Shell’s counsel reveals how to handle a crisis

Beat Hess, legal director of Shell, took delegates through his checklist yesterday for corporates facing a scandal or regulatory investigation.

Speaking two and a half years after he dealt with an investigation relating to misstatements about the company's oil and gas reserves, Hess told the audience that full and open cooperation with the authorities is the best policy for counsel faced with a crisis.

In Shell’s case, he explained, the company knew that within days of announcing the misstatements it would face investigations from several regulators. “We took the position of cooperating fully,” he said.

Drawing on his experience, Hess shared with delegates his crisis management checklist, including the following advice:

- Preserve all documents and send out an immediate reminder to all.
- Don’t wait too long before disclosing a problem.
- Cooperate fully with regulators.
- Keep top management informed but manage the process yourself.
- Secure outside counsel.
- Address the concerns of management who might be potential defendants in litigation.
- Don’t play detective. Use outside counsel to do that.
- Involve your public relations firm from the start.
- Stay calm, be honest and use your judgment.

Hess spoke also of the need to condition the expectations of management, who he said will sometimes assume that the impossible is possible. But, while accepting that cooperating with authorities will not guarantee results, his main message was for counsel to “pack their suitcase immediately and go see the regulators” if a problem is uncovered.

The company got an enormous amount of credit for its truthful approach, he told the audience. Hess advises: “If you are or sound like you are protecting [the company], not only will they sound but they will be very aggressive…. Don’t try to be smart when you deal with regulators.”

Hess was speaking at the showcase session on corporate governance during which panellists discussed the dual role of in-house counsel as advisers to management and as gatekeepers responsible for policing corporate behaviour.

Opening the session Charles Lawton, legal adviser at Rio Tinto, said that despite extensive legislation after cases such as Enron and WorldCom corporate scandals are still happening. He pointed to current investigations concerning Dell and Hewlett-Packard as well as British Airways and Microsoft as examples of why the session was especially topical.

At the same time, companies are facing the complexities caused by regulators extending their reach beyond their own jurisdictions, he said. Speakers also turned attention to the controversial topic of legal professional privilege, which many see as under threat from regulatory pressure to waive privilege and some controversial rulings in European courts.

Jan Eijbouts, general counsel of Akzo Nobel, who has been personally involved in one of those cases spoke of his company’s experience seeking privilege over documents created as part of a compliance initiative within the company.

Speaking to IBA Daily News ahead of the conference, Lawton said: “Attacks on legal professional privilege are happening all the time. If what passes between a lawyer and a client can’t be held to be confidential between the parties then the rule of law is undermined.”
NURTURE IS THE KEY TO DEVELOPING STAR PARTNERS

ATTRACTING AND MAINTAINING THE TOP TALENT IS THE ONLY WAY TO SUSTAIN COMPETITIVE ADVANTAGE, A PAKED SESSION ON STRATEGIC LEADERSHIP HEARD YESTERDAY. IT WAS STANDING ROOM ONLY IN THE LAW FIRM MANAGEMENT COMMITTEE AND PUBLIC AND PROFESSIONAL INTEREST DIVISION SESSION AS LEAD-

ING ACADEMICS JOINED SENIOR PARTNERS TO REVEAL HOW THE BEST LAW FIRMS STAY AHEAD OF THE REST.

STAR PARTNERS’ PERFORMANCE CAN MAKE OR BREAK A LAW FIRM, SAID BORIS GROYSEGB, “IF THE NATURE OF THEIR LAW-YEAR WAS CORRECT THEN ALL WE WOULD NEED IS THE DNA OF Star PARTNERS TO CREATE THE GREAT LAW FIRM.” GROYSEGB SAID THAT HIS STUDIES HAD TAUGHT HIM THAT THE NATURE MYTH IS WIDELY HELD: 85% OF RESPONDENT PARTNERS TO ONE STUDY THOUGHT THAT STARS WERE THE RESULT OF PURE INNATE ABILITY.

THE REALITY IS THAT STARS ARE PRODUCED BY THEIR ENVIRONMENT AND THEIR SKILLS AND EFFECTIVENESS ARE NOT READILY TRANSPORTABLE. THE MESSAGE IS THAT THERE IS NO SUBSTITUTE FOR INTERNAL DEVELOPMENT IN WHAT IS A STAR-INTENSIVE BUSINESS. THE PANEL ALSO REVEALED THAT STAR MOBILIZATION CAN BE HARMFUL TO THE INDIVIDUAL AND THE HIRING LAW FIRM. “IT CAN TAKE FIVE YEARS TO REPAIR THE DAMAGE,” SAID GROYSEGB. STUDIES SHOW THAT TOP PARTNERS’ OUTSTANDING PERFORMANCE IS A FUNCTION OF THEIR ABILITY ON ONE HAND AND RELATIONSHIP NETWORKS ON THE OTHER. THE NETWORKS ARE BASED ON TRUST BUILT UP WITH CLIENTS, COLLEAGUES, REGULATORS AND MEDIA SAID THE PANEL. RELATIONSHIPS TAKE TIME TO DEVELOP AND EXPLAIN THE DAMAGE, AT LEAST IN THE MIDDLE TERM, OF LATERAL HIRE RELATIONSHIPS.

THE Plaintiffs argued that Disney’s directors failed to fulfill their fiduciary duties in regard to the relationship between shareholders and directors. Michael Ovitz was hired by Disney in August 1995 only for his employment to terminate in December 1996. Under the terms of his employment agreement, his “non-fault termina-

"tion” resulted in: the balance of his salary, an imputed amount of bonuses, a $10 million termi-

nation fee and three million stock option.

T. This case is a shock to many Americans, said Justice Steege, but the stance of the Delaware court remains the same. Delaware is a director-


primacy state and any change in the relationship between shareholders and directors had to come through a legislative rather than litigous path.

The plaintiffs argued that Disney’s directors failed to fulfill their fiduciary duties in regard to the hiring or termination, and sued for over $200 million in damages. The court rejected the plaintiffs’ claims and concluded that courts must uphold the business judgment rule. The business judgment rule affords directors the privilege to make business decisions in good faith, according to Delaware law. Chief Justice Steege used the August 2005 Disney case to illustrate the court’s position on the partnership relationship between shareholders and directors.

NURTURE IS THE KEY TO DEVELOPING STAR PARTNERS

The myth is that stars are produced by pure innate talent. The reality is that stars are produced by their environment and their skills and effectiveness are not readily transportable. The message is that there is no substitute for internal development in what is a star-intensive business. The panel also revealed that star moves can be harmful to the individual and the hiring law firm. “It can take five years to repair the damage,” said Groyseg. Studies show that top partners’ outstanding performance is a function of their ability on one hand and relationship networks on the other. The networks are based on trust built up with clients, colleagues, regulators and media said the panel. Relationships take time to develop and explain the damage, at least in the short to medium term, of lateral hires. Relationships represent a non-transferable resource said Groyseg, one of the essential features of competitive advantage at a law firm. Delegates also heard from Guy Beringer and Gerard Tavernier, senior partners of global firms Allen & Overy and Gide Loyrette Nouel respectively. Beringer detailed his own firm’s experiences with a strategic thinking programme, conducted in partnership with Judge Business School in the UK, and emphasized the value of involving senior support staff in strategic planning. “The responsibility for leading change lies at the very top,” said Beringer. “The profession as a whole needs to be more proactive on issues such as diversity.”

