

New to In-house Practice

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The purpose of this InfoPAKSM is to assist corporate counsel who are new or relatively new to in-house practice in understanding the scope and nature of their duties. By comparing the roles and responsibilities of in-house counsel to that of their counterparts at law firms and government agencies, this InfoPAK aims to inform lawyers as to what they should expect when they assume the role of in-house counsel. By addressing some of the issues that arise in the ordinary course of an in-house counsel's practice, this InfoPAK will arm a new in-house counsel with the basics of what he or she needs to know to provide a high level of quality legal representation for their corporate client. It will also provide insight as to what can be the "hazards of the job" and how in-house counsel might protect themselves. This InfoPAK should not be construed as legal advice or legal opinion on specific facts, or representative of the views of ACC or any of its lawyers, unless so stated, and is not intended as a definitive statement on the subject but a tool, providing practical information for the reader. We hope that you find this material useful. Thank you for contacting the Association of Corporate Counsel.¹

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Table of Contents

I.	Introduction.....	1
II.	Scope of Work.....	2
	A. Size of Legal Department	
	a. Legal Role	
	b. Business Role	
	c. Privilege–Periled by Dual Roles?	
	B. Outside Counsel: Not an Excuse to Bail	
	C. Ten Things a New In-house Lawyer Should Know	
III.	Risk Management	12
	A. In-house Counsel, In-house Prosecutor?	
	B. Compliance and Enforcement	
	1. Sarbanes-Oxley	
	a. Who	
	b. What	
	c. Where	
IV.	Corporate Governance Duties.....	16
	A. Federal Law	
	B. Industry Regulations	
	C. Code of Ethics	
	D. Document Retention/Data Protection	
	E. Contract Oversight and Compliance	
	F. Whistleblower Policies	
	G. Privacy Laws	
	1. HIPPA	
	2. Gramm-Leach-Bliley Act	
	H. Setting Reserves	
	I. Intellectual Property/IT	
	J. Corporate Social Responsibility	
	K. Media Scrutiny	
	L. SEC Enforcement Actions	
	M. Grand Jury Investigations	
	N. Internal Investigations	
V.	Work Environment	25
	A. Firm	
	B. Government	
	C. In-house Counsel	
VI.	Benefits of Working In-house	28
VII.	Client Contact	30
VIII.	Liability	31
	A. Government	
	B. Firm	

C. In-house Counsel

IX. Conclusion.....33

X. Additional Resources.....34

XI. Article: Phillip R. Strauss, The Facts Of In-House Life: 80s Things I Wish I Had Known When I Went In-House, *ACC Docket* Vol. 23, no. 3 (March 2005) 22-42

I. Introduction

Whether you are considering a position as in-house counsel as your first job out of law school, or as an alternative to your current employment with a law firm or a government agency, you should carefully evaluate the benefits and drawbacks of such a move before you make the leap. While many believe that the grass is always greener somewhere else and, accordingly, working in-house is a vacation compared to the challenges that law-firm life and government practice present, in reality, the same challenges – the demand for excellent legal advice tailored to the needs of the client – remains. With few exceptions, corporate counsel are talented, motivated and highly qualified lawyers whose contribution to the corporation cannot be understated. Knowing what to expect when you enter the world of in-house practice and having the necessary tools will enable you to assume your role with confidence and become a valued asset to the organization.

II. Scope of Work

Perhaps the biggest difference between working for a firm or the government and working for a corporation is that the scope of an average in-house counsel's responsibilities is much broader than that of his or her outside counterparts (with the possible exception of large organizations, whose law departments tend to house specialists).

A recent survey of 1,000 in-house counsel revealed that 44% of those surveyed work at in-house departments comprised of less than 10 lawyers.² Twenty-eight percent of those surveyed work in a medium-sized department where the in-house lawyers number between 11 and 50. Only 19% would classify their law department as large (between 50 to 100 lawyers) and even fewer (9%) were members of a legal department with lawyers in excess of 100.

A. Size of Legal Department: In This Case, Smaller is Bigger (in Terms of Responsibilities, That is)

In general, in-house counsel in small legal departments of less than 10 lawyers are exposed to a legal practice that addresses a wide range of issues on a regular basis. In contrast, lawyers within a large in-house legal department are usually assigned to work in a single practice area within a designated practice group, which is similar to the structure of a law firm³. An in-house position is a good fit for a lawyer who is comfortable multi-tasking and who is secure in a dynamic legal environment that provides exposure to a wide variety of legal challenges.⁴

Before you make the leap, do some investigating. Set your sights on those companies which have legal departments that fit your own personal requirements. Not all in-house departments are alike. Before an interview, investigate the Web sites of various companies; look at in-house counsel surveys (frequently prepared by associations such as ACC and the ABA) to determine which corporations report having the most satisfied in-house counsel; look on the Internet for corporate newsletters and articles written by in-house counsel at various corporations to get an idea as to the sophistication and variety of the practice within the in-house legal department; and most importantly, ask around and make contact with in-house lawyers at corporations that interest you to see if counsel there are happy, and why.

² "The Dish on the Departments," a survey conducted by American Lawyer Media, available at www.law.com/special/professionals/corp_counsel/2004?dish_on_departments.shtml. A July 2004 survey of ACC membership revealed that 21% of members' law departments consisted of one lawyer (solo practitioner); 33% had between 2 and 5 lawyers; 21% had between 6 and 20 lawyers; 9% had between 21 and 50 lawyers; and 16% had 51 or more lawyers.

³ Nextel, for example, has a legal department comprised of 80 lawyers, specializing in areas such as Communications and Government Affairs. Go to www.nextel.com.

⁴ Eveleth, *Life as Corporation Counsel*, Maryland Bar Journal, Vol. XXXVII No 1, Jan/Feb 2004, p 18-19; Veta Richardson, *From Lawyer to Business Partner*, ACC Docket, Vol. 22 No. 2 p. 72 February 2004. Specialization within distinct practice areas varies from corporation to corporation. For example, Host Marriot in Bethesda, Maryland has a legal department comprised of 9 in-house counsel, most of whom specialize in particular areas. Kevin Gallagher, who came to Host Marriot after working at a Washington D.C. law firm as well as Enron and MCI, specializes in litigation, and to that end has extensive experience in managing outside counsel.

During an interview, ask questions to ascertain where on the generalist-specialist continuum the opportunity falls. Also ask questions as to how the legal department fits into the overall corporate structure – does the most senior counsel directly report to the President or to someone at a lower level? Seek information as to how the legal department is viewed by the business units and other support groups within the corporation. Be aware that within some corporations the legal department can be generally viewed negatively. Try to find out if the business units see in-house counsel as being in the business of “Sales Prevention.” Clearly this is not ideal, because it suggests a corporate culture of working around the legal department, as opposed to working with the legal department. In such a case the role of the in-house lawyer can involve a great deal of “fixing of problems” instead of proactively working so that the problems are avoided in the first place. Lastly, make inquiries as to the allotment of money for continuing education. You should have the funding to permit you to develop and improve. This is something which can often be negotiated up front.

Overwhelmingly, the majority of in-house counsel report that the major difference between working for a corporation and working for a firm or the government is the dual nature of the responsibilities of in-house counsel. In general, serving as in-house counsel entails more than just performing isolated, case-specific legal tasks; rather, in making decisions in-house counsel must think in terms of the big picture.⁵ The role frequently requires performing business and management duties. Your in-house clients may think locally -- that is, they may try to solve a problem in a way that best serves their particular department. While you assist them in that endeavor, you must also help to ensure that the local solution does not have adverse consequences for the corporation on a company-wide basis. Remember that your client is the entire business and its stakeholders. This can take some getting used to for counsel who were previously accustomed to a government or a law firm atmosphere. Ray Rothermel recalls that when he joined the legal department of Nextel more than 4 years ago, the notion that he would be responsible for evaluating the business ramifications of a legal decision was completely foreign to him. Now, he says, it’s almost second nature.

The vacuum that sometimes exists between law firms and their clients (mostly because they are not in the same location and cannot walk into each others' offices) does not exist for in-house counsel. In-house counsel has a seat at the table, and the clients want their problems solved. This frequently requires more than providing just legal advice.

This is not to suggest that the practice of law in an in-house setting lacks structure. For an-house counsel, the job of providing sound legal advice exists within a more complex structure.

a. Legal Duties of In-house Counsel

The legal duties of in-house counsel may encompass a broad range of areas including contracts, intellectual property, labor/employment, litigation, tax, antitrust, corporate/securities, ERISA/benefits, ethics, real estate and privacy matters – and maybe more. In-house counsel frequently have a significant role in the areas of transaction support, insurance, pre-litigation settlement, and litigation management. Depending on the nature of the business and the depth of the legal issues facing it, in-house law departments can have specialists in virtually every legal discipline, some of which can be industry-specific. In-house counsel who are the sole lawyer or are in

⁵ Interview with Patrick Murphy, Senior Counsel of Litigation and Legal Policy, General Electric. *See also*, Michael A. Lampert and Joseph M. Fairbanks, *Privilege Gets Hazy for Counsel Who Give Legal and Business Advice to Corporate Clients*, 15 Corporate Counsellor No. 5 (Oct. 2000).

a small legal department must be willing and able to recognize when they do not have the skills to provide advice on a particular matter, and in such circumstances must recommend to others within the corporation that the advice of outside counsel should be obtained. Corporations are wise to involve in-house counsel at the initial stages of a matter and in-house counsel should encourage this. In-house counsel can provide a different perspective in identifying potential problems and liabilities. They can also propose resolutions, such as mediation, that may avoid costly, time-consuming litigation.⁶

b. Business Role of In-house Counsel

Increasingly, in-house counsel must often assume dual roles of legal and business advisor.⁷ A corporation will often expect a new, junior-level in-house counsel to consider the business impact of a legal decision. It is the ability to render advice with both objects in mind that makes in-house counsel so valuable to an organization. It is also what makes the role of in-house counsel, at times, a treacherous but challenging journey. Patrick Murphy of GE explains:

“[When you serve as] in-house counsel, the burden and responsibility for anticipating adverse results and doing everything legally [possible] to prevent damage to the company is squarely on your shoulders. A bad result can be not just career threatening to the individual managing the case, but [can also] profoundly impact business operations if not anticipated by the business due to faulty legal advice. Had legal advice been made in a timely manner, the business could have made accommodations to prepare for the adverse event.”

This is very different from the seemingly one-dimensional responsibilities of a lawyer at a law firm or a government agency. To a large extent, in those environments a lawyer is a lawyer and legal advice is legal advice; junior associates are rarely asked to step outside the box.

That simply isn't the case for in-house counsel. A recent survey demonstrates that most in-house counsel act as both a senior level manager and as legal advisor; 8.7% also serve as COO; 7.4% serve as CFO; 6.3% serve as CEO; 13.5% serve as the head of a business unit; 24.9% serve as director of human resources; and 39.2% serve “other” business functions.⁸

To serve the corporation well, it is imperative that in-house counsel learn the business. Do this as early as you can upon joining the corporation. In-house counsel needs to acquire the knowledge base to determine such things as which departments must be involved in a particular decision, or if a client representative is exceeding his authority. In-house counsel is expected to guide the corporation in ensuring that proper corporate judgment is exercised. The client is the corporation and its stakeholders, not the executive in charge of a particular matter. Executives may need some steering and guidance, but rarely want a stop sign. If something is amiss, in-house counsel is expected to identify it, step in (with or without the support of a higher level person), and help to guide the corporation in making the appropriate decision – from a variety of standpoints, including business, ethical and legal.

⁶ Chad R. Brown, *In-house Counsel Responsibilities in the Post-Enron Environment*, ACC Docket 21, no. 5 (May 2003): 92-107, available at www.acca.com/protected/pubs/docket/mj03/inhouse1.php.

⁷ *Id.*

⁸ *Non-legal Function of General Counsel*, ACC online poll (July 29-Sep. 28 2002) available on ACC Online at www.acca.com/Surveys/accapoll.php.

c. Privilege: Periled by Dual Roles?

If in-house counsel acts in a business capacity as opposed to a purely legal role, is the attorney-client privilege applicable to communications between the in-house counsel and the corporate client? This is a question that is raised more and more frequently in corporate environments, particularly as in-house counsel's role in corporate functions expands. While most agree that corporations should not use the office of in-house counsel as a citadel—"a place where public, business, or technical information may be placed to defeat discovery and thereby ensure confidentiality"⁹—some try Courts are none too receptive to such transparent attempts to circumvent the discovery rules.

Attorney-client privilege can be very complicated. Opinion differs as to what is privileged. A junior in-house counsel who encounters privilege issues should seek guidance, either from a more senior counsel within the corporation or from outside counsel. Recent years have seen an effort by prosecutors and plaintiffs' lawyers to erode the privilege. In-house counsel should be familiar with the types of circumstances where the privilege does not apply or where it may be lost depending on the actions of those involved.

There are practical steps in-house counsel can take to protect the attorney-client privilege. Some of these are: use legal titles, such as general counsel, legal officer, esquire, or attorney-at-law; establish and implement procedures for separating legal files from corporate files; limit the number of people receiving legal information within a corporation on a "need-to-know" basis; ensure that the people who have access to the privileged documents are closely related to the particular matter; and label information that is to be closely held as "confidential." That said, do not routinely stamp "confidential" on documents, but rather be selective in marking it only on what is truly "confidential."¹⁰

B. Outside Counsel: Not an Excuse to Bail

In many cases, in-house counsel must rely on external counsel to resolve legal matters that may require expertise in an area that the in-house department lacks. When outside counsel is retained, in-house counsel is charged with the responsibilities of coordinating with and counseling company employees, and providing direction to external counsel as how to staff and approach the particular matter.¹¹ Depending on the size and importance of the matter, in-house counsel should request a written budget or project plan in advance of commencement of the work. This will be in addition to a standing retainer arrangement which should be in writing and generally act as a guide to all work which is undertaken by outside counsel.

In most corporate environments, in-house counsel is expected to think seriously about a particular matter before seeking advice from external counsel. Sometimes there is a real need for outside help

⁹ Lee Applebaum, *A Matter of Privileges: In-House Attorney-Client and Work Product Claims Face Challenges*, The Legal Intelligencer, December 4, 2001, available at www.law.com/jsp/statearchive.jsp?type=Article&oldid=ZZZEUL8TSUC.

¹⁰ Chad Brown, *In-House Counsel Responsibilities in the Post-Enron Environment*, ACC Docket 21 No. 3 (May 2003); Michael Lampert, Joseph Fairbanks, *Privilege Gets Hazy for Counsel who Give Legal and Business Advice to Corporate Clients*, 15 Corporate Counsellor 1 (October 2000).

¹¹ Robert L. Haig, *Successful Partnering Between Inside and Outside Counsel*, Chapter 40:19, Operating a Small Law Department (October 2003).

because the issues are beyond the expertise of anyone in the department or because the vast workload of in-house counsel prevents the matter from being completed in-house within the required time frame. In-house counsel is expected to be able to justify the legal costs, and should be in a position to answer to the corporation's chief financial officer at any time. For costs which are out of the ordinary course of business and are difficult to determine in advance, there should be a formula in place for determining the costs over time. If in doubt, obtain the approval of the corporation's chief financial officer or other appropriate person in advance of incurring an expense.

In-house counsel should know what policies or guidelines are in place within the corporation as to his or her authority to retain outside counsel. For instance, there may be restrictions as to what type of work goes to which outside law firm and which outside lawyers are the first point of contact. There may also be restrictions as to who within the legal department is permitted to contact outside counsel. If you encounter resistance within the corporation and feel strongly about the need to retain outside counsel, consider reminding others that you work with that sometimes a one-hour, \$400 phone call with outside counsel can give the problem an entirely different perspective. Outside counsel can sometimes save the corporation significant amounts of money by putting it on a better and completely different course of action. As in-house counsel you should recognize that you cannot handle everything yourself. The corporation wants in-house counsel to be cost-effective, but not to the extent that the legal department is unable to provide the correct answer or unable to provide it within the required time frame.

