Table of Contents

Volume 1

CHAPTER 1. [Reserved]

CHAPTER 2. PRE-LITIGATION MANAGEMENT AND AVOIDANCE

§ 2:1 Scope note
§ 2:2 The need for pre-litigation management and avoidance
§ 2:3 The goals of pre-litigation management and avoidance and the strategies to meet them
§ 2:4 “Get inside your client’s head!”
§ 2:5 —Learn the client’s business
§ 2:6 —Maintain regular contact with management and operating personnel
§ 2:7 —Assist with training exercises
§ 2:8 —Counsel and the client’s customers
§ 2:9 —Keep an eye on the sales and marketing departments
§ 2:10 Draft and negotiate contracts that avoid disputes and reduce exposure
§ 2:11 —Role of counsel
§ 2:12 Contract drafting checklist
§ 2:13 Avoiding bad documents
§ 2:14 —What is a document?
§ 2:15 —The scope of discovery
§ 2:16 —Concentrate on prevention
§ 2:17 —Prevention is a function of training
§ 2:18 —About e-mail
§ 2:19 Implement a product integrity program
§ 2:20 —PIP goals
§ 2:21 —Management commitment
§ 2:22 —Proper organizational structure
§ 2:23 — —Align management and operations
§ 2:24 — —Integrate product integrity into each phase of a product’s life-cycle

© 2019 Thomson Reuters, 4/2019
§ 2:25 — Make information and knowledge work for the company
§ 2:26 — PIP benefits
§ 2:27 Early investigation and assessment
§ 2:28 —Pre-investigation tools
§ 2:29 —Investigation tools
§ 2:30 —The inspection
§ 2:31 —Participate
§ 2:32 Manage crises to avoid litigation
§ 2:33 —Establishing a CMT
§ 2:34 —Announcing the CMT
§ 2:35 —Identifying a crisis
§ 2:36 —Investigating a crisis
§ 2:37 —Crisis control
§ 2:38 —Crisis resolution
§ 2:39 Accelerating claim resolution
§ 2:40 —Mock trials
§ 2:41 —Mediating the claim out of the public eye
§ 2:42 The use of technology in pre-litigation management and avoidance
§ 2:43 —Case management software
§ 2:44 —Resolution of pre-litigation disputes
§ 2:45 Lessons learned
§ 2:46 Practice checklist

CHAPTER 3. [Reserved]

CHAPTER 4. SELECTION OF OUTSIDE COUNSEL
§ 4:1 Scope note
§ 4:2 Objectives, concerns, preliminary considerations
§ 4:3 Planning and internal analysis
§ 4:4 —Analysis of the factual background of the matter
§ 4:5 —Analysis of the legal services needed
§ 4:6 —Determination of corporation’s objectives
§ 4:7 —Analysis of internal resources (can it be handled in-house?)
§ 4:8 —Budget considerations and fee arrangements
§ 4:9 —Type of law firm or individual capable of providing the service
Table of Contents

§ 4:10 — Hiring a lawyer, or a law firm?
§ 4:11 — Length of anticipated relationship
§ 4:12 — Geographic considerations
§ 4:13 — Insurance
§ 4:14 — Corporate policies
§ 4:15 — Identification of potential outside counsel
§ 4:16 — Prior company experience with counsel
§ 4:17 — Approved counsel lists
§ 4:17.50 — Panel counsel and preferred provider programs
§ 4:18 — Other counsel known to the company
§ 4:19 — Other sources of information (surveys, online resources, LinkedIn)
§ 4:20 — Selection process
§ 4:21 — Interviews and “beauty contests”
§ 4:22 — Requests for proposal
§ 4:23 — Bidding process
§ 4:24 — Internal selection procedure
§ 4:25 — Criteria for evaluating and selecting counsel
§ 4:26 — Quality of legal work required
§ 4:27 — Resources necessary
§ 4:28 — Financial issues
§ 4:29 — Messaging to opposing parties and counsel
§ 4:30 — Working relationship/chemistry
§ 4:31 — Conflicts of interest
§ 4:31.50 — Cybersecurity capabilities
§ 4:32 — Other considerations
§ 4:33 — Early Dispute Assessment Form
§ 4:34 — Sample Request for Qualifications Letter

CHAPTER 5. REQUESTS FOR PROPOSALS, BIDDING AND PRESENTATIONS

§ 5:1 — Scope note
§ 5:2 — Preliminary considerations
§ 5:3 — Goals, objectives and pitfalls of the selection process
§ 5:4 — The time allotted
§ 5:5 — Beauty contests and developing alternatives for the selection
§ 5:6 — Requests for proposals
§ 5:7 — Cost-effective RFPs
§ 5:8 — Schedule

© 2019 Thomson Reuters, 4/2019 ccix
§ 5:9 — Selecting the firms to participate
§ 5:10 — — The initial list
§ 5:11 — — Paring the initial list
§ 5:12 — — Conflicts
§ 5:13 — — Number of firms participating
§ 5:14 — Developing the RFP
§ 5:15 — — Key components
§ 5:16 — — Format and procedure for the request
§ 5:17 — — Technology
§ 5:18 — — Format of proposals
§ 5:19 — Evaluation
§ 5:20 — — Team
§ 5:21 — — Process
§ 5:22 — — Selection and notification
§ 5:23 — Agreement
§ 5:24 Advanced concepts
§ 5:25 — — Project management
§ 5:26 — — Buyer-driven transaction systems
§ 5:27 Bidding: requests for quotes
§ 5:28 Presentations
§ 5:29 — — Objectives
§ 5:30 — — Pre-presentation questions
§ 5:31 — — Ensuring effective presentations
§ 5:32 — — From the law firm’s perspective
§ 5:33 — — After the presentation
§ 5:34 Monitoring performance
§ 5:35 — — Tracking performance criteria
§ 5:36 — — Reciprocal performance evaluations
§ 5:37 Practice checklist
§ 5:38 Form: Sample RFP
§ 5:39 Form: Performance evaluation with outside counsel

