



Roundtable Discussion:

In-House Perspective on Litigation

December 20, 2006

PANEL:

Charles A. James, Chevron Corporation, V.P. & General Counsel,
Mark Chandler, Cisco Systems, Inc., V.P. Legal Services & General Counsel,
Richard M. Burt, Bechtel Group, Inc., Senior V.P., Director & General Counsel,
Jill Dessalines, McKesson Corporation, Assistant General Counsel, and
Joseph J. Catalano, Union Bank of California, Senior V.P. & Associate General Counsel.

MODERATORS:

Rick Seabolt, Duane Morris LLP and Chair, Litigation Section
Eduardo Roy, Squire, Sanders & Dempsey LLP
Kent Mastores, Chair, Bay Area General Counsel Group

— Backgrounds —

JILL DESSALINES: I'm Assistant General Counsel for McKesson Corporation. McKesson is the country's largest pharmaceutical distributor and health care services company. It has 17 business units, about 25,000 employees, and is 15th on the Fortune 500. Primarily, the litigation that I manage is products liability, some IP, some employment, general sophisticated commercial litigation. We have about 25 lawyers in-house, which is a very, very skinny staff. Most of those 25 are in corporate headquarters in San Francisco, and we have some in Georgia, a couple in the UK, scattered throughout our various business units. We don't do much litigation in-house, although we will take the occasional case if it's small and we think we can get rid of it quickly. Other than that, we would hire outside counsel.

RICK BURT: I'm General Counsel to Bechtel Group, Inc., a major engineering and construction company. We have approxi-

mately 40 lawyers organized on a divisional basis. We also have a small group managing litigation. We do some of the labor mediation and arbitration inside. Otherwise all the litigation is done with outside counsel.

JOE CATALANO: I'm Chief Litigation Counsel at Union Bank of California and also chairman of the litigation committee of the Association of Corporate Counsel — America. The bank has about 11,000 employees and approximately 350 branches. We are the fourth largest commercial bank in California, and the 25th largest bank in the country. We have a fairly typical portfolio of bank-related litigation. We have a series of check cases. Naturally, we have the occasional employment dispute. We have some fairly sophisticated commercial litigation. And we have an occasional class action. We're fortunate that, not being primarily a retail bank, we tend to stand behind the larger retail players in the consumer class action arena.

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CHARLES JAMES: I'm General Counsel of Chevron. We are a global international energy and energy services provider, with about 57,000 employees located in 180 countries. We have approximately 350 in-house lawyers divided among our operating companies, our headquarters staff, and some global cross-functional practices. We conduct all of our litigation through outside counsel.



The Panel (left to right): Mark Chandler, Charles A. James, Joseph J. Catalano, Richard M. Burt and Jill Dessalines

MARK CHANDLER: I'm General Counsel of Cisco. We're a Fortune 100 company based in San Jose with \$25 billion of annual revenues and about 40,000 employees worldwide, with revenues about half in the U.S. and half outside. All of our litigation is managed by one attorney and two paralegals in-house using outside counsel, with the exception of employment litigation, where we have about a dozen cases and one in-house labor employment lawyer who manages that as well.

— **Selection of Outside Counsel** —

JILL DESSALINES: At McKesson, we have a preferred provider list — primarily for the transactional segment of our law department. In litigation, there are various

criteria that we use. Some criteria are more important than others, depending on the case. So when I tick them off, I'm not necessarily giving them to you in order of importance: subject matter expertise, reputation and standing in the bar and in the community, geographic location, cost. And then there's one big category that's sort of intangible. You can lump it into the category of judgment or, as my mother used to say, common sense, which is the least common thing in the world. I've had some cases where the result was excellent, I mean, I couldn't ask for a better result in effectuating the business goals of the litigation. The cost might have even been reasonable. But I will never work with the firm again because they made management an impossibility. That's part of the intangible that you really cannot, in my opinion, understate in importance. There are other criteria depending upon where you are. But typically we're going to be looking for those major components one way or another.

CHARLES JAMES: We too have a preferred provider program. It consists of about 35 firms — 5 of them major general practice firms, 30 of them regional and specialty firms. It's a list, it's a starting point; it's not a set of handcuffs. Once we've done enough work to really identify what's at issue on a piece of litigation and really what's going to matter in generating the result that we're hoping for, we are fond of conducting beauty contests. I find that beauty contests, if you give the law firms enough information to give you some meaningful advice, you can also

get the specific approach to the case that the firm is going to take. I think it's a very useful way of getting some free legal advice. We think well-run beauty contests that have identified the selection criteria in advance are a good way to make choices between a select group of providers.

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MARK CHANDLER

MARK CHANDLER: We’ll typically look both to a beauty contest once we’ve narrowed to a group of firms that we think have the capability in the matter, including local relationships as well as expertise drawn from similar cases and then there is a heavy pricing component in it. We do the pricing by seeking bids if there’s multiple litigation or if we can establish a pretty tight budget delin-

ation for each phase of the case that we’ll be able to compare. One of the things that we try to do in that process is not just get ideas for how the case will be handled but also to figure out what it takes to be a good client for them. We’ve made a significant investment in electronic discovery tools to make less expensive the cost of electronic document production. And in doing so, we’ve been able to significantly reduce bids. So I think there’s an element that is a matter of figuring out how to be a good client as well as figuring out who is going to be a good lawyer.