Some in-house counsel view the use of outside counsel as an exercise of the "toss the file over the wall" approach.¹² Needless to say, we urge you not to adopt this attitude. Before you embrace this option (and the perceived free time you might have to shop on the internet or e-mail friends as a result) as a crutch or as a means of alleviating your workload, consider this. While all corporate legal departments believe in drawing on the expertise of outside counsel, the degree to which outside counsel is used is dependent upon a variety of factors, such as the size and depth of the corporate legal department and basic financial considerations. While the "toss the file over the wall" approach may have been quite prevalent decades ago, the proliferation of outside counsel fees and an appreciation for the efficiency of partnering between in-house and outside counsel has rendered that view obsolete.¹³ Moreover, the need for outside counsel to be called in is greatest when the expertise of in-house staff cannot adequately handle a particular issue. Most of you will be asked to both manage outside counsel and to solve problems on your own. It is the rare job these days where all that an in-house lawyer does is manage outside counsel. Where that job does exist, in-house counsel must be sophisticated in making sure that the corporation is obtaining good and cost-effective advice.

In-house counsel in a somewhat larger corporation can reasonably be expected to develop areas of expertise as a member of an in-house counsel legal department. For example, the general counsel for a Baltimore investment firm stated that his corporation tends to outsource for non-routine matters such as litigation, but keep tasks relating to registration statements and mutual funds in-house, where they have generated a pool of in-house counsel who is more experienced in such matters.¹⁴ Still other in-house counsel report that it is common for their department to hire external counsel

¹² *Id.*

¹³ *Id.*

¹⁴ See Janet Stidman Eveleth, *Life as Corporate Counsel*, Maryland Bar Journal, (January/February 2004), at p. 20.

for matters such as patents and trademarks, where developing an in-house expertise on those issues is neither wise nor feasible.¹⁵ That corporation, as well as others, maintains a pool of outside counsel from which it can draw when the need arises, especially on very complicated matters or issues involving large amounts of money.

In an increasing number of instances, corporations are decreasing the number of law firms in that pool and asking in-house counsel to step up to the plate. For example, in 2002 the head of litigation for Caterpillar did more than slash the number of external law firms handling product liability matters—he outright decimated the pool, reducing it from 400 to a mere 20.¹⁶ This action is not surprising given the results of a recent survey which shows that by and large, in-house counsel are not pleased with the level of service they receive from outside counsel. In fact, only 35 percent of in-house counsel surveyed reported that they were satisfied with the services provided by their primary outside law firms. The other 65 percent of in-house counsel surveyed are willing to look elsewhere for better advice.¹⁷ The key to resolving this predicament is to know how to establish a good working relationship with outside counsel, so that as in-house counsel you will not be frustrated and the corporate client will be best served.¹⁸

Most junior in-house counsel will not be responsible for selecting outside counsel. The corporation will, however, expect junior in-house counsel to manage that relationship, and assess it from time to time. In-house counsel who are responsible for retaining outside counsel should be guided by the question: "Why am I hiring this team of lawyers?" The only acceptable answer is that this team can provide the best timely advice at the best price. Don't hire your former law firm, a relative's law firm or your friend's dad's law firm because you like them. That's a sure recipe for a bad result and a bad career move.

Exercise discretion when reaching out to outside counsel. Experienced in-house counsel might think twice about whether the use is justified regardless of whether there is money in the budget for it. As Ray Rothermel of Nextel indicates, he gauges the use of outside counsel by whether it is cost efficient for the client. "If it will take me three hours to research and resolve an issue that I am not sure of, but I know I can make a phone call to one of our outside counsel and have the answer in a minute, then I won't hesitate to use outside counsel," he explains, noting that he has an established relationship with outside counsel who are experts in the communications field. On the other hand, he admits, "I might hesitate to do so if I feel that it will be used as an associate training exercise." Ray Rothermel isn't frugal; he's just efficient, and his work ethic reflects an experienced ability to balance the needs of the client and avoid unnecessary expenditures. He, like many other in-house counsel, have the luxury of being able to put the client first—which is made easier by the simple fact that there is one, and only one, client.

Kevin Gallagher of Host Marriot in Bethesda, Maryland advises that in-house counsel needs to ensure that outside counsel knows who the client is. This may seem obvious to some, he notes, but it isn't. Kevin Gallagher notes that sometimes "outside counsel will respond to a business officer or someone else in the corporation before they get back to me with the answer that I requested." In

¹⁵ *Id.*

¹⁶ See Eric Gardner, *Practicing Budahism*, Corporate Counsel Vol. XI, No. 3 March 2004.

¹⁷ Ronald F. Pol, *Get More Value From Outside Counsel: Show Them the Flipside*, ACC Docket 21, no. 4 (April 2004): 22-39, available at www.acca.com/protected/pubs/docket/am03/flipside_satis.php

¹⁸ *Id.*

such cases, he advised, in-house counsel has to politely but firmly remind outside counsel that you—the specific in-house counsel who requested their assistance—is the client, and that they need to respond to *you* in a timely manner. Many outside lawyers understand this, but you'd be surprised at the number who don't.

C. Ten Things a New In-house Lawyer Should Know (And a Few More, While We're at It)¹⁹

1. Learn The Business

You must learn the business. You must know why each department of the company exists and when they should be involved in a contract, due diligence or a deal. You won't serve your overall client, the company, if you think in a vacuum. Some of your clients might be charged with "thinking locally" and solving a parochial problem, but it's your job to make sure that the overall interests of the company are protected. Ask questions frequently from the beginning and learn who is best to ask. Figure out early on who does what and who knows what and meet them. Learn as much as you can about accounting and financial concepts and terminology to help better understand what's driving business decisions.

2. Partner with your Clients Early

Help enable your clients to help themselves get better results. If you're working on contracts, make sure your clients know how to "bake" an idea so that it's ready to be documented and that it's ready for a negotiation. You don't want to waste your time drafting a document in a situation where the parties never reached a business deal. Also, teach your clients the key terms that your company relies on day in and day out, so that they can help sell them to the business people on the other side. Get involved early in the thought process that may lead to entering into a contract, because the earlier you get involved, the better the transaction can be structured, and it can conclude in a most timely fashion. Sometimes clients dance around with another party for five months, where basically all they discuss is price, and then your client comes to you and wants a contract done in 2 weeks. Then, when you raise what to you are basic issues, the other side says, "well, that wasn't the deal", and now the project must start in 2 weeks and it's clear that they never really had a business deal to begin with. In short, get your seat at this type of table early.

3. "Just Saying No" Won't Work

Think creatively and practically about how to get the deal or any matter done in a way that protects the business. Simply saying "no" and placing the onus on the business people to come up with different alternatives isn't enough; you're a stakeholder in the business and need to try to think of good solutions and alternatives.

¹⁹ Excerpted from: *Welcome to Rookie Camp: Ten Things a New In-house Lawyer Should Know (And a Few More, While We're at it)*, ACC 2004 Annual Meeting Session 510. This list was prepared and provided by Richard D. Gorelick, Vice President and General Counsel, Integra LifeSciences Corporation, Plainsboro, New Jersey.

4. Know the Internal Operating Rules and Regulations (Policies and Procedures) Governing Your Organization

In-house lawyers are expected to give legal advice that is in accordance with company policies and procedures and to provide advice on compliance with policies and procedures so read up! You must be role models for integrity, exhibiting behavior that reflects your company's values and following the rules.

5. Sense of Urgency

You must have a sense of urgency. Some lawyers think that the in-house demands on them won't be, cannot be, what they were at a law firm. It may be that you won't personally have to work life-threatening hours or kill your weekend plans with an assignment that comes down at 4:49 on a Friday afternoon, but that doesn't mean your work flow won't be constant or even over-whelming or that you can take your good old time in finishing work. In-house clients have their timetables, too, and you must partner with them in their mission to get something done and be organized and good at prioritizing. At the same time, don't shoot from the hip in your effort to be fast – it's important to stick by your advice. Going in-house has great rewards, but putting your work ethic on "coast" isn't one of them.

6. Write for Your Audience

Executives have little time and patience for long legal memorandums. Get to the point, be succinct and summarize your findings and recommendations. Know your audience. Write for the benefit of your audience or pick up the phone or stop by if that would be a better way to communicate, especially for sensitive matters.

7. A Corollary: Put the Hay Where the Horses Can Reach It

Remember that your clients are typically not lawyers so provide them with practical advice that they can understand. Taking time to explain the rationale of the decision can go a long way to working well with them as a united team, rather than creating a Legal v. Business mentality.

8. Demonstrate Your Value Every Day

You're no longer the revenue-generating center of the enterprise, you're overhead. You need to demonstrate your strategic value every day. Constantly think about how you can do your job better, faster and cheaper than anyone else could and just do it. Having a service orientation attitude with a goal of always being value-added and fast will go a long way toward your in-house success!

9. Communication is Key

It may be the case that you're juggling 60 different matters at once instead of, say, 3 really big ones, 5 middling ones and 12 small ones. You have to keep your clients informed as to status and find out their expectations from the outset. Don't set incorrect expectations – develop planning and project management skills and learn how to accurately express likely outcomes and timeframes, as well as key steps and items. It's better to under-promise and over-deliver. If you feel overwhelmed and don't think you can get everything done, go to your supervisor (no one expects you to negotiate six contracts from scratch in three days with six different clients on six different subjects). You are in more of a team environment than you were in a law firm, so communicate -- with your boss and with your clients -- and be a good listener too.

10. Be Wary of Lawyer Shopping

You might be faced with a situation where a businessperson comes to you for an answer in an area that isn't your responsibility. True, it may be that all service areas of companies aim to please, and it may be that you always want to be helpful. That's a good instinct, but the person coming to you might be coming to you for a "yes" where the lawyer who has "day-to-day" responsibility for the subject matter has put up a red light. If you're curious why someone is coming to you who doesn't usually, go to your supervisor.

11. Manage Outside Counsel Relationships and Costs Carefully

Force local counsel to provide an assessment as to fees and costs for ongoing/new/significant projects, negotiate to obtain the best budgets from outside counsel and then require frequent budget updates from outside counsel. Think about how many widgets your company would have to sell to pay for any unnecessary legal fees and be as efficient as possible. Know when, if ever, and under what circumstances, if any, outside counsel is permitted to contact and deal with your company officials directly. Learn your department's outside counsel engagement requirements and follow them. Learn generally which outside lawyers are considered best in your areas of responsibility in case you need to engage outside counsel quickly for a matter. You are held accountable for what you know, don't know and should know about the work outside counsel is performing and for directing them. Obtain feedback from persons in your company who are exposed to outside counsel. If they dislike outside counsel it will have an impact on you.

12. Never Provide Bad News Without Options and a Strategy; Stay Calm in the Face of Problems

Anyone can deliver bad news. You must demonstrate how well can you develop options and a strategy for dealing with problems. Problems pop up in corporations daily, and your business colleagues will make mistakes. Stay calm and work with your colleagues in a team effort to surface and solve problems.

13. Own Your Responsibilities and Provide Training to Prevent Problems

As you develop the ability to be more of a generalist and handle new types of legal matters, continue to know your areas of responsibility well and keep a handle on recent regulations and trends in your areas of responsibility so as to practice preventative law and training for the benefit of your company and your clients. Get on distribution lists to receive law firm newsletters covering matters in your areas of responsibility to stay apprised of legal developments.

14. Internal Reports

Every busy lawyer hates the internal deadlines, reports and updates that in-house attorneys have to deal with. However, timely compliance with internal deadlines, reports and updates can make or damage a career. Ask for feedback on how you're doing and what your goals and outcomes should be.

15. Develop Rapport and Learn from Colleagues

Unless you're "it" in your legal department, you're now part of an in-house team that needs to work collaboratively to get the best results without reinventing the wheel. Don't overlook the resources and institutional knowledge that more senior lawyers can provide, if your department has more

senior lawyers. Figure out how others before you became successful. Ask to shadow other lawyers or to be involved with various activities or matters in your department to learn more. Treat colleagues as you want to be treated. Don't be afraid to personally deal with people, even if they are more senior, and keep your sense of humor and personality!

III. Risk Management

Straightforward, reactive legal work for a corporate client may take up a good portion of your day as in-house counsel, but increasingly you will be charged with duties of a more proactive nature. Commentators have characterized this role as “Risk Management.” Risk management entails not just looking out for your client, but as is discussed in Section VIII of this InfoPAK, for your own interests as well. Note, however, that these responsibilities are not likely to be hoisted upon a more junior in-house counsel in the early stages of his or her career. Still, it is smart business practice for you to be aware of what may be expected of you in the years ahead.

Corporations are required to perform risk analysis in three ways: “where a law specifically requires it; where a law impliedly requires it; or where no law requires it but good business practice does.”²⁰ For a list of U.S. Statutes and Regulations Applicable to Corporations that Require or Imply Performing Risk Analysis, see Bao Tran and Jonathan Tomes, *Risk Analysis: Your Key to Compliance*, ACC Docket 21, no. 10 (November/December 2003), page 44-45, available at <http://www.acca.com/protected/pubs/docket/nd03/risk.pdf>.

Viewing in-house counsel as risk managers means that no longer is in-house counsel able to sit back and wait for problems to arise. He or she must actively search to identify areas where a corporation may be overlooking potential legal exposure. In this respect, the role of in-house counsel differs dramatically from the role of associate at a firm, where work is generally reactive—responding to suit against a client or infringement of right. A junior associate’s tasks are tightly defined, and generally restricted to one limited area of expertise. A junior associate at a firm will rarely, if ever, have management responsibilities or be required to assess the business aspects of a legal issue.

Assuming this role is essential if in-house counsel is to effectively function as legal advisor and provide the greatest value to a corporate client. Patrick Murphy, Senior Counsel, Litigation and Legal Policy for General Electric, affirms this notion. “In-house lawyers must be far more proactive in compliance and preventive law than outside counterparts who are largely brought in to simply clean up a mess,” advised Patrick Murphy, whose experience includes a stint as a counsel at King & Spalding, as well as Counsel on the Senate Judiciary Committee, Assistant General Counsel to the FBI, and as a Judge Advocate in the U.S. Marines.

“Someone coming in-house who simply expects to wait for cases to come through the door is never going to thrive. You must become proactive and constantly look to identify areas where a company may be overlooking potential legal exposure,” he adds. Murphy’s outlook isn’t a product of his own exceptionally stringent work ethic, but an accurate reflection on what corporate employers increasingly expect of in-house counsel, and a fair estimate of how corporations will ultimately gauge that counsel’s performance.

²⁰ Bao Tran and Jonathan Tomes, *Rick Analysis: Your Key to Compliance*, ACC Docket 21, no. 10 (November/December 2003): 38-54, available at: www.acca.com/protected/pubs/docket/nd03/risk.pdf

A. In-house Counsel, In-house Prosecutor?

In this role, however, more senior counsel must strive to walk a fine line between serving as “trusted advisor” and being viewed as an in-house prosecutor.”²¹ The key is for counsel to ensure that the corporate philosophy views the role of in-house counsel as an ever-vigilant guard who is constantly on the lookout for trouble that might harm the corporation, and who will not, by the same token, hesitate to call anyone on the carpet if that person or their conduct threatens to expose the corporation to potential criminal or civil liability.

B. Compliance/Enforcement

One of the most significant tasks for in-house counsel is the drafting and implementation of policies that ensure compliance with the dictates of the Sarbanes-Oxley Act and the implementation of rules promulgated by the Securities and Exchange Commission. These rules do more than impose duties on board members, CEO’s and accountants -- they also require lawyers to report to their clients any evidence of a material violation of securities law or a breach of fiduciary duty. In this way, the rules affect the relationship between the in-house counsel and the corporate client, putting the lawyer in the dichotomous roles of internal policeman and zealous advocate.