CHAPTER 6. MARKETING TO POTENTIAL CORPORATE CLIENTS
§ 6:1 Scope note
§ 6:2 Preliminary considerations
§ 6:3 — — Self-analysis
§ 6:4 — — Use of surveys
§ 6:5 — — Definition of target audience
§ 6:6 — — Evaluation of the competition
§ 6:7 — — Cost-benefit analysis

ccx
§ 6:8 —Alternative fee arrangements
§ 6:9 —Ethics
§ 6:10 ——“Unjustified expectations”
§ 6:11 ——Constitutional challenges to attorney advertising regulations
§ 6:12 Additional considerations—Pro bono team projects
§ 6:13 ——Diversity
§ 6:14 Marketing tools
§ 6:15 ——A corporate client’s general perspective
§ 6:16 ——Web sites
§ 6:17 ——A corporate client’s view of the Internet from a marketing perspective
§ 6:18 ——Client extranets
§ 6:19 ——A corporate client’s perspective
§ 6:20 ——Social networking and social media
§ 6:21 ——Web enabled social networking from a corporate client’s perspective
§ 6:22 ——Requests for proposals (“RFPs”)
§ 6:23 ——How to respond to a request for proposal
§ 6:24 ——A corporate client’s perspective
§ 6:25 ——Pitch books
§ 6:26 ——A corporate client’s perspective
§ 6:27 ——Beauty contests
§ 6:28 ——Ethical considerations
§ 6:29 ——How to prepare for and win a beauty contest
§ 6:30 ——A corporate client’s perspective on beauty contests
§ 6:31 ——Newsletters, blogs and client alerts
§ 6:32 ——A corporate client’s perspective
§ 6:33 ——Annual reports
§ 6:34 ——Law firm seminars
§ 6:35 ——How to effectively utilize seminars
§ 6:36 ——A corporate client’s perspective
§ 6:37 ——Secondments
§ 6:38 ——How to build client relationships through secondments
§ 6:39 ——What the corporate client seeks to obtain through a secondment
§ 6:40 ——Ethical consideration
§ 6:41 ——Summer programs
§ 6:42 ——Client service teams
§ 6:43 ——CRM/ERM

© 2019 Thomson Reuters, 4/2019 ccxi
CHAPTER 7. OPTIMIZING THE NUMBER OF OUTSIDE COUNSEL THROUGH CONVERGENCE AND PARTNERING STRATEGIES

§ 7:1 Scope note
§ 7:2 Preliminary considerations
§ 7:3 — Defining convergence and partnering
§ 7:4 — Convergence and partnering: genesis and historical context
§ 7:5 Objectives of convergence and partnering
§ 7:6 — Managing legal matters more efficiently
§ 7:7 — Reducing the cost of counsel
§ 7:8 — Improving the quality of outside counsel
§ 7:9 — Promoting diversity in law and business
§ 7:10 — Advantages to partner law firms
§ 7:11 Challenges of convergence and partnering
§ 7:11.50 — Reduction of legal costs
§ 7:12 — Time commitment and complexity
§ 7:13 — Loss of competitive edge
§ 7:14 — Failure to obtain best expertise
§ 7:15 — Loss of independent perspective/staleness
§ 7:16 — Inertia & failure to overcome existing legal models
§ 7:17 — The illusory nature of client knowledge
§ 7:17.50 — Challenges to partner law firms
§ 7:18 Implementing convergence and partnering strategies
§ 7:19 — Deciding whether to explore convergence or partnering strategies
§ 7:20 — Collecting information, data, and insights
§ 7:21 — — Assigning responsibilities
§ 7:22 — — Comparing costs to outcomes
§ 7:23 — — Geography, practice areas, and services
§ 7:24 — — The legal department’s role in company strategy
§ 7:25 — Selecting outside counsel
§ 7:26 — — Identifying key criteria
§ 7:27 — — Making the selection
CHAPTER 8. FEE ARRANGEMENTS

§ 8:1 Scope note
§ 8:2 Objectives and concerns of inside and outside counsel
§ 8:3 Types of fee arrangements
§ 8:4 —Hourly rates
§ 8:5 —Modified hourly rates
§ 8:6 ——Fee caps
§ 8:7 ——Budgetary constraints
§ 8:8 ——Phased billing
§ 8:9 ——Target fees
§ 8:10 ——Blended rates
§ 8:11 ——Partner-based rates
§ 8:12 ——Discounted or premium rates
§ 8:13 ——Volume discounts
§ 8:14 ——Frozen rates
§ 8:15 ——Per diem rates
§ 8:16 ——Cost-plus
§ 8:17 —Flat fees
§ 8:18 ——Fixed fees
§ 8:19 ——Unit pricing
§ 8:20 ——Retainers
§ 8:21 ——Percentage fees
§ 8:22 —Value-based billing
§ 8:23 ——Success fees or bonuses
§ 8:24 ——Result-based billing
§ 8:25 ——Minimum-maximum range
§ 8:26 ——Contingent fees
§ 8:27 —Other arrangements
§ 8:28 ——Investments in clients
§ 8:29 ——Teaming arrangements
§ 8:30 ——Virtual law firms
§ 8:31 ——Disaggregation of legal work
§ 8:32 ——Loaned or seconded lawyers
§ 8:33 ——Unbundling
§ 8:34 ——Budgeting
§ 8:35 ——Regular reviews