JOE CATALANO: Union Bank uses the convergence model as well. We were, until about the year 2000, using pretty much an ad hoc assemblage of perhaps 30 or 40 firms on primarily a California portfolio of litigation. We’ve narrowed that down to a group of six who know us well, who know our risk appetite, who know our approaches, our business practices, and who know the people within our organization who are the decision makers in the particular matter. So while that list is not the exclusive array of lawyers that we go to, they’re the primary firms and we look to see whether they have the particular expertise we need in a matter. If they do not, all of our lawyers are free to go to the lawyer who they believe best addresses the needs of a case. We find that this is an effective approach. We find that it gives us economies of familiarity and learning curves are not quite so steep each time a new matter arises. And we’re by and large happy with the results.

RICK BURT: Well, without formally doing it, I guess we have sort of a convergence model. There is a relatively small number of firms around the country that we go to for different kinds of matters. Bechtel has had a long-standing relationship with a particular outside firm, but obviously for any given kind of matter, you can’t rely solely on one firm because you will have conflicts come up. And

going beyond that particular firm would sometimes depend upon location, sometimes the particular nature of the matter. There's no formal relationship; we don't feel obligated to go back to that firm. It's just that they've gotten to know the company very well, and they've been very responsive to our needs. And we have a pretty good chemistry with most of our lawyers and most of our business people.

Approaches to Fee Arrangements

MARK CHANDLER: We've used three different types of approaches. First, in employment litigation, where we're looking at single plaintiff litigation, we have arrangements with three different firms to handle those. And we agree up front whether a given case is big, medium, or small. And those are very qualitative judgments each time, but we've never had a disagreement with the firm in trying to figure out what a case is going to be. And we have a fixed price for handling each of those. And there's enough volume there with 10 or 12 active cases at any given time in the U.S. that the firms have been comfortable with that. That one case may turn out to be more expensive for the types of reasons you alluded to and others will turn out to be less expensive. I get predictability out of it in looking at what the internal billings are which they continue to track. We haven't lost because of it. It does keep them focused on which stones are worth turning over and which aren't, which is always a problem, I think, in terms of their ability to assess what the risk is and avoid being too conservative. At the same time, fixed fees take my internal staff out of the business of trying to figure out whether one too many associates went to a certain meeting and the whole bill review nightmare. So that's model number one.

Model number two is for all of our routine commercial litigation, we have a two-year

contract where we've solicited bids. We got bids from about 30 firms when we first started this three and a half years ago, narrowed it to a short list of four or five — two of whom we had worked with before, three we hadn't — and then ended up selecting

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one to do all of the work. We pay a fixed amount every month. Obviously, in the first months of the arrangement, we were paying a lot of money and there was no litigation to handle. But, you know, you can bet on the fact that over time litigation came in and they were handling it. And that worked out pretty well. It's led to a lot of incentives for litigation avoidance efforts which have been smart, and we have not seen a ten-

dency on their part to want to settle cases that should be litigated. In fact, on a couple of occasions where we thought an early resolution might be the simplest path, they said, “No, we can win. Let’s hang in there and do it,” and they did.

The third model is for large litigation, a securities class action or patent litigation. And in that case, we keep bids by phase. At the outset, we can get a bid that will cover the first couple of phases of the case and be pretty sure of it. Then down the road, we’re dealing more with budgets. Once you’re past the initial couple of phases that have enough visibility to bid, you never know what’s going to happen and you can’t — this is never from our point of view about trying to put our partner, meaning our law firm, in a money-losing situation. It’s always about trying to find a way for them to align their interests with ours and to resource appropriately and not over-resource.

JOE CATALANO: Well, one of the things that you’re doing, which is really interesting, is you are opening the envelope into law firm economics much more than a lot of clients do. Your fixed price bid approach to engaging one law firm for a lot of your standard commercial litigation invites imitation. We frequently face the issue of appropriate staffing on our matters. Is it appropriate to put a \$600-an-hour lawyer on a particular matter? And your approach really gets past that. But do the law firms need to share their economics to make the process work?

MARK CHANDLER: We have expectations for who we want at the law firm to be engaged and how much time they’ll put into

the matter. And we do ask them, as part of the bidding process, to explain how much time different levels of attorney are going to put in and how they view the resourcing. And they’ll prepare their bids on that basis. I haven’t seen it as pulling back the curtain on the law firm economics so much because at the end of the day, they’re telling us what they think it will cost to provide a certain



Richard M. Burt and Jill Dessalines

level of service. And that’s not dissimilar from years ago. The billable hour doesn’t go back to medieval times in the legal world.

