The "Art" that is part of "Partnering"

By Jack L. Foltz and Steven A. Lauer *

For the past few years, "partnering" has been the subject of much commentary in the trade press in respect of relations between in-house and outside counsel. There have been some efforts to define that term. Those efforts generally have focused on specific examples of relationships (usually, each article dealt with one particular relationship) that the authors called "partnering" without a critical analysis of how widespread were the attributes of the specific exemplar. Similarly, few attempted to discern whether there are core attributes of a "partnering" relationship – attributes that can assist the observer in deciding if a specific client/counsel relationship represents true partnering.

As time has passed, several of the relationships that have been so labeled have matured. With the benefit of hindsight and the opportunity to review some of the literature and to analyze the issue with the assistance of comments by experienced participants in those situations, perhaps we can identify the commonalities that seem to identify the true partnering relationship. With those common characteristics in hand, inside and outside counsel will be able to identify their relationships as "partnering" or not as "partnering" more accurately. The appropriateness of that label will depend less on the vagaries of personal opinion and more on objective standards.

Before undertaking that analysis, it's important to remember that the most important element of the responsibility of the lawyers is the needs of the client. Those needs must be paramount. The term used to describe the relationship, and the type of relationship that exists between a law department and the law firms that serve that client, is of subsidiary importance. In fact, a relationship that elevates the needs of the client to the pre-eminent place that they must occupy is a good attorney/client relationship whether you can call it "partnering" or something else. In sum, the client's needs must override the concerns of both the law department and the law firm. The attorneys must have a strategic understanding of the client's goals if the relationship is to work properly.

So, what are the identifiable attributes of a "partnering" relationship?

The most elementary characteristics seem to be respect, trust and communication. Those three seem to exist in all the relationships that are commonly understood as representing a partnership between inside and outside counsel. There are other specific traits that those relationships exhibit, but those traits often are concrete manifestations of those three, or more-specific examples of how those three traits play out in the unique web of exchanges that each combination of client and outside counsel represents.

It is entirely possible for a corporate general counsel and a member of a law firm to have a good interpersonal relationship. Each may respect and trust the other and they may communicate frequently. That relationship, in turn, may lead to relations between the department and the firm that exhibit the characteristics of a partnering relationship. In certain contexts, such as one in which the law department is small (say fewer than five attorneys, for example) and the outside firm represents the company in many different situations (litigation and transactional work that cuts across substantive areas), that may suffice. The interpersonal relationship between the general counsel and her outside counterpart will set the tone for their organizations' relationship effectively.

In that regard, each of the most effective partnering relationships between departments and firms seem to have at its core a very good relationship between the general counsel (or another senior member of the department) and a senior partner. It may not be possible to have a good partnering relationship without that foundation. Whether you can institutionalize such a relationship is difficult to know, since the trust aspect is particularly dependent on interpersonal experience. It develops over time.

If a law department has several hundred lawyers and the company works with dozens or hundreds of law firms over the course of a year, something more lasting or organizational may be necessary. If those characteristics don't permeate both of the organizations (the law department and the law firm) in that

situation, that relationship will survive only so long as those individuals are in their respective positions; the relationship between the organizations will simply be a reflection of their personal relationship. That might not suffice if the relationship between the organizations is to survive the departure of either individual. Is that possible? The answer is difficult to predict.

The precise characteristics of the relationship, whether it constitutes "partnering" or not, must reflect the needs of the specific situation. The size of the law department can impact how structured the relationship with the outside law firms ought to be. Another factor that can impact that issue is the nature of the legal work that they must handle for the client. What is possible for repetitive, relatively uncomplicated litigation may be very different from what is needed to appropriately handle very complex, one-of-a-kind litigation.

What are some of the traits, besides respect, trust and communication, which are often found in partnering relationships? The inside and outside lawyers constitute a team that contains both generalists and specialists needed by the legal needs of the company. The team should be seamless in that the respective strengths of each member of the team are calibrated to supplement and complement those of the rest. In the aggregate, the team members will possess all the talents needed to fully serve the client's needs. The division of responsibility among the members of the team is based on strategic strengths or core competencies. The outside attorneys must possess an understanding of the particular needs of the in-house attorneys. Outside counsel share inside counsel's sensitivity to the cost of legal service.