Panelist John Conroy of Baker & McKenzie also stressed the importance of diversity to client relationships at global law firms, warning lawyers not to underestimate the value of developing local talent. “Firms cannot provide effective global service with a bunch of ex-pats,” said Conroy. All firms, not just those with global networks, need to recognize the importance of effective talent management said Conroy. “Hiring the best talent is not enough,” he said. “‘Talent must also be cultivated, developed and effectively delivered.”

Conroy went on to caution that lawyers must do more than pay lip service to staff development and that genuine effort is needed to produce results. Training schemes derive credibility within the firm from the investment that goes into them, he said. Conroy revealed that Baker & McKenzie hired a team of 16 organizational psychologists to help put together its talent management and partner-learning scheme, which was conducted in partnership with the Kellogg School of Management.

THE PROFESSION AS A WHOLE NEEDS TO BE MORE PROACTIVE ON ISSUES SUCH AS DIVERSITY.
Legal professionals from around the world met at a joint session of the Access to Justice and Human Rights Committees yesterday to discuss the difficulties of navigating their countries’ various barriers to justice, which disproportionately affect the poor across geographic and cultural boundaries.

J Parker MacCarthy, incoming president of the Canadian Bar Association (CBA), talked about the lack of access to legal aid for the poor in Canada, a reality which has recently inspired the CBA to bring a test case against the province of British Columbia (BC). The CBA is seeking to establish a constitutional civil right to legal aid in BC, a system that MacCarthy says has been “dismantled completely” since the province’s change of government in 2002. Although the BC Supreme Court recently ruled against the case, MacCarthy says the CBA will appeal, and expressed “profound frustration about government indifference to the plight of litigants who cannot afford legal representation.”

“Everyday in British Columbia, people who can’t afford legal aid fall by the wayside,” said MacCarthy. “Without legal access, justice is really just a hollow ideal.”

Limited access to legal aid was also identified as a major barrier to justice in Fiji by panellist Graham Leung, president of the Fiji Law Society. Leung said that the provision of legal aid for civil defendants and cases “is nonexistent,” a fact which puts the working class and indigenous members of Fijian society - who comprise 56% of the population - at a major disadvantage. According to Leung, Article 28 of Fiji’s constitution stipulates that every person charged with an offence has the right to legal aid “if the interest of justice so require,” a qualification which further limits the extent to which legal aid is effectively available. “The challenge for all of us is to discover ways of getting more money from the public purse to fund legal aid schemes,” said Leung.

Meanwhile, in other regions of the world, the barriers to justice are far more basic. Justice George Adesola Oguntade of Nigeria related his experience with congested and corrupt courts, which are in part a result of the country’s turbulent history since the military’s overthrow of the democratically elected government in 1966. “In the period of military rule, the economy was badly plundered,” said Oguntade. As a result, the influx of wealth from crude oil during the Gulf War affected a “massive rural-urban migration” which the poorly-maintained infrastructure could not withstand. Today, problems including the “epileptic” supply of electricity in court rooms, absence of vehicles to convey prisoners from prisons to the courts and a “poorly paid and poorly trained” police force all contribute to Nigeria’s inefficient legal system. “If we deny justice, we have deemed it worthless,” said Oguntade.

Similarly, in Nepal, problems obtaining access to justice involve fundamental issues such as corruption. “It’s very common to hear of lawyers who play cards with judges on the weekends and always lose,” said panellist Sudheer Shrestha of Kusum Law Firm in Kathmandu. Shrestha also said that conditions such as widespread illiteracy, extreme poverty and gender discrimination make it extremely difficult to obtain justice in Nepal. Although some effort has been made over the last 50 years to improve the situation, most recently by the United Nations Development Program, “these efforts are a small dot in a big, vicious circle,” said Shrestha.

Other topics discussed during the all-day session included the challenges presented by shariah law, the International Legal Assistance Consortium’s (ILAC) experiences with barriers to justice in Iraq and the problems obtaining justice for the disadvantaged in Haiti.

“It’s very common to hear of lawyers who play cards with judges on the weekends and always lose”

Sudheer Shrestha, Kusum Law Firm in Kathmandu

“If we deny justice, we have deemed it worthless”

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The dangers of trading in art

One might be forgiven for thinking that the title of yesterday’s session on the art trade, “How to earn a living dangerously”, was a little spurious. But co-chair Joel Simon of New York law firm Serko Simon Gluck & Kane, was anxious to point out that this was not the case: “I don’t use the word dangerous speciously. Art trading has become dangerous work. It’s also become very lucrative, which has introduced some bad elements.”

The number and scale of thefts has increased, leading the US Federal Bureau of Investigation to set up an Art Crime Program in 2004, and the level of enforcement around the world has risen. The Swiss panelist, Yves Jeannraud of Schellenberg Wittmer, detailed Switzerland’s first law that specifically addresses art crime, passed last year, and the level of enforcement has increased. In the last year the J Paul Getty Museum in Los Angeles and the Metropolitan Museum in New York have both returned ancient pieces, to Greece and Italy respectively, that the originating counties claimed wereeffectively stolen in past centuries.

Looking at the Duke’s records, Sotheby’s found that the Duke had excavated the piece himself on the Via Appia in Rome in 1817. Unfortunately, the trail went cold after the Second World War.

Contacting the owner of the note, however, found that the piece had been inherited from a distant cousin, who had bought the piece in the same county of northern England.

It is Oury’s intention, in his IBA role, to announce the launch of an urgent issues website alerting IBA colleagues to threats requiring legal intervention, ranging from an overseas national being tried in a foreign country and requiring fair trial assistance (Oury is currently representing Omrie Golley, a former Revolutionary United Front spokesman in Sierra Leone, charged with treason) to new legislative proposals. He feels that law has been through a commoditization and is not seen as a profession any more. Lawyers are seen purely as a product, removing the industry’s fundamental sense of being in a position to influence.

“Lawyers, regardless of speciality, need to be in a position to pursue justice and fairness”, he says. “The role of the Human Rights Commission should be to target lawyers as a resource and to educate lawyers globally as IBA members to enfranchise them in the struggle for human rights, even if their day-to-day work is M&A. It stems from the original...
a sense of justice

principle of being a lawyer, whether paralegal or judge: upholding the rule of law. The legal community needs to recognize the need to be zealous advocates and custodians of justice in a global environment where realpolitik continues to undermine justice. After all, the Rwandan appeal was by and large generated by a group of lawyers very committed to the need for justice. It is often said, and I think it is correct, that there can be no peace without justice - accountability for victims who have suffered grave human rights violations.