RICK BURT: I have, in another company, done some major litigation with a firm that prides itself on doing it on a fixed fee basis. And like everything else, there are pros and cons. No, it doesn’t pull back the curtain on law firm economics because sometimes it really pays — that is, you can see it’s very cost effective for you — and at other times, you can see it’s very expensive for you relative to the work being done. It certainly gives you predictability; you know what the cost is going to be. I think at the end of the day the law firms will always think of themselves in terms of units of hourly service — and I don’t know how they can do anything else



because that's what they have to sell. You're in the service business. But if they manage it properly and can sell that service on some other basis, fine for them. And their economics are their business.

MARK CHANDLER: The firms are making huge investments in knowledge management tools in order to drive productivity internally, to get more legal services delivered with fewer hourly units of input. And part of what we're trying to do is create vehicles for sharing some of those productivity benefits with us. That's why we made the investment in electronic discovery. Because if we do that, we can reduce the number of hourly units that are required. The tools we've developed have been accepted by opposing counsel in a wide range of matters, they've been accepted by government agencies in government reviews. So we're very comfortable that the tools are good. But at the end of the day, they reduce the number of hours that need to come in, allow the firm to be more efficient. Why should I have lawyers spending time reviewing duplicates of e-mails if I can electronically cull the duplicates? So my feeling is that I can preserve their profitability; I'm not trying to reduce their profitability. I'm just trying to drive efficiency.

CHARLES JAMES: We've not resorted very much to bidding. We have a different model. It relies very heavily on budgeting and our understanding and knowing the business of the litigation that we're doing. We've managed to reduce our outside counsel spending through just being cost conscious and working with the preferred provider model. One of the big issues as you're thinking about costs is really an issue of the lawyers that you select. If you're spending too much of your time devoted to monitoring and overseeing this billing situation, you have picked the wrong lawyers. You've got business partners you don't trust. We try to provide incentives for people to do

efficient work by setting objectives and knowing what we're hoping for out of the case. We have not been shy, for example, in giving law firms seven-figure unilaterally granted premiums because we've had a very

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successful result from a case and it produces business value. We're focused on sort of a partnership issue. I think the bidding is another way of achieving that partnership. Our major and most significant litigation puts our company at tremendous risk. We're looking at the value of the result as much as anything else. And we're trying to do that, contain those costs, through effective budgeting and through an expectation of efficiency. The other thing that we do that is perhaps differ-

ent than a lot of other companies is we review our relationship with our preferred providers on a regular basis. And this is a very, very detailed review. We've invested in electronic discovery tools. We've also invested in financial management tools for our law function so that we can look beyond, behind the cost of our providers. And when we do that review, they're often surprised at how much we know quantitatively about the services that they're providing, how much things cost, how much time is devoted to individual things. And so we're able to get that efficiency in. A different way of skinning the same cat, I think. The nature of our business and its expanse prevents us from even confining our major and significant litigation to our preferred providers. We can be sued at any moment at any place in the world. We're probably being sued right this second someplace. But we tend to have a sweet spot of law firms, and we have some lawyers that have produced miraculous things for our company. And we'll go back to them very often.

Do You Hire Lawyers or the Law Firm?

JILL DESSALINES: We hire lawyers. Absolutely. For several reasons. One, lawyers move. Two, even though a firm culture is going to integrally affect the relationship we have with our outside counsel, it too changes. And sometimes when we find somebody who is very talented we take the time to make the investment to train that person in our business. Depending upon that person's fate at the firm may affect how often we have to do that. So we absolutely hire lawyers and not law firms. Now having said that, obviously there are some law firms that we hire over and over again. But that tends to be because they have the lawyers in them we want to work with.

CHARLES JAMES: I actually probably will run against the current on this because I think in some instances we do in fact — certainly, when you're picking that lead lawyer for the case, you're really looking to that lawyer. But there are so many other elements to this. I mean, when you get that bill

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JILL DESSALINES

from the firm, all those hours come from the firm's infrastructure. It comes from its IT department; it comes from some other things. One of the big issues that we face as a company that litigates all over the world and constantly is that we have to ask our providers to help manage their conflicts so they're available to us when we need them.

And that is part of this sort of partnership arrangement that we make. Now, that's not to say that they're guaranteed cases, but this is the group of people that we're going to look to in the first instance. If they have the capability, they're going to be on the beauty

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contest list. And we're trying to cultivate a partnership with that firm. We're going to work with them. We've asked certain law firms to go out and develop practices to support us in particular geographic regions. Those types of things involve a sort of partnership. And I don't know that you can get that level of partnership if you say that we're just hiring the person.

Alternative **Billing Arrangements**

JOE CATALANO: We have different approaches which resolve themselves into some flat fee arrangements for modules of work rather than entire relationships for a portfolio of cases. So rather than on a portfolio-wide basis, we'll have discrete fee arrangements for certain segments of a case where we'll have a process that's fairly routine and standard. For example, if we have a state court receivership action, which is a repetitious remedial device, we might have a flat fee for that particular action. But we might have each of our state court receiverships done for that flat fee, regardless of whether the matter is uncontested, or goes to trial.