Drafting a compliance policy to comply with the SEC’s attorney reporting rules requires that counsel know who is covered by those rules. In general, the rules apply to any attorney appearing and practicing before the SEC in the representation of an issuer.²² SEC Rule 205.2 defines an attorney covered by the rules as one who engages in the following activities:

- Transacting business with the SEC, including communications in any form.
- Representing a company in an SEC administrative proceeding or in connection with any SEC investigation, inquiry, information request, or subpoena.
- Providing advice with respect to the federal securities laws regarding any document that the attorney has notice will be filed with or submitted to or incorporated into any document that will be filed with or submitted to the SEC.
- Advising the company as to whether information or a statement is required to be filed with or submitted to the SEC or incorporated into a document that is filed with or submitted to the SEC.
- Conducting an investigation on behalf of the company pursuant to Part 205.
- Supervising and directing an attorney who is appearing and practicing before the SEC in the representation of an issuer.²³

²¹ Chad Brown, *In-House Counsel Responsibilities in the Post-Enron Environment*, ACC Docket 21 No. 5 (May 2003) available at www.acca.com/protected/pubs/docket/mj03/inhouse1.php

²² Although the rules specifically apply to lawyers at public companies, private companies are looking at adopting similar guidelines. This move is attributed in large part to the emerging perspective among state legislatures, bars, and stakeholders that lawyers representing all companies, public and private, should be concerned about corporate responsibility. See, *New Attorney Standards Under Sarbanes-Oxley*, an ACC InfoPAK, available at ACC Online at: www.acca.com/infopaks/sarbanes.html

²³ Broc Romanek, and Kenneth Winer, *The New Sarbanes-Oxley Attorney Responsibility Standards*, ACC Docket 21 no. 5, (May 2003): 40-55, available at www.acca.com/protected/pubs/docket/mj03/standard2.php.

a. Who?

In case the intricacies of the Sarbanes-Oxley and SEC rules don't have you reeling, consider Section 205.3(a), which is intended to clarify who your client is and explain your obligations to that client:

An attorney appearing and practicing before the SEC in the representation of an issuer owes his or her professional and ethical duties to the issuer as an organization. That the attorney may work with and advise the issuer's officers, directors, or employees in the course of representing the issuer does not make such individuals the attorney's client.²⁴

So now that you know who the attorney is and who the client is, what are you supposed to do about it? Simple, as the rules imply—just follow the ethical steps set forth in the rules for keeping the corporation honest. That means if you are an attorney within the meaning of the rules, and you become aware of “evidence of a material violation” by the corporation or any of its officers, directors, employees or agents, then you must report the evidence either to the corporation's Chief Legal Officer (CLO) or the CLO and the Chief Executive Officer (CEO).

b. What?

What is evidence of a material violation? The rules attempt to clarify this phrase as follows: It is “credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.” A material violation is reasonably likely, if it is “more than a mere possibility, but it need not be ‘more likely than not.’”²⁵ Perhaps in recognition that this clarification isn't terribly helpful, the Commission offered the following two criteria to be used in evaluating whether a material violation has occurred or is about to occur:

- It is unreasonable under the circumstances for the attorney to conclude that it is not reasonably likely that there is an occurring material violation? In applying this criterion, an attorney can resolve factual issues by identifying those reasonable credibility judgments and drawing those reasonable judgments that tend to indicate that it is not reasonably likely that a violation occurred, is ongoing, or is about to occur.
- It is unreasonable under the circumstances for the attorney to conclude that the occurring violation is not material? Although a competent and prudent attorney could conclude that the indicated violation is material, another could conclude that the indicated violation is not.²⁶

²⁴ Model Rules of Professional Conduct 1.13(b) also defines the client of the in-house lawyer: “a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” The Model Rules are available at www.acca.com/protected/comments/professionalconduct.pfd.

²⁵ See also Model Rules of Professional Conduct 1.13(b): “If an lawyer for an organization knows that an officer, an employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization and that is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization.” Notice that the standard for knowledge under the Model Rules is different than that under the SEC rules: under the former, an attorney must “know” of wrongdoing, but under the SEC rules an attorney must report such wrongdoing of which he or she “becomes aware.”

²⁶ *Id.* at p. 3.

c. **Where?**

Okay, so you are an attorney who has evidence of a material violation by the corporation or a director, officer, employee or agent of the corporation. Where do you take your information? The answer is generally “Up.”

There are four ways in which you, as in-house counsel, can satisfy your reporting obligation. You can report to the corporation’s Chief Legal Officer, to the Board, to the Qualified Legal Compliance Committee (if your corporation has one), or to a Supervising Attorney.

Are your duties over once you have notified the higher-ups of the issue? Hardly. The rules provide that if the report is made to the CLO or CEO, such officer must cause an inquiry to be made (perhaps by the QLCC) unless that officer believes that no such violation occurred. The CEO or CLO must advise the reporting attorney (whether it is a subordinate attorney or the subordinate attorney’s supervisor) of what action has been taken.

When you are advised of what action has been taken, you have a choice. If you are happy with it—the rules call it “receiving an appropriate and timely response”—then you don’t have to take any further action. However, if you haven’t received an appropriate response within a reasonable time, then you have an obligation to voice your dissatisfaction with the CEO or CLO, and then notify others in the corporation of the situation. This process is known as “reporting up,” and requires you as the reporting attorney to bring the matter to the attention of either the audit committee, the board of directors or another committee of the board which consists of directors who are not employed, directly or indirectly by the corporation.

It is only at this point that your work is done.²⁷ Although the SEC had initially proposed a “noisy withdrawal” requirement for reporting attorneys who did not receive an appropriate and timely response, that requirement was not included in the final rules. It is, however, still pending.

²⁷ Note, also, that the ABA amended the Model Rules of Professional Conduct to include corporate governance principles designed to enhance the effectiveness of attorneys representing corporate clients. These new rules require attorneys representing public companies to report violations by corporate officers or employees in a manner similar to that required by the SEC rules.

IV. Other Corporate Governance Duties

Counsel must also make certain that the corporation develops and implements policies and procedures to assure compliance with various other laws and regulations, such as those regarding:

A. Federal law

There are a myriad of laws which your corporation must comply with on an everyday basis, and it is often your duty to identify those areas, draft policies or review existing policies to determine their adequacy, and enforce compliance. Ensuring that your corporation does not run afoul of anti-trust laws or the Foreign Corrupt Practices Act requires that you pay close attention to the operations of the company divisions. Similarly, you are likely to be charged with ensuring that internal corporate policies are legally sound, such as those involving human resource issues—maternity leave, employee recruitment, interviewing, hiring and firing, the Americans with Disabilities Act, and Executive Compensation—to name a few.

In addition to being satisfied that the corporation is operating properly internally, you must ensure that it is complying with applicable regulations. Some of these are discussed below.

B. Industry regulations

Does management need to be involved in the formulation of a plan that you draw up and which you will effectively be monitoring? Some corporations think so. For example, The Scotts Co implemented a unique, company-wide compliance program in 2001 that was “homegrown”—that is, it was devised by a coordinated group comprised of 20 company senior executives and the seven-member legal department. By using managers to develop a risk assessment, the corporation identified problems relating to price-fixing, insider trading and other antitrust matters, and rolled out a program to address these and other potentially unethical and illegal conduct. Observers believe that this “culture of compliance” will go a long way to avoiding an anti-trust case or a government investigation that could arise if the corporation wasn’t diligent about policing itself.²⁸

The Home Depot is another example of a corporation that recognized it might have some potential liabilities and did something about it. Frank Fernandez, General Counsel of the hardware and home improvement giant, saw potential for trouble when he took over three years ago.²⁹ His concerns about whether the home product installers were properly insured and licensed and the degree of familiarity of store construction managers with local building laws, led him to institute a company-wide compliance program to protect the company from lawsuits. Like Fernandez, you have the potential to be an invaluable asset to a corporation if you adopt a proactive, assertive approach to compliance programs.³⁰

²⁸ See, Thom Weidlich, *Miracle Gro-ing Compliance*, Corporate Counsel Vol. XI, No. 3, 74-75, March 2004.

²⁹ See, *Pathbreaking GC's*, Corporate Counsel, Vol. XI, No. 3, March 2004.

³⁰ *Id.*

C. A Code of Ethics

If the notion that you should do it because it's the right thing to do doesn't get your corporation motivated, maybe a gander at the revised United States Sentencing Guidelines will do the trick. Recent amendments to Chapter 8 of the Guidelines focus on deterring criminal misconduct by implementing structural safeguards to prevent and detect criminal conduct within an organization. Specifically, U.S.S.G. § 8B2.1(b) requires organizations to exercise due diligence to "promote an organization culture that encourages ethical conduct and a commitment to compliance with the law." The new "Culture of Compliance" may walk softly in some circles, but the federal government has made sure that it now carries a big stick.

If you are charged with drafting a compliance policy you should first identify the various purposes for drafting the policy so that your legal department can balance the obligations imposed by the SEC Rules and the policies of the corporation which incorporate a duty to act in the best interest of the corporation. This approach can help dispel the notion that in-house counsel are in the "gotcha" reporting business, but are members of a corporate team who are responsible for legal counseling and preventive compliance.³¹

D. Document Retention/Data Protection Program³²

Ensuring that documents, emails and other material are retained in the event of litigation or an investigation is a concept that has come far too late for some corporations, which have found themselves scrambling to piece together evidence of a transaction, event or practice. Knowing how to establish such a policy—or how to gauge the effectiveness and thoroughness of such a policy already in place at your corporation—is essential.

For instance, the Securities and Exchange Commission has issued a regulation, pursuant to § 802 of the Sarbanes-Oxley Act, requiring firms that perform audits on public companies to preserve all records relevant to the audit, including electronic records created, sent or received in connection with the audit. The records must be preserved for seven years after the audit is completed (Rule 2-06 of Regulation S-X). The Internal Revenue Service has mandated that companies retain accounting records and other financial data to support their tax filings. The Environmental Protection Agency has rules on retaining environmental records and reports, whether paper or electronic. The Occupational Safety and Health Administration has set standards for retaining data about employees, as has the Equal Employment Opportunity Commission ("EEOC").

Most importantly, a corporation which doesn't have a document retention policy and then throws its hands up when prosecutors or the SEC comes looking for documents risks an obstruction of justice charge. Not only does the Sarbanes-Oxley Act impose a requirement that corporations implement a document retention program and effectively administer it, but the lawyer faces sanctions for violating Model Rules of Professional Conduct 3.4.

³¹ See ACC InfoPAK *New Attorney Standards Under Sarbanes-Oxley*, available at www.acca.com/infopaks/sarbanes.html. This InfoPAK also contains references to the corporate policies of several large corporations such as BellSouth Corporation, General Electric Company and PepsiCo, Inc., which can be used as sample policies for drafting your own policy if you are charged with that task.

³² See ACC InfoPAK *Records Retention*, available at www.acca.com/infopaks/recretent.html

You should be aware of privacy issues that arise when you or individuals in your corporation request that information about individuals (whether employees of subsidiaries, customers or in third-party databases) be transferred from Europe, Canada, or Asia into the U.S. Innocent but ill-informed requests can land the corporation in a heap of trouble.³³

E. Contract Oversight and Compliance

Did you know that those contracts that you might have carefully drafted can be radically altered by subsequently executed electronic agreements? They can, and it can happen in an instant without you or other legal counsel even knowing about it—until it's too late. Sometimes, “wet signature” contracts can be modified by subsequently executed electronic agreements. Establishing a policy that alerts all employees of the potential to undo a corporation's legal rights can be one of your most important tasks.

F. “Whistleblower” Policy

Firing someone for poor performance as a pretext to ditching a squeaky wheel has always been prohibited under a variety of laws, including Section 215(a)(3) of the Fair Labor Standards Act (“FLSA”), Title VII of the Civil Rights Act of 1964, the False Claims Act, and various federal safety and environmental statutes. Now, however, the whistleblower provisions of the Sarbanes-Oxley Act reflect a middle ground between the extremes of the False Claims Act and purely remedial statutes. The Sarbanes-Oxley Act protects whistleblowers, but does not reward them. Although claims must be filed in the first instance with the Secretary of Labor, the Sarbanes-Oxley Act also allows plaintiffs to sue in federal court. As with claims filed with the EEOC under Title VII, claimants can initiate private civil litigation if the agency fails to investigate and resolve the complaint in a timely manner.

Importantly, however, unlike most other federal statutes that protect employees, the Sarbanes-Oxley Act holds individual executives, agents, and supervisors personally liable for unlawful retaliation, and makes retaliation a felony offense under federal criminal law. Accordingly, if you or one of your corporation's executives or managers knowingly approve the termination of an employee who has blown the whistle on some form of alleged corporate misconduct, you and/or your colleagues may be personally sued and held liable for the termination, and you and/or your colleagues may face criminal penalties to boot. It is therefore critical to understand exactly what conduct this new law protects.

Your task as in-house counsel is to impress upon your corporation how critically important it is to establish an effective internal compliance program. Carefully draft or revise your corporation's code of conduct to reflect both the culture of the corporation and the standards of conduct expected from the corporation. Effective codes reinforce core corporate and legal values and address at least the following:

- Corporation's expectation that the corporation and its employees comply with the letter of the law.
- Corporation's expectation of compliance with the spirit of the law.

³³ ACC InfoPAK *Data Protection*, available at www.acca.com/infopaks/data_protection.html

- Importance of ethical business practices even when no law applies.
- Expectation of open communication within the corporation about ethical issues.
- Specific delineation of conduct prohibited by the corporation.
- Specific delineation of conduct required by the corporation

Ways that you can assist in protecting yourself and the corporation include the following: revise managers' and supervisors' job descriptions to reflect their duties and responsibilities with regard to corporate compliance; establish uniform response and investigation procedures for complaints; train and educate employees regarding corporate compliance; and impress upon your corporation the importance of properly documenting discipline and terminations.

G. Privacy Laws

1. HIPPA

The Health Insurance Portability and Accountability Act of 1996 (HIPPA) requires certain health care businesses to maintain reasonable and appropriate administrative, technical and physical safeguards to ensure the integrity, confidentiality and availability of health care information and to protect against reasonably anticipated threats or hazards to the security or integrity of the disclosure. The regulations implementing HIPPA specifically require risk analysis, mandating that entities covered by HIPPA conduct an assessment of potential risks and vulnerabilities and implement security measures sufficient to reduce risks and vulnerabilities.

2. Gramm-Leach-Bliley Act

The Financial Modernization Act of 1999, also known as the “Gramm-Leach-Bliley Act” includes provisions to protect consumers’ personal financial information held by financial institutions. There are three principal parts to the privacy requirements: the Financial Privacy Rule, Safeguards Rule and pretexting provisions.³⁴ The Act aims to inform persons about the financial practice of financial institutions so that consumers can make informed choices about which institutions they chose to deal with. It also gives consumers an option to control how that financial institution uses their financial and personal information.