The obstruction of realpolitik

The idea of realpolitik supplanting justice is a recurring theme with Oury. “There are many examples of realpolitik stifling justice in history,” he says.

“An example is the Turkish massacre of hundreds of thousands of Armenians in 1915. An amnesty was granted to those responsible because Turkey was seen as politically important against the former USSR.

“A related and profoundly concerning theme is the effect of realpolitik on the war on terror”, he continues. “It is seemingly difficult for governments to use existing, domestic criminal processes as it is somehow seen as slowing the delivery of effective justice. A recent example of this shift in the UK was the proposed introduction of control orders as part of the Prevention of Terrorism Act 2005. A control order can restrict a person in numerous ways, ranging from surrendering passports to being under house arrest, and the order can last indefinitely and the High Court can implement without the individual being surrendering passports to being under house arrest, and the order can last indefinitely and the High Court can implement without the individual being surrendered. Oury feel there is much support from commercial lawyers for his ideas? “There must definitely be. It is a case of extending your ethics, and it is up to Oury Clark as a firm to break down walls - many commercial lawyers are just as analytically adept as criminal lawyers. That is the main challenge: to be able to tap into the lawyers in commercial law firms who would be willing to participate and get them involved. In many ways it has been like Beckett’s Waiting for Godot, with a number of lawyers waiting patiently for the website to finally be up and running.”

“The difficulty for most lawyers is actually making the journey to a place like Sierra Leone. And that’s where the urgent issues website comes into play”

James Oury, Oury Clark

Wednesday, 20th September 2006
between 9:30am and 12:30pm at the Pro Bono Session entitled ‘Who’s doing the best pro-bono work? What models are being developed? How can they be adapted?’

Thursday, 21st September 2006
between 2:00pm and 5:00pm at the Human Rights Law session entitled ‘Guantanamo Bay – where rights end?’.

‘Sometimes we work for free... sometimes we work for freedom...’

James Oury
Senior Partner
Chair - Human Rights Committee

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IBA Daily News - Thursday, September 21 2006
Saving privilege rights

Ben Maiden looks at how lawyers in the US and Europe are responding to pressure on attorney-client privilege.

Lawyers may not enjoy the same spiritual or tax-exempt status as priests, but they have traditionally shared a form of confessional. Both parishesioners seekingatonement and clients seeking more worldly advice have traditionally been able to speak freely with their chosen saviour without fear that what they tell them will be made public or used against them. In recent years, however, that confidence has been eroded for lawyers’ clients.

This erosion has been most obvious in the US, where inhouse counsel in particular have been caught in a perfect storm between government prosecutors, regulators and sentencing guidelines. Scandals arising from the collapse of Enron, WorldCom and other high profile companies in the early part of this decade have put US government investigators on high alert. Not only have they faced renewed political and public pressure to pursue more aggressive enforcement, but it leads to huge losses for shareholders and employees, but the complex and cleverly disguised nature of many schemes led investigators to question how they can best be rooted out.

It was in this atmosphere that, in January 2003, then-US deputy attorney general Larry Thompson issued a document called “Principles of Federal Prosecution of Business Organizations”, otherwise known as the Thompson Memorandum. In most respects the memo reiterates an earlier document issued in 1999 by Thompson’s predecessor Eric Holder. Both papers lay out a series of principles that they describe as guidance for Department of Justice (DoJ) prosecutors in deciding whether or not to bring charges against a company.

One of the factors both memos say should be considered is “the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protections.” In other words, when deciding whether to indict a company a prosecutor should bear in mind whether it has cooperated and given up its right to attorney-client privilege. The phrase is one that has sent shudders through the ranks of inhouse counsel, defence lawyers and corporate directors facing investigation.

Although the DoJ insists that the Thompson Memorandum is simply a list of guidelines, lawyers who have advised companies involved in investigations over the last few years say prosecutors are using it more as a set of rules, or at least as standard practice. “It has become almost expected by prosecutors and regulators that companies will waive their rights to privilege. What’s surprising is that they have been denying that this is going on,” says Bruce Yanetti, co-chair of Debevoise & Plimpton’s white-collar practice group, former prosecutor and co-chair of the American Bar Association’s litigation section’s task force on attorney-client privilege.

William Ile of M Killick & Aldridge, chairman of theABA’s Presidential task force on attorney-client privilege and a former general counsel of Monsanto, agrees that prosecutors often apply pressure to secure waivers. “When we are put on privilege by the DoJ and the SEC is considering pulling out of the US. Now the pressure is on inhouse counsel and private practice lawyers to find that it is happening,” he says. “And not worse than that is the perception that it is happening.”

This trend was compounded in October 2005 when then-deputy attorney general Robert M Altman issued a memo directing US attorneys to set up their own formal attorney-client privilege waiver review processes. The move was intended to restrain prosecutors from overly zealous attempts to secure waivers. In reality, however, it also arguably helped to institutionalize the practice of asking for waivers and potentially added confusion by allowing each district to write its own review procedures.

The main US financial regulator, the Securities and Exchange Commission (SEC), has also been reviewing its enforcement practices over recent years. In a 2001 document known as the Seaboard R eleise, the SEC outlined 13 factors that it would consider when making decisions about whether to bring charges. These were not dissimilar in scope to those outlined in the DoJ memos and also included consideration of whether the company voluntarily disclosed information to the SEC. “In some cases,” the release noted, “the desire to provide information to the Commission staff may cause companies to consider choosing not to assert the attorney-client privilege.”

The old saying warns that when America sneezes the world catches a cold, but across the Atlantic in European lawyers have so far been spared the worst symptoms suffered by their US counterparts in the squeeze on privilege.

In the UK, for example, the Financial Services Authority (FSA) has in general not followed the lead of its US counterpart the SEC, despite fears a few years ago that it would do so. This may in part be a result of the high profile Three Rivers litigation, which despite a tortuous and twisting series of rulings was eventually settled by the House of Lords in such a way as to give greater comfort and clarity to those taking part in investigations.

Defensive lawyers report that investment banks in particular have adapted their behaviour towards being more open with the authorities. “There is a tendency for financial institutions not to want to be seen to be hiding behind privilege to their regulators,” says Calum Burnett, a partner in London who has spent time with the FSA’s enforcement division.

This openness often manifests itself in banks volunteering to share with the FSA reports covered by privilege that are produced by law firms hired to conduct internal investigations. According to Burnett, the FSA will gratefully accept such reports but generally not press for further waves of privilege. This contrasts with accounts of investigations involving the DoJ, which lawyers say will tend to take the report and press for more.

Multinationals based outside the UK, however, are potentially subject to the involvement of US authorities in investigations. This applies particularly to those whose shares are listed on a US stock exchange and are therefore registered with the SEC. The demands of complying with Sarbanes-Oxley and in particular Section 404, which requires companies to give an auditorattest report on their internal controls over financial reporting, have led many companies to consider pulling out of the US. Now the pressure is on inhouse counsel and the SEC is acting as a further incentive to de-register. According to Burnett, for example, if an investigation involves both UK and US components and the US authorities secure a waiver then banks will often spurt over to their US privilege.