JILL DESSALINES: If we are plaintiffs, we have used contingency fee arrangements. But the format can vary. It can be contingency phased in with a guarantee. You can have straight flat contingency which, depending on the size of the case, I found that many law firms are not terribly comfortable with, at least in the areas of expertise that we're looking for.

MARK CHANDLER: We use contingencies when we're defendant and also for resolution at certain phases. If someone wins a motion to dismiss, I'll give them extra.

JOE CATALANO: We have used some sliding scale contingency fees on the plaintiff's side against a discounted base fee. And I think that we will see a lot more creativity going forward on the plaintiff's side, certainly, when institutional clients engage counsel. I also think we'll see some of the innovative arrangements that we're talking about here become more routine on the defense side. Because while, obviously, the billable hour is not dead and it's a useful metric and it's one we've all become accustomed to, you know, there's a lot of competition in the delivery of

legal services that will enter the marketplace with new and different approaches. Some will be tried and fail, and others will succeed and they'll become more systemic because I really think that there's enough creativity out there on both the buy and the sell side of

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legal services now that we’re going to start seeing changes in the way the services are delivered and how they’re charged and how they’re purchased.

RICK BURT: We have tried different methods, including as defendant and plaintiff, and used a variety of methods. But at the end of the day the billing method you agree on has to fit into and be consistent with the

relationship with the law firm because if you go forward in an important matter and you are fussing about the billing all the time, your eye is not on the ball. I think, as Mark said, you’ve got to be sure the law firm is doing well. You know, it doesn’t do you any good for the law firm to lose money on the matter. And you’ve got to build those relationships and make them work and find a place where the interests of the client and the law firm are congruent.

CHARLES JAMES: One of the things we seem to be talking about here, and this warms my heart as an antitrust lawyer, is the different ways of infusing competition into the situation. Now, I think among the companies at the table here we all have different needs, and we face different kinds of litigation challenges. And if there are repeatable tasks that you can identify and isolate, either on the document production side or on the litigation side, and you can create the crucible of competition with regard to that issue, it’s wise to do it. And I think it’s really going to be interesting for your readers to see that there isn’t a one-size-fits-all. People are doing a lot of things because — and this is the thing that I think your readers really need to understand — there needs to be some competition in this business. I sat down at a program in San Diego where lots of outside lawyers were meeting — the managing partners of lots of big law firms. And one of them said, “I wouldn’t say this if my clients were here; but, you know, our success over the last several years has been based on raising prices, and all of our clients’ success over the last several years has been based on containing costs.” One of these days these things are going to collide. And quite frankly, they’re going to collide because law firms have built into this model of hourly rates, not just the issue of how much does it cost to provide the service but really what they’re competing for is associate time and prestige and what have you. And I haven’t seen very

many law firms that are properly managed that look like they're hurting. But the companies really are under tremendous pressure to reduce these costs. And you're going to see lots of different approaches to this, and I'm going to take some of these home with me and maybe try some of them.

MARK CHANDLER: Well, I think you hit the nail on the head about trying to bring competition, and that's why I made the reference to the knowledge management investments because I think the firms are much, much more efficient at the way they share information internally, the way they leverage what they learn in handling one matter to



Joseph J. Catalano

handling the next matter. I get measured partly on productivity. I have a budget as a percent of total corporate revenue. So I have to do a report quarterly: what I spend on legal services, broken down by litigation and non-litigation as a percent of the company's revenue. My challenge from my boss every year is: We've got a 15 percent productivity goal for the company; I expect that in the

legal department as well, so that if our business grows 15 percent next year, legal spending will be flat. Now, for litigation I do get a little more play because new cases come in; I have to come up with a metric for weighing the fact that the quantity has changed.

JILL DESSALINES: Charles's point is absolutely right; those worlds are colliding, and they're colliding every day. One of the ways that we try to control that is we require firms to maintain the billing rate that they started at the initiation of the case through the life of the case. And that's in addition to whatever discounting arrangement we have. But unless you understand what the needs of the client are, you're right, sometimes if you have a lot of cases that are fairly routinized and you have a bunch of them, it doesn't make any sense to do anything but bid those out, fixed fee, whatever. Our cases don't tend to be that way. But to raise another point, the constant drive to build profit centers into every aspect of the law firm experience, I think, is hastening that collision. We're just starting billing software where the bill will be automatically bounced, that may lessen some of the investment in actually red penciling bills.

RICK BURT: I have the benefit of having done this for a long time — what goes around comes around. These conversations happened very much in the late 80's, early 90's. And that's when you heard a lot about alternative means of billing; you heard a lot about the fact that companies were coming under pressure to cut costs, why don't the law firms do the same thing; you heard a lot in the first wave of the utilization of technology, particularly in discovery. I think what happens is, that like in so many areas of business, you go through a wave of it, you go through the change, and then everybody gets used to it and gets relaxed and backs off and it becomes undisciplined. For a while law firms were at least a little bit shy about those

yearly increases. And they went from where you were lucky if you got a notice after an increase took effect, to firms being very up front and discussing them with you. And now I notice they're not so shy anymore. And I think perhaps this is part of a cycle that has to go around again.