Although there has been a push to apply the provisions of the Act to attorneys, a recent decision by Judge Reggie Walton of the U.S. District Court for the District of Columbia may slow that movement down. In response to a suit brought by the American Bar Association against the Federal Trade Commission, Judge Walton issued an order on April 30, 2004 holding that the privacy provisions of the Act do not apply to attorneys. Walton’s Order held that the FTC’s extension of the privacy provisions to attorneys exceeded the statutory authority of the Act and amounted to arbitrary and capricious action. Thus, attorneys who counsel their clients not to comply with the privacy provisions of the Act need not fear enforcement actions by the FTC.³⁵

³⁴ Privacy Initiatives, www.ftc.gov/privacy/glbact/

³⁵ See, ABA Press Release, available at: www.abanet.org/ftc-letter.doc

H. Setting Reserves

Setting a reserve to accurately reflect the liabilities of the corporation doesn't lie solely with the financial folks at the corporation -- in-house counsel must ensure that the appropriate standards (GAAP) are being used and that the corporation is not failing to accrue a loss contingency based on a potential or actual law suit when it should. A very good article on this subject can be found in the July/August 2004 issue of ACC Docket, entitled, *Now, Never, or Somewhere In Between: The Nuts and Bolts of Setting a Reserve*.³⁶

I. Intellectual Property and IT System Security and Protection

Although IT and IP law may not be your thing, a working knowledge of these areas may be expected of you once you step into the role of in-house counsel. Trade secrets, for example, are the lifeblood of your corporation—some refer to them as the crown jewels—but an inattentive in-house counsel or a lackadaisical corporate philosophy can allow this capital to walk right out the door each and every day. Does your corporation have a policy setting out when, where and how employees are required to discuss information that amounts to a trade secret? Is your Internet and physical plant secure from theft of those secrets or inadvertent transfer of such valuable information to a competitor or someone else who has an interest in snooping? If not, you could become the victim of corporate espionage. It's up to you as your corporation's lawyer to protect the corporation's interests. Either get to work drafting a policy or evaluate the existing one to ensure that all employees are protecting the corporation's invaluable intangible assets.³⁷

If your corporation has a website, you should also be alert to the concept of "Internet Poachers": a practice otherwise known as search term bidding. Search engine companies have made it possible for the person or corporation willing to pay the most money for a particular search term to earn the spot at the top of the list of search results. This turns out to be a problem if the search term is within your trademark—i.e. Kumon. A search of a particular term can display your competitor at the top of the list of results because it may have bid the highest price for the searches. Open bidding on search terms exists. It's incumbent upon you to understand whether your trademark is being infringed in this process and prevent it—if you can.³⁸

J. Corporate Social Responsibility Programs

In the government, counsel can feel assured that they are engaging in a public service through their practice of law at a government agency. Law firms, too, offer an opportunity for young lawyers to

³⁶ Peter Brennan, Chris Holmes, and Bill Phelan, *Now, Never or Somewhere In Between: the Nuts and Bolts of Setting a Reserve*, ACC Docket 22, no. 7 (July/August 2004):30-46, available at www.acca.com/protected/pubs/docket/ja04/reserve.pdf

³⁷ Glenna Rogers and Scott Marrs, *Trade Secrets and Corporate Espionage: Protecting Your Company's Crown Jewels*, ACC Docket 22, no. 4 (April 2004): 60-78, available at www.acca.com/protected/pubs/docket/apr04/secrets.pdf

³⁸ For more on this topic, see Devon Klein and David Koch, *Search Terms for Sale*, ACC Docket 22, no. 4 (April 2004):24-40, available at www.acca.com/protected/pubs/docket/apr04/poachers.pdf

reach beyond the four walls of their offices, providing pro bono cases in which associates can become involved and gain valuable experience.

Corporations, too, have a way of reaching out to the community: it's called Corporate Social Responsibility. If your corporation has a CSR program, be prepared to get involved. Successful in-house counsel do.

Gloria Santona of McDonald's Corporation is among those who believe in the value of CSR programs, and participates in the upkeep of local Ronald McDonald Houses for seriously ill children. In addition, Gloria Santona and other lawyers at McDonald's corporation provide legal services to the poor, operate a legal advice hotline, and reach out to local disadvantaged children.³⁹

Paula Boggs of Starbucks is of a similar bent, helping Seattle's poor navigate the maze of the local housing court. In addition to encouraging all members of the in-house staff to pitch in, she has initiated a pro bono effort that recognizes community service as an essential attribute in a legal practice.⁴⁰

K. Media Scrutiny

You may not be the communications officer for the corporation, but when it comes to legal issues that rear their ugly heads in public forums, you better guess that the directors will be looking to you to figure out what if any potential liabilities the corporation is facing in order to formulate a public relations game plan. Saying too much or, alternatively, not saying enough can have dreadful consequences, and can lead to more and bigger problems that you started out with.⁴¹

Will your law firm or government counsel colleagues ever face this dilemma? Perhaps not. While it is routine for government agencies and law firms to have press offices and/or managing partners to handle these events, it may not be the case in your small legal department. If your corporation does not have a PR department, folks may look to you for guidance. Although it is unlikely that this enormous burden will rest squarely on your junior shoulders, the responsibility may be vested in your legal department.

As such, members of the in-house counsel team must be prepared to present the case to the public, as well as to a jury. The two processes are not dissimilar. Bad publicity may result in reductions in your corporation's profits and difficulty in recruiting and retaining top quality employees. Corporate counsel must take a preventative approach to managing the presentation of sensitive matters to the press. Implementing policies and thinking through systems of how to deal with corporate concerns before there is a crisis are the best ways to avoid being a media defendant.⁴²

³⁹ *Pathbreaking GC's*, Corporate Counsel, (March 2, 2004), available at www.law.com.

⁴⁰ Sue Reisinger, *Breaking Ground*, Corporate Counsel, March 2, 2004, available at www.law.com/jsp/article.jsp?id=1076428389389. See also, Dannette Wineberg and Phillip Rudolph, *Corporate Social Responsibility: What Every In-house Counsel Should Know*, ACC Docket 22, no. 5 (May 2004), available at ACC Online at: www.acca.com/protected/pubs/docket/may04/social.pdf

⁴¹ ⁴¹ James Patton, Terrence Delehanty, David Fannin, Diane Geller, Theresa Van Vliet, and Naomi J. Paiss, *Responding to Media Inquiries in a Crisis*, ACC Docket, Vol. 22, no. 6 (July/August 2003):40-56, available at www.acca.com/protected/pubs/docket/ja03/media.pdf

⁴² *Id.*

If your corporation decides that you look best in front of the camera, certain things should be taken into consideration. First and foremost, you should consider whether you serving as spokesperson will jeopardize the attorney-client privilege. Some provisions of the Sarbanes-Oxley Act may impose an affirmative duty on you, as counsel, to disclose certain activities. Carefully weigh whether that will impact your effectiveness in protecting your client's interests. Alternatively, you could suggest hiring a public relations firm that would be free of the ethical dilemma you might find yourself in.

L. SEC Enforcement Actions

In-house counsel will likely be the lead for coordinating the response to SEC enforcement actions or to any criminal investigation which focuses on the conduct of the corporation or its officers, both of which are distracting and potentially devastating to a corporation. At the very least, he or she should do some crisis response planning and implement policies for dealing with law enforcement officers, supervising the production of documents, and ensuring the preservation of evidence without incurring additional liability.⁴³ As a practical matter, in-house counsel—who represents the corporation, remember, not the individual officers, directors, or employees—should ensure that if the SEC contacts an employee about possible violations of securities laws, the employee is afforded counsel.⁴⁴ The provision of representation should not be viewed as a means of obstructing the investigation, but as a step in cooperating with investigators while simultaneously informing the employee about his or her legal rights regarding questioning and the right to counsel. Whether the SEC is seeking documents or testimony—and they are most commonly going to be looking for both in an investigation—a coordinated effort by the corporation—spearheaded by you—is imperative.⁴⁵

In *SEC Enforcement Investigation: What You Need to Know*⁴⁶, the authors identify and discuss in detail ten steps you can take upon learning of an SEC investigation:

1. Preserve documents.
2. Notify the Audit Committee.
3. Notify auditors.
4. Form a response team.
5. Prohibit trading in company stock by anyone with knowledge of the investigation.
6. Gather information.
7. Develop a defense strategy.
8. Develop a disclosure strategy.
9. Notify insurers
10. Consider remedial measures.

⁴³ Gregory Matthews, *SEC Enforcement Investigation*, ACC Docket Vol. 21 no 12, (November/December 2003):96-113, available at www.acca.com/protected/pubs/docket/nd03/sec.pdf.

⁴⁴ *Id.*

⁴⁵ How do you get a general idea of whether or not the SEC will issue a Wells notice—the equivalent of a formal statement of an intent to initiate an enforcement action? See how you would answer these ten questions if you were in the SEC counsel's shoes. *SEC Investigations: How Much Cooperation is Enough?* Nixon Peabody LLP Securities Law Alert, (April 7, 2004), available at www.nixonpeabody.com/linked_media/publications?SLA04072004.pdf.

⁴⁶ Gregory Matthews, *SEC Enforcement Investigations: What You Need to Know*, ACC Docket Vol. 21, no. 10 (November/December 2003): 96-113.

Counsel must also take the lead when learning of a grand jury investigation, particularly to prevent against inadvertent privilege waivers.⁴⁷ Often, in-house counsel will look to and work with outside counsel specialists in this critical area.

M. Grand Jury Investigations

Sometimes, when the big guns come, it's not the SEC, but DOJ. In such cases, you might be the first person to whom your corporation turns for advice on how to proceed. Although you will quickly obtain outside counsel to represent the corporation in such a case, there are important steps that you can take to ensure that neither your corporation nor you face obstruction of justice charges.

First, make sure that no relevant evidence is destroyed. This sounds easier than it is, but Frank Quattrone might be in a different situation right now if he or his corporation had heeded this sage advice. Your corporation must suspend any document destruction program immediately and issue a "freeze letter" to all employees who are likely to have records in whatever form that would be relevant to subpoenas.

Next, identify employees who will likely be subpoenaed, inform them of the possibility that subpoenas for documents or live testimony might be issued to them, and advise them on what they should expect. Give them the nuts and bolts of the process, and tell them what their rights are including the right to be interviewed in the presence of counsel for the corporation. Protect the interests of your client the corporation -- just don't suggest anything that could be viewed as obstructionist.⁴⁸

N. Internal Investigations

Often in-house counsel will be charged with conducting an internal investigation of corporate wrongdoing. Such investigations may be in response to an internal complaint—a whistleblower—or as a means of assessing the corporation's exposure and convincing the government not to pursue its own investigation. Whether you or outside counsel conduct the investigation, it should be done in a way that retains the attorney-client privilege and respects the work product doctrine. Are you acting in a legal capacity in such a case, or are you performing a business function? An in-house counsel assigned to investigate a claim of sexual harassment, for example, might wind up having a court determine that his or her work was not privileged because the work was not truly legal in nature.⁴⁹ For a step-by-step approach to conducting an internal investigation and protecting the

⁴⁷ Jay A. Brozost and Lawrence S. Goldman, *Grand Jury Investigations, A Guide for In-house Counsel*, ACC Docket 21 No. 7 (July/August 2003):58-72 available at www.acca.com/protected/pubs/docket/ja03/grandjury.pdf

⁴⁸ See also ACC InfoPAKs *Attorney-Client Privilege*, available at www.acca.com/infopaks/attclient.html and *Responding to Government Investigations*, available at www.acca.com/infopaks/govtinvest.html

⁴⁹ Lee Applebaum, *A Matter of Privileges: In-House Attorney-Client and Work Product Claims Face Challenges*, *The Legal Intelligencer*, December 4, 2001, available at www.law.com/jsp/statearchive.jsp?type=Article&oldid=ZZZEUL8TSUC

attorney-client privilege, see *What to Do When the Whistle Blows*, ACC Docket 22, no. 5 (May 2004) by Deborah Edwards, Mark Calloway and Brian Edwards.⁵⁰

⁵⁰ This article is available at www.acca.com/protected/pubs/docket/may04/whistle.pdf. See also ACC InfoPAK *Internal Investigations*, available at www.acca.com/infopaks/intinvest.html.

V. Work Environment

While the structure of the work environment enjoyed by in-house counsel differs in many respects from that of their counterparts in law firms and government agencies, it is a misnomer to suggest that life is easier on the corporate side. Wearing more than one hat can make the job much more difficult.

A. Life At a Firm

Working either as a junior associate or a junior partner have one thing in common—and it's not the compensation—it's the horrendous hours. The rigid structure of the firm is determined by partner track, and the work ethic is uniformly driven by billable hours. Many firms establish a minimum billable hour requirement of anywhere between 1800 to 2000 hours, which is tied directly to bonuses, not to mention moving you along on the partnership track.

The more years spent at a firm prior to making partner, the more intense the pressure to reach the top. A recent survey showed that the average partnership track is now nine to ten years.⁵¹ Moreover, fewer and fewer large law firms allow associates to jump directly to partnership status -- the institution of the non-equity partner keeps some associates in partnership limbo for several years. While law firms believe that it may be a good training ground for “wanna-be” partners, the truth is that attorneys in this status have limited if any voting right, and earn less than equity partners...but don't fear, they still do quite well, pulling in salaries in the \$500,000 range.⁵²

The focus is not entirely on what you do at the firm, it's also on what you bring into the firm. Senior associates must cultivate clients to make themselves into partnership material. A smart associate is not going to be profitable to the firm in the long run if he or she can't bring in their own business. Junior and even mid-level partners are constantly concerned with maintaining and expanding their client base.

While the partners and more senior associates might have the benefit of having contact with those clients for whom work is performed, junior associates have minimal, if any, face to face time with the client. Even more disappointing, however, particularly in large law firms, is that the potential for in-court experience is minimal.

B. Life at a Government Agency

Government attorneys are hired at a particular grade level, with the exceptions of Excepted Service (ES) and Senior Executive Service (SES). These grades act as ceilings, limiting a counsel's potential for advancement, forcing attorneys to apply for other positions with higher grade potential and/or supervisory positions. Although a widely held belief casts government attorneys as a lethargic lot, that is an unfair characterization, and work loads vary tremendously depending on the particular agency. A 40-hour work-week may be the regular schedule for some government lawyers, but

⁵¹Alison Frankel, *Am Law.00 100: Veil of Tiers*, The American Lawyer (June 29, 2004), available at : www.law.com/jsp/law/amlaw100.jsp

⁵² *Id.*

prosecutors and attorneys working in enforcement divisions of agencies often work significantly longer hours (as evidenced by the filing of a class action suit by federal prosecutors seeking compensation for years of unpaid overtime.) While some attorneys have a great deal of control over their caseloads (i.e. AUSA's), the ultimate decision-making responsibility is generally vested in deputy chiefs and chiefs of the divisions. Prosecutors, for example, routinely have to submit prosecution memoranda prior to seeking indictments in major cases, and the ultimate decision on what charges are to be brought—not to mention the penalties sought—are vested in superiors. The recent memo from Attorney General Ashcroft mandating that prosecutors charge the most serious offense in all cases further limits the discretion of government lawyers.

C. Work Life of an In-house Counsel

One of the most noticeable aspects to life as in-house counsel is the absence of billable hours, Ray Rothermel of Nextel admits. However, the freedom from having to bill your time every six minutes and not having to worry about whether or not you are still on partnership track does not make work or the environment at a corporate law department any less demanding. When Kevin Gallagher of Host Marriot first went in-house from a law firm he worked more hours that year than he did the previous year at his firm. The days aren't necessarily shorter or the hour expectations any less; however, it is the proactive duties and dual legal/business responsibilities that make working as corporate counsel an entirely different game.

- **Enhanced responsibilities.** The expansion of many in-house departments, the advent of Sarbanes-Oxley and the abundance of attorneys vying for these positions have made corporations increasingly dependent upon in-house counsel for an abundance of tasks. Corporate officers want immediate access to counsel, and desire answers from individuals who can appreciate the business implications of a decision.
- **Implications of decisions, strategies are wide-reaching and long-lasting.** In-house counsel must contemplate the financial and legal implications of a course of action and how decisions may reverberate throughout the organization. For example, Patrick Murphy of GE notes that if you lose a motion or a case in private or government practice, you may lose the client, but you essentially move on to the next matter. In-house, however, the burden and responsibility for anticipating adverse results and doing everything legally possible to prevent damage to the corporation is squarely on the shoulders of in-house counsel. A bad result can be more than career threatening to the individual managing the case: it can profoundly impact business operations if not anticipated by the business due to faulty legal advice. Had proper legal advice been made in a timely manner the business could have made accommodations to prepare for the adverse event.⁵³
- **A different kind of pressure: You are part of a team.** The client's expectations of in-house counsel are different from those of a firm of attorneys because of the multi-faceted nature of in-house counsel's legal and business-oriented duties. For example, Pat Murphy explains that in-house counsel is part of a bigger corporate team—and other cross-functional members of that team—such as the CEO, finance, and sales personnel—look to in-house counsel to facilitate a deal or proposal. In-house counsel will not engender much support if he or she merely advises these other team members that there are legal impediments to pursuing a certain course of action.