Lawyers in continental Europe face their own questions of privilege, which will be discussed in several sessions at this year’s conference. These questions centre on whether inhouse counsel should be regarded as lawyers in the same way as their private practice colleagues, and therefore whether they should be extended the same rights of privilege.

The standard, for inhouse counsel is based on the 1982 ruling in AM&S, Ltd v Commission of the European Communities. The judgment limited privilege to communications between a client and an independent lawyer entitled to practice his profession in a member state. In many EU countries inhouse counsel are not regarded as independent since they usually only have one client (their company) and are thus protected from former local bar associations. Member states are split almost exactly down the middle on the issue, with 13 of 25 countries denying privilege in inhouse counsel.

Changes may be in the air, however, with many in the legal profession arguing that the role of inhouse counsel has changed since AM&S. Some civil law jurisdictions, including France, are considering changes to their rules. The continuing AKzo Nobel dispute could also overturn AM&S if the client is seen as the company’s saviour without fear that what they tell them will be made public or used against them. In such an environment agreeing to waive their privilege could be essential.

Not all lawyers agree with this approach, however. “I’ve always been suspicious of the view that a client with criminal exposure can significantly reduce that risk by waiving its privilege, unless doing so will reveal evidence that the client’s innocence,” says David Greenwald, a partner in the litigation department of Cravath Swaine & Moore and a former lawyer in the US Attorney’s Office for the Southern District of New York.

“I tend to counsel clients against waiving their privilege, because I question whether it
achieves the effect that prosecutors claim it will have,” says Greenwald. “I’ve not found it difficult to persuade many clients not to waive, but that decision must be carefully taken based on a variety of factors.” Such factors might include the risk aversion of the client, the strength of its case and what the privileged documents contain.

When conducting interviews as part of internal investigations, outside lawyers say they now routinely caution employees to assume that their company will waive its privilege and that therefore anything they reveal in the interview could also be given to the prosecutor. When many employees may believe differently, lawyers warn them that the privilege belongs to their company, not to them as an individual. Such warnings can do little to help the employee who may wish to remain silent, however, since most corporations fire workers who do not cooperate.

A further challenge for companies and their lawyers when waiving privilege is the risk they run in terms of civil litigation. The plaintiff bar has been quick to seize on the release of privileged documents to investigators, arguing that once privilege is waived the documents should be made available in discovery. Companies can protect themselves to some degree if they can convince the investigating authority to sign a confidentiality agreement, and the SEC has been particularly cooperative in this respect. However, such agreements may be harder to reach with some prosecutors and even if signed are no guarantee that plaintiffs will not be successful. Defence lawyers report that in the vast majority of cases companies have been unable to keep their waived documents private. “My working assumption is that a voluntary waiver to a government agency will be treated in any subsequent litigation as a general waiver,” says Greenwald.

Backlash

At a macro level, opposition to the DoJ’s policies has crystallized in the shape of the so-called Coalition to Preserve the Attorney-Client Privilege. The coalition includes such diverse, and unlikely, partners as the U.S. Chamber of Commerce, the American Civil Liberties Union, the Association of Corporate Counsel (ACC) and the Business Roundtable. The ABA is also working closely with the coalition, albeit its internal rules prevent it from being a formal member. These influential groups are lobbying for the DoJ to review the guidelines of the Thompson Memorandum and to reassure the privilege principle. The ABA and the ACC, for example, have both written to attorney general Alberto Gonzales to ask him to rethink his department’s policy.

In March of this year the House Judiciary Committee’s subcommittee on crime, terrorism and homeland security heard testimony on attorney-client privilege. Of four witnesses only one, R. Obert McCullum of the DoJ, supported the Thompson Memorandum approach. He argued that the Department recognizes the value of privilege and that his 2005 memo was intended to prevent federal prosecutors from requesting a waiver without a supervisory review. He also asserted that waivers should not be asked for “routinely”, but only when they are necessary.

The other witnesses expressed more concern. Dick Thornburgh, a former attorney general and now of counsel with Kirkpatrick & Lockhart Nicholson Graham, said: “While the tone of these documents may be moderate … it has by now become abundantly clear that, in actual practice, these policies pose overwhelming temptations to prosecutors seeking to save time and resources and to target organizations to save their very existence. And each waiver has a ‘ripple effect’ that creates more demands for greater disclosures, both in individual cases and as a matter of practice.”

The coalition also presented the results of a study on privilege when giving evidence to both the judicial subcommittee and, the following week, to the U.S Sentencing Committee. According to the survey, 75% of in-house counsel and private practice lawyers agree that a “culture of waiver” has developed to the point where government agencies expect companies under investigation to broadly waive privilege. Among those who, or whose clients, had been subject to an investigation 30% of in-house counsel and 51% of outside lawyers reported that the government had expected a waiver to be given as a condition for engaging in bargaining or to consider offering more lenient treatment. Of respondents who had been investigated, 55% of outside counsel and 27% of in-house counsel said that a waiver had been requested directly or indirectly by the investigating agency, rather than having been inferred or volunteered.

Despite the influence of the DoJ and regulators such as the SEC, these efforts are beginning to have an impact in terms of gathering congressional and judicial support. At the end of the judiciary committee hearings in March, committee member R. Obert McCullum of the SEC announced that he would introduce bi-partisan legislation if nothing was done. “I am concerned about attorney-client privilege because I can see slippage in that privilege. Today it’s the corporation; tomorrow it’s the priest that I might have gone to confession to,” he said. Following its own hearings in March, the Sentencing Commission announced that it was amending the commentary to Section 8C2.5 by removing the controversial reference to attorney-client privilege. The Commission acknowledged that it had received comment and testimony to the effect that the offending sentence “could be misinterpreted to encourage waivers”. The SEC has also been thwarted in some regards. In 2003 the SEC introduced up-the-ladder reporting requirements for lawyers as requested under Section 307 of the Sarbanes-Oxley Act, which had been passed by Congress in response to corporate scandals. Although not included in the Act, the SEC did introduce two proposals for so-called noisy withdrawal that would require lawyers to resign from representing a company and to tell the regulator that they are doing so if they fail to dissuade their client from pursuing improper actions. These proposals sparked uproar in the legal profession, with critics saying they would further undermine attorney-client privilege. Although the proposals have not been formally dropped, no further public action has been taken and most observers believe they have been shelved, at least for the foreseeable future.