JOE CATALANO: We get a most favored rate from our law firms. But unless you trust them, you know, 10 hours at \$500 or 11.11 hours at \$450 an hour equals the same bill. So unless you trust the lawyers that you're hiring, the discounted fee arrangement really is illusory. And the other thing is — the companies represented at this table, that are well-established and profitable, are providing the ability for these law firms to go out and say, "I represent so and so." There is real value in having very attractive marquee clients. But it takes hard work for other corporate clients to negotiate the same arrangements with these same firms. And I think that in terms of what we can do to help define the balance between the buy side and the sell side is really important to a broader range of corporate clients than just the people sitting at the table.

CHARLES JAMES: I think you made a real important point, which is putting the proposition to providers: how much do you value our business? What is Chevron's business worth to you in terms of your firm's prestige, your firm's stability, and all of those other kinds of issues? I think that's why you're seeing more firms trying to collect up more business so that they have a little bit more leverage. But in the end, in the end, as much as my CEO would like productivity and like metrics, if I'm sitting there with a very productive dollars per hour situation and a bunch of hundred million dollar judgments, he and I aren't going to be in that wonderful relationship we have today. And so the ultimate question is: How do we put our economics as a company, which are value-based

in terms of this issue of litigation, against the cost- and margin-based values that law firms have and how do we reach an accommodation? But I think the balance is going to shift over a period of time, particularly as companies begin to do what I think a lot of compa-

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nies here are doing, which is identifying the pedestrian stuff, which really isn't worth the rates that law firms want to charge you for them, and figure out ways to reduce the costs of that. The big Bet-Your-Company case, you might put it out to bids. But if you've got a feeling one firm is going to give you a better result than another, you're going to pick that firm and you're not really going to ask much about it.



Firms Should Have a Long-Term View and Build a Base

RICK BURT: In my company's business, we make some decisions based very much on a real sense of sustaining relationships. I think some of that thinking in law firms would be very useful so where the law firm can be the kind of firm that keeps the kind of lawyers you want to go to, that gets the kind of lawyers and understands that you, as a significant client, are going to be back there because, litigation or anything else, that's just the way it goes. And likewise, in addressing the cost issue, I think as we've all said, nobody wants to see the law firm be unprofitable. And the law firm certainly doesn't want to see its services cost its client more money than the client is comfortable with. And someplace, there's a place they can meet. I haven't been in a law firm for many, many years so I guess I don't know much any more whether or not that's possible. You worry a bit when you see the extent to which people in law firms move. And again citing my age, that didn't use to happen at all. It was rare. Maybe that's almost a message out to the community of law firms that there's a way to approach this where a good law firm can build a base and maybe in any given year it's not the best result economically but over the intermediate term it can work out pretty well.

Recommendations for Outside Firms

JILL DESSALINES: The trust issue is one that comes between outside counsel and inside counsel too much. But putting that aside for the moment, I think efficiency in staffing is number one. But the other thing — and, I admit, this is a hot button issue for me, it's a pet peeve — is inflating profit centers. You have a flat fee Westlaw or Lexis arrangement. Yet we all know they will, for not very much money, convert your flat fee

bill into what it would have been if you did not have a flat fee bill which then sometimes you see passed on, things like that. Secretarial overtime. We're not in business to pay anybody's overhead. To me, that should be in the billing rate. And that's why you have large firms with high billing rates and

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smaller firms with lower billing rates. But again, that really goes back to the point we've all been making, and that's trust. You don't want to feel like your outside counsel is gaming you. You don't have time to review bills to that level of detail. I have one basic rule and it's very easy: You make me look good, I'll make you look good. You don't make me look good, you've got issues. Make my life

easier. Understand what is important to my company. Understand how I'm judged. And help me as a partner accomplish that. Because when you do that, that's the relationship. That's what creates the continued business. That's what builds the trust. Issues of excellence in delivery of legal services have pretty much gotten to the point, that's a given. Give me the cushion. Give me the icing on the cake. So those are two of the issues, but they all really kind of devolve and collapse into the issue of mutual trust.

CHARLES JAMES: Staffing is probably my pet peeve as an inside lawyer. This is an area where I'm not altogether sure that our outside law firms are getting it, which is that — my imperative is to buy legal services from you; that's what I'm trying to do. I am not trying to train your associates; that's your job. I'm not trying to create a beneficial work environment for your associates; that's your job. I'm not trying to pay for your library, help you achieve your Lexis costs, buy your new document management center. I'm not trying to do any of those things. I'm trying to buy legal services from you, and I think that there is a sense in which lots of these costs are transferred from your organizations as outside lawyers to me if I'm not careful about it. For example, we all talk about the hourly billing rate, and I hate to go back to that issue. But any law firm that thinks that their lawyers are just more valuable to me simply because 12 months have passed by, is wrong. And, quite frankly, we don't accept that at Chevron. We sit down at the beginning, at least with our preferred providers, and we talk about your

annual billing rate increase. And you very well may be announcing to the world and to those people at the law schools that your salaries are going up and whatnot, but that doesn't necessarily mean your rates to Chevron are going up by that amount. And also, one of the things that I think every law firm in this country ought never to do is send me a bill for a summer associate.