The expectations of the various members of the team must be clear and clearly expressed early in the relationship. Communications among the team must reflect honest, frank dialogue, with each participant listening as well as contributing to the exchanges. Inside counsel and outside counsel must have a great deal of empathy for the position of the other and for the other's needs in the relationship. For example, a company's general counsel will "call the shots" as to what legal positions are taken on behalf of the company and how those positions are advanced. Those decisions should be animated, however, by an appreciation for the needs of the outside attorneys, to the extent those needs are relevant and important. In that way, the inside and outside attorneys will achieve a greater degree of interdependence.

Very often, a partnering relationship includes a fee arrangement that is based on something other than an hourly rate or hourly rates. Whether such an arrangement (often called an "alternative fee arrangement") leads to a partnering relationship or can succeed only if implemented within the context of an existing, effective partnering relationship is not clear. Whatever the form of the fee arrangement by which the law firm is paid, it should reflect a strategic understanding of the client's goals.

The relationship must be managed. That management must be firm. Each party is willing and ready to evaluate the relationship on a continuous basis to assure that it is working as planned.

What are the specific terms of these various attributes? How can they be implemented or achieved?

The team (inside and outside) that delivers the legal service to the common client is very deliberately formed. The relative strengths of the two organizations are taken into account and their contributions to achievement of the goals of the relationship are carefully plotted. Whether done through formal requests for proposals for legal service (as done by Prudential, Stanford University, Sunoco and other corporate law departments) or less formally, the law department analyzes the client's needs and determines how those can be best satisfied. Often, lawyers with specific, narrow specialties are included in the team along with generalists, since corporate clients often have varying needs over time and the particular needs at any point may change unexpectedly.

Outside attorneys must recognize the importance, for most if not all law departments, of issues other than the quality of the legal service (as outside attorneys tend to define quality). Without gainsaying the importance of quality, few in-house lawyers have the luxury of using that as the sole touchstone for measuring the success of an assignment. Cost effectiveness is, increasingly, a standard by which their efforts are judged and it has become part of the measure of the quality of the service expected of them. (In

this sense, in-house lawyers define quality a bit differently than do outside lawyers. The latter often seem to consider it a quality apart from cost effectiveness.) They must, in turn, apply that standard to the work of their outside compatriots. Thus, sensitivity to cost issues is an ever-more-important criterion by which outside counsel are selected and judged.

Communication must be frequent and honest. Each party must set out for the other its expectations for the relationship. The law department must enable the law firm to know what the client (the internal business units of the company, as understood by the internal law staff) needs in the way of legal service and how it expects that service to be delivered. The relative importance to the client of various qualities of the legal service must be communicated. For example, does the client want the law firm to pursue every legal issue that it can identify in a project regardless of the cost of doing so? Is cost a significant criterion by which the lawyers' (inside as well as outside) performance will be judged? Law firms often seem to think that quality of their service is independent of the cost of that service; for inside counsel, quality and cost are irrevocably intertwined. Indeed, cost is an element of quality.

DuPont, in its widely publicized convergence program, meets annually with representatives of all the law firms in its team (which it refers to as its preferred law firms or PLFs) in a plenary session. There are other, more focused meetings (some with just one or a few firms if the subject is very specific to one or a small number of cases), as well. Prudential's in-house real estate lawyers formed a team of law firms to represent the company's real estate units in environmental litigation. Those law firms then met annually with the in-house real estate attorneys and the inside and outside environmental engineers and consultants who also work for those business units. Other law departments have established less formal mechanisms for getting the inside and outside counsel together on a regular or sporadic schedule. When the General Counsel of Stanford University created a legal team from members of three law firms and some in-house attorneys, the law firms' representatives were assigned office space in university buildings in order that they and the in-house attorneys would meet on a daily basis as a way of fostering communication.

Flexibility is important. Attorneys within the department and within the firm must be willing to adapt to unanticipated circumstances. Moreover, they must also be willing to re-examine the relationship periodically and to ask if it continues to be the best that it can be. Fresh approaches to the company's legal needs must be welcome always.