The DoJ’s policies also have come under fire from the judiciary. In June, Judge Lewis Kaplan of the Southern District of New York strongly criticized the Thompson Memorandum in two rulings on a case involving former employees of KPMG. The rulings took issue with a part of the Thompson Memo that has been interpreted as suggesting that companies can win favourable treatment from prosecutors if they refuse to pay employees’ legal expenses, something that companies have traditionally done as a matter of course. As with privilege waivers, the DoJ insists that the memo is merely a set of guidelines, but according to Judge Kaplan: “KPMG refused to pay [the employee’s legal fees] because the government held the proverbial gun to its head.”

Although not addressing the question of privilege directly, Judge Kaplan’s rulings and criticism of the memo suggest an agreement with other critics who complain that prosecutors are being overly zealous. “The Kaplan opinions shine a spotlight on the compulsory nature of the Thompson Memorandum guidelines,” says Bruce Yannett at Debevoise. “I hope it’s the beginning of a judicial backlash but it’s too early to say.”

How far that backlash goes will depend to a degree on the political climate. With important mid-term Congressional elections approaching in November, a change of tack could be in the wind.

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How to organize the modern law firm

Changing markets mean law firms are increasingly complex organizations. The solution can mean to look beyond rigid structures, say David Maister and Patrick J McKenna.

Large law firms today are structurally complex, with management and partners overburdened by time-consuming and often conflicting roles. We frequently hear comments like this from members of management:

“We are divided into departments and discipline-based practice groups. We also have industry groups, and a grid of functional offices. As a result, we are coordinating the many services we provide to our best clients. All of these departments, practice groups, industry groups and client teams are organized across geographic locations. It’s not at all clear what should each of these groupings be responsible for, and how their activities should be coordinated and evaluated.”

Then, individual partners will weigh in: “As a trial lawyer I’m first and foremost a member of the litigation department. Because most of my litigation experience is with employment matters, I am a member of the labour and employment practice group. And as I have a good amount of my work with WalMart and McDonald’s I am active on those two client teams, and also on the firm’s retail industry team.”

And finally, from the managing partner: “If you are a key player in this firm, you can spend an inordinate amount of time in meetings. I participate in no less than 10 meetings a month myself. There has got to be a better way to organize our firm for effective operations.”

There is a better way, but the way firms organize and manage has not kept up with their increasing complexity as businesses. Eventually – we think sooner rather than later – this will impede their continuing success.

Not only do modern firms have more types of organizational groupings than in the past, but these groups now have more responsibilities than the simple generate and sell work goals of the past. To survive and flourish, individual groups within today’s law firm are accountable for client loyalty, knowledge transfer, development of their people, and the thinking of firms.

Structural changes alone will not resolve conflicting goals and resolving these questions in our book First Among Equals: Structural and Process Matters, we argue that the solution for an individual firm must always address three aspects of organizational axes.

1. Examine structure, process and people

We would first observe that the solution for an individual firm must always address three aspects of any organization structure: how are we organized; process - how different levels of decisions are to be made; and people – appointing the right individuals to play the complex roles that make up a firm. One dimension will solve the problem: all three must be examined.

2. Recognize shifting priorities in structural design

Structural changes alone will not resolve conflicting priorities and demands for resources, but structure does nonetheless matter. The evolution of professional service firms over time is suggesting that some structural approaches do work better than others. Most successful global firms, in a broad array of professions have elevated the importance of their different organizational axes.

We would argue that there is a general trend towards making the top get client industry the most important (and organizationally powerful) grouping. Clients repeatedly telling their professional service providers that they had better get to know and understand their business have largely driven this.

Next, in authority and emphasis, comes the specifically-targeted client team. Few sophisticated clients today believe law firms can be able to offer the level of seamless service across all the disciplines that they seek. Well-orchestrated client teams are the only answer to making any seamless service representation a reality.

Don Lents of Bryan Cave notes “It is my sense that there is a growing focus on client teams, and the need for such teams to be front and center in the thinking of firms.”

Third, and increasingly less power and responsibility inside most organizations, are the traditional discipline or service-line groups, built around a focused technical speciality. Firms need to have highly focused and skilled technical people, but few, in most professions, are still primarily organized that way.

Finally, (and this is a revolution) the trend has been to make geography the least important and powerful dimension of the complex matrix. In the past, the office head (or country head in large firms) was the source of all resources and the arbiter of all. Today, in many firms, an office head may preside over a location whose professionals all belong to groups headed and controlled by a powerful partner located elsewhere.

This is not meant to denigrate the role of the geographic leader. As Bob Dell of Latham & Watkins points out: “Having the right leader in an office can be extremely effective in facilitating the success of all the other groups therein.” There seems to be something about physical presence combined with a leader who is perceived as less biased toward any group that can be very powerful in resolving competing demands.

3. Establish mandates for each group

Even if you have an ideal structure, there will always be problems with coordinating cross-boundary resources and dealing with conflicting priorities. You cannot make all cross-boundary issues go away by simply redesigning the boundaries.

Beyond structure, firms must ensure that each group has a clear mission (or mandate), that is understood by those inside and outside the group. It is apparent, if not obvious, that if our experience is any guide, for firms to launch groups of different kinds with ambiguous charters, and then leave it to powerful (or not-so-powerful) group leaders and rainmakers to determine through negotiations over time precisely how the groups will interact.

Not examining the issue in advance rarely achieves an optimal result. Under such an approach, power rather than principle determines group goals, and how groups will interact, and we believe this leads to lower performance.

Resolution of conflicting goals and clear, agreed guidelines for decision-making over trade-offs situations must be made in advance. We discussed specific procedures for addressing and resolving these questions in our book First Among Equals (Free Press, 2002.)

We also believe that firms must stop treating all groups alike (with one mandate, one style of leadership) for, administratively, it is impossible to use different types of groups for different things, lots of little teams for client-level relationships, one large central group for financial and administrative services. A large, growing, and complex law firm doesn’t have to be (in fact, can’t be) made up of units which have similar roles, similar goals, have the same targets and are managed in the same way.

4. Clarify agreements within the groups

Firms can successfully have many teams of different kinds, but there needs to be a clear understanding what team membership implies. As a matter of reality (although not, alas, reality in some firms) there also needs to be a limit on the number of teams (and the number of roles) one person can play.

For teams to work, there need to be clearer, more explicit guidelines (even rules of engagement) that team members have agreed to observe. Clarifying team members’ rights and obligations can go a long way to becoming more efficient and effective. (Even as simple a rule as “you must do what you said you were going to do” would transform some firms and save a lot of wasted meeting and planning time.)

The need for such agreements, while always wise, has become ever more critical in a virtual world. As Harry Truehart, chairman of Nixon Peabody observes: “Getting people and procedures that facilitate effective management at a distance is the biggest challenge in making groups work.”

We believe that if far-flung groups made up of many autonomous individuals are to make cohesive decisions over time, then it is necessary that the group members agree in advance the principles on which they will base their decisions - the guidelines the group members agree to follow. Only with such an agreement in place can a decentralized organization make consistent decisions.

Part of the solution may involve thinking of and formalizing different levels of team membership. For example, levels of team membership might include: full decision rights (possibly called team leadership), right to be consulted (team membership) and right to be kept informed (team affiliation).