⁵³ See also *Corporate Counsel: In-House Counsel Must Take Initiative in Managing Risk*, 19 BNA Corporate Counsel Weekly (March 17, 2004).

Instead, the task of in-house counsel is to find a way to help the organization accomplish a goal within the clear confines of the laws and applicable regulations. This requires some “internal salesmanship” tactics: not saying “no”, but explaining that you are trying to keep the corporation out of trouble. As the general counsel for Ford put it, “a lawyer’s perspective in the process of business decisions facilitates a leadership role in the discussion but not necessarily in the decision. ... As in-house counsel, you may venture into the business dialogue, but be mindful that your professional responsibility is to focus on compliance with the law and to protect the interests of your clients (the shareholders).⁵⁴

- **Advancement slow and steady:** Unlike counterparts at a law firm, an in-house counsel may takes longer to establish himself or herself as an asset to a corporation. At a firm, his success is measured by the quality of a memo, a motion or pleading, or success at trial. At a corporation, it is sometimes difficult to walk a fine line between being a ‘nay-sayer’ on a deal and contributing suggestions and direction as to how the deal can be accomplished and the legal requirements can be satisfied at the same time. Getting to a point where other members of the corporation rely on you for both business and legal advice is a continuous process that may take several months or years to achieve, Pat Murphy explains.

⁵⁴ Bernard K. Hooper, *Choose one: Expediter or Cat Herder? The Role of In-house Counsel in Corporate Decision Making*, Business Law Today, Volume 12, Number 6 (July/August 2003), available at www.abanet.org/buslaw/blt/2003-07-08/hooper.html

VI. Benefits of Working In-house: A Comparison

Are things like vacation, job security, and prestige important to you in your job selection? Jobs at the law firms, in the government, and at corporate organizations all offer these attractive perks, but in different amounts and varying degrees.

	IN-HOUSE	GOVERNMENT	LAW FIRM
Job security	Performance-based. A recent survey shows 82% of in-house counsel are not afraid of being laid off ⁵⁵ ; however, security of the corporation may depend on the economy, and may vary if an investigation is initiated or if political events impact profitability	Usually high	Partnership track determines longevity; Of Counsel and Senior Counsel positions offer alternatives to partnership track
Reliable hours	More so than firms, but dependent entirely upon particular organization. ⁵⁶ Flex-time and part-time opportunities may be available ⁵⁷	Generally predictable in non-litigation positions	Billable hours are required, often exceeded; flexibility of work schedule minimal due to immediacy of demands of clients

⁵⁵ *Staying Put, but Working Harder*, Corporate Counsel, December 2003, available at www.law.com/special/professionals/cpor_counsel/2003/staying_put_working_harder

⁵⁶ The experience at Nike Inc.'s Oregon headquarters may counter this assertion. The company affirmatively keeps the in-house counsel staff lean (it's now at 18), which means that everyone works longer hours. A recent survey reports that they may be among the increasing number of in-house counsel who believe that life as in-house counsel has gotten worse this year due to overwork. Just ask Bryan Dempsey, legal affairs director for Tgs-Nopec Geophysical Co in Houston, Texas. He's the sole lawyer for a company that employs 280 people, and he works every weekend and hasn't taken a vacation since a five-day break in 2000 for the birth of his child. Eriq Gardner, *Picking Up the Pace*, Corporate Counsel (November 20, 2003), available at www.law.com. "In fact, the time company lawyers spend at the office is approaching the time logged by law firm associates, according to comparisons between the 2004 Quality of Life survey and ...the American Lawyer's annual report on law firm midlevel associates." Both surveys show in-house and law firm associates are putting in between 46 and 55 hours per week. *Id.*

⁵⁷ Nancy Gardner of Reuters America works a flex-time schedule. Thom Weidlich, *Preach What You Practice*, Corporate Counsel (March 2, 2004), available at www.law.com/jsp/article.jsp?id=1076428390300. See also, Teresa Kennedy, Eva Kripalani and Elinora Mantovani, *Achieving Balance: A Recipe for High-quality Work Life for In-house Counsel*, ACC Docket Vol. 22, no. 2 (February 2004) 38-54, available at www.acca.com/protected/pubs/docket/feb04/balance.pdf

Compensation	Salaries plus bonuses and stock options can make for a generous package ⁵⁸	Determined by step/grade; annual COLA and merit increases; small bonuses for special achievement	Usually quite high, particularly at larger firms. Creates the “golden handcuffs” for many
Diversity of work	Can be quite varied depending on size of organization; in-house must serve as legal and business consultants. Counsel enjoy collegiality, enjoy feeling like they are part of a business team ⁵⁹	Counsel usually limited to one area of expertise; however, special details offer counsel opportunity to work at different agencies	Associates and partners usually limited to one area of expertise
Potential for advancement	Constant interaction makes promotion potential possible, ⁶⁰ but it depends on organization ⁶¹	Limited by step/grade. Unhappy government lawyers must apply for jobs of higher grade or look for SES or Excepted Service positions	Partnership track is the way to advance; of counsel an option
Additional benefits	Quality of legal practice is distinct: corporate social responsibility programs allow in-house departments to reach out to community. Pro-bono opportunities possible. Employer’s view of vacation less favorable than last year, but still good ⁶²	Thrift savings plan; FEGLI (life insurance) generous sick and annual leave; flexible hours depending on agency	Prestige; well-developed training programs for junior associates ; ample opportunities to work on pro-bono projects

⁵⁸ The average salary in 2002 for in-house counsel was \$149,693, with an average of \$56,358 in bonuses. Forty-nine percent received stock options, while 48 percent did not. *The Dish on Departments*, Corporate Counsel (December 2003), available at www.law.com/special/professionals/cpor_counsel/2003/dish_on_departments.shtml

⁵⁹ *Id.*

⁶⁰ Even though only a third of in-house counsel rated advancement at their company as average, most said they plan on sticking around regardless of whether or not they are promoted. In fact, 83 percent plan to stay put. Eriq Gardner, *Picking Up the Pace*, Corporate Counsel, March 20, 2003), available at www.law.com.

⁶¹ A December 2003 survey by Corporate Counsel revealed that only 34 percent of in-house counsel would rate the opportunity for advancement at their organization above average or outstanding; 35 percent would rate it average, and 20 percent would rate it poor. *Good People Going Nowhere*, Corporate Counsel (December 2004), available at www.law.com.

⁶² Although 84 percent of in-house counsel rate their company’s attitude about taking vacations as above average or excellent last year, only 64 percent could say the same this year. *Id.*

VII. Client Contact

Many attorneys consider the ability to have close contact with the client essential to the effective representation of that client's interest. If you share this view, then an in-house counsel position will deliver what you are looking for. Attorney positions at law firms and government agencies, however, often fall short in this regard.

- **Associates don't often interface with clients on a regular basis.** Associates at firms have minimal, if any, contact with the client. "Face time" is reserved for partners and senior associates, and in many cases, an associate's contributions go totally undetected and unappreciated by the client.
- **Government counsel caught in red tape.** The United States, state, or municipal entity is the client. Governmental regulations and procedures preclude immediate access to upper level managers, disabling some government counsel from being able to make the final decision on a client's behalf.
- **In-house lawyers have "captive client."** Even at a most junior level, an in-house counsel has the opportunity for almost daily contact with the managers of the organization, which affords him or her the ability to see the "big picture."
 - This familiarity encourages a close working relationship between the in-house counsel and client.
 - In-house counsel is involved in virtually every aspect of organization; however, when outside counsel is brought in, in-house counsel does not abrogate all responsibility but maintains role of overseer.⁶³

⁶³ Veta Richardson, *From Lawyer to Business Partner*, ACC Docket Vol. 22, no. 2. (February 2004)70-75 available at www.acca.com/protected/pubs/docket/feb04/partner.pdf; Robert Haig, Successful Partnering Between Inside and Outside Counsel, § 40:19, *The Role of In-house Counsel in Matters Entrusted to Outside Counsel: Partnering Versus "Tossing the File Over the Wall."* (West 2003); Ronald F. Pol, *Get More Value from Outside Counsel: Show Them the Flipside*, ACC Docket, Vol. 21 no. 4, p. 22-39 April 2004 available at www.acca.com/protected/pubs/docket/am03/flipside1.php.

VIII. Liability

Under what circumstances would in-house counsel find himself or herself facing liability for actions taken on behalf of the corporation? The answer? Increasingly more than he or she would have in recent years. While government lawyers and those working at firms are exposed to liability for malpractice, obligations imposed by Sarbanes-Oxley have exposed in-house counsel to greater exposure in several areas.

A. Government

Compliance with the Hatch Act used to be the big problem; now, the Office of Professional Responsibility and/or Bar Counsel closely monitor conduct of counsel and disciplinary actions within agencies.

In general, government counsel is immune from liability for acts performed within the scope of employment. Federal prosecutors have greater exposure, as they are bound by ethical standards and rules of procedures in jurisdictions which are impacted by an investigation (McDade Act). Moreover, 42 U.S.C. §1983 civil rights actions can be instituted against prosecutors as well as law enforcement agents for alleged damages resulting from wrongful prosecutions.

B. Firm

Malpractice insurance is a large cost of doing business; luckily, however, junior associates are generally deprived of responsibility necessary to incur liability.

C. In-house Counsel

Sarbanes-Oxley and SEC Regulations impose obligations on counsel that could give rise to liability in the event of a failure to comply. These include:

- **Document retention programs:** Necessary to stave off obstruction of justice charges under 18 U.S.C. § 1519; 1512(c)(1) and (2). Most importantly, a corporation which doesn't have a document retention policy and then throws its hands up when prosecutors or the SEC comes looking for documents risks an obstruction of justice charge. Not only does the Sarbanes-Oxley Act impose a requirement that corporations implement a document retention program and effectively administer it, the lawyer is looking at sanctions for violating Model Rules of Professional Conduct 3.4.
- **Reporting up requirements.** §307. 17 CFR §201.102(e)(1) (2002). The SEC Rules implementing provisions of the Sarbanes-Oxley Act require that an attorney practicing before the SEC must report material violations of securities laws and breaches of fiduciary duties to a supervising attorney, the CLO or CEO of the issuer, and if the response is not appropriate in the view of the reporting attorney, the reporting attorney must bring the matter to the board of directors or a designated committee of outside directors.
- **Breach of Fiduciary Duty:** In-house counsel who also serve in business capacities (i.e. vice president, general counsel, chief compliance officer, business ethics counsel, environmental

- compliance leader, or chief legal officer) also run the risk of being held liable for breach of fiduciary duty rather than plain old malpractice.⁶⁴
- **Obligation to implement a corporate code of conduct.** The “culture of compliance” isn’t just a fad in corporate social circles -- it’s the law. Amendments to the U.S. Sentencing Guidelines in § 8B2.1 created a guideline entitled “Effective Compliance and Ethics Program.” Not only is the establishment of an internal safeguard to prevent and detect criminal conduct within corporations and organizations required, but it can serve as a mitigating factor which can reduce an organizations’ fine punishment in the event that a corporation is convicted of a criminal offense. U.S.S.G. § 8C2.5(g). The guidelines also require that one individual at a high level of the organization have day-to-day responsibility for overseeing compliance with the internal ethics program, and precludes a reduction in the base offense level for organizations which do not have such programs. U.S.S.G. §8C2.5(f) includes a rebuttable presumption that organizations did not have an effective compliance and ethics program in place—and are thus not entitled to the three level reduction in culpability score—if high-level personnel of a small organization or a person with substantial authority of any other organization participated in, condoned, or was willfully ignorant of the criminal offense.
 - **Director and Officer liability.** In-house corporate counsel are increasingly exposed to legal malpractice claims. As corporations bring more work in-house, the exposure to legal malpractice claims expands. These malpractice claims typically arise, not from in-house counsel's "client", but rather from third-parties or from statutory agents, like bankruptcy trustees or the FDIC, who take over after the client fails. Although in-house counsel who also hold the position of a director or officer within the client sometimes are protected by director and officer liability insurance, many policies have an exclusion for legal advice. This exposes in-house counsel to personal liability and places them in the precarious position of having no coverage for many of their acts. Or it may place their corporate employer in the position of having an uninsured duty of indemnity to a corporate agent. While insurance companies traditionally did not offer in-house counsel policies for legal malpractice, a few companies have recently begun to offer such insurance coverage. This portion of the policy will cover (1) areas in which in-house liability is arising; and (2) malpractice insurance coverage.⁶⁵

⁶⁴ Corporate Counsel: *In-house Counsel Must Take Initiative in Managing Risk*, BNA’s Corporate Counsel Weekly, March 17, 2004, available at www.bna.com.

⁶⁵ Saul, Ewing, Remick and Saul, *The Law of Inside Counsel, Liability and Insurance for In-house Lawyers*, www.acca.com/protected/legres/program/newjersey/liability.html.

IX. Conclusion

Choosing life as an in-house counsel is a wise option for many; however, it's not a panacea for all law firm ills or the woes of government work. It may be less hours in some cases, and it may be less money, but the opportunity to work as a trusted member of legal and business teams is priceless.

Knowing what you are in store for before you make the jump will help you make the right choice, but will, more importantly, allow you to be the most prepared, effective, and valuable in-house counsel. This InfoPAK has touched on many of the issues that you are likely to encounter as a junior in-house counsel, and provided a short primer on those areas so you can hit the ground running.

X. Additional Resources

D.C. Toedt III and Robert R. Robinson, GC Rules: Over 350 Things I Wish I'd Known My First Year As General Counsel, *ACC Docket* Vol. 23, no. 5 (May 2005) 80-114 available at www.acca.com/protected/pubs/docket/may05/rules.pdf

Phillip R. Strauss, The Facts Of In-House Life: 80s Things I Wish I Had Known When I Went In-House, *ACC Docket* Vol. 23, no. 3 (March 2005) 22-42, available at www.acca.com/protected/pubs/docket/mar05/facts.pdf

Deborah J. Edwards, Mark T. Calloway, and Brian D. Edwards, What to Do When the Whistle Blows: Dos and Don'ts of Internal Investigations, *ACC Docket* Vol.22 no. 5 (May 2004), available at www.acca.com/protected/pubs/docket/may04/whistle.pdf

Danette Wineberg and Phillip H. Rudolph, Corporate Social Responsibility: What Every In-House Counsel Should Know, *ACC Docket* Vol. 22, no. 5 (May 2004) 68-83, available at <http://www.acca.com/protected/pubs/docket/may04/social.pdf>

Philip R. Strauss, New to In-House: Love Labor Laws, *ACC Docket* Vol. 22. no. 3 (March 2004) 14, available at www.acca.com/protected/article/newinhouse/laborlaws.pdf

Philip R. Strauss, New to In-House: The Running Man, *ACC Docket* Vol. 22, no. 2 (February 2004) 10, available at www.acca.com/protected/article/newinhouse/runningman.pdf

Teresa T. Kennedy, Eva M. Kripalani, and Elinora S. Mantovani, Achieving Balance: A Recipe for High-Quality Work Life for In-House Counsel, *ACC Docket* Vol. 22, no. 2 (February 2004) 38-54, available at www.acca.com/protected/pubs/docket/feb04/balance.pdf

Veta Richardson, From Lawyer to Business Partner, *ACC Docket* Vol. 22, no. 2. (February 2004) 70-75 available at www.acca.com/protected/pubs/docket/feb04/partner.pdf

Teresa Kennedy, Eva Kripalani and Elinora Mantovani, Achieving Balance: A Recipe for High-quality Work Life for In-house Counsel, *ACC Docket* Vol. 22, no. 2 (February 2004) 38-54, available at www.acca.com/protected/pubs/docket/feb04/balance.pdf

Philip R. Strauss. New to In-House: Kung Frugal, *ACC Docket* Vol. 22, no. 1 (January 2004) 12, available at <http://www.acca.com/protected/article/newinhouse/kungfrugal.pdf>

PROGRAM MATERIAL

Frederick L. Douglas, Richard D. Gorelick, Hillary B. Smith, and Laura Stein, *Welcome to Rookie Camp: 10 Things New In-House Lawyers Should Know*, ACC Annual Meeting (2004), available at www.acca.com/am/04/cm/510.pdf

New to In-house Counsel Practice Resources, *accessible at* www.acca.com/networks/resources/newinhouse.php

New to In-house Counsel Practice Group home page *accessible at* www.acca.com/networks/newinhouse.php

Corporate Counsel University - The Basics of In-house Counseling

2004 materials *available at* www.acca.com/ccu/04/material.php

2003 materials *available at* www.acca.com/education/ccu/material.php

the facts
of in-house

LIFE

In-House

by philip r. strauss







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“I was dreaming when I wrote this; forgive me if it goes astray.