JOE CATALANO: The other thing in staffing is that as the number of hours that associates are imagined to bill annually keeps ramping up, we know that there's a certain drop-off in efficiency. If you're trying to get 50 hours of billable time a week, I'm sorry, it's



Mark Chandler and Charles A. James

just not going to consistently add value to my matter. And I think we on the buy side recognize that there's a drop-off in efficiency that we experience because all of a sudden it takes six hours to do something, if you were doing it midday on a Thursday, it would take you three.

— The In-House — Lawyer's Role in Litigation

JILL DESSALINES: One of the things that the in-house lawyer brings to the table is

hopefully a very intimate knowledge of the players, what's important to them, what their philosophies are, whether or not they've got their own budgets — because I find often that the people who protest the loudest have the least financial stake in the matter — understanding the power dynamics, understanding the metrics of their measurements for success. And in litigation, for better or for worse, there really is no upside. I mean, let's face it, you might have a plaintiff's case, a patent case and, yes, you might really ring the bell; but in our business, eight and a half out of ten times we're the defendant, maybe even nine times out of ten. And for the defendant, there really is no good news. "Okay, guess what, you got this bogus case dismissed. You paid a few hundred thousand for the privilege." Most businesspeople do not view that as a win-win situation. So I think as in-house counsel you have to understand where you have to direct outside counsel. I serve as liaison so that means that by the time that I've hired outside counsel, I've identified the people with knowledge. Now, that may not be 100 percent of them, but it is usually. You do all the investigation that you're able to do. If there are insurance or indemnification issues, usually that's handled in-house; if there are issues having to do with collection of documents to some degree, electronic discovery, that typically is handled at least initially in-house. But the key thing is to act as the liaison so that you know that you're acting as a team toward the common good.

CHARLES JAMES: We use a system designed to do what I refer to as front-end loading whereby we do an extensive amount of investigation; we do an extensive amount of risk assessment; we have looked at the case from the public relations perspective, the accounting perspective, the business plan perspective, etc. Then we get the business owner to participate in a discussion of setting

the litigation objectives. Our whole approach is really driven off of what the litigation objectives are. That's what drives the strategy; that drives the tolerance to the budget because setting a budget X of the objectives is really sort of senseless. And then we try to get alignment between our legal team and our business team on the business plan that comes from the objectives. But the most fundamental portion of this process is, one, ownership of the litigation by the businessperson and understanding of ownership because with ownership comes accountability; and making sure that there is complete alignment between the businessperson and the legal strategy and that legal strategy appreciates the risks and it appreciates the associated demands. Saying that you're going to fight a case very often for a lay person doesn't really help them understand what that means in terms of time, disruption. They haven't thought through the public relations hit of, for example, protesters outside your gate every other month or whatever. All of those things are part and parcel to making the decision about what you want to do to go forward. And once you have that, then you can assign roles and have a clear path ahead. Our whole system is built to make sure there's alignment on that path.

JOE CATALANO: We learn our case as well as we possibly can before we engage counsel; we want to have them get a good start from what we've done before the firm sets to work on strategy and tactical guidance and execution. We'd rather cull and dedupe the discovery before it gets to the firm and we do. I think we all learned that lesson a few years ago. And the systems, the tools available today are so much more robust to do that now than they were even two years ago. The electronic discovery arena has become so crowded, I call it Y2K without an end date, in terms of the number of advisors, the consultants and expertise and tools that

are available to manage that process. Thankfully, because so many of us were blindsided by the burdens a few years ago. Electronic discovery for a while was like the threat of a jury trial for a corporate defendant. Having to produce all of that stuff

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made the settlement value of cases that were otherwise worthless rather material. Out of necessity most of us have now learned how to address those issues more efficiently. So what we found is that we try to learn our case as well as possible before we engage counsel. Our businesspeople are intimately involved in our cases. And we are the liaison between the businessperson and the outside lawyer.

RICK BURT: When the case first comes in or the matter first arises or you see it arising, one of the important functions that our lawyers play is helping the businesspeople find the strategic setting for the litigation. You’ve been sued or you’ve been trying to work out a problem and your people always have been trying to work it out in good faith with the best of intentions and the other guy just isn’t quite as nice a person and they come at you with this lawsuit. Finding the right strategic setting, I think, is an important part of what my friends and colleagues here have mentioned about getting the businesspeople aligned with you, telling people — if it’s an IP case, a patent case, which is basic technology to your business, that’s pretty clear-cut. Often what we see are issues that arise between us and a relatively small client base and what is the best way to resolve that. Are there points of precedent we need to make here? Are there issues of client relations we have to be concerned about? Are there points of precedent that go beyond this client to our entire base in industry because there aren’t that many participants in it? Settling all that, if you can, understanding what your client’s motivation is. Jill said when you talk to your businesspeople, how are they measured. How is your adversary measured? If you’re dealing with somebody in our business, the promise to his company, “I can bring this project in on this schedule, on this budget,” and that didn’t happen, you’d better understand you’ve got somebody out there who for good reason has got something they’ve got to prove and how do you address that? For the lawyers who have seen a lot of litigation, I think that’s something they can really help with, particularly if it’s with a businessperson that maybe hasn’t seen too much, to say there’s a strategic setting for this where you’ve got to take into account your company’s motivation, their motivations and that’s going to have major effect on how it all plays out. Doing that up front is very important.