5. Choose the right group leaders

Many law firm leaders believe that selecting the right leaders (and having enough of them) is more important than structure or process.

Peter Kals, managing partner of Kirkpatrick & Lockhart, states the view forcefully: “Structure and process – while as essential to a law firm as a skeleton and a nervous system to a human – are prone to ossification and thus fundamentally at war with the dynamism of the marketplace.

People, on the other hand, are not. We try to elevate the empowerment of our people over the organizational niceties of structure and process except to the extent that the structure and process features work to empower our people.”

Choosing the right people for leadership positions was always important, but is even more critical in complex organizations.

Consider just some of the (newly important?) skills that today’s group leader must have:

• Tries, filled with (most in) motivating and influencing people they never see in person.
law firm

- The ability to delegate and trust others to manage important relationships
- The ability to play a "linking-pin" role, simultaneously thinking about the overall good of the firm while taking care of the need of the unit they are responsible for; and
- The ability to manage people who have core disciplines other than the one in which the leader was specifically trained.

In our experience, many firms have not really thought through the requirements of today’s leadership roles. It is a common syndrome that all initiatives (client team, industry, geographic, functional) are seen as important, so the same partners always end up on all of the committees.

As a result, it is somewhat hit-and-miss as to whether the right people get selected for these roles, their mandate is clear, their performance as leaders discussed and evaluated, and whether they receive any assistance or guidance in learning how to perform the role.

Not only does this hurt the firm by (possibly) leading to less effective team leadership, but it’s not clear that it is wise to consume the scarce time of valuable people by asking them to manage or get involved in everything. This is simply economics – a valuable resource should always be focused on its highest and best use.

Of course, to make this work, there is a need for key players to be willing to let other people decide some things even when they’re not there – a situation which does not exist at all firms.

We do not mean this to be a throw-away line. To effect real change firms must not try to establish theoretically correct structures and processes, but must have honest discussions among power partners about the types and nature of the firm’s group processes that would, in fact, be honoured.

We have seen too many firms go through the motions of putting in place what appear to be sensible organizations, when everyone knows that certain key partners will not adhere to the policies that have been adopted.

We’re not idealists here – we recognize the realities of the need to accommodate personalities and special situations. But we also do not believe that progress is made by pretending or obtaining false consent. That is why organizational solutions must be custom-designed for each firm, and need to be the result of a comprehensive review, not, as is so frequently the case, the net result of an accumulation of a series of incremental changes driven by short-run pressures.

**Moving forward**

We believe that there is a distinct process that firms need to go through to find their own customized solution to managing a complex law firm.

**“I’d rather have created more energy than I could control than not created any energy at all. Here’s to structural complexity! Here’s to dispersed leadership!”**

Ben Johnson, Alston & Bird

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**The steps are these:**

1. Assess the partners’ pain and difficulties with the organization, and determine their appetite for examining the issues and considering changes. This will usually require a process of interviewing key partners across the firm. As Stuart Pape of Patton Boggs observes: “The private practice of law is inhabited by individuals who rank independence of action very highly and only reluctantly accept some organizational structure.” No change can be made unless there is a keenly-felt sense of either pressure or opportunity.

2. Collect and assess the evidence as to how well the organization and its components are performing and interacting. This will usually include not only an in-depth view of financials, analyzed according to numerous perspectives, but also evaluating external evidence (including, perhaps, input from selected clients) and internal structural frustrations and performance inhibitors.

3. Design and implement a process to mobilize the partners and generate commitment to redesign organizational structures and processes, and explore the major alternatives (including possibly re-constituting key practices.) Any redesign, must, of course, ensure continuity of strategy formulation and implementation through the firm.

Bob Dell (of Latham & Watkins) says that this step can be immensely challenging. He notes that “The power of inertia in law firms is sometimes stunning. A redesign can be clearly superior to the existing design and yet nearly impossible to implement.”

4. Examine, consider and implement methods for the development of special skills and competencies, including team management abilities and new metrics that may give better indications of the organization’s functioning and response to external forces or internal pressures.

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<td>Academic’s Forum Breakfast</td>
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<td>Access to justice: Committee Business Meeting</td>
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<td>09:30 – 17:00</td>
<td>Legal ethics - necessary for the training of lawyers, and properly understood by society?</td>
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<td>Food safety from farm to fork - who is liable for unsafe food?</td>
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<td>Mediation as a management tool</td>
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<td>Making a joint – how to roll two complimentary companies into one wrapper</td>
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<td>There’s a new sheriff in town – the extra-territorial reach of US courts and regulators</td>
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<td>Immigration treaties and nationality-based visas</td>
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<td>The intersection of intellectual property rights and competition law in new technologies: standard setting and technology pools</td>
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<td>Selling satellite communication: a global success story</td>
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<td>14:00 – 17:00</td>
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<td>Responding to hostile takeover bids and deal jumps</td>
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<td>Independence of the legal profession under attack</td>
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<td>The trials and tribulations of being a young litigator: your questions answered</td>
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<td>Thinking about the unthinkable: crisis contingency and disaster planning in law firms</td>
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**UNLOCKING THE VALUE OF INTELLECTUAL PROPERTY RIGHTS**

**Wednesday, September 20, 2006 at 9:30 a.m.-12:30 p.m. CT**

Kirkland & Ellis LLP invites you to a joint session of Committees I, L & R on Unlocking The Value Of Intellectual Property Rights. This should be of broad interest not only to intellectual property and technology lawyers but also to those interested by cutting edge corporate finance techniques using intellectual property and to those interested by how the very high values attributed to intangible rights today are being realized in a business setting and more controversially in litigation. The large panel faculty includes industry leaders as well as IBA members with experience in the field. Organizations represented include:
LAWIN - group of the leading Baltic law firms, top rated in corporate/commercial by Chambers Global

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Seven secrets of a successful business strategy

Pippa Blakemore explains the keys to managing change within a law firm, whether a merger, expansion or reorganization

A strategy has no value unless it is implemented. It remains rhetoric, empty words and hot air. Seven secrets apply to all law firm business initiatives, ranging from overseas expansion, for example into China, to pitching for new work, to merging with another firm.

1. **Clients are your focus**
   Start your first planning session with two challenging questions. The first is: “Will new clients we are targeting buy legal services from us?” and the second: “Will current clients continue to buy existing or new services from us?”
   Put your head into the head of each new client who might buy your services. Imagine the individual people to whom you will be selling: do they really exist? T horougly research answers to the following questions: What legal services do they need, how do they buy them and how loyal are they to their lawyers? What are their expectations of their lawyers? What commercial issues do they face that you can help with? Will they want what we offer? Will they buy from us, rather than another firm? How much do they have to spend? How much will they pay? How much will they buy? How often?