But when I woke up this morning, could have sworn it was Judgment Day.

The sky was all purple, there were people running everywhere.

Trying to run from my destruction, you know I didn't even care.”

song, “1999,” 1999, *Prince* (Warner Bros. 1985)

After several years of private practice and one year after Prince's prediction, I decided to go in-house. The sky was not all purple, but there were people (including me) running everywhere. In fact, I found it to be quite a culture shock. So, trying to run from my destruction, I had to find some way to translate the lessons that I had learned in private practice to in-house life, but I was looking in the wrong place.

“Somebody I never met, but in a way I know, didn't think that you could get so much from a picture show.”

song, “E=MC²,” *This Is Big Audio Dynamite*, *Big Audio Dynamite* (Sony 1985)

Turns out, I had learned everything I needed to know for success in-house from the movies, music, and books of my junior high, high school, and college years. Those years spanned the 1980s. So without further ado, here are the 80s things I wish I had known (or remembered) when I went in-house.

THE IN-HOUSE ENVIRONMENT

“I'm looking for a new direction. Where in the world am I?”

“New Direction,” *Echo & The Bunnymen*, *Echo & The Bunnymen* (Warner Bros. 1987)

1. “People are afraid to merge onto the freeway in Los Angeles.”

book, *Less Than Zero*, Bret Easton Ellis (Random House Value Publishing 1987)

These opening lines of *Less Than Zero* are repeated by the protagonist throughout the book and are relevant to in-house practice in two ways. First, they illustrate a tendency to generalize. Unlike the law firm, many of your clients will not have dealt with lawyers very often and will bring generalizations—positive and negative—about lawyers. Some will be positive; more will be negative. You have to be keenly aware of people's perceptions. Second, they express the protagonist's feelings that he doesn't quite fit into his Los Angeles life anymore. Lawyers just don't fit perfectly into the corporate institution. Many of these 80s things address how to improve that imperfect fit.

2. “All you want to hear is the audience's applause. You can't get onstage for a contract clause.”

song, “On Through the Night,” *Def Leppard* (Mercury/Universal 1981)

All of us have been accused of being part of “the department of business prevention” or some similar in-house slur. Unfortunately, some people view legal departments as a necessary impediment to doing business. Even if you are lucky enough to join a department that has overcome this reputation, new hires outside the department may enter with legal department prejudices developed at other companies. An unacceptable contract clause will rarely justify the lack of business progress for any nonlegal business professional. The best way to change this situation is to frame issues in terms of business realities rather than contractual provisions. “This ‘work for hire’ clause is not acceptable” means nothing to a product manager. “Under the proposed business arrangement, you will not own or be able to sell the XYZ project” highlights the same problem, but frames it as a business issue rather than a contract issue.

3. “It's kinda social. Demented and sad, but social.” movie, *The Breakfast Club* (Universal Studios 1985)

Unlike a law firm, the majority of people in a corporation have no connection to law. As a result, the legal department may be somewhat isolated, both socially and professionally. The legal department may be regarded with the same mix of awe and pity

accorded to the physics club in *The Breakfast Club*. Be an ambassador for the legal department and get to know folks outside the department. Often, knowing the name of somebody's child or how somebody spends their free time will help you get things done more effectively by adding a human element to your legal duties.

4. "Here in my car I feel safest of all. I can lock all my doors. It's the only way to live—in cars." song, "Cars," *The Pleasure Principle*, Gary Numan (Beggars Banquet Us 1979)

As you get out to meet folks outside the legal department, you will need other lawyers with whom you can commiserate and celebrate. Don't lock yourself in your car, and don't be a hermit within the legal community! For whatever reason—overwork, the thrill of freedom from law firm serfdom, general disinterest—there is a tendency to shut out the rest of the legal world after you go in-house. ACC, local bar associations, your old private-practice colleagues, your informal network, and trade associations are all good places to meet other lawyers. Keep in touch! The networking may just come in handy someday.

5. "I don't want to sell anything, buy anything, or process anything as a career. I don't want to sell anything bought or processed, or buy anything sold or processed, or process anything sold, bought, or processed. You know, as a career, I don't want to do that." movie, *Say Anything* (20th Century Fox 1989)

Lloyd Dobler, the main character in *Say Anything*, could have made it as outside counsel, but not as in-house counsel. To avoid being mere scribes, in-house lawyers must examine and define their roles in the corporation. Most in-house lawyers *buy, process, or sell* stuff. I have sold software for over five years. I wasn't out there in the field visiting customers, but I helped with the contracts that memorialized those transactions, and I ensured that my clients had the rights to embed the necessary third-party intellectual property in the software that I sold. The more closely you can associate yourself and your role with your company's core business, the better counselor you can be.

6. "I should have learned to play the guitar. I should have learned to play them drums."

song, "Money for Nothing," *Money for Nothing*, Dire Straits (Warner Bros. 1990)

The great thing about private practice was getting to know a little about a lot of different industries and corporations. In my first year of private practice, I worked on cases involving defective operating tables, recalled antibiotics, foreign currency trading, medical device patents, and diet powder sales compensation, to name a few. I learned a little about limited aspects of those businesses at discrete moments in time. The great thing about in-house is getting to know a lot about one industry over a long period of time. The better you know the business, the better you can serve your clients. Go on a sales call to understand the competitive landscape your salespeople face. Visit the research and development department when a production deadline is approaching. Learn about the amount of work that goes into developing a national advertising campaign. Round out your business side as you round out your legal skills.

7. "When I get high, I get high on speed. Top-fuel funny car's a drug for me. My heart, my heart, kickstart my heart."

song, "Kickstart My Heart," *Dr. Feelgood*, Motley Crüe (Hip-O Records 1999)

It is a fundamental principle of finance that high rewards come from high-risk business opportunities. Usually, your job is not to convince your clients not to enter a race; it is to make sure that they have considered the risks and taken (or know about) any available precautions. Because you cannot eliminate all possible risk, approach all decisions as a risk manager.

8. "Mr. Gorbachev, open this gate! Mr. Gorbachev, tear down this wall!"

speech, President Ronald Reagan, *Remarks at the Brandenburg Gate* (1987)

As in-house counsel, you will be called upon to work in or lead cross-functional teams of HR, finance, sales, marketing, and R&D folks; building consensus among these key stakeholders—all of whom are your clients—is critical to your success. Like any institution, there are some natural and artificial walls between these departments. If you can institute your own *perestroika* and get those departments to share information more freely and cooperate more often, you will be hailed as a great leader. (One would hope that you would not

fall to a coup soon thereafter, however.) As in diplomacy, calling a “summit” may be your best hope. While getting all stakeholders or their delegates into a room may not immediately resolve all conflicts, it may set in motion a process of conflict resolution.

9. “You gotta learn to kick ass if you want to be a peacemaker.”

movie, *Superman 2* (Warner Bros. 1981)

Lawyers have excellent execution skills. Sometimes, on your cross-functional teams, despite your best efforts to be diplomatic, the need for consensus causes paralysis. I call this “consensalysis.” At that point, take the lead, assign tasks, and execute!

10. “When a problem comes along, you must whip it.”

song, “Whip It,” *Are We Not Men? Devo* (Warner Bros. 1980)

Often, when you are in-house, the proverbial buck stops with you. Enjoy a bit of authority; you’ve earned it!

11. “I don’t think there are any Russians, and there ain’t no Yanks. Just corporate criminals playing with tanks.”

song, “The Walls Came Down,” *The Call, The Call* (Mercury Records 1980)

This band captured a certain anticorporate backlash of the 1980s that seems to be repeated here two decades later. Whatever corporate issue your company may be dealing with—government contracting scandals, labor conditions in Asia, leading the charge against stock option expensing—expect to confront the anticorporation movement. And be prepared to defend your corporation within the bounds of the law and ethics.

12. “If you break the law, you got to pay your dues, Ain’t it much better if you play it by the rules?”

song, “No Parking (On the Dance Floor),” *No Parking on the Dance Floor, Midnight Star* (Capitol 1983)

A quick survey of the corporate scandals of the past two years (or the 1980s, for that matter) saw plenty of in-house lawyers (but few outside counsel) in handcuffs. Simply put, the stakes are higher in-house.

13. “Darling you’ve got to let me know. Should I stay or should I go? If I go there will be trouble, and if I stay it will be double.”

song, “Should I Stay or Should I Go?,” *Combat Rock, The Clash* (Sony 1982)

The rules on your duty to report corporate misconduct or resign depend on your state’s professional responsibility rules, the SEC’s up-the-ladder reporting regime, and the more draconian proposed “noisy withdrawal” rules. This is especially difficult if you are the sole or chief legal officer and have no senior lawyer to whom you can report up. Know these rules and engage in some scenario planning. What would you do if ABC situation happens? What about XYZ situation?

14. “Don’t say no.”

song, “Don’t Say No,” *Don’t Say No, Billy Squier* (Capitol 1981)

and

15. “Well I kept saying no. No, no, no, no, no.”
song, “No No No,” *No No No, Def Leppard* (Mercury/Universal 1981)

Again, the classic conundrum of the in-house lawyer is not to be tagged the “department of business prevention,” but still to prevent bad (*i.e.*, unnecessarily risky or illegal) business. Thus, I have juxtaposed quotes representing the extremes of this conundrum. In general, heed Billy Squier’s caveat: “Don’t Say No,” but say it a little more productively: “No, but we can do it this way...” and come up with one or more alternatives that drive business and protect the company. But remember that there are situations where the proposed action and all alternatives are simply unacceptable. In those cases, you have to be firm and heed Def Leppard’s words: “No no no no no.”

16. “And I’m looking in the mirror all the time, wondering what she don’t see in me. I’ve been funny, I’ve been cool with the lines. Ain’t that the way life’s supposed to be?”

song, “Jessie’s Girl,” *Working Class Dog, Rick Springfield* (RCA 1981)

The envy in this song is similar to the envy you will find in-house. As a lawyer, you are definitely “cool with the lines,” but you are in a *supporting* role. The founders of the company, the top salespeople, the award-winning engineers, these are the people who get to date the proverbial prom king/queen. You may read your proxy statement and say “how did that idiot get

such a big bonus?" You may toil nights and weekends to close a deal without much sales support while somebody else gets the fat commission check. Back in your law firm, you were the product; you were the star. In-house, you are not. It is one of the toughest transitions and one that, like envy, can creep up years later if you lose sight of the benefits of being a lawyer in-house: not having your nosy office neighbor know your salary and not having to chase a quota every single quarter.

17. "Oh the heads that turn, make my back burn." song, "She Sells Sanctuary," *Love, The Cult (Beggars Banquet Us 1985)*

Even though you are a supporting actor, you will be in the spotlight, usually at the worst possible moment. "That is stuck in legal" is the last desperate cry of a businessperson looking for an excuse for his boss. Of course, "stuck in legal" may mean (a) the matter is stuck in the customer's legal department; (b) legal has expressed concerns about a concept raised by the business team; or, most likely, (c) the matter sat in the business person's in-box for two weeks and was submitted to legal this morning. It takes less time to do something to get it "out of legal" than to argue why it isn't really "in legal." Call and email the customer's legal department daily and cc your team to let them know you are working. Reiterate your conceptual concerns and offer to draft a term sheet that would address them. Pay attention to the time gaps in email strings forwarded to you and point them out early to prevent future delays.

18. "I'm sorry, who are you again?" "I'm Frieda's boss." "Who's Frieda?" "My secretary." movie, *Fletch (Universal Studios 1985)*

Like Fletch, the enterprising investigative journalist of the eponymous film, you probably will not have a secretary or assistant. If you do, close your eyes, thank the in-house gods, and move on to the next paragraph. If you do not, then your choices are (1) to lie about it like Fletch did, or (2) to get yourself organized and learn how to work the fax machine. This should be easy; people love being able (for once) to show a lawyer something they don't know. On a similar note, it may take a while to get used to being in a cubicle rather than an office, if those are your assigned digs. Invoke attorney-client privilege as a reason you should be located in a private office instead. If that doesn't work, then schedule a conference call with the cus-

tomers who has the most ornery counsel. Take the call on speakerphone in your cubicle and get into a yelling match with your adversary. The people in the cubicles around you will complain and you will get that private office. Seriously, it worked for me!

19. "They come running just as fast as they can, 'cause every girl's crazy 'bout a sharp dressed man." song, "Sharp Dressed Man," *Eliminator, ZZ Top (Warner Bros. 1983)*

Depending on where you are, the cuff links and stickpin worn by the song's hero may not be appropriate, but you should pay attention to your dress. Many people come in-house from firms that required business attire. Many legal departments, especially in my neighborhood (Silicon Valley) wear jeans daily. I will say more about unintentional messages in #48, but understand that the way you dress will send a message. Overdressing may alienate your clients. Underdressing may make you seem less professional. Be aware of this dynamic.

20. "Wild Thing, I think you move me. But I wanna know for sure. Everytime I kiss you I taste what other men had for lunch!"

song, "Wild Thing," *Have You Seen Me Lately? Sam Kinison (Warner Bros. 1990)*

In a law firm, generally, a deal or a case may have had a few lawyers touch it over time. An in-house lawyer inherits the corporation's (and any acquisition's) problems dating back to formation. These include ineffective assistance of counsel or vastly different style of counsel. Be prepared to wince at what your predecessor may have done (or not done). When you have to amend or modify a contract that you did not originally do, look at the contract well in advance to identify any problems or ambiguities.

21. "Better get a bucket. I'm going to throw up." "A bucket for monsieur!"

movie, *Monty Python's The Meaning of Life (Universal Studios 1983)*

In-house practice is a customer service business. Accordingly, you need to emulate your favorite waiter in your favorite restaurant. Be present when needed; otherwise don't get in their way. Know what is on the menu and be prepared to make recommendations. And always take notes, even if you know you will remember the order!

THE PEOPLE

“People are people so why should it be, you and I should get along so awfully?”

song, **“People Are People,”** *Some Great Reward*, Depeche Mode (Warner Bros. 1984)

22. “When they say ‘why? why?,’ tell them that it’s human nature.”

song, **“Human Nature,”** *Thriller*, Michael Jackson (Sony 1983)

You have to be attuned to human dynamics, more so as you become more involved in management. “Please” and “thank you,” conspicuous in their absence in law firms, must bracket all requests you make of your colleagues inside and outside the legal department.

