a plaintiff have actually transformed the in-house litigation practice into a profit center—an almost unheard of development that has made the attorneys a pretty popular group around here.

A Management Philosophy

Internally, our management approach is all about transparency. Wherever possible, financial data as well as substantive legal and business issues are regularly disclosed to the department's 20 employees, including legal assistants and support staff as well as attorneys.

Outside counsel are regularly invited to attend and participate in meetings with the entire staff, both monthly and at an annual retreat where we focus on their performance, knowledge management, and relationship building. It was at one annual retreat that I initiated a program in which winning attorneys are rewarded as "Knights of the Lyondell Enterprise." The idea came from my experience in the Air Force and a lifelong interest in medieval knighthood and chivalry.

Shortly after Faulk, Hagemann, and Conrad won their initial victories for Lyondell, I conferred special recognition for their work by dubbing them the first three Knights of the Lyondell Enterprise. They were summoned to Lyondell headquarters for what they thought was a holiday party. Instead, regal proclamations were read, summarizing their successful defense of Lyondell. Each of the three lawyers was given an authentic English broadsword, around 45 inches long and made of the finest Spanish steel, and formally knighted during an elaborate ceremony attended by Lyondell's senior management as well the in-house lawyers.

Again, the key to their success was that they did not merely do well—they had also *won* and, by so doing, vanquished the dragons that had besieged the corporate tower. As I said during that first ceremony, and repeat each year, "Lyondell Knighthood is not about doing well….it is about winning. There are no points for style, sartorial splendor, or silver-throated oratory. You must win to become a knight."

I often get calls from attorneys wanting to know how they can "get a sword." The conversations are usually short. You have to represent Lyondell and all you have to do is win.

Since that first ceremony, the Lyondell Knighthood has grown, in number and in reputation, as has LBI. Hoffman, Kayatta, Berlanga, Schulz, Nilan, Godfrey, and Bhatia have joined the sacred fold, which also includes Erica Harris and Brooke Taylor of Susman, and Amanda Cialkowski of Nilan's firm. The total number of knights now exceeds 30 trial attorneys. Many knights have achieved multiple victories for Lyondell and, as a result, they've been elevated to an even higher status and received ever more recognition.

According to Faulk, knighthood transcends money: "The Lyondell Knighthood goes beyond financial compensation because it recognizes that the relationship is more than business as usual…Something special happens when a client appreciates your work, values it, and makes a special

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- *Managing Litigation from the Inside Out* (2008). When a company is sued, the responsibility of the litigation process falls on in-house counsel. If the in-house attorney is inexperienced or feels uneasy with the litigation process they may turn to outside counsel. However, the in-house attorney is not only missing the opportunity to influence the course of the lawsuit, but also to ensure savings. *www.acc.com/resource/v9733*
- *A Public Health Approach to Litigation Management* (Small Law 2008). John Ross takes a public health approach to litigation management: Litigation got you down? Treat it like the flu. Read on to find out more. *www.acc.com/resource/v9245*

Program Materials

- *Using Litigation Metrics to Demonstrate Value to the CFO* (2007). With growing emphasis on controlling the costs of litigation, corporate counsel must demonstrate value using objective measurements. The emerging best practices for measuring the value of litigation management require metrics using methodology CFOs understand and in which they will have confidence. Our panel of law department leaders demonstrate litigation management metrics here. *www.acc.com/resource/v9131*
- *What You Should Know About Litigation* (CCU 2008). Whether you are an in-house counsel in a large legal department or a solo practitioner in a small corporation, chances are that at some point your company will get sued. What steps can you take to prepare for the potentiality of a lawsuit and how should you respond if the litigation process is triggered? This session provides some answers. *www.acc.com/resource/v9966*

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effort to honor you. The recognition creates loyalty that inspires stronger commitment, greater loyalty, and better work than money can buy."

"What really distinguishes one corporate client from another, the memorable clients from those that are merely business relationships, can be summed up in one word—gratitude," says Hoffman. "LBI's unique method of expressing its thanks through knighthood separates Lyondell from all the other clients we represent." From a management standpoint, the additional efficacy is that knighthood is "ongoing….As each case ends with a win, more honors come the attorney's way."

> In the current **predatory**, dysfunctional, and confiscatory **litigation climate**, **fighting back has become essential** and not merely an "option."

Special recognition for victories makes for better representation. There is a scene in one of my favorite films, *Kingdom of Heaven*, where the lone remaining knight determines to ensure the defense of Jerusalem by knighting every man in the city who is willing to fight.

When challenged by a clergyman and asked whether knighting a man "makes him a better fighter," the knight answers with a forceful and unequivocal "yes."

A Strategy that Works

The Lyondell Knighthood—one of America's most powerful and successful litigation teams—is the fruit of a consistent 15-year strategy that centers on a few very basic points:

- Litigation must be resolved on a principled basis, not on a merely financial basis. Any other approach only invites and encourages overwhelming, vexatious, baseless, exorbitant, and destructive litigation.
- Those who manage litigation internally must accept full budgetary and outcome responsibility for litigation results, not simply fees, expenses, and related costs.
- The business impact and value of victory must be weighed in any risk analysis performed of pending or threatened litigation. In the current predatory, dysfunctional, and confiscatory litigation climate, fighting back has become *essential* and not merely an "option."
- Key outside counsel must become "partners" with the company, taking on the burden, standing in the way of harm, and accepting significant risk for the corporation—Knighthood, if you will.

It frustrates me that most other US companies seem incapable or unwilling to defend themselves against the onslaught of mass litigation. LBI's victory culture is a clear exception to the trend and shows that it can be done. The solution is to celebrate winning in litigation and that doing so is just as important as rewarding excellence in accident prevention, safety, and environmental achievement.

The alternative to the Lyondell culture is a "money" culture where principles are sacrificed, victory is devalued, and, ultimately, oppressive litigation leads to an inability to compete in global markets.

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