

COST CONTROL CORNER

Prudential Begins a Convergence Program

BY STEVEN A. LAUER

On April 19, 1995, an unusual two-day meeting began in New Orleans. Representatives of eight law firms from around the country got together with in-house counsel from The Prudential Insurance Company of America to discuss environmental litigation.

What was unusual is that the meeting was not about specific litigation. Rather, the subject was litigation management. The firms had been selected by Prudential's lawyers to represent the company in environmental litigation arising out of Prudential's real estate investment operations.

Prudential invests in real estate by extending mortgage loans and by purchasing and developing real estate which it leases. On account of its roles as lender, owner, and lessor, Prudential is involved in cost-recovery litigation (as plaintiff as well as defendant), Superfund and non-Superfund clean-ups, and other situations impacted by environmental laws, court decisions, and rules.

Several of the firms present had represented Prudential previously in such cases, while some had represented the company in other situations. Still others had not represented the company previously at all.

The purpose of the meeting (the first of its kind for this group) was to begin the process of forging a nationwide team of litigators who over time would develop a common understanding of Prudential's environmental policies, perspectives, and history, and to begin to establish relationships among the firms and between the firms and Prudential attorneys.

The meeting coincided with another

meeting, between Prudential's in-house environmental engineers and representatives of environmental consulting firms that work for Prudential. I work closely with those in-house environmental engineers, and I hoped we could establish a cooperative attitude among the outside counsel and environmental

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consultants, as well. Accordingly, one day of our meeting consisted of sessions attended by the consultants as well as the lawyers.

The outside lawyers paid their own way to the meeting, and the time was not billed. Those attending included senior partners at the firms. All of these facts reflected the willingness of the firms to invest in the program.

COMMON THREADS

What led up to the meeting, and what was it intended to accomplish?

As we know, litigation is an expensive exercise for many companies. All of us are trying to find ways to make it cheaper and more predictable, with the predictability being at least as important as cost for many companies. These concerns are magnified when litigation involves environmental liabilities, because in these matters the stakes often are higher and the litigation more expensive.

We noted certain other characteristics of environmental litigation, as well. Typically, issues are common to all the environmental litigation involving one company. The same facts are often relevant to multiple lawsuits (for example,

a company's environmental policies and its history). The same evidence likely will be examined in many cases.

All of these features suggest that consistency in the approach to litigation and coordination among the positions taken by the company are particularly important with regard to environmental litigation.

As a member of the real estate section of Prudential's law department, my responsibilities include the management of environmental issues that arise in the course of Prudential's real estate investment (in the context of transactions as well as in disputes), and the management of litigation involving those investments. I had been seeking a way to manage and monitor these issues more effectively.

The real estate section has field attorneys located around the country. Those attorneys are organized in four divisions, each managed by a division counsel. The primary responsibility for managing the legal affairs related to real estate investments resides in the division counsel, who oversees the field attorneys who handle the legal affairs of business clients. Accordingly, to select regional environmental litigation counsel, I worked closely with the four division counsel. Because they are in touch with the day-to-day practice in their respective locales, I felt that they were

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About the Author

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better positioned to make the initial identification of counsel for the role we were seeking to fill.

FORMING THE TEAM

The division counsel and I determined, first of all, that the regional counsel should be formed into a unified team, and that it was better to do this before, not after, we had a specific matter to deal with. We felt that if these lawyers developed a successful long term relationship with Prudential, they

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would acquire an understanding of the company's history and approach to environmental policies and litigation, and that understanding would benefit their handling any particular litigation that arose.

We felt the fewer firms we chose to handle such matters, the easier it would be to achieve the coordination that we sought. Nonetheless, I recognized that despite the development of federal common and statutory law dealing with environmental issues, there remains a need for counsel who are familiar with local practice.

The division counsel and I identified candidate law firms in various markets. The geographic size of those markets varied from region to region. We conducted the interviews together.

Of the firms we selected, some had represented Prudential on real estate matters previously, while others had not. Some were large firms, while others were environmental litigation boutiques. But all of them expressed an approach to litigation and to litigation management that seemed to complement the approach we intended to take. That approach involved a proactive in-house staff working in partnership with the outside counsel and playing an active role in manag-

ing all aspects of the litigation. We expected to have an equal voice, and we required clear and open communication.

The selection of firms was only the first step. Because we believed that coordination among the firms would be the critical factor for the success of the program, we looked for ways of creating or enhancing that teamwork. Electronic communication among the firms, and between the firms and our in-house attorneys, would be helpful, and so would distribution of material relative to Prudential's environmental concerns. But I also believed it would be important to have face-to-face meetings, so that the firms could get to know each other well. Accordingly, we arranged the first of what I hoped would be an ongoing series of meetings among representatives of the firms.

