

An Introduction to Corporate Litigation

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I. PREPARING FOR POTENTIAL LITIGATION

I. Preparing for Potential Litigation

a. Communication, Understanding and Expectations

Communication, Understanding and Expectations

- **What does your client want?**
- **Why do you ask questions?**
- **When do you ask questions?**
- **Why your client's expectations are important.**

I. Preparing for Potential Litigation
b. Early Case Assessment

“Early Case Assessment” Defined:

A disciplined, proactive case management approach designed to assemble, within 60 days, enough of the facts, law, and other information relevant to a dispute to evaluate the matter, to develop a litigation strategy, and to formulate a settlement plan if appropriate.

I. Preparing for Potential Litigation
b. Early Case Assessment (cont'd)

a. The Facts

1. A Claims Summary
2. The Other Side's Position
3. A Timeline
4. Interview Summaries
5. The Documents
6. Your Experts
7. The Themes

b. The Law

8. The Jury Charge
9. A Summary of Legal Issues

c. The Forum, Your Opposition and More

10. A Venue Analysis
11. The Opposition
12. Other Circumstances

d. The Plan

13. Your Strategy
14. The Budget
15. A Settlement Plan

I. Preparing for Potential Litigation
c. Additional Techniques

- **Jury consultant whiteboard session**
- **Three-partner focus group**
 - **Presentation on both sides by your counsel**
 - **Focus group from lawyers at different firms**
 - **Not involved in the case**
 - **Separate initial evaluations**
- **Damages expert whiteboard session**
- **Do you have a plaintiffs' lawyer on retainer?**

Remember - If you and the other side value the case differently, (at least) one of you is wrong.

II. Litigation Holds and Internal Discovery

III. Outside Litigation Counsel

III. Outside Litigation Counsel
a. Whether to Retain Them

How Much Outside Counsel Do You Need?

Consider Several Models:

- Internal Counsel as Litigation Manager
- Internal Counsel/Outside Counsel Team
- Internal Counsel as Lead on Many
- Internal Counsel Only

III. Outside Litigation Counsel
b. Selection

How to Select Outside Counsel

- **Type of Matter**
 - *Specialized expertise needed*
- **What is at Stake**
 - *Amount sought*
 - *Potential for adverse precedent*
- **Consider the Forum**
 - *Avoid “home-cooking”*
 - *Jury pool*
- **Value added by firm**
 - *Need large firm resources?*
 - *Can smaller firm handle?*
- **Leverage buying power**
 - *Negotiate volume discount*

III. Outside Litigation Counsel
c. Fee Structures

How Do You Pay Your Outside Litigation Counsel?

- Discount off rack rates**
- Contingency and modified contingency**
- 80/20 holdback**
- Fixed fee (with variants)**
 - Quarterly budgeting or year-end true-up**
 - Fixed fee in exchange for a certain number of cases**
 - Fixed fee at each stage of litigation**
- Success fee based on certain milestones**

III. Outside Litigation Counsel
d. Distribution of Tasks

What Should I Do Versus Outside Counsel?

- **Own Your Case Internally**
- **Facilitate Information Gathering**
- **Understand Company’s Strategic Considerations and Needs**
 - **Outside counsel will not usually know or understand these needs without your assistance**
- **Understand when to say “no” to outside counsel**
 - **Push on discovery issues**
 - **Encourage creative thinking**

III. Outside Counsel

e. Management of Outside Counsel

Management

- **Staffing of the Matter**
- **Outside Counsel Guidelines**
- **Budget for the Matter**
- **Early Case Assessment**
 - **Should you consider settlement**
- **In-House Counsel's Involvement in Matter**

IV. Conducting Effective Investigations for Litigation or Government Reviews

What Corporate Counsel Should Know

(supplemental materials available in appendix section)

V. Who pays?

V. *Who Pays?*
a. *Insurance*

Insurance -- A Huge Topic With Four Simple Rules

1. Always act like a reasonably prudent insured.

When confronted with a decision, what would you do if you weren't insured?

2. Never try to outsmart yourself.

Don't force an argument, rely on colluding with the plaintiff to secure coverage or falsely characterize one claim as another.

3. Apply an age-old rule.

An insured cannot sue for bad faith without acting in good faith.

4. Remember that insurers hate surprises.

V. Who Pays?

b. Indemnification

Who Wants a Lawyer?

Who Needs a Lawyer?

Who Gets a Lawyer?

-- an Ethics Minefield

Who?

The Company

The Board?

The Audit Committee?

The Special Committee?

Senior Management?

E's and O's?

Former E's, O's and D's?

Why and How Much?