Dealing with Electronic Discovery

MARK CHANDLER: For electronic discovery, we approached it as a two-phase process. First of all, how do we build up the corpus. We want to make sure that everything that's out there that needs to be captured does get captured. So before we start culling anything, we want to make sure that the universe has been captured and we aren't missing things that would cause us exposure for failing to produce things that needed to be produced. Having built up a huge mountain of data, we then start at chipping away at the mountain and figuring out what isn't relevant to the case. And we've broken that down into about 30 different phases. And in some of them we employ outside consultants; sometimes we use our own tools. We've got the automatic backups for internal PCs and for structured data so that we, at least from an electronic side, are pretty sure we have the majority of what we're going to need before we even start. And then we start chipping away, chipping away, chipping away until hopefully we're left with only 2 or 3 percent that human beings actually have to look at and read. We've spent about \$2 million building the system that we use. And then it cost about \$40,000 a month, mostly for disk storage, to augment it every quarter.

What Do You Value in Your Outside Litigator?

JILL DESSALINES: Well, I think understanding the goals of the litigation, the business goals, using good judgment and communication and efficiency of practice, having the oversight that's necessary. Does the relationship partner truly understand what's driving me, our business, what our goals are, and how best to partner with us to accomplish those goals? That's what makes a great lawyer, whether it's a litigator or not.

JOE CATALANO: I think the term of art you just used, which is relationship manager, really needs to be understood by the law firm. If there isn't a lawyer that you can go to as the client and address any problem, whether it's a bad result or bad staffing or bad strategy or bad tactics, then you've got — then you don't have a relationship manager. You need a lawyer that you can go to and say, "This lawyer, I don't want that lawyer on my case."

CHARLES JAMES: That's one of the factors I think that is driving what I think we've come to call a convergence, which is to say that the firm really doesn't have to respect the relationship beyond the life of the matter. It has to be — if you want to be our partner, you've got to be our partner and understand all of the pieces of that. Quite frankly, we've had circumstances where we picked a relationship person based on the matter and we found that the issues are larger than perhaps that lawyer's stroke in the individual firm can be. And if you don't have that broader relationship with the firm, then you can't get it resolved because very often the person who may be in the middle level or the high middle of the law firm, they're looking at a set of imperatives and a set of metrics that they've got and how much billing credit and how much initiation credit they're going to get. I don't really care about your relationship credit and what have you. I really care about getting our work done consistent with our understanding of how we're going to do it. So I think that's one of the reasons that people are going to manage relationships with a smaller number of providers because then you can get that stuff addressed. With the five providers that we have as our national providers, if I have an issue, I call the managing partner, and I don't have to go through — he doesn't go through his committee. He says yes. And that's very important to us.

JOE CATALANO: And the point you just

made about law firm economics getting in the way of delivery of legal services is really a valid one. If the relationship manager has a vested interest in keeping that work within his or her unit and not getting it to the right unit, we're being ill served.

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RICK BURT: On the general point of the law firm and litigator understanding your objectives, if I can tell just a quick story. I managed a case that went to the Supreme Court; in which my company was successful. It was a companion case to the *Gore v. BMW* case on punitive damages back in the early 90's. And goes back down to a very, very difficult lower court. And we were represented by one of the leading appellate lawyers in the country and a wonderful human being and a phenomenal lawyer. And I said to him, "Look, let's talk to these people. As long as it's way

below the reserve on my company's books, we're all heroes." And he said to me, I'll never forget, "You darn corporate types, all you care about is the money." He was a really phenomenal lawyer — a Supreme Court litigator. And there was a point to be made here, and the court had ruled and, darn it, that lower court should follow that ruling and there shouldn't be any punitive damages. And I was thinking it's going to cost a lot of money and be a distraction of everybody's time. And in my mind, that story encapsulates what you want out of a law firm because that guy's heart was in the right place — he cared about the final result being consistent with the Supreme Court's ruling. But as general counsel, I just wanted to be done with the thing.