23. “I get along fine with them friends of mine but you have to make a choice, You’re singing out of tune but the beat’s in time and it’s us who makes the noise.”

song, **“New Religion,”** *Rio*, Duran Duran (Capitol 1982)

If you heed my advice in #3, you will ultimately have friends outside the legal department. You will one day find yourself in a conflict position as a result of these relationships. Either you will know something that you would want to tell them as a friend (e.g., that they are on the list of employees considered for downsizing), or they will approach you with a matter “as a friend, not as a lawyer.” As Duran Duran advises, you have to make a choice, keep the beat in time, and make the noise. You didn’t need me (or Duran Duran) to tell you what to do. On second thought, maybe legal department isolation has its benefits....

24. “You consider me the young apprentice, caught between the Scylla and Charybdis... I have only come here seeking knowledge, things they would not teach me of in college.”

song, **“Wrapped Around Your Finger,”** *Synchronicity*, The Police (A&M Records 1983)

This one is simple. Mentors are more important in-house than they are in law firms. The bad news is that they are harder to find. The good news is that they don’t necessarily have to be lawyers and they don’t necessarily have to be at the same corporation.

My mentor is as great a resource as ever, even when he is working at a different company from me.

25. “My gang’s my family, it’s all that I have.” song, **“Colors,”** *Power*, Ice-T (Warner Bros. 1988)

Like the streets of gangland, it is important to shore up allies in the corporation early. Don’t be narrow in your selection; you might find help in unexpected places and at all levels. Back in the law firm, you probably learned that the paralegals knew more than the junior associates. It is the same in-house; hierarchy exists, but don’t make more of it than it deserves.

26. “Do you know where there are any person-ages of historical significance around here?”

movie, **Bill & Ted’s Excellent Adventure** (MGM/UA Studios 1989)

Critical among your base of allies is to find out who has institutional memory in all of the areas where you are likely to need information: HR, sales, R&D, and marketing. Similarly, you are ideally situated to become the institutional memory of legal, if not the whole corporation, which ultimately will vault you to the top of other folks’ allies lists.

27. “The 1961 Ferrari 250GT California. Less than a hundred were made. My father spent three years restoring this car. It is his love, it is his passion...”

“It is his fault he didn’t lock the garage.” movie, *Ferris Bueller’s Day Off* (Paramount Studio 1986)

People will rationalize anything in business. “We need to do this to get their business,” or “we really need this deal to make the quarter.” Those may be perfectly legitimate business reasons and, if true, may ultimately drive shareholder value. But they may be unethical or illegal. Expect this behavior; don’t leave the garage unlocked on days your son is home from school and don’t give the sales team an excuse for bypassing your review on the last day of the quarter.

SETTING YOUR AND YOUR CLIENTS’ EXPECTATIONS

“Captain, maybe we ought to turn on the search lights now?”

“No. That’s just what they will be expecting us to do.”

movie, *Airplane* (Paramount Studios 1980)

28. “I am, I am, I am Superman, and I can do anything.”

song, “Superman,” *Life’s Rich Pageant*, REM (Capitol 1986)

Even if you don’t think you are superman (or superwoman), your clients may expect you to be superperson. There is more pressure when you are in-house to present a solution to any legal barrier you identify than there is for a law firm lawyer who is not part of the ongoing business. Most of your clients will not know that a copyright specialist is very different from a patent specialist and that you wouldn’t want either one of them anywhere near a 10-K. They think “you are a lawyer, this is legal, ergo you should know this.” I frequently use the analogy that I am a primary-care physician and I can diagnose a brain problem, but they wouldn’t want me doing brain surgery. Hopefully, they still think I am Superman, but realize that there are some tall buildings that I cannot leap in a single bound.

29. “You were going to set the world on fire. When will you ever learn?”

song, “You Give Love a Bad Name,” *Slippery When Wet*, Bon Jovi (Mercury/Universal 1986)

In a law firm, your clients are generally smart, diligent, and motivated. At the very least, the better ones have learned to maximize the use of your time because they ultimately receive a bill for it. When you go in-house, you cannot have Wall Street expectations of Main Street clients. You will set yourself up for failure and it will reinforce the perceptions of isolation and arrogance against which you are constantly fighting. So start with low expectations and then train your clients to help you do your job better. I use a self-deprecating PowerPoint presentation analogizing the client-lawyer relationship to an owner-puppy relationship (see #55 for more on this point). If you can do it in a way that is not preachy or condescending, most of them will give you the information you need up front with realistic deadlines. And Bon Jovi would say, that gives in-house law a good name!

30. “You made me, promises promises, I knew you’d never keep.”

song, “Promises Promises,” *Naked Eyes*, Naked Eyes (1983)

As a lawyer, you have been trained to deliver on

your promises. But you cannot expect your new nonlawyer colleagues to be so diligent. Set your expectations and deadlines so that you can overcome the inevitable broken promise from the Biz Dev team. If that team is the one checking whether you can meet a technical deadline and you have not heard back from them, you want to leave enough time to get the information for yourself.

31. “You are a neo-maxie zoom dweebie.”
movie, *The Breakfast Club* (Universal Studios 1985)

If you have been hired to do licensing and you aren’t a neo-maxie zoom dweebie (*i.e.*, expert) when it comes to licensing, you need to find a way to become one quickly. My first in-house position was as a licensing lawyer, but my background was as a litigator-turned-corporate lawyer. I pled Socratic ignorance with respect to licensing, but was able, through my diligence and my mentor’s patience, to become a neo-maxie zoom licensing dweebie. You will become a dweebie in many areas over time. After all, nothing we do is rocket science. (By the way, while I am being a dweebie, what do the folks at Boeing say when they want to express a relative lack of difficulty, because the task to which they are referring may, indeed, be “rocket science”?) The point is to realize that it only takes a couple of times to become an export filing dweebie. Remember, being more of a generalist and learning new areas of the law are probably some of the reasons you went in-house.

32. “Nobody ever told me, I found out for myself... Don’t look at me for answers. Don’t ask me, I don’t know!”

song, “I Don’t Know,” *Ozzy Osbourne, Blizzard of Ozz* (Sony 1980)

Even the neo-est maxi-est zoom-est dweebie cannot possibly know everything, so don’t be afraid to admit that you don’t know an answer, but remember that even the Ozzman had the good sense to go find stuff out for himself. Constantly take inventory of your internal and external sources of information. If you are unsure, the ACC website and network are great places to start.

33. “Not many girls in contemporary American society would give their underwear to help a geek like me.”

movie, *Sixteen Candles* (Universal Studios 1984)

This is simple. Express appreciation to your in-house clients and your outside counsel at every possible opportunity. This is possibly the highest ROI investment you can make in-house.

GETTING THE JOB DONE

“Say ‘Hello’ to my little friend.”

movie, *Scarface* (Universal Studios 1983)

34. “I straddle the line of discord and rhyme and I’m hungry like the wolf.”

song, “Hungry Like the Wolf,” *Rio*, Duran Duran (Capitol 1982)

The primary key to success in-house is to drive business (to rhyme) while protecting the business (to maintain a healthy degree of discord). There are no simple rules for when each is appropriate. But you need to be sensitive to this dynamic and you will, over time, develop a feel for when to be discordant or harmonious. For example, I was in a legal department that had a knee-jerk reaction against approving nonbinding letters of intent, reasoning that there was no need to go through the formality of negotiating and signing a document that ultimately was not enforceable. When the business team convinced me that a nonbinding LOI had an important “moral” importance to the business relationship, my discord turned to rhyme and I commented on and approved the document, only to receive pushback from my superiors. Other times, when I have struck a discordant note in deference to corporate policy, I have received pushback to relax policy to drive business. As you undertake bigger challenges in your career, straddling this line will remain difficult.

35. “I’m a fool in your game . . . You’re just wasting my time. All you do is talk talk.”

song, “Talk Talk,” *Talk Talk* (EMI International 1982)

An economist looking at in-house practice would say that it suffers from a “free rider” or “negative externality” problem, insofar as your clients don’t bear the true cost of the legal services they get from you. A noneconomist would say that some clients will waste your valuable time. Perceived importance

does not equal true importance; this goes both ways. Your clients may wrongly see something as important and then talk talk talk about it. At the very least, they will see their task as more “mission critical” than that of one of your other clients. On the other hand, you may not fully appreciate that a simple, routine NDA is holding up a major strategic partnership. The key is to get credibility with respect to the prioritization of clients’ assignments and to determine the credibility of your clients when they make requests of you. One of my colleagues takes the approach of expediting a client’s first project to gain credibility, then prioritizing subsequent projects.

36. “Don’t rush me sonny. You rush a miracle man, you get rotten miracles.”

movie, *The Princess Bride* (MGM/UA Studios 1987)

Time demands in-house are very different from those in a law firm. Most likely, you will be working far fewer hours on far more matters. Time management is critical. You will have a lot more leeway in terms of what, when, and at what pace to do your assignments. I’d suggest enjoying your freedom from billing hours for a while, but at some point, keep track of your time for a month to get a real idea how you spend your days and to look for ways to be more efficient. How much of what you are doing could be done faster by outside counsel? How much could be done cheaper by an in-house paralegal? Do a “checkup” every month or so.

37. “I push, I struggle, I’m living in the Eighties.”
song, “Eighties,” *Night Time, Killing Joke* (E.G. Records 1985)

If you are always pushing and struggling, you are most definitely not living in the eighties, *i.e.*, on the right side of the “80-20 Rule.” (If you want to sound erudite, you can call it the (Vilfredo) Pareto Principle, though it was applied in common parlance by Dr. Joseph Juran.) The Pareto Principle says that 80 percent of the work can be done in 20 percent of the time. The most important thing for in-house counsel is to recognize which tasks require a less-than-perfect effort to both drive business and minimize risk. Save the virtuoso lawyer performance for IP ownership clauses, M&A indemnities, and resolving SarbOx whistleblower complaints.

38. “It’s 106 miles to Chicago. We’ve got a full tank of gas, half a pack of cigarettes, it’s dark, and we’re wearing sunglasses. Hit it!”

movie, *The Blues Brothers* (Universal Studios 1980)

Resources in-house are finite. Often, you cannot hire consultants or outside counsel for a project and you don’t have the luxury of time. In such cases, you must, like Jake and Elwood Blues, take inventory of the resources that you *do* have, and “Hit it.” Hint: there are a lot of great resources within ACC.

39. “What do you make of this?” “I can make a hat, a brooch, or a pterodactyl!”

movie, *Airplane* (Paramount Studios 1980)

In-house you will find much less deference to forms and transaction precedent than you do in a law firm. So exercise that creative side that you have ignored since 5th grade art class. If you can draft a nonsolicitation clause that works for you, your client, and the customer, then why spend an hour looking for that perfect model clause? And, as stated in #50, it is preferable to craft your words in the “modern minimalist” style; the shorter and more clear you can make your contracts, the better.

40. “What did we have for dinner?” “We had a choice: fish or steak.” “Ahhh, yes, I remember now... I had lasagna.”

movie, *Airplane* (Paramount Studios 1980)

In business and in-house, you are expected to think outside of the box. This goes hand-in-hand with creative problem-solving. Just remember to think outside the box but within those other boxes they call the law and ethics. Engage in brainstorming, where you suggest and solicit options and list them without discussing the merit (or lack thereof) until all possibilities have been listed. Only then do you begin to weigh risk/reward/reality of the options. Make it clear that you are merely brainstorming and that you have not thought through the options but will give each one due consideration.

41. “We have a pond in the back. We have a pool and a pond. The pond would be good for you.”

movie, *Caddyshack* (Warner Studios 1980)

As inviting as the pool may have been in your days of private practice, as in-house counsel you have to roll up your sleeves, get your hands dirty,

and jump in an occasional pond. As a lawyer responsible for a matter, you will generally have to do all of the “associate-level” tasks as well as the “senior partner-level” tasks. Aside from sending your own faxes and opening your own mail, as detailed in #18, you will have to do your own NDAs and slog through discovery documents before sending them to outside counsel. Just remember that the free fish live in the pond, not the aquarium pools.

42. “I asked of my reflection, ‘tell me what is there to do?’ ”

song, “Tempted,” *Singles 45’s and Under, Squeeze* (A&M Records 1981)

I have worked in three very different in-house legal departments and, as great as each was, there were a lot of improvements that could be made in each one. When you start at a new company, you have the unjaded perspective of an overpriced strategy consultant. Take note of what you would change before you become assimilated. Put your list away until you become credible. And when you get a free moment, get out that list and start making your department better. Profile and put all of your contracts online. Make that signature policy a flowchart or a matrix so that it’s easier to read. Pull out that rarely used Referral Agreement and see if you can make it half a page shorter.

43. “The most valuable commodity I know of is information.”

movie, *Wall Street* (Twentieth Century Fox 1987)

The more you know, the more valuable you will be and the more you will get done. Knowledge of the law, knowledge of the company, knowledge of the industry, knowledge of the economy, and even, sometimes, knowledge of pop culture. Your goal should be that if they had a Trivial Pursuit® contest at your corporation, you would be one of the first people picked.

44. “So let me take you by the hand and lead you on this dance, ’cause what I’ve got is because I took a chance.”

song, “Control,” *Control, Janet Jackson* (A&M Records 1986)

In-house, you will become a quick study in the corporate budget process. Here’s a hint: focus on controlling your variable costs, the largest of which

will be outside counsel expense. You need to control and focus your outside counsel or you will crash and burn in Budget 101. Lead your outside counsel on the dance—tell them how long to dance and with whom. That said, don't micromanage them. And I urge you, if you can, take a chance and experiment with alternative billing arrangements.

45. “[Bob Hope] doesn't play police actions, just wars...” “How about if it escalated?...” “We are not going to escalate a whole war just so we can book a big name comedian!”

movie, *Good Morning, Vietnam* (Touchstone 1988)

Often, you will find that you are “accountable without authority.” In such cases, you have to determine where you will get your authority. For each such matter, work with your client to agree on an appropriate escalation path for issues outside your (or their) authority.

46. “You broke my nose!” “It looks better that way.”

movie, *My Bodyguard* (Fox Home Entertainment 1980)

Use outside counsel as your own personal bodyguard. If the CEO's good friend is the VP of Sales, your longevity may be best served by letting outside counsel investigate alleged policy violations. If you are negotiating a merger and hope to join the merged company, you may do well to let outside counsel take a firm position (and most of the heat) on certain contentious issues.

47. “What you gonna do when things go wrong? What you gonna do when it all cracks up? What you gonna do when the love burns down? What you gonna do when the flames go up? Who is gonna come and turn the tide? What's it gonna take to make a dream survive? Who's got the touch to calm the storm inside? Who's gonna save you? Alive and kicking.”

song, “Alive and Kicking,” *Once Upon a Time, Simple Minds* (A&M Records 1985)

This is simple. Plan ahead for specific, relevant scenarios. What would you do if there were a terrorist incident near your office? What would you do if the CEO called you from jail at midnight? What would you do if you got an SEC Wells Notice? What would you do if your company's

critical component supplier declared bankruptcy? Though the relevant questions will be unique to each company, two universal and fundamental scenarios are: (1) what would you need to do to be ready to respond to a due diligence request from a potential acquirer and (2) what would you need to do to be ready to defend your company in whatever is the most likely litigation it would face?

COMMUNICATING WITH CLIENTS

“You see it your way, I'll see it mine. Well, conversation is a useless change of line.”
song, “Lack of Communication,” *Out of the Cellar, Ratt* (Atlantic 1984)

48. “And in the silence, I think of you. I send a message, hope it gets through.”

song, “I Send a Message,” *The Swing, INXS* (Atlantic 1984)

Pay constant attention to the unintentional messages you want to send and don't want to send. This advice goes for all of your client communications, but especially for meetings. Looking at your watch, interrupting a meeting to look over at the email that just chimed on your computer, checking the caller ID on an incoming phone call, looking at your BlackBerry, all of these things may send the unintentional message that you don't feel your client's problem is very important. On the other hand, orienting your office so that you meet with clients at a table where your back is to your desk, computer, and phone sends a message that they have your full attention for the time of the meeting. When you know you may be interrupted for another high-priority matter, warn the client with whom you are meeting in advance and be sure to be extra-attentive the next time you meet with him or her.