Bylaws

State Law

Yours

The Employee's

Employment Agreements

Company Course and Practice

V. *Who Pays?*

b. *Indemnification*

Who Wants a Lawyer?
Who Needs a Lawyer?
Who Gets a Lawyer?

Miscellaneous Thoughts

- Undertakings
 - Impact on Credibility
 - May Be Required
- “Reasonable and Necessary”
 - What are the Limits?
 - Does this Impact Choice of Counsel?
 - Are Advance Restrictions OK?

V. *Who Pays?*

b. *Indemnification*

Who Wants a Lawyer?
Who Needs a Lawyer?
Who gets a Lawyer?

Selecting Counsel

- One Lawyer/Many Clients?
- Conflicts
 - ABA Model Rule 1.7
- Sharing
 - Documents/MOIs/ Internal Investigation Report
- Who Would You Hire This Afternoon?
 - Think About This Before the Subpoena Arrives
 - Not For Your Everyday Litigator

VI. Settlement

VI. *Settlement*

a. *What's Unique for In-House Counsel?*

What Do You Have that Others Don't?

- **Alignment of Interests**
- **Proximity to the Client**
- **Perspective**

VI. Settlement

b. Tips

Settlement Analysis: Carefully Analyze the Settlement Dynamic

- **Plaintiffs' Perception is Reality (early on)**
 - Their perception of your weaknesses and strengths
 - Their perception of their weaknesses and strengths

- **Consider Every Variable**
 - Timing
 - Counsel Reputation
 - Other Defendants
 - The Plaintiffs' perception of their case
 - Time to trial
 - Copycat potential
 - Your ability to cast your client as unreasonably entrenched
 - A hundred others

VI. Settlement

c. *Get There Faster, Better and Cheaper*

7 Nontraditional Way to Get It Settled (And a Link to More on Each)

1. [Narrow the Dispute](#)
2. [Nonbinding Arbitration](#)
3. [Blind Bidding Enhancement](#)
4. [Serve a Rule 68 Offer](#)
5. [Just Send Them a Check](#)
6. [Negotiate a High-Low Offer](#)
7. [Mix and Match a Few of the Above](#)

VI. Settlement

d. Tips (A Few More)

A Few Neglected Pointers

- Every move you make means something
- Bonus your counsel for early resolution
- Know 5 great mediators
- FAS 5 -- Avoid the Career Limiting Surprise

Questions?

Additional Resources

Outside Counsel Management

<http://www.acc.com/legalresources/resource.cfm?show=19673>

109 Effectively Managing Outside Counsel & Associated Costs

<http://www.acc.com/legalresources/resource.cfm?show=19986>

Alternative Billing

<http://www.acc.com/legalresources/resource.cfm?show=19678>

105 Building/Maintaining Relationships with Outside Counsel

<http://www.acc.com/legalresources/resource.cfm?show=20196>

504 Best Practices in Hiring Outside Counsel

<http://www.acc.com/legalresources/resource.cfm?show=20527>

105 Getting the Best Results Cost Efficiently -Working with Outside Counsel in Canada & the US

<http://www.acc.com/legalresources/resource.cfm?show=20203>

Promoting Litigation Cost Control Measures

<http://www.acc.com/legalresources/resource.cfm?show=39201>

Additional Resources

E-Discovery Litigation Response-

<http://www.acc.com/legalresources/resource.cfm?show=20026>

802 Litigation Planning

<http://www.acc.com/legalresources/resource.cfm?show=20208>

What You Should Know About Litigation

<http://www.acc.com/legalresources/resource.cfm?show=19801>

Small Law: A Public Health Approach to Litigation Management

<http://www.acc.com/legalresources/resource.cfm?show=14392>

003 Litigation Management for the Small Law Department

<http://www.acc.com/legalresources/resource.cfm?show=20357>

904 10 Tips for Reducing the Costs of Litigation

<http://www.acc.com/legalresources/resource.cfm?show=20260>

804 How In-house Litigation Counsel Add Value- Proving Your Case

<http://www.acc.com/legalresources/resource.cfm?show=20076>

Additional Resources

Collaboration in Managing Litigation: Lessons of the First Five Years

<http://www.acc.com/legalresources/resource.cfm?show=20634>

New to In-house Managing Litigation From the Inside Out

<http://www.acc.com/legalresources/resource.cfm?show=14338>

904 End It Before It Begins: Litigation Prevention in Today's Business Environment

<http://www.acc.com/legalresources/resource.cfm?show=20394>

Bios

S. Kendall Butterworth

S. Kendall Butterworth currently serves as Associate General Counsel, Litigation, for Mueller Water Products, a leading North American manufacturer and marketer of infrastructure and flow control products for use in water distribution networks and treatment facilities. Her responsibilities include oversight for all litigation matters involving Mueller and its subsidiaries, as well as providing counsel on compliance and operational matters.