© 2019 Thomson Reuters, 4/2019
§ 8:36 Selecting an appropriate fee arrangement
§ 8:37 — General principles
§ 8:38 — — Aligned incentives
§ 8:39 — — Clearly-defined objectives
§ 8:40 — — Stability and certainty
§ 8:41 — — Flexibility and the possibility of revision
§ 8:42 — — Negotiation strategies
§ 8:43 — Complex litigation
§ 8:44 — Routine litigation
§ 8:45 — Transactional work
§ 8:46 — Counseling
§ 8:47 — Lobbying and regulatory work
§ 8:48 — Volume business
§ 8:49 — Third-party funding
§ 8:50 — — Insurance coverage
§ 8:51 — — Joint representation
§ 8:52 — — Fee shifting
§ 8:53 — — Indemnification and contribution
§ 8:54 — — Transactional allocation
§ 8:55 — — Benefits of advance planning
§ 8:56 Ethical considerations
§ 8:57 — Ground rules for ethical fee arrangements
§ 8:58 — Fixed fees
§ 8:59 — Contingent fees
§ 8:60 — Discounted and blended rates
§ 8:61 — Success fees or bonuses
§ 8:62 — Loaned or seconded lawyers
§ 8:63 — Temporary or outsourced legal services
§ 8:64 — Equity or proprietary interest as payment
§ 8:65 — Practical advice
§ 8:66 Practice checklist
§ 8:67 Forms
§ 8:68 Form: Hours times rates
§ 8:69 Form: Fee cap
§ 8:70 Form: Budgetary constraints
§ 8:71 Form: Phased billing
§ 8:72 Form: Target fee
§ 8:73 Form: Blended rates
§ 8:74 Form: Discounted or premium rates
§ 8:75 Form: Volume discounts
§ 8:76 Form: Frozen rates
§ 8:77 Form: Per diem rates
CHAPTER 9. ENGAGEMENT LETTERS (INCLUDING WRITTEN CORPORATE POLICIES AND PROCEDURES)

§ 9:1 Scope note
§ 9:2 Objectives, concerns and preliminary considerations
§ 9:3 —Ethical issues
§ 9:4 —State statutes
§ 9:5 —Discussing conflict waiver
§ 9:6 —Choice of law
§ 9:7 —New projects with existing clients
§ 9:8 —Should the engagement letter be comprehensive?
§ 9:9 —Construing the written product
§ 9:10 —Negotiating the terms
§ 9:11 Engagement letters
§ 9:12 —Defining the “client”
§ 9:13 —Conflict check and current conflict waivers
§ 9:14 —Prospective conflict waivers
§ 9:15 —Defining the scope of the relationship
§ 9:16 —Defining the “lawyer”
§ 9:17 —Allocating work between inside and outside lawyers
§ 9:18 —Fee arrangements
§ 9:19 —Case evaluation and disclaimer of results
§ 9:20 —Dispute resolution clauses
§ 9:21 —Confidentiality/press releases
§ 9:22 —File retention
§ 9:23 —Termination
§ 9:24 —Sign and return
§ 9:25 Corporate policies

© 2019 Thomson Reuters, 4/2019

ccxv
SUCCESSFUL PARTNERING

§ 9:26 —Research
§ 9:27 —Number and identity of lawyers
§ 9:28 —Hours billed in a day
§ 9:29 —Particular billing format
§ 9:30 —Distinguishing “administrative” from “legal” work
§ 9:31 —Litigation plan and budget forecast
§ 9:32 —Disbursements for expenses
§ 9:33 —Frequency of billing cycle
§ 9:34 —Preliminary and regular reports
§ 9:35 —Settlement authority
§ 9:36 —Dispute resolution
§ 9:37 —Public relations/media statements
§ 9:38 —Travel expenses
§ 9:39 Discovery of the engagement letter
§ 9:40 Joint clients
§ 9:41 Joint defense agreements
§ 9:42 Termination letters
§ 9:43 —Effect of not using a termination letter
§ 9:44 Checklist of practice pointers, best practices, avoiding pitfalls
§ 9:45 Form: sample engagement letter
§ 9:46 Form: sample joint client letter
§ 9:47 Form: supplemental engagement letter
§ 9:48 Form: sample “I’m not your lawyer” letter
§ 9:49 Form: sample termination letter
§ 9:50 Form: sample corporate policy