2. **Your firm is fit and lean**
   A realistic analysis of the characteristics and qualities of your firm’s leadership, management and support systems will identify whether your firm has the health and stamina to achieve your goals.
   Visionary leadership is a pre-requisite. It needs to be inspirational, energetic and consistent, to set high standards and demand accountability. Leadership by example encourages entrepreneurship whilst at the same time ensuring that lawyers already in the firm, not directly involved in new initiatives, feel informed and involved in the strategies and successes of the rest of the firm.

3. **The business case is robust**
   The business case objectively evaluates the likelihood of returning investment and costs in the short, medium and long-term. It should not be driven by fear (“all our competitors are doing it, so we must”) or greed, (“there is so much money in that country or in that organisation”).
   Those who prepare and evaluate the business case must have vested interest in its outcome. They must agree objective criteria for the basis of the decision to go ahead or not, must ask difficult questions, must listen to the answers, must consider what would happen if the ideas were not developed, must evaluate the alternative courses of action and must have the authority and credibility to say no.
   A realistic assessment of your current position of clients, work, lawyers, systems and finance will highlight what you are capable of given where you are now. It should also include an analysis of the strength of contacts in relation to the proposal: what can they offer, how they will help, who may have tried this before in the firm or elsewhere, its history and how successful your competition is.
   Where do you want to be? Analyses countries, sectors, industries, legal skills, clients, referrers, contacts, intermediaries and work types, that you want and equally important, that you do not want. How much income are you aiming for over what period of time?
   What resources do you need to get there and then maintain your position? Management time of all involved must be costed, estimating the direct and indirect hidden financial costs - for example, the lost opportunity costs of neglected clients or abandoning alternative strategies. Hidden costs take into account that in times of change, people spend up to 60% of their working day talking about their future, rather than working. The cost of maintaining the strategy once it is put in place must be estimated. For example, continuous support for an overseas merger or alliance may require resources for up to five years or longer.

4. **A two-part business plan**
   Part one is entrepreneurial and part two is the long-term maintenance. It is similar to an organ transplant - the preparation for and the initial surgery, followed by long-term maintenance to ensure that there is no rejection.
   The plan needs a vision (“we want to be an international law firm”) with clear objectives (“we want to be represented in eight new jurisdictions in four years”), measurable activity (“we will acquire/merge with one firm in each jurisdiction every six months”) and specific targets based on results (“producing x fee income per month by 2010”).

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Multi-dimensional and responsive communication

Good communication increases mutual knowledge, understanding and trust, while it reduces fear and suspicion of change and the unknown. Communication can be planned in four dimensions. The first dimension is the provision of relevant information to everybody directly involved or not, through a range of media according to individual preferences including emails, bulletins, intranet, flyers, small/large, formal/informal meetings, one-to-one, conference and video calls.

The second dimension is listening to and acting on feedback. This is whether it is given directly or indirectly, requested by you or not, from whatever source and however unpalatable. You need to listen to who is giving it, why they are saying it and decide whether you should act on it. The third dimension is looking at what is actually happening rather than listening to what is said to be happening. Ensure that you are not being told what you want to hear, such as “everything is fine” when a successful and high profile department within the firm is about to leave taking their clients, because they feel under-appreciated by their own firm.

Commitment by all

Indicators of a lack of commitment are absence of support from the top of the firm through a lack of resources, availability and enthusiasm. Personal indicators are people not returning telephone calls, not being available, nobody knowing where they are and not replying to emails within an appropriate timeframe.

Meetings are also good indicators of a lack of commitment, demonstrated by lateness by attendees, lack of preparation, no agenda, one identical to all the others, unstructured and unfocussed discussions, action points and minutes not written up immediately or at all, no follow-through of decisions and actions, and meetings regarded as ends in themselves rather than a catalyst for the next stage.

An inspirational leader and owner

There must be only one leader or owner. A committee cannot implement a strategy. The leader needs to be entrepreneurial and decisive, with energy and drive, and the ability to motivate others to deliver, to delegate appropriately and to prioritise.

The leader needs a close support team with clearly defined and well-publicised roles: the project manager, who has the authority and confidence of the leader, to manage the plan, hence the emphasis of his career in America, became head of architecture at the Illinois Institute of Technology (IIT) in 1937 where he designed new buildings on the campus including Crown Hall, the home of IIT’s School of Architecture.

Van der Rohe’s work is sometimes called the Second Chicago School and was characterized by his regard for structure in the abstract as the most important objective of building art more than the plan, hence the emphasis of his career in America, became head of architecture at the Illinois Institute of Technology (IIT) in 1937 where he designed new buildings on the campus including Crown Hall, the home of IIT’s School of Architecture.

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Chicago’s famous architecture

Chicago architecture has both influenced and reflected the history of American architecture, with the city’s buildings employing an array of different styles by several important architects. Since most buildings in the downtown area were destroyed by the Great Fire of 1871, Chicago buildings are celebrated more for their innovation and avant-garde magnetism rather than traditional conventionalism.

The Second School was the Chicago office of architectural firm Skidmore, Owings and Merill (SOM). The Inland Steel Building of 1957 (the first commercial structure in the Loop, the heart of Chicago’s downtown business district, following World War II) was notable for its structural steel framing, including 60-foot girder spanning the office floors and supporting the beams and steel decking, its office floors supported entirely by seven columns on the east and west sides set outside the curtain wall, and its column-free interior. The two SOM commercial buildings, the John Hancock Center (1969) and the Sears Tower (1974) are regarded highly by critics and are among the tallest buildings in the city. The John Hancock Center, one of the most recognizable buildings in the world, is an architectural icon, with its distinctive X-bracing removing the need for inner support beams, it is also the first tubed-tube skyscraper ever built and tapers on all four sides. The Sears Tower, located on Wacker Drive in the heart of the west Loop, consists of nine framed tubes, which are actually nine skyscrapers taken together into one building. Both of these structures are examples of the tubular frame, in which the load is carried not by the traditional cage but mostly by exterior walls.

Chicago is now in the process of reinventing its skyline with a new generation of buildings, many of which use new designs both for structural and aesthetic benefits. These include 400 North Lake Shore Drive (formerly known as the Fordham Spire), a proposed 54-story skyscraper to be completed in 2010, which will surpass the Sears Tower in size, and the Trump International Hotel and Tower: a skyscraper condo hotel under construction at 401 N. Wabash Avenue estimated to be completed in 2009.

LOCAL ATTRACTIONS

Chicago's famous architecture

How to sound knowledgeable when atop a tour bus round the city, by Jamie McKay

Pippa Blakemore of The PEP Partnership LLP, is an international expert on business development, marketing and sale for lawyers. Pippa is presenting three sessions in Chicago: "Turn themselves rather than a catalyst for the next stage.

decisions and actions, and meetings regarded as ends in themselves rather than a catalyst for the next stage.

them; a scribe, who will record and circulate within 24 hours action points arising from all meetings; the chief commu-

nicate, who is thorough, sensitive and imaginative and constantly asks, “who needs to know this?”; and the police-

man, who has the authority and confidence of the leader, to ensure that deadlines are met, followed-up and followed-through to the end.