How else does the flexibility of the inside and outside attorneys change in this new environment? Each must be willing to allow the other to have input into decisions that formerly were his or her sole province. For example, inside counsel will have a say in how the legal work is staffed by a law firm and whether some tasks are performed by individuals or organizations not employed by the law firm (*i.e.*, those tasks are "outsourced"). Suppose an arrangement between a law department and a law firm places on the latter full responsibility for completing an assignment (including the cost by imposing a cap on the latter's fee). If local counsel must be involved, to what degree should the inside attorney be concerned with the selection of local counsel if the primary outside firm is responsible for completion of the project as to quality, cost and all other measurable factors? Perhaps the inside attorney should have a voice in that decision but leave most of the discretion to the outside attorney.

Arrangements by which outside counsel's fees are not measured solely by the amount of time devoted to them are popular today (though more so in discussion than in practice, according to surveys). An interesting question is whether such an arrangement is the basis for a good relationship or whether a good relationship must precede an effective, successful arrangement that eschews the hourly rate. Though there may be exceptions, it seems that the success of such an arrangement often depends on the existence of a good, honest relationship between the law firm and the client. This is so because a fee arrangement must often be adjusted to reflect events that were not (and couldn't have been) anticipated when the arrangement was designed. A fee arrangement that reflects the client's strategic needs should provide a greater foundation for a good relationship, however, whether it is based on hourly rates or not. Establishing an arrangement that addresses the client's needs and the needs of the firm requires that the parties discuss those needs carefully. That discussion is an important element of the communication that underlies an effective relationship.

All the well known (and the lesser-known) examples of partnering relationships seem to include a recognition of the need to have an identified attorney within the law department and one within the law firm responsible for maintaining the relationship. That responsibility is independent of the substantive responsibilities for completing the work. (In fact, a partner who is not involved regularly in the client's work often fills that role at the firm.) In other words, a good relationship requires attention on its own.

The relationship must be managed. If the client and the firm expect that a relationship will flower without periodic attention, they will be disappointed. A representative of one department that is well known for the partnering arrangements that it has created with its outside firms has stated that, "[I]n short, it takes lots of TLC to keep a relationship strong." Whether that TLC must be continuous or can be episodic may vary with the specific needs of the situation and of the relationship.

It is important that the outside counsel be well attuned to the particular needs of the law department in question. For example, at Sunoco, the law department decided to outsource the intellectual property legal section. In seeking outside firms for the role that had been played up to that point by inside lawyers, the department needed to address at least four significant issues:

- The loss of the people who had been part of that section of the department
- Economic pressure from the business clients to do the outsourcing correctly and to achieve real savings
- The impact of the outsourcing on the morale of the rest of the law department staff; and
- Determining how to best manage the intellectual property function after the transaction was in place

One of the criteria by which the department evaluated the candidate law firms was a relatively subjective one: how well did the firm understand those issues and the significance of those issues to the Sunoco legal department?

The department had to make some tough decisions as to the degree of core competency that would be needed in-house after the outsourcing in order to properly manage the resulting team of lawyers. After all, without some internal understanding of the technical minutiae of patent and trademark work, the law department would be unable to provide the management or monitoring function that the company expected of its internal lawyers.

If law firms are to become parts of the team that the word "partnering" suggests, there is another important consequence of that role of which they should be aware. Inside counsel are subject to increasing expectations to demonstrate that they add value to the operation of a company. While in-house lawyers have always felt, with significant justification, that they fill a strategic and important role in achieving the business goals of the enterprises that they serve, the expectations now demand better evidence or proof of that fact. No longer will a company's senior managers accept on faith that having lawyers involved in their business is necessary. They demand that the law department provide them data to support the position that having a law department is a cost-effective means of advancing the business interests of the company.

Law firms should help shoulder this burden. After all, the spending for outside legal talent typically consumes over half the aggregate budget for legal services of a company. The inside and outside lawyers have a common interest in making that case. The total legal team, inside and outside, must have the reputation of being a value-adding component of the corporate structure. Whether through metrics or some other means, they must present to corporate management the data necessary to support that view.

A recent article described an innovative effort to institutionalize and enhance the interrelationship between a corporate law department and a law firm. The department and firm have determined that they will jointly conduct the recruiting by which the firm locates lawyers to work on that client's matters. By doing so, the firm and client should assure that lawyers so hired by the firm would be more responsive to and in synch with the attitudes of the client department.