CHAPTER 10. THE PLANNING PROCESS
§ 10:1 Scope note
§ 10:2 Overall planning considerations
§ 10:3 When to retain outside counsel
§ 10:4 —Expertise
§ 10:5 —Resources
§ 10:5.50 —Independence requirements
§ 10:6 Corporate policies and procedures for the selection and retention of outside counsel
§ 10:7 Planning for effective communication and coordination with in-house counsel and business personnel
§ 10:8 Outside counsel work product
ccxvi
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 10:9</td>
<td>Having in-house counsel oversee transactional matters</td>
</tr>
<tr>
<td>§ 10:10</td>
<td>Having in-house counsel oversee litigation matters</td>
</tr>
<tr>
<td>§ 10:11</td>
<td>— The litigation plan</td>
</tr>
<tr>
<td>§ 10:12</td>
<td>— Case summaries</td>
</tr>
<tr>
<td>§ 10:13</td>
<td>Planning for budgeting</td>
</tr>
<tr>
<td>§ 10:14</td>
<td>Planning for fee arrangements</td>
</tr>
<tr>
<td>§ 10:15</td>
<td>Planning for disbursements</td>
</tr>
<tr>
<td>§ 10:16</td>
<td>Planning budgeting strategies</td>
</tr>
<tr>
<td>§ 10:17</td>
<td>Creating lists of approved outside counsel</td>
</tr>
<tr>
<td>§ 10:18</td>
<td>Strategic planning and risk analysis after outside counsel is selected</td>
</tr>
<tr>
<td>§ 10:19</td>
<td>Tactical planning</td>
</tr>
<tr>
<td>§ 10:20</td>
<td>— Choosing offensive or defensive tactics</td>
</tr>
<tr>
<td>§ 10:21</td>
<td>— Choosing a forum</td>
</tr>
<tr>
<td>§ 10:22</td>
<td>— Planning in light of special rules of the forum</td>
</tr>
<tr>
<td>§ 10:23</td>
<td>— Settlement</td>
</tr>
<tr>
<td>§ 10:24</td>
<td>Logistical planning</td>
</tr>
<tr>
<td>§ 10:25</td>
<td>— Staffing</td>
</tr>
<tr>
<td>§ 10:26</td>
<td>— — In-house counsel</td>
</tr>
<tr>
<td>§ 10:27</td>
<td>— — Corporate employees</td>
</tr>
<tr>
<td>§ 10:28</td>
<td>— — Transaction counsel, advisors, investment bankers, auditors, proxy solicitors</td>
</tr>
<tr>
<td>§ 10:29</td>
<td>— — Experts and/or consultants</td>
</tr>
<tr>
<td>§ 10:30</td>
<td>— Managing e-discovery</td>
</tr>
<tr>
<td>§ 10:31</td>
<td>— Other technology issues</td>
</tr>
<tr>
<td>§ 10:32</td>
<td>— Communications with corporate employees</td>
</tr>
<tr>
<td>§ 10:33</td>
<td>— — Document/data retention</td>
</tr>
<tr>
<td>§ 10:34</td>
<td>— Press or third-party inquiries</td>
</tr>
<tr>
<td>§ 10:35</td>
<td>Changing strategies and/or tactics</td>
</tr>
<tr>
<td>§ 10:36</td>
<td>Practice checklist</td>
</tr>
<tr>
<td>§ 10:37</td>
<td>Form: Sample litigation case management letter</td>
</tr>
<tr>
<td>§ 10:38</td>
<td>Form: Sample litigation plan</td>
</tr>
<tr>
<td>§ 10:39</td>
<td>Form: Sample litigation case summary</td>
</tr>
</tbody>
</table>

**CHAPTER 11. BUDGETING AND CONTROLLING COSTS**

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 11:1</td>
<td>Scope note</td>
</tr>
<tr>
<td>§ 11:2</td>
<td>Objectives, concerns, preliminary considerations</td>
</tr>
</tbody>
</table>
§ 11:3 Case law and statutes
§ 11:4 Strategic (pre-budget) plans
§ 11:5 —Transactional engagement plan
§ 11:6 —Litigation engagement plan
§ 11:7 Budgets generally
§ 11:8 Benefits of budgeting
§ 11:9 Handling budgeting issues
§ 11:10 Transaction budgets
§ 11:11 Litigation budgets
§ 11:12 Legal department budgets
§ 11:13 Cost controls
§ 11:14 —Selecting counsel
§ 11:15 —Setting ground rules
§ 11:16 —Establishing billing guidelines
§ 11:17 —Maximizing the benefits of bill review
§ 11:18 —Defining and enforcing staffing policies
§ 11:19 —Allocating work among inside and outside counsel
§ 11:20 —Alternative fee arrangements
§ 11:21 —Early case assessment
§ 11:22 —Technology
§ 11:23 Macro-management issues
§ 11:24 —Convergence/unbundling
§ 11:25 —Purchasing power
§ 11:26 —Bringing work in-house
§ 11:27 —National coordinating counsel and litigation management counsel
§ 11:28 —Prevention and alternative dispute resolution
§ 11:29 —Cycle time management
§ 11:30 Budgeting and cost-control checklists
§ 11:31 Form—Model budget for transactional engagement
§ 11:32 —Model plan and budget for litigation

CHAPTER 12. EVALUATING LEGAL RISKS AND COSTS WITH DECISION TREE ANALYSIS
§ 12:1 Scope note
§ 12:2 Selecting an approach for evaluating legal risks
§ 12:3 —The need for risk analysis
§ 12:4 —Practical considerations
CHAPTER 13. COMMUNICATION METHODS AND SKILLS

I. INTRODUCTION
§ 13:1 Scope note
§ 13:2 Judgment, empathy and diplomacy
§ 13:3 —Outside counsel: the client’s core expectations
§ 13:4 —Inside counsel: making the process work well

II. COMMUNICATION SKILLS
§ 13:5 Listening
§ 13:6 Responding
§ 13:7 Building the relationship
§ 13:8 Think before acting
§ 13:9 No surprises

III. COMMUNICATION TOOLS
§ 13:10 Choosing the right tools in dynamic times
§ 13:11 Security
§ 13:12 Learning the client
§ 13:13 Face-to-face meetings
§ 13:14 E-mail
§ 13:15 Texting
§ 13:16 Instant messaging
§ 13:17 Written reports
§ 13:18 Telephone
§ 13:19 Voicemail
§ 13:20 Vehicles for collaboration
§ 13:21 —Shared data access
§ 13:22 —Videoconferencing
§ 13:23 —Web conferencing
§ 13:24 —Extranet
§ 13:25 Social media

IV. COMMUNICATIONS IN PARTICULAR SETTINGS
§ 13:26 Investigations
§ 13:27 Reality check
§ 13:28 Staying in touch with inactive clients
§ 13:29 Possible new client relationships
### Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 13:30</td>
<td>Budget issues</td>
</tr>
<tr>
<td>§ 13:31</td>
<td>Strategic assessments for ongoing matters</td>
</tr>
<tr>
<td>§ 13:32</td>
<td>Delivering bad news and dealing with dysfunction</td>
</tr>
<tr>
<td>§ 13:33</td>
<td>Clearing conflicts</td>
</tr>
<tr>
<td>§ 13:33.50</td>
<td>Electronic discovery</td>
</tr>
<tr>
<td>§ 13:33.60</td>
<td>Cyber-security agreements</td>
</tr>
</tbody>
</table>