Your knowledge and application of the seven secrets will be your source of success.

Pippa Blakemore of The PEP Partnership LLP, is an international expert on business development, marketing and sale for lawyers. Pippa is presenting three sessions in Chicago: “Turn contacts into clients and referrers: five steps for successful rainmak-

ing”, “Increase your value to current and future clients: the Rainbow strategy” and “Give a winning presentation.”
IP judges join call for specialization

Speakers in a session yesterday continued the push for specialization among intellectual property judges that has been part of an IBA initiative over the past three years.

Three judges joined the panel to discuss the merits of specialization: the Honourable James Holderman from the US District Court in Chicago, The Honourable Justice Annabelle Bennett of the Federal Court of Australia in Sydney, and Justice Klaus Grabinski of the Dusseldorf Regional Court.

Holderman estimated that only two-thirds of patent cases that go to appeal in the US are affirmed compared with 80% of cases overall.

“Greater specialization among judges and allow judges to pass IP cases to others better qualified to hear them, he explained, a development he wholeheartedly endorsed.

He hopes to have the resolution signed by yesterday’s panellists as well as other high-profile judges such as the UK’s Judge Michael Fysh who spoke at last year’s conference in Prague.

The resolution has been put together alongside a survey run by the IBA Intellectual Property and Entertainment Law Committee over the past three years as part of an effort to encourage debate about the merits of specialist IP courts.

For this conference the IBA has published the updated results of the survey (see chart), which tracks how different countries have approached the treatment of IP cases. The survey, based on responses from lawyers, judges, policymakers and public officials in 85 jurisdictions, has shown a global trend towards creating specialist courts or tribunals or encouraging greater specialization among judges to hear IP cases in courts of general jurisdiction.

“The lack of IP expertise in the judiciary is a major problem for the enforcement of IP rights,” says the survey. “There exists a trend in the IP field of either creating specialized IP courts or setting up specialized divisions for IP matters within courts of general jurisdiction.”

The case in favour of creating specialist courts centres on the view that these courts will enable judges to gain more expertise, reach decisions more quickly and thus save parties in litigation time and money.

Sceptics about the value of specialist courts say they are expensive to run and that in many countries the caseload might be too small to justify the cost. Meanwhile, some commentators suggest that specialist judges lose the ability to approach cases without preconceptions and that there is a danger that IP decisions might become detached from developments in the wider law.
Delegates debate war crime victims’ rights

The International Criminal Court (ICC) has only been in operation for a few years and IBA delegates have been discussing some of the thorny issues facing the nascent institution as it moves towards the prosecution of its first cases. How far, for example, should the ICC go in allowing victims to play a role in cases against alleged perpetrators of war crimes and other human rights offences? This question has come into focus recently with the first arrest of a suspect to be tried by the court. In March of this year Thomas Lubanga Dyilo was brought into custody from the Democratic Republic of Congo for allegedly having committed war crimes, specifically the conscription of children and using them to take part in hostilities.

In the past, the ad hoc United Nations (UN) criminal tribunals assembled to prosecute crimes relating to the genocide in Rwanda and the wars in the former Yugoslavia have been criticized for not allowing victims to have a sufficient voice in proceedings. The Rome Statute that established the ICC, however, provided for the participation of victims in cases but left the nature of their involvement to the discretion of its organs. This includes the option to award victims compensation.

Speaking at a session on Tuesday, panelist Rod Rastan, a lawyer in the prosecutor’s office of the ICC, described this development as “a milestone in terms of international criminal proceedings”. However, he said that questions remain as to when and to what extent victims should be involved. According to Rastan, the ICC regards early participation as problematic. For example, it raises security issues for witnesses and could compromise the rights of the defence if victims present evidence before the defendant has the chance to speak.

While recognizing the desirability of giving a voice to victims, other speakers raised similar notes of caution. Ambassador Hans Corell, a former head of the UN office of legal affairs, urged that care be taken and expressed concern that the court might become overburdened if victims push it to pursue an ever-growing list of lower level suspects rather than the leaders the ICC has focused on until now.

In the case of Lubanga, victims groups have asked the ICC’s judges to broaden the scope of the charges against the defendant to include other forms of war crimes. This has raised other questions, said Rastan, such as whether victims should have the right to make such decisions, and whether the prosecutor should have to explain why he has not indicted a defendant for other crimes.

Justice Richard Goldstone, co-chair of the IBA’s human rights institute (HRI) and former chief prosecutor of the UN’s Rwanda and Yugoslavia tribunals, said that he would be very concerned if the ICC’s judges told prosecutors to increase the scope of charges. Doing so, he said, would undermine the independence, at least in people’s minds, of the court’s proceedings.

A member of the audience raised further concerns, noting the problems encountered in U.K courts where victims have been involved to some degree in the sentencing process of criminal cases. Victims who have been treated cruelly, the speaker noted, could not be expected to be objective in making such decisions, which would be better left to judges.

The session also examined the links between justice and peace and the ICC’s role in that relationship. As with the UN tribunals, many believe that the ICC can help bring peace to troubled regions by ensuring that perpetrators of war crimes face justice, ideally by acting as a deterrent against such crimes. Difficulties arise for the court, however, when its pursuit of justice is argued to be endangering the cause of peace.

The court is currently facing a serious dilemma in its handling of cases involving Uganda. In October 2005 the court unsealed its first arrest warrants, which were issued for five members of the Lord’s Resistance Army (LRA) on charges of crimes against humanity and war crimes. The LRA has been fighting a war in the north of Uganda for several years, and the five are accused of murder, sexual enslavement, rape, the forced enlistment of child soldiers and other offences.

Since then, the leadership of the LRA has entered into peace negotiations with the Ugandan government, but there has been disagreement over whether the ICC should suspend the warrants while the process continues. Although he cannot suspend arrest warrants, under Article 53 of the Rome Statute the prosecutor has the power to suspend an investigation, for example if it would interfere with a peace process.

The ICC was invited to look into the situation in Uganda by the country’s government, which is fighting the LRA. If the court now agrees to suspend its investigations, warned ambassador Emilio Cardenas, co-chair of the IBA’s HRI, it risks being seen as ineffective and as a political tool that can be used by governments to bring leverage against opposing groups. Above all, he said, the ICC must work to protect people who are targeted in such conflicts. “There is no lasting peace without justice, and there’s no justice without peace,” he said.

It is not known what course of action the ICC will take. However, Rod Rastan noted that in the past annuities for alleged war criminals have led to cycles of violence in countries such as Sierra Leone. Ultimately, he said, the LRA has asked the ICC to suspend its investigations, warned ambassador Emilio Cardenas, co-chair of the IBA’s HRI, it risks being seen as ineffective and as a political tool that can be used by governments to bring leverage against opposing groups. Above all, he said, the ICC must work to protect people who are targeted in such conflicts. “There is no lasting peace without justice, and there’s no justice without peace,” he said.

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