Key Factors in Selecting New Counsel

CHARLES JAMES: The one initial case is easy — that's the circumstance where we've had a matter that doesn't really fit very well within our preferred provider program. And, by the way, one of the most important roles of the relationship manager and the preferred provider is to tell me when this is not in their sweet spot. And firms that have not been successful — the firm for which the answer to every question is "yes," doesn't really stay a preferred provider for very long. Or the firm that's trying to force upon me their mediocre practices when it's pretty obvious they are mediocre doesn't stay a preferred provider long. I think for new providers, it's a matter of broadening your experience with our company through individual matters. One of the things that I saw as a new general counsel was, everybody wanted to come in and ask how do I get on the list? And the answer to it is, Go back to your office and wait. That's really how you get on the list. We know who you are and if we need you, we'll call you. But it's just a

matter of experience and delivering the mail when you do have that opportunity to provide good service.

JOE CATALANO: Another thing we look at — we're in a very peer-intensive arena. In California there are a lot of banks, and we're pretty active in the Financial Services Committee and the State Bar. And we like to think that we're paying attention to what's happening to our peer group and who is representing our peer group and what the opinions that are coming out of the courts are saying and who is winning and who is losing. Another thing that I like to do is to read whitepapers. If it's not something I care about, I'll dump it. But if I do care about it, I'll pass it to the rest of my group. I want to learn as much as I can about what's happening now. I have picked up the phone after seeing a whitepaper and talked to a lawyer about engaging that lawyer for a matter.

CHARLES JAMES: Joe, it's interesting you say that because of the number of hits versus the number of misses on those. The trick is for law firms not to send e-mail marketing material unless you have something new or interesting to say.

MARK CHANDLER: First, I'll point out an approach that isn't very effective with me. When I've hired a law firm to do a certain type of work because I know they have particular expertise, I really don't appreciate it when they then devote energy and time that they have with me not to talk about the thing I hired them for, but to try to sell me on their litigation department. I find cross-selling to be one of the most offensive activities that law firms engage in. On the other hand, occasionally, when I go to conferences, I'll see someone present and I'll say, "Gee, that person is really on the ball; they really understand this thing." I would say speaking at conferences where general counsel are going to be is a valuable thing to do. And word of mouth.

CHARLES JAMES: You folks in the law firm business think there ought to be some way that you can market these services more directly than you do. And I think it bothers you or irritates you; it makes me mad. When I'm sitting in my office and I'm opening my mail and a case has been filed against me and we've already answered the complaint and I get a six-page letter from some person saying, "Gee, I would like to be your lawyer." It just sort of seems like me calling up the Falcons and saying, "I understand you're playing football on Sunday; I'd like to be your quarterback." And the answer to that is you're not Michael Vick. We found Michael Vick, and you're not him so don't bother me. And I really think if you were looking for a way to save costs so that you could provide the services more effectively, fire your marketing director, fire your marketing department, stop having your associates write those tomes. You'll save a lot of money.

RICK BURT: I can think of two significant relationships with law firms which started from conferences. Conferences are one way for people to really see and get a sense of what you and your firm might be able to deliver.

JOE CATALANO: I don't agree that law firms should fire the marketing directors. Conferences and marketing associations are useful in getting law firm partners in front of lawyers who are hiring decision makers. I want to know who knows the areas that I'm worried about. I want to know who the experts are. I want to hear what they have to say so that I can raise my level of consciousness and so I can learn who the leaders in that thought arena are.

JILL DESSALINES: For me, it keeps coming back to one of the central themes and that's relationships. If you can get in front of lawyers or decision makers, that can be the start of a relationship. Getting in the door can be frustrating and might take a long, long

time. But once you get in the door, that's when you can show what you can do.

Diversity As a Factor in Selecting Outside Counsel

JILL DESSALINES: In selecting counsel, we talked about all of the factors except one, and that is diversity. Our corporate policy is to encourage diversity; we take that extremely seriously. One of my pet peeves is letting my outside counsel in the beauty contest, for example, know how important diversity is to me and having all kinds of wonderful colorful brochures arrive on my door only to have the team that ultimately staffs the case bear no relation to the brochures that were forwarded.

In-House Lawyers Need to Be Good Clients

CHARLES JAMES: Can I raise a topic that we haven't talked about? One of the things about this is that this discussion has been a lot of clients sort of blasting law firms and what have you. One of the things I think that's really incumbent upon us, and you said I think earlier, is to be a good client. And one of the things that we have focused on through our look-back and review process is what are the things that we're doing that get

in the way of providing effective legal services. And I can tell you that for the firms that have been honest with us, we have come to some real truths about how we litigate and how we approach things that were really important. For example, when we rolled out our e-discovery and document management solution, we thought we had invented water and it was tasty and low calorie and filling and everything else. And our outside providers provided us a lot of good input on how to make what really was a pretty good system a lot better. And one of the things I think is important about these relationship people is that we shouldn't be allowed to drink our own Kool-Aid either. And there ought to be an honesty about things; there ought to be a willingness, very often, to come in and say to us, "Well, we've got it wrong," or, "Quite frankly, you had your meeting, you set your objectives; you're not going to get those objectives unless you change your strategy or you change the objectives." And I think it's a point for both the outside lawyers to bring that candor to the relationship and for the people on this side of the table to be big enough to take it. And I think that that's an important element, getting that feedback and taking it to heart when it adds up, is really an important thing that in-house lawyers need to learn how to do.