### V. Final Words and Practice Aids

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 13:34</td>
<td>Communications checklist</td>
</tr>
<tr>
<td>§ 13:35</td>
<td>Training meeting agenda</td>
</tr>
</tbody>
</table>

### Chapter 14. Billing

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 14:1</td>
<td>Scope note</td>
</tr>
<tr>
<td>§ 14:2</td>
<td>Hourly billing—Is it inherently inefficient or just a terribly misunderstood scapegoat?</td>
</tr>
<tr>
<td>§ 14:3</td>
<td>The evolution to client-friendly, task-based billing</td>
</tr>
<tr>
<td>§ 14:4</td>
<td>The Uniform Task-Based Management System</td>
</tr>
<tr>
<td>§ 14:5</td>
<td>Modernizing the review process via e-management</td>
</tr>
<tr>
<td>§ 14:6</td>
<td>Streamlining the payment process through electronic billing</td>
</tr>
<tr>
<td>§ 14:7</td>
<td>Legal fee auditors</td>
</tr>
<tr>
<td>§ 14:8</td>
<td>Policy manuals and billing guidelines</td>
</tr>
<tr>
<td>§ 14:9</td>
<td>Meaningful budgets as a cornerstone of a robust billing process</td>
</tr>
<tr>
<td>§ 14:10</td>
<td>The presentation and review of outside counsel invoices</td>
</tr>
<tr>
<td>§ 14:11</td>
<td>The ethics of billing</td>
</tr>
<tr>
<td>§ 14:12</td>
<td>Alternative fee arrangements</td>
</tr>
<tr>
<td>§ 14:13</td>
<td>UTBMS code sets</td>
</tr>
</tbody>
</table>

### Chapter 15. Expenses and Disbursements

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 15:1</td>
<td>Scope note</td>
</tr>
<tr>
<td>§ 15:2</td>
<td>Objectives, concerns, and preliminary considerations</td>
</tr>
<tr>
<td>§ 15:3</td>
<td>Preliminary considerations—Perspectives from inside counsel</td>
</tr>
<tr>
<td>§ 15:4</td>
<td>—Perspectives from outside counsel</td>
</tr>
<tr>
<td>§ 15:5</td>
<td>—Controversy over expense and disbursement billing</td>
</tr>
</tbody>
</table>

© 2019 Thomson Reuters, 4/2019
§ 15:6 Ethical guidance

§ 15:7 —ABA Formal Opinion No. 93-379

§ 15:8 —ABA Statement of Principles

§ 15:9 —The Model Rules

§ 15:10 —The Code of Professional Responsibility

§ 15:11 —Markups/surcharges

§ 15:12 —Use of contract attorneys

§ 15:13 —Billing for computerized research

§ 15:14 Current trends

§ 15:15 —Development of standard guidelines for outside counsel

§ 15:16 ——Charging for expenses

§ 15:17 ———Computerized research

§ 15:18 ———Phone, facsimile, and photocopying charges

§ 15:19 ———Messenger/courier services

§ 15:20 ———Other technology related expenses

§ 15:21 ———Electronically stored information

§ 15:22 ———Extranets and collaboration systems

§ 15:23 ——Charging for disbursements

§ 15:24 ———Travel policies

§ 15:25 ———Client's preferred vendors

§ 15:26 ———Supporting documentation for invoices

§ 15:27 ——Law firm billing practices

§ 15:28 ——Carrying costs of client disbursements

§ 15:29 Recommended practices

§ 15:30 —Economic concerns—Knowledge of cost structure

§ 15:31 ——Establish guidelines

§ 15:32 ——Budgeting

§ 15:33 ——Be creative

§ 15:34 ——Avoid overstaffing

§ 15:35 ——Monitor costs

§ 15:36 ——Timely billing and payment

§ 15:37 ——Pay bill at closing

§ 15:38 —Trust

§ 15:39 ——Communication

§ 15:40 ——Attention to the bill

§ 15:41 ——More communication

§ 15:42 —Reasonableness

§ 15:43 Conclusion

§ 15:44 Practice checklist
CHAPTER 16. THE RELATIONSHIP BETWEEN THE LEGAL DEPARTMENT AND THE CORPORATION

§ 16:1 Scope note
§ 16:2 The evolving role of the general counsel
§ 16:3 Company culture
§ 16:4 —Determining and influencing the legal department’s subculture
§ 16:5 —Predicting behaviors
§ 16:6 —Keeping pace with changing cultures
§ 16:7 Business partners’ expectations from the legal department
§ 16:8 —Why there are different definitions for different business partners
§ 16:9 —Key areas of importance to most business partners
§ 16:10 ——Expertise/quality of legal work
§ 16:11 ——Responsiveness
§ 16:12 ——Cost-effectiveness and rationalizing the cost structure
§ 16:13 The company’s strategic objectives
§ 16:14 —Why lawyers must understand them
§ 16:15 —Methods for keeping informed about them
§ 16:16 ——Aligning the legal department with the business units
§ 16:17 —An emphasis on business solutions
§ 16:18 General Counsel leadership
§ 16:19 —Legal department retreats
§ 16:20 —Transition
§ 16:21 —Setting the tone
§ 16:21.50 More agile legal teams
§ 16:22 Legal departmental morale
§ 16:23 —Individual morale
SUCCESSFUL PARTNERING