Prior to joining Mueller in February 2008, Kendall was Chief Litigation Counsel for AT&T Southeast (the nine state region within AT&T formerly known as BellSouth Corporation) where she supervised a team of lawyers and paralegals and had responsibility for all commercial litigation. In her 10+ years at AT&T/BellSouth, she developed extensive experience with commercial litigation, records management, electronic discovery and the workings of a corporate legal department.

Kendall is very active with the State Bar of Georgia, having served on its Board of Governors since 1999. She was President of the Young Lawyers Division of the State Bar of Georgia in 2000-01. Kendall also has a significant commitment to pro bono work, having served as Chair of BellSouth's Pro Bono Committee from 2001 – 05. She served on the Board of Directors of Pro Bono Partnership of Atlanta as well as the Advisory Board for the Atlanta Legal Aid Society. She also has served on the American Bar Association's ("ABA") Pro Bono Committee and on the ABA's Commission on the American Jury, which was chaired by former U.S. Supreme Court Justice Sandra Day O'Connor.

John DeGroot

John DeGroot serves as Executive Vice President and Chief Legal Officer to BearingPoint, Inc., a global management and technology consulting firm with approximately 15,000 employees doing business worldwide. John leads a legal team of over 40 lawyers in 10 countries with responsibility for the Company's legal strategies and affairs, including corporate governance issues, litigation and corporate risk management, and securities and global finance activities. Mr. DeGroot also has primary legal responsibility for the Company's restructuring efforts, including its recent Chapter 11 filing and the sales of substantially all its businesses now underway.

Mr. DeGroot served as BearingPoint's Chief Litigation Counsel from 2000 - 2008, with responsibility for the Company's global litigation docket and litigation prevention strategies. He previously practiced with the law firms of McKool Smith, P.C. and Jackson Walker, L.L.P. and as Vice President and Counsel to nationwide financial concern First USA, Inc.

In addition to his duties at BearingPoint, John maintains a website on settlement techniques and negotiation strategies at www.settlementperspectives.com.

Mr. DeGroot received his J.D. from the Duke University School of Law and his B.A. from Mississippi State University. He lives in Dallas with his wife Hillary and sons Jack, Luke and Max.

William H. Jordan

William H. Jordan is a partner in the Litigation and Trial Practice Group in the firm's Atlanta and Washington, D.C. offices. He concentrates his practice on complex commercial litigation, government and internal corporate investigations, corporate ethics and compliance matters, and antitrust law. Bill is a member of the firm's Government Investigations and Special Matters Team and leads its Health Care Litigation Team. He also serves as outside ethics and compliance counsel to a number of companies, including multi-national chemical and manufacturing companies and health care providers. In 2006, Bill was appointed by the Georgia State Senate to a four-year term on the State Ethics Commission, which regulates political contributions and expenditures and lobbying activity in Georgia, and was elected as Chairman of the Commission in 2007.

Bill rejoined Alston & Bird in 2004 following his tenure as a senior official at the U.S. Department of Justice, where he served from 2001 to 2003 as the Senior Counsel to the Assistant Attorney General for the Civil Division and in 2003 as the Senior Counsel to the Associate Attorney General. In those capacities, he supervised offensive and defensive litigation and other matters for the federal government in areas as diverse as health care fraud and whistleblower actions, terrorism-related cases, government contracts, constitutional litigation, and civil RICO.

Bill is active in other matters. He served as the Associate General Counsel and then General Counsel for the Georgia Republican Party from 1999-2001 and served as General Counsel for the late Sen. Coverdell's state political action committee. Bill is a Board Member and former President of the Atlanta Lawyers Chapter of the Federalist Society and is also a member of the Legal Advisory Board for the Southeastern Legal Foundation. He is active in the community and currently serves as the incoming board chairman of Families First, an organization that provides adoption counseling, foster care, and assistance to Georgia's children and families and which is one of Atlanta's oldest and most active non-profit charities. Bill also serves on the Georgia Advisory Committee for the United States Commission on Civil Rights and on the board for Atlanta CrimeStoppers. He is a 2008 graduate of Leadership Atlanta.

Bill received a J.D., with distinction, in 1995 from Emory University School of Law, where he was Articles Editor for the Emory Law Journal, and his B.A., cum laude, in Economics and Business from Rhodes College, where he was awarded membership in Phi Beta Kappa and Omicron Delta Kappa.

Additional Materials