**Philippe Nordmann**
Wenger Plattner, Basel
philippe.nordmann@wenger-plattner.ch

**Maurice Courvoisier**
Wenger Plattner, Basel
maurice.courvoisier@wenger-plattner.ch

**Urs Feller**
Prager Dreifuss, Zürich
urs.feller@prager-dreifuss.com

# Session report: Inside counsel perspectives on management of complex litigation

The afternoon double session during the conference of the IBA Litigation Committee in Washington, DC in April 2010, held under the auspices of session chair Lawrence S Schaner, was dedicated entirely to a discussion on the nuts and bolts of the management of complex litigation, mainly from the perspective of inside counsel.

The first panel consisted of Matthew L Biben (Executive Vice President and Deputy General Counsel of the Bank of New York Mellon Corporation), Thomas A Boardman (Vice President & Deputy General Counsel of 3M Company), Philip Jeyaretnman SC (Rodyk & Davidson LLP), Randal S Milch (Executive Vice-President and General Counsel of Verizon Communications Inc) and Richard D Owens (Latham and Watkins LLP).

The first topic discussed was staffing. Whenever companies are faced with major litigation the question of who will work on a case arises. In-house counsel on the panel presented their companies' internal organisation (whether they have a litigation group, whether centralised or not, etc), and their strategies to control the process of staffing. For example, some companies have hired experienced trial-lawyers to better manage and control the process. The engagement letter proved to be of paramount importance to in-house counsel. At the outset of any engagement, not only should the partner at the top of the ticket be fixed, but also the rest of the team (including midrange-partners and associates). Some companies will not allow any other member of the outside law firm to work on the case, unless the engagement letter is amended in writing.

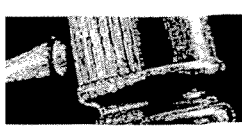
A lively discussion evolved over the inside counsels' view that they would prefer not have first, second or even third year-associates on a case because they felt they did not want to fund a law firm's training activities. The outside counsels on the panel replied that there were many tasks which could be done perfectly well by younger associates (like case law research and fact finding). Also, services by younger associates could be invoiced at much lower hourly rates which was in the interest of the client company as well.

The next topic was communication between in-house and outside counsel. The panellists were in agreement that the client company's expectations are paramount and should be clearly set out at the beginning. Most communication is done by e-mail or conference calls; face-to-face-meetings are reserved for very important matters. The need for (more) communication also depends on the significance of an issue for the company (for example, if its reputation is at stake).

The next topic was the litigation budget. In-house counsel stressed that the importance of such a budget should not be underestimated and that it showed whether outside counsel had really thought through the case. Outside counsels on the panel countered that litigation is a dynamic process, and the panel ultimately came up with the recommendation to always keep track of the original budget and to communicate (and justify) any deviation as soon as possible.

The last topic of the first afternoon panel was dedicated to the issue of multiple law firms working on the same case. In complex cases the need could arise that several law firms, in accordance with their different fields of expertise, work on one and the same case. In-house counsel had some reservations on such (sometimes inevitable) settings as they require more management efforts on their behalf.

Larry Schaner (Jenner & Block) led a further session during the conference of the Litigation Committee. The session concentrated on a number of issues which a corporation should consider when involved in complex litigation. The panel was made up of in-house and external counsel, namely Henry Z Horbaczewski (Senior Vice-President and General Counsel, Reed Elsevier Inc), Sharon Daly (Matheson Ormsby Prentice), Charles W Cohen (Hughes Hubbard & Reed), Thomas A Boardman (Vice President & Deputy





General Counsel, 3M Company) and Fei Ning (Jun He Law Offices).

In an overview presentation, Henry Z Horbaczewski pointed out some of the most relevant topics under this heading, inter alia, e-discovery, outsourcing, retention policy, privilege and confidentiality, communication with senior management and board members. These topics were then discussed in more detail among the panellists.

The panellists agreed that the new technologies posed an immense burden for the companies. Large corporations receive an average of 250 to 300 million e-mail messages per month, Horbaczewski cited from a recent report. The sheer amount of electronic data requires new forms of risk management. More than 90 per cent of the discoverable information these days is generated and stored electronically. It comes as no surprise that a recent study in the US found that the average for (American style) e-discovery litigation costs for a typical law suit are US$3.5 million.

A sophisticated corporate document management programme was regarded as compulsory in order to cope with these new technology-related risks. A corporation lives in constant fear of being sanctioned. A contract lawyer selects the information to be retained. Careful supervision of the contract lawyer is necessary and needs to be followed by a thorough review. It was also explained that the legal community will need to develop rules in order to cope with the sheer amount of information stored in e-documents. However, the likelihood of finding a smoking gun is still considered remote. In any case, it is essential that the record retention policy is reasonable, adhered to and understood by the management of the company.

The panellists then moved to outsourcing issues. Although some corporations make use of service providers from abroad (for example contractors in India) outsourcing may lead to a loss of confidentiality. It is likely that the legislator in some jurisdictions will be called to draw up rules in this area. In this connection, privilege issues were also discussed. If documents produced in one jurisdiction (for example, the US) are sent off to another jurisdiction, the corporation loses its capability to control confidentiality because of differing confidentiality rules. Further, e-documents contain metadata and hidden data that may pose serious risks if this additional data ends up in the hands of a hostile party. Two recent decisions were mentioned in this regard: litigation hold-related communication may be privileged initially, but the privilege may need to be waived in order to show compliance with preservation obligations.[1] In addition, failure to issue a written litigation hold, to prevent documents from being destroyed, constitutes gross negligence.[2]

One of the main challenges to in-house counsel remains the communication of litigation and reporting of such to senior management of the company. The legal in-house team needs to prevent management reading about new litigation in the newspaper before being informed internally. Therefore, regular internal reporting is crucial. Sometimes, senior management seem to suffer from selective amnesia as the members only remember opportunities and seem to have already forgotten the associated risks of a transaction or a business venture. From the external counsels' perspective it was noted that communication might be easier if the legal in-house team was not involved in the problem beforehand. Every one agreed that there is no easy way to communicate bad news.

**Notes**

1 In re Ebay Seller Antitrust Lit, (ND Cal, 2 October, 2007).

2 *Pension Comm of the Univ of Montreal Pension Plan v Banc of Am Sec*, 2010 US Dist, LEXIS 4546 at *10 (SDNY, 15 January 2010).