§ 16:24 —Collective morale
§ 16:25 Role of emotional intelligence in interdisciplinary teams
§ 16:26 How the practices are managed
§ 16:27 —What is practice management in a legal department?
§ 16:28 —Checklist for developing in-house practice group descriptions
§ 16:29 Administration of the legal department
§ 16:30 —Role of a Legal Operations Officer
§ 16:31 The legal department’s compensation structure and pay levels
§ 16:32 —Company connection
§ 16:33 Collaboration between human resources and legal
§ 16:34 Wearing two distinct hats: GC and Head of Human Resources
§ 16:35 Career tracks available to department members
§ 16:36 How the organizational structures of the company and legal department impact relationships
§ 16:37 Managing outside counsel relationships within the corporation
§ 16:38 Partnering with outside counsel to best service the business partner
§ 16:39 Communication
§ 16:40 Project management (defined and distinguished from practice management)
§ 16:41 The GC’s responsibilities and relationship with the board and the senior executives
§ 16:42 —Establishing the relationship
§ 16:43 —Maintaining the relationship
§ 16:44 Getting to the future
§ 16:45 —Relentless prioritization
§ 16:46 —Legal department leadership (and failings) in diversity initiatives
§ 16:47 Practice checklist
§ 16:48 Suggested books and articles

CHAPTER 17. LAW DEPARTMENT MANAGEMENT
§ 17:1 Scope note

cxxiv
# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 17:2</td>
<td>Preliminary considerations</td>
</tr>
<tr>
<td>§ 17:3</td>
<td>Understanding and defining culture</td>
</tr>
<tr>
<td>§ 17:4</td>
<td>Understanding the client relationship</td>
</tr>
<tr>
<td>§ 17:5</td>
<td>General Counsel on the board of directors</td>
</tr>
<tr>
<td>§ 17:6</td>
<td>Lawyers on business management committees</td>
</tr>
<tr>
<td>§ 17:7</td>
<td>Conflict identification and resolution process</td>
</tr>
<tr>
<td>§ 17:8</td>
<td>The necessity for business skills</td>
</tr>
<tr>
<td>§ 17:9</td>
<td>Providing unsolicited advice</td>
</tr>
<tr>
<td>§ 17:10</td>
<td>Reporting breaches of fiduciary duty</td>
</tr>
<tr>
<td>§ 17:11</td>
<td>Establishing the department’s mission and goals</td>
</tr>
<tr>
<td>§ 17:12</td>
<td>Determining the services the law department can and should provide</td>
</tr>
<tr>
<td>§ 17:13</td>
<td>Potential proactive services</td>
</tr>
<tr>
<td>§ 17:14</td>
<td>Potential reactive services</td>
</tr>
<tr>
<td>§ 17:15</td>
<td>Decisions to cover needs with internal resources or utilize outside counsel</td>
</tr>
<tr>
<td>§ 17:16</td>
<td>Assessing needs</td>
</tr>
<tr>
<td>§ 17:17</td>
<td>Drafting a mission statement</td>
</tr>
<tr>
<td>§ 17:18</td>
<td>Developing a strategic plan for implementing the goals and tasks reflected in the mission statement</td>
</tr>
<tr>
<td>§ 17:19</td>
<td>Building the department</td>
</tr>
<tr>
<td>§ 17:20</td>
<td>Recruiting and hiring legal professionals</td>
</tr>
<tr>
<td>§ 17:21</td>
<td>The Chief Operating Officer</td>
</tr>
<tr>
<td>§ 17:22</td>
<td>Temporary attorneys, outsourcing, and secondments</td>
</tr>
<tr>
<td>§ 17:23</td>
<td>Training and continuing legal education</td>
</tr>
<tr>
<td>§ 17:24</td>
<td>Professional growth and development</td>
</tr>
<tr>
<td>§ 17:25</td>
<td>Monitoring and evaluating performance</td>
</tr>
<tr>
<td>§ 17:26</td>
<td>Bar associations, civic activities, and pro bono work</td>
</tr>
<tr>
<td>§ 17:27</td>
<td>Diversity</td>
</tr>
<tr>
<td>§ 17:28</td>
<td>Compensation</td>
</tr>
<tr>
<td>§ 17:29</td>
<td>Managing the department</td>
</tr>
<tr>
<td>§ 17:30</td>
<td>Choosing the organizational model</td>
</tr>
<tr>
<td>§ 17:31</td>
<td>Location of the law department</td>
</tr>
<tr>
<td>§ 17:32</td>
<td>Assignment of work within the department</td>
</tr>
<tr>
<td>§ 17:33</td>
<td>Keeping track of assignments</td>
</tr>
<tr>
<td>§ 17:34</td>
<td>Allocating law department costs to business units</td>
</tr>
<tr>
<td>§ 17:35</td>
<td>Keeping outside counsel in sync with department goals</td>
</tr>
<tr>
<td>§ 17:36</td>
<td>Selecting and managing outside counsel</td>
</tr>
</tbody>
</table>
CHAPTER 18. LAW FIRM STAFFING

§ 18:1 Scope note
§ 18:2 What inside counsel have always wanted in law firm staffing
§ 18:3 Forces causing changes to traditional law firm staffing models
§ 18:4 Traditional notions of leverage and use of junior lawyers
§ 18:5 Unbundling, disaggregation, and segmentation
§ 18:6 Contract/contingent attorneys
§ 18:7 Impact of alternative fee arrangements on law firm staffing decisions
§ 18:8 Staffing decisions as part of legal process outsourcing (“LPO”)
§ 18:9 The impact on law firm staffing of the make or buy decision
§ 18:10 Promoting inclusion and diversity in law firm staffing decisions
§ 18:11 The evolving role of other timekeepers and non-attorney professionals
§ 18:12 Practice checklist
§ 18:13 Form: sample shadowing policy language
§ 18:14 Form: sample AFA experience report
§ 18:15 Form: sample diversity and inclusion retainer language
§ 18:16 Form: sample inclusion and diversity report card

CHAPTER 19. LEGAL RESEARCH MANAGEMENT

§ 19:1 Scope note
§ 19:2 Reducing direct costs of legal research
§ 19:3 Benefits of more effective legal research
§ 19:4 Cost savings when legal research is part of early case assessment and risk analysis
§ 19:5 Legal research specialization
§ 19:6 —Personality traits of research and writing experts
Table of Contents