49. “Hush hush. Keep it down now. Voices carry.”
song, “Voices Carry,” *Voices Carry, Til Tuesday* (Sony 1985)

It may come as a surprise, but the halls of your company are just full of *nonessential third parties!* As true as that may be, I wouldn't recommend walking down the hall and pointing to folks and calling them “nonessential;” those who have not been to law school may take offense. But you (continued on page 38)

(continued from page 35) do need to know that you cannot assume attorney-client privilege applies like it does in the hallowed halls of your old law firm. Constantly pay attention to privilege—do I want privilege for this and am I taking the correct steps to preserve it?

50. “And there are simply too many notes. Just cut a few and it will be perfect.”

movie, *Amadeus* (Warner Studios 1984)

Shorter documents and correspondence will serve you well. By using short, user-friendly forms and focusing only on what really matters, you can reinforce the message that your company is easy to do business with. I’d say more, but that would violate this principle.

51. “Dream of better lives, the kind *which* never hate, wrapped in a state of imaginary grace.”

song, “I Melt with You,” *After the Snow*, *Modern English* (Warner Bros 1982)

As lawyers we all (should) know that the “which” in the foregoing line is an erroneous use of a nonrestrictive qualifier in a clearly restrictive context. But the song is probably one of the best of the 80s and would not be improved by the use of “that” instead of “which.” The point is, some things may be ok, even with arcane grammatical errors, such as the preposition at the end of the sentence in the penultimate sentence of the preceding paragraph.

52. “Very clever dinner. Appetizing food fit neatly into interesting round pie.”

“It’s a quiche.” “How do you spell?” “You don’t spell it, son, you eat it!”

movie, *Sixteen Candles* (Universal Studios 1984)

Remember that contracts, like quiches, have a purpose, and it is not to show off your drafting skills.

53. “When I have nothing to say, my lips are sealed.”

song, “Psycho Killer,” 77, *The Talking Heads* (Warner Bros. 1977)

This is simple, but often forgotten. Shut up and listen before you speak. A client may approach you with a problem and you may think you know the answer 10 seconds into her speech. Let her finish. At the very least, it will give her a chance to show

you, and you a chance to express, what a great client she is. In some cases, you may hear some relevant information that would change your initial assessment.

54. “Sorry folks, we’re closed for two weeks to clean and repair America’s favorite family fun park. Sorry....” “Now you listen to me We just drove 2,460 miles, just for [Wally World].

The Moose says you’re closed, I say you’re open.”
movie, *National Lampoon’s Vacation* (Warner Studios 1983)

Management, and people in general, can handle bad news, but they do not want to be surprised. Surprises make for good horror and comedy, but not for a productive in-house career. If there is something that could prevent consummation of a business opportunity at the last minute, warn them early and often.

55. “I think of all the education that I missed, but then my homework was never quite like this!”

song, “Hot for Teacher,” 1984, *Van Halen* (Warner Bros. 1984)

You have to train your clients to be good clients; be creative how you do this and avoid condescension. A great way to train clients about contracts is to take the worst contract draft you have seen, doctor it to make it worse, and give it to your clients—whom you have divided into teams—as a competition to see which team can spot the most errors. One point for identifying the error and a bonus point for explaining why the clause is problematic. Treat the winning team to lunch. At the company that instituted this competition (at the annual sales kickoff), the teams took it very seriously, had fun, and referred back to the contest several times in the year after as we discussed real contract issues.

56. “I’m gonna get myself connected. I ain’t gonna go blind for the light which is reflected.”
song, “Connected,” *Connected*, *Stereo MCs* (Island, 1993)

Make an effort to stay in the loop. Don’t get so consumed by your own inbox that you neglect the important nonlegal issues facing the company, the big problems to solve, the worries and fears. At some point, some element of those issues will land on your desk. And make sure you reciprocate; identify the key stakeholders for a matter and keep

them in the loop about your big legal issues, worries, and fears.

57. “There are 178 parent languages on our planet with over 1,000 dialects. . . It’s amazing we communicate at all. . . Languages and dialects with this one thing in common: AEIOU sometimes Y.”

song, “AEIOU Sometimes Y.” AEIOU Sometimes, Ebn Ozn (Electra Records 1984)

If your company is multinational, then you absolutely will have contact with people from different cultures. More often than not, due to time differences, this diplomacy will occur in written emails. Though languages and cultures are different, they share a few things in common: clearly written emails that eschew legalese (hint: don’t use the word “eschew,” even with Americans), bear some resemblance to formal business communication, and include some pleasantries, will get you far. Courtesy, clarity, and conciseness are universally appreciated in business correspondence.

58. “Please please tell me now, is there something I should know?”

song, “Is There Something I Should Know?” Duran Duran, Duran Duran (Capitol)

Don’t be afraid to ask questions. When a client comes to you with a problem, you may get a sense that there is something playing behind the scenes. Trust your instinct; don’t be afraid to ask them (or others) if there is something else going on.

**59. “99 red balloons
Floating in the summer sky
Panic bells it’s red alert
There’s something here from somewhere else.”**

song, “99 Luftballons,” 99 Luftballons, Nena (Sony, 1984)

Your clients may not start a nuclear war because they see some balloons floating in the sky, but they will overreact at times. When they do, you need to take them back down to Defcon One and get them focused on explaining and solving the problem, if there really is one. I find that, when appropriate, the best thing to do is tell a story from your experience to illustrate that there really is no problem.

60. “Do you hear me? Do you care? Do you hear me? Do you care? My lips are moving but no

sound is coming out. The words are audible but I have my doubts that you realize what has been said. You look at me as if you’re in a daze. It’s like the feeling at the end of the page when you realize you don’t know what you just read. What are words for? When no one listens anymore.”

song, “Words,” Spring Session M, Missing Persons (One Way Records Inc. 1982)

The worst assumption that you can make in-house is that your client has read the document. Most people assume “that’s the lawyer’s job.” While clients need not be reading late-payment, governing law, integration, notice, and other provisions, they should be reading relevant representations and warranties, indemnities, license grants, or statements of work. After you complete your review, close your memo with “as you read through this document, you may want to pay particular attention to Section X because” Then assume they won’t read anything else but that section.

61. “What I really need is a droid that understands the binary language of moisture vaporators.”
movie, Star Wars (Twentieth Century Fox 1977)

I know, I know, *Star Wars* was made in 1977, but everybody would agree that it was before its time. In any event, I challenge the reader to find any 80s quote with the word “binary” in it. The point is that just as Uncle Owen needed a droid who could speak a binary language, so do corporate executives. Clients want bottom-line options and recommendations; they don’t want a recitation of all the issues (*i.e.*, how smart you are to find so many interesting little issues in the contract!). Identify the available courses of action and present them succinctly to your client.

62. “When you came in here, didn’t you have a plan for getting me out?”

“He’s the brains, sweetheart.”

movie, Star Wars (Twentieth Century Fox 1977)

Occasionally, after presenting a succinct binary choice, and despite your best efforts to sell option A, your client will pick option B, which may land you in the trash compactor. You’re the brains, sweetheart, so always have a back-up plan. This may mean doing what is necessary to keep option A open for when your client does see the light or it may mean mitigating all of the damage that you know will come under option B.

63. “Let me give you a little advice so you know. In times of economic uncertainty, never ever [mess] with another man’s livelihood. Go have fun now. You know fun, time of your life? Maybe if you follow that, I won’t have to come back here.”

movie, *Risky Business* (Warner Studios 1983)

“Guido, the killer pimp” may be able to give advice about his core business in the same line with general advice. You do not have that luxury. You can give legal advice—which is your core business—and you should give general business advice where relevant. You do not want to appear to overstep your authority and you want to be clear when you think something is both perfectly legal but plain stupid. When you give advice, make it very clear what part is legal advice and what part is business advice. If you want privilege to apply to the legal part, put it in a separate memorandum and mark it appropriately.

GETTING AHEAD

“Keep feeling fascination, looking, learning, moving on.”

song, “(Keep Feeling) Fascination,” *Best of the Human League, The Human League* (A&M 1983)

64. “I want my two dollars!”

movie, *Better Off Dead* (20th Century Fox 1985)

In the movie, this line is repeated by a zealous newspaper delivery boy attempting to collect on his route. He chases the debtor all over the ski slopes trying to get his money. You’re not in private practice anymore. On September 1, you will not be automatically promoted from “third-year associate” to “fourth-year associate,” and your pay will not ratchet up simultaneously with all of your peers. If you think you deserve it, don’t be afraid to ask for a raise.

65. “You know you’re missing out on something. Well, that something depends on you.”

song, “The Look of Love, Pt. 1” *The Lexicon of Love, ABC* (Polygram Records 1982)

Most legal departments do not have a Career Development Committee. You need to work with your bosses inside and outside the legal department

to make the most of your experience. And even before that, you have to think about what you really want to get out of your in-house career, because a good manager will ask you that precise question. The answer may be “I want to get more M&A experience,” or “I’d like to do anything but what I am doing now.” The important thing is to have a thoughtful answer that fits with your short- and long-term career development plans.

66. “Video killed the radio star.”
song, “Video Killed the Radio Star,” *Age of Plastic, The Buggles* (Polygram Records 1980)

Stay current with technology or go the way of the radio star. This includes mobile connectivity, email retention, electronic discovery, online data rooms, and automated contract management. The more you know technology, and the more your bosses know that you know technology, the more influence you will have in shaping your department’s technology resources. You also may get some cool gadgets out of the deal!

67. “I fought the law and the law won.”
song, “I Fought the Law,” *The Clash, The Clash* (Sony 1979)

At times in-house, for a number of reasons, you may be tempted to move over to the business side. Maybe it is for the money, maybe it is to be making the deals before the lawyers get involved, maybe it is just a need for change. Just be sure you know what you are giving up on the legal side before you make a rash move.

68. “Act like wherever you are, that’s the place to be. ‘Isn’t this great?’”

movie, *Fast Times at Ridgemont High* (Universal Studios 1982)

Venting and complaining is commonplace among law firm associates. Outside the law firm, it is much less prevalent. Innocent venting in a small law department may be perceived as a serious attitude problem. Similarly, in a law firm it was accepted for a case or deal team to bash its adversaries. In-house, as unreasonable as your opponents may be, they are also your company’s customers, and if you badmouth them to your client in sales, they will use your “hostile attitude” as a reason the deal fell apart. It is okay to point out concrete ways

in which your opponent is being unreasonable, but always do it in a civil manner, without getting personal, and frame it as a business issue.

69. “And if you find you don’t like my ways, well you can send me back in 30 days!”

song, “30 Days,” *Run D.M.C., Run D.M.C.* (Profile Records, Inc. 1984)

In-house, you generally don’t get the chance to see your new hires in action (at work and at the cocktail parties) as a summer associate. When I showed up to one of my first in-house interviews, I received (and passed) a *written test*, a horrible software license agreement in which I had to spot problematic provisions. As a candidate, know that in-house interviews are more difficult than law firm interviews. As a hiring manager, know that you must be creative in doing your due diligence to hire the right folks. Whether that involves a written test, a “case-interview” or dozens of behavioral questions is up to you, just be prepared to ask (or answer) tough questions. Talk to friends who have gone through business school or management consulting interviews for advice on non-traditional interviews.

70. “Because your kiss is on my list of the best things in life.”

song, “Kiss on My List,” *Hall & Oates* (RCA 1980)

Keep track of your accomplishments. If people start using tougher, behavioral in-house interviews, you will be asked to discuss how you resolved a contentious issue in a particular negotiation. If you have a running list of the parties, the subject matter, the date, the dollars, and noteworthy facts, you will be well-prepared to discuss your experiences.

71. “We are the ones who make a brighter day, so let’s start giving.”

song, “We Are the World,” (The Live Aid Concert), *USA for Africa* (Polygram Records 1985)

Most private firms have ample opportunity for pro bono projects—interesting cases for nonprofits, amnesty cases, legal aid clinics, etc. Most legal departments are too small to have a regular flow of pro bono work. Stay involved with pro bono through ACC, through your local bar association, or get involved in nonlegal pro bono through

your company. Painting a low-income housing project with that obnoxious salesman may be just the bonding experience you need to develop a good working relationship.

72. “I got lots of money, but it isn’t what I need. Gonna take more than a shot to get this poison out of me.”

song, “Bad Medicine,” *New Jersey, Bon Jovi* (Polygram Records 1988)

Remember that your in-house lawyers are motivated much more by challenging work than by money. If one of your lawyers is unhappy, it will probably take more than a raise to satisfy him or her professionally.

73. “I am the son and the heir of a shyness that is criminally vulgar.”

song, “How Soon Is Now?,” *The Smiths, The Smiths* (Warner Bros 1984)

Especially in a small law department, succession planning is important. Look at the organization chart for your department. Everybody in the department should be able to step up, down, or over in case of voluntary or involuntary turnover or illness/emergency. Know how you would access somebody’s working files and work email short-term. When a vacancy arises, let the department know as soon as possible how you will fill the spot long-term (promote from within or recruit from outside).

74. “The numbers all go to eleven....” “Oh, I see. And most amps go up to ten?” “Exactly....” “Why don’t you just make ten louder and make ten be the top number and make that a little louder?” “These go to eleven.”

movie, *This Is Spinal Tap* (Columbia Tristar 1984)

There is always room for improvement. You can always draft a better, shorter, more customer-friendly license agreement. You can always learn wages and hours laws for another country. You can always prepare for a smoother due diligence review. On a scale of 1 to 10, don’t be afraid to take it to 11.

CONCLUSION

“Party over, oops, out of time...”

song, “1999,” *1999, Prince* (Warner Bros. 1983)

75. “Relax! Don’t do it.”
song, “Relax,” *Welcome to the Pleasuredome, Frankie Goes to Hollywood (Island 1984)*

This is an easy one. Your new environment, your first offshoring contract, your first termination in Brazil, and your first Sarbanes-Oxley whistleblower report will all be stressful and exciting moments. None of them prevents you from taking a moment to relax before you tackle them.

76. “I’m working out most everyday and watching what I eat. They tell me that it’s good for me, but I don’t even care.”

song, “It’s Hip to Be Square,” *Fore! Huey Lewis and the News (Capitol 1986)*

All that time you used to spend at the printer or flying back from those depositions in Hartford? Use it wisely. Cook for your family, train for that marathon, or read the *Financial Times*.

77. “I don’t care where we go. I don’t care what we do. I don’t care, pretty baby, just take me with U.”
song, “Take Me With U,” *Purple Rain, Prince (Warner Bros. 1984)*

Don’t forget that none of this in-house stuff is as important as the ones you love.

78. “Ack!”

Common saying of Bloom County comic strip character Bill the Cat, authored by Berke Breathed

Just as Bill the Cat responded “Ack!” to everything, your initial response to an issue should be “ACC.”

79. “‘Never get involved in a land war in Asia’, but only slightly less well known is this: ‘Never go in against a Sicilian, when death is on the line.’”
movie, *The Princess Bride (MGM/UA Studios 1987)*

This is generally good advice, whatever your profession.

80. “Now whip it, into shape, shape it up, get straight, go forward, move ahead, try to detect it, it’s not to late, to whip it, whip it good.”

song, “Whip It,” *Are We Not Men? Devo (Warner Bros. 1980)*

If you only remember one thing from this article, remember the last few lines of the 80s classic “Whip

It.” It really sums up your obligations and opportunities as an in-house lawyer solving a corporation’s problems.



The author would like to dedicate this article to the memory of David Matthew Bonnot, a true friend, philosopher, musician, athlete and fellow aficionado of the 1980s:

“You can be the Captain and I will draw the chart, sailing into destiny, closer to the heart.”
song, “Closer to the Heart,” *Moving Pictures, Rush (Mercury/Universal 1977)*

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