The first day was devoted to issues of interest to the attorneys, but not to the environmental consultants. Since this was the first time the group had assembled, administrative matters occupied much of the schedule. Administrative issues are extremely important in this context, because properly handled they have the potential to knit a group of natural competitors into a cooperative team.

DISCUSSION POINTS

The Prudential attorneys explained the structure and operation of the law department, and in particular the structure and operation of the department's real estate section.

Much of that discussion centered around the "partnering" concept now in vogue. We expect that cooperation between the in-house attorneys and the outside litigation counsel will benefit the client, and we discussed ways to enhance that cooperation: electronic communication links between the firms and the law department, for example. And we did make clear that additional periodic meetings would be held. We also described Prudential's policies on environmental issues in its real-estate-investment operations, as well as our approach to litigation.

At one point, I introduced a representative of the law firm that we had selected as our outside environmental counsel. That firm serves as our advisor on environmental issues generally, although it does not handle environmental litigation. It does on occasion provide a "second opinion" on issues that arise in that litigation, and so it seemed important for the litigators to get to know these lawyers as well.

The simultaneous consultant's meeting was set up by Prudential's in-house environmental engineering staff. On the second day of our meeting, the attorneys met with those consultants' representatives and discussed a number of issues of interest to both groups: the relationship between environmental consultants and environmental litigators; the National Contingency Plan and the two groups' respective roles in assuring that cleanups and investigations are managed consistently with that EPA mandate; and several substantive environmental legal issues frequently encountered by both groups, such as disposal of materials and questions regarding what must be reported, and by whom.

That first meeting seemed to go quite well. The firms' representatives exhibited an open attitude that bodes well for cooperation among them and between them and the in-house attorneys. We solicited

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comments, and received some constructive criticism on how both the meetings and the program itself might be improved.

We are likely to refine the electronic links between the firms and the in-house attorneys, and establish some form of regular periodic communication among all members of the team. The business clients will be incorporated into the communications as well, and they probably will be invited to future meetings.

Prudential Convergence – The Law Firm View

Regional Boundaries Key to Cooperation

BY DENNIS M. STOTTS

Prudential's regional environmental litigation counsel program is the kind of program that outside environmental counsel often hope for but rarely see. It includes a number of features which counter potential problems in a convergence program.

One of those potential problems is the threat or fear of competition among the law firms in the network. Typically, a law firm whose client is a large corporation knows there are a lot of other law firms doing work for that client. And we all know there is a lot of very aggressive marketing going on right now. Private practice has never been more competitive.

When one firm in a client's law firm network deals with another firm in that network, the question naturally arises: How much information do you share?

Boutiques like ours might have special concerns. We are a small firm that practices in environmental and land-use law, and we have been doing it well for 20 years, but we note that in the last several years many larger full-service law firms have made forays into these areas. Obviously, this represents competition to us, as our work does to them.

So when one firm in a client's law firm network deals with another firm in that network, the question naturally arises: How much information do you share? In our case, we have been in this business for 20 years. How much do we really want to educate the other firms? The fact is, if your law firm is doing work for a major corporation, the competition is always on the back of your mind, and this is one potential drag on a convergence program.

Prudential has solved this problem by carving out geographical regions with clear boundaries. As a result, the participating firms don't have to worry about competition. In our case, as regional counsel for Florida, we don't have to worry about a firm in California doing work here. Prudential has made it clear that as long as we perform well, are cost-effective, and manage our litigation in accord with their goals, we will be their law firm here in Florida.

The result is a system that works better for the client as well as the law firm. We now feel comfortable helping other law firms, and they feel comfortable helping us. For

example, here in Florida I deal with EPA Region IV, out of Atlanta. I may know everything that is going on in Region IV, but I don't know what is going on out in California or Washington State, or Chicago.

Before, I might have known lawyers in these areas, but there were limits to their willingness to provide me with information, and I had my own constraints. Now I have people I can really talk to. I can pick up the phone and say, "Have you encountered such-and-such?" If, for example, a new policy comes out of Region VII, I may want to know that. Then, if Region IV says, "We can't allow that - it is against policy," I will be able to say, "Au contraire. It is being done in Region VII." I've found out, because I have allies there, people who I could not have talked to before, at least not in the same way.

Another significant feature in Prudential's system is that the client has made clear to all the law firms that we had *better* cooperate. Prudential expects it. And the program is well organized. We know this is critical, because we have seen it work the other way. In our work for some other major clients, sometimes we get calls from corporate representatives who have no idea how our firm represents them. Prudential has made sure, starting with its initial meeting, that the client knows us, that we know the client, and the law firms know each other.

Also promising, I believe, is the fact they have elevated environmental concerns to a level that is equal to other areas of potential liability. Even many large and sophisticated companies have not done this. They still don't realize, or don't believe, that environmental liabilities can be as onerous and potentially devastating as any liability the company could face.

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