Firms that engage in "secondment" or externships with client law departments evidence a similar goal. In such an arrangement, a lawyer from the firm works at the law department for a set period of time, such as a year or six months. The head of a department at a major law firm that has entered into such

arrangements with clients described it as "an important element in creating a tighter relationship between the client and the firm." In some cases, a member of a law department has worked in one of the company's law firms for a period.

The Sunoco law department has established with one firm an arrangement that should improve the law firm's understanding of the company and provide the law firm an advantage in its recruiting efforts. The firm's summer associates can spend a portion of their term with the firm working in the company's law department under the supervision of one of the department's attorneys. The remainder of the summer associate's time is spent at the firm. The firm pays the summer associate's salary, even while working within the law department. The opportunity to observe and experience the work undertaken in the law department of a major industrial company is unusual for summer associates and that opportunity distinguishes that law firm's program from those of its competitors.

If respect, trust and communication are the most basic attributes of a partnering relationship, how can you achieve that state? Trust and respect are hard to mandate; they must grow of their own accord to a large degree. Communication, on the other hand, can be nurtured directly. The types of regular meetings held by some law departments (such as Prudential and DuPont) with their outside counsel are very conducive to establishment of the interpersonal and institutional relationships that comprise a partnering relationship between a law department and a law firm. Less formal meetings can be valuable in that regard as well.

One type of meeting that seemed to help establish such a relationship was an "orientation" meeting organized by the Prudential Law Department. Meetings were held with representatives of some law firms that had significant amounts of work for the company (over 20 such meetings took place). Each firm's representatives visited the company's headquarters for at least one full day to meet with representatives of the sections of the Law Department with which those firms would work under assignments that had been awarded pursuant to a series of requests for proposals. The discussions over the course of the meeting focused on how the inside and outside lawyers would work together under those awards. Issues relative to the use of technology, billing and budgeting and other specific areas were addressed. By the end of each meeting, the firm's representatives had a much clearer idea of what the in-house attorneys expected of their firm. During the meeting, the firm's representatives had the opportunity to ask questions and offer constructive criticism (an opportunity of which a few availed themselves). The dialogues were healthy. As a result, the form of the partnering between the department and the firm was much crisper for all who were involved.

Unfortunately, some data suggest that very few law departments and firms expend enough effort to understand each other's expectations. For example, the most recent (of ten annual versions) survey conducted on behalf of Corporate Legal Times (see "Law Departments Are from Mars, Law Firms Are from Venus" in the July 1999 issue) reveals that there is considerable discrepancy in how law departments and law firms describe the form of their collaboration.

General counsel of companies were asked to assess their companies' outside counsel on a large number of criteria. In addition, they were asked to select among five choices the type of matter management style their law departments follow in respect of seventeen substantive fields of law. Law firm partners were asked to describe (using those same choices of style) how the law departments with which their firms dealt manage the work in those areas.

Of the management styles identified in the survey, two (those labeled "case management" and "co-counsel") seem to involve some sort of active participation in the matter by both inside and outside lawyers, albeit participation at different levels of intensity. The outside law firms and the corporate general counsel consistently expressed very different views of how frequently law departments and law firms work together in ways that are so identified.

For example, when handling acquisitions and divestitures, the general counsel described either "case management" or "co-counseling" as the management style 65% of the time. Law firm partners used those terms to describe the management style of their firms' clients for such matters only 12.5% of the

time. For capital markets work, general counsel used those descriptors 52.5% of the time, while law firm partners used them only 9% of the time. Intellectual property work was handled in that fashion 62.4% of the time according to general counsel but only 16.5% of the time according to law firm partners. Litigation is handled through "case management" or "co-counseling" 67.7% of the time (in-house respondents) or 26.9% of the time (outside respondents). For international work, the respective percentages were 55.6 and 17.1.

Clearly, there's little unanimity between the groups as to whether law departments share the substantive responsibilities of the work with outside lawyers. If the lawyers (inside and outside) cannot agree on how they work together, it's hard to believe that they can hold a common view of much else.