§ 19:7 —Seven habits of highly effective legal researchers
§ 19:8 —Checklist for hiring research attorneys
§ 19:9 Building a legal research skills development program
§ 19:10 Vital role of the legal research director
§ 19:11 Impact of technology on legal research management
§ 19:12 —A brief review of technology options
§ 19:13 Reusing and leveraging legal research work product
§ 19:14 —Benefits
§ 19:15 —Law firm case studies
§ 19:16 Building the legal research knowledgebase
§ 19:17 —Staffing
§ 19:18 —Selecting a platform
§ 19:19 —Identifying content
§ 19:20 —Securing participation
§ 19:21 —Creating the structure
§ 19:22 —Training users
§ 19:23 —Evaluating results
§ 19:24 Outsourcing and “unbundling” legal research
§ 19:25 —The traditional model
§ 19:26 —Role of specialized firms
§ 19:27 —Establishing trust and confidence
§ 19:28 —Ethical and professional considerations
§ 19:29 —Economic considerations and billing options
§ 19:30 —Checklist for selecting a research firm
§ 19:31 —Managing the relationship
§ 19:32 —Deciding which research projects to outsource
§ 19:33 —Mechanics of assigning the research project
§ 19:34 —Pitfalls to avoid
§ 19:35 —Case study
§ 19:36 Reducing compliance costs: multi-jurisdictional surveys
§ 19:37 —Case studies
§ 19:38 —Employee education
§ 19:39 Practice checklist
§ 19:40 Guarantee

CHAPTER 20. LOCAL AND SPECIALIZED OUTSIDE COUNSEL

§ 20:1 Scope note

© 2019 Thomson Reuters, 4/2019
§ 20:2 Objectives, concerns, preliminary considerations
§ 20:3 —The salient characteristics of relationships with local and specialized counsel
§ 20:4 —When to retain local counsel for litigation matters
§ 20:5 —When to retain local counsel for corporate, transactional, securities, and administrative matters
§ 20:6 —When to retain specialized counsel for litigation matters
§ 20:7 —When to retain specialized counsel for corporate, transactional, securities, and administrative matters
§ 20:8 Strategies for identifying and selecting local and specialized counsel
§ 20:9 —Identifying the characteristics of the attorney needed
§ 20:10 —Timing of the selection of local and specialized counsel
§ 20:11 —Who should select local or specialized counsel?
§ 20:12 —Locating candidates to serve as local or specialized counsel
§ 20:13 —Law firm networks
§ 20:14 —Verifying the reputation, experience, and ability of local and specialized counsel
§ 20:15 —Ensuring that local and specialized counsel suit the company’s goals and personality
§ 20:16 What local and specialized counsel should do to evaluate potential clients
§ 20:17 Controlling costs associated with local and specialized counsel
§ 20:18 Working with and monitoring the performance of local and specialized counsel
§ 20:19 —Scheduling an early, preliminary exchange of ideas
§ 20:20 —Designating contact persons
§ 20:21 —Emphasizing the importance of timely, clear, and complete communication
§ 20:22 —Deciding who will decide
§ 20:23 —Reaching an understanding concerning transmission and review of documents
§ 20:24 —Ensuring a quick response time
§ 20:25 —Maintaining the focus on the company’s goals
§ 20:26 —Establishing an efficient division of labor

ccxxviii
CHAPTER 21. COORDINATING COUNSEL
§ 21:1 Scope note
§ 21:2 Objectives
§ 21:4 Alternative approaches
§ 21:5 Selection of coordinating counsel
§ 21:6 Practices and responsibilities
§ 21:7 —Investigation and development of themes and strategy
§ 21:8 —Early risk analysis
§ 21:9 —Selecting, training, and monitoring local counsel
§ 21:10 —Discovery document management
§ 21:11 —Tracking and developing issues
§ 21:12 —Resource library
§ 21:13 —Tracking and developing witnesses
§ 21:14 —Experts
§ 21:15 —Arranging common services
§ 21:16 —Technology
§ 21:17 —Coordinating regulatory, legislative, SEC, public relations, and other responses or initiatives
§ 21:18 —Settlement
§ 21:19 —Trial and post-mortems
§ 21:20 —Appeal
§ 21:21 Practice checklist
§ 21:22 Form—Training agenda
§ 21:23 —Witness summary sheet
§ 21:24 —Local task list

© 2019 Thomson Reuters, 4/2019  ccxxix
CHAPTER 22. COUNSEL FOR INTERNATIONAL LEGAL WORK

§ 22:1 Scope note
§ 22:2 Objectives, concerns, and preliminary considerations
§ 22:3 Identifying characteristics
§ 22:4 Methods and strategies for identifying international counsel
§ 22:5 —Foreign offices of United States firms
§ 22:6 —Global alliances
§ 22:7 —Direct identification
§ 22:8 Requests for proposals
§ 22:9 Selection criteria
§ 22:10 —Substantive considerations
§ 22:11 —Quality of work required
§ 22:12 —Knowledge of the relevant local laws
§ 22:13 ——Data privacy regulations
§ 22:14 ——Relevant substantive experience
§ 22:15 —Local relationships
§ 22:16 —References
§ 22:17 —Practical considerations
§ 22:18 —Language skills
§ 22:19 —Knowledge of applicable United States laws
§ 22:20 ——The Foreign Corrupt Practices Act
§ 22:21 ——Anti-boycott regulations
§ 22:22 ——Export laws
§ 22:23 —Local communications infrastructure
§ 22:24 —Ethical conflicts and concerns
§ 22:25 —Costs and fees
§ 22:26 The interview
§ 22:27 Managing the working relationship
§ 22:28 —Engagement letter
§ 22:29 —Client involvement
§ 22:30 —Communications
§ 22:31 —Setting goals
§ 22:32 —Educating counsel
§ 22:33 —Division of labor
§ 22:34 —Client involvement
§ 22:35 —Billing and budgets
§ 22:36 —Cultural considerations
§ 22:37 —Parent/subsidiary considerations
§ 22:38 —Evaluation of foreign counsel