That same survey provides other data that indicate the need for better communication between the groups. General counsel consistently grade outside lawyers on a variety of criteria lower than the outside firms grade themselves on the same criteria. Many of the criteria are relevant to a discussion of partnering.

For example, on communication, general counsel assign to law firms a score of 2.1 (with 1 – "excellent" - being the highest score and 5 – "poor" - the lowest) in response to the question "keeps all parties informed of progress on a timely basis." As to whether firms "provide sufficient information required for informed decision making" by the clients, general counsel awarded 1.8.

In response to those same questions, on the other hand, law firms awarded themselves 1.5 and 1.5. Clearly, law firms think that they do a better job of communicating with their clients than the clients think.

As to whether law firms "understand the importance/balance of cost and quality" (which is a frequent issue in discussions of partnering arrangements), general counsel graded firms with 2.3. For being "cost conscious and sticking to budgets," they awarded the firms only a 2.5. Law firms graded themselves with 1.5 and 1.7, respectively.

The grades given the firms by general counsel in areas related to cost and billing are among the lowest of any. The grades given by the general counsel are also uniformly lower than the grades that the firms give themselves on the same factors. Since cost and value are also central tenets of the push toward partnering (and for in-house counsel, those qualities are subsumed in a definition of "quality legal service"), these results do not augur well for an effective partnering arrangement, as a rule.

Communication, which is the most critical step that law departments and law firms can affirmatively take to enhance the nature of the way that they work together, must be improved for partnering (or any team approach, for that matter) to work. The relationships between corporate law departments and their outside law firms would be greatly enhanced were they communicating with each other more effectively.

• Jack L. Foltz recently retired as Vice President and General Counsel of Sunoco, Inc., one of the largest independent U. S. petroleum refiner-marketers. He joined Sunoco in 1980, following a 19-year career with Shell Oil Company, where he held various responsibilities in Shell's legal patent and licensing organizations. He was named to his current post at Sunoco in 1992.

While attending law school at George Washington University, from which he received an LLB in 1961, Mr. Foltz served as a Patent Examiner at the United States Patent Office. In addition, he received a Master of Laws degree in Trade Regulation in 1971 from New York University Law School. Mr. Foltz's 1957 undergraduate degree is a Bachelor of Science from Rose-Hulman Institute of Technology where he majored in Chemical Engineering.

Mr. Foltz has been admitted to practice law in Virginia, California, New York, Texas and Pennsylvania as well as various federal courts. He is the immediate past Chairman of the Board of the American Corporate Counsel Association, and is a member of the American Bar and the Philadelphia Bar Associations.

Jack Folt was the General Counsel of Sunoco until his retirement. Steven A. Lauer is a consultant on issues related to the management of legal service by corporate law departments and the relationships between in-house and outside counsel. Mr. Lauer began his consulting practice in 1997, after thirteen and one-half years as an in-house attorney. For six years prior to becoming an in-house attorney, he was in private practice.

From April 1989 until May 1997, Mr. Lauer was an Assistant General Counsel for The Prudential Insurance Company of America. From March 1996 until May 1997, he was Project Director for the Prudential Law Department's Outside Counsel Utilization Task Force. In that capacity, he designed and managed the preparation and distribution of 109 distinct work packages (RFPs) by which Prudential restructured its purchase of legal services and the evaluation of hundreds of proposals submitted by over 130 firms to handle those packages of work.

Mr. Lauer was the in-house environmental attorney in the Law Department's Real Estate Section for almost seven years. In that capacity, he managed all environmental litigation for the company's commercial real estate investment units. For several years, he was responsible for management of all litigation for those real estate units.

In his consulting practice, Mr. Lauer has conducted benchmarking research for clients, designed evaluation processes for counsel selection and created a manual for outside counsel, among other projects. He has consulted on alternative fee arrangements, task-based billing and client expectations. He has worked with law firms to better understand the changing expectations of corporate clients.

He has authored numerous articles on the relations between in-house and outside attorneys, the selection of counsel by corporate clients, the evaluation of legal service, litigation management and other topics relevant to corporate legal service. He has spoken at numerous conferences in respect of those topics. He has organized such conferences and seminars, as well. He can be reached by e-mail at slauer@carolina.rr.com or by phone at (973) 207-3741.

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