ccxxx
### Table of Contents

| § 22:39 | —Common problems and suggested solutions |
| § 22:40 | Practice checklists |
| § 22:41 | Form: Outside counsel guidelines |
| § 22:42 | Form: Foreign Corrupt Practices Act—Vendor Due Diligence Questionnaire |
| § 22:42.50 | —Vendor Registration Questionnaire—To be completed by internal business sponsor |
| § 22:43 | Form: Foreign Corrupt Practices Act questionnaire for foreign counsel |
| § 22:44 | Form: Engagement (retainer) letter: Practical considerations checklist |
| § 22:45 | Form: Outside counsel evaluation process checklist |
| § 22:46 | Form: Legal RFP cover letter |
| § 22:47 | Form: Law firm RFP |
| § 22:48 | Form: Managing Legal Costs Checklist |

### CHAPTER 23. REPRESENTING EUROPEAN COMPANIES IN U.S. LITIGATION

| § 23:1 | Scope note |
| § 23:2 | Objective: a mutual education process |
| § 23:3 | —Common law v. civil law |
| § 23:4 | —U.S.’s federal/state dichotomy; application of foreign law |
| § 23:5 | Selection of U.S. outside counsel |
| § 23:6 | Strategic planning |
| § 23:7 | —Preparatory work |
| § 23:8 | —Timetables |
| § 23:9 | —Logistics |
| § 23:10 | Communication |
| § 23:11 | —Team leaders |
| § 23:12 | —Methods and frequency of communication |
| § 23:13 | —Cultural considerations |
| § 23:14 | —Outside counsel in Europe; pros and cons |
| § 23:15 | Staffing |
| § 23:16 | —Language issues |
| § 23:17 | Budget and billing |
| § 23:18 | Document handling |
| § 23:19 | —Document custodians |
| § 23:20 | —Procedures |
| § 23:21 | Privileges and protections |
| § 23:22 | —Attorney-client privilege |
§ 23:23 — —European inside counsel
§ 23:24 — —Conflict of laws
§ 23:25 — —Practical efforts to protect the privilege
§ 23:26 — —Joint defense agreements
§ 23:27 — —Attorney work product
§ 23:28 — —Internal company investigations
§ 23:29 — —Data protection and privacy laws
§ 23:30 — Insurance
§ 23:31 — Service of process
§ 23:32 — —Hague Convention on service abroad; letters rogatory
§ 23:33 — —Waiver
§ 23:34 — Motion practice
§ 23:35 — —Client declarations
§ 23:36 — —Specific motions
§ 23:37 — —Subject matter and personal jurisdiction
§ 23:38 — —Forum non conveniens
§ 23:39 — —Summary judgment
§ 23:40 — Discovery
§ 23:41 — —Hague Evidence Convention and letters rogatory
§ 23:42 — —Document production
§ 23:43 — —Discovery of electronically stored information in Europe
§ 23:44 — —Resolving conflicts with European data protection and privacy laws
§ 23:45 — —Interrogatories
§ 23:46 — —Depositories
§ 23:47 — —Corporate officers, managers and employees
§ 23:48 — —Former employees and similar persons
§ 23:49 — —Experts
§ 23:50 — —Witness preparation
§ 23:51 — —Protective orders
§ 23:52 — —In aid of foreign proceedings (28 U.S.C.A. § 1782)
§ 23:53 — Trials
§ 23:54 — —The court’s role
§ 23:55 — —Pre-trial orders
§ 23:56 — —Post-trial orders
§ 23:57 — —The attorney’s role
§ 23:58 — Recognition and enforcement of U.S. judgments in Europe
§ 23:59 — Settlement
TABLE OF CONTENTS

§ 23:60 Alternative dispute resolution
§ 23:61 Practice checklist

Volume 2

CHAPTER 24. USE OF CONTRACT LAWYERS

§ 24:1 Scope note
§ 24:2 Preliminary considerations
§ 24:3 Reasons for using contract attorneys
§ 24:4 —Economic cycles
§ 24:5 —Cyclical staffing and workload demands
§ 24:6 —Determining whether a new position is necessary
§ 24:7 —Keeping work in-house
§ 24:8 —Cost-effectiveness
§ 24:9 —Specific expertise
§ 24:10 —Dedication to one project
§ 24:11 —Document review projects
§ 24:12 —Head count and outside counsel budget restrictions
§ 24:13 Potential disadvantages to using contract attorneys
§ 24:14 The potential pool of contract attorneys
§ 24:15 —Junior attorneys
§ 24:16 —Attorneys seeking lifestyle changes
§ 24:17 —Attorneys between jobs
§ 24:18 —Retirees and part-timers
§ 24:19 Practical considerations and risks
§ 24:20 —Agencies: purpose for using
§ 24:21 —Seconding process
§ 24:22 —Collegial referrals and call backs
§ 24:23 —Selection process for attorneys
§ 24:24 —Quality control
§ 24:25 —Commitment is voluntary
§ 24:26 —Organizational fit and role of contract attorney
§ 24:27 —Hiring contract attorneys
§ 24:28 —Budgetary allocation
§ 24:29 —Selection process for vendors
§ 24:30 —Billing

© 2019 Thomson Reuters, 4/2019 ccxxxiii
SUCCESSFUL PARTNERING

§ 24:31 —Malpractice insurance
§ 24:32 Statutory considerations
§ 24:33 —Employee or independent contractor
§ 24:34 — —Common law “right to control” test
§ 24:35 — —“Economic realities” test
§ 24:36 — —Hybrid test
§ 24:37 —Joint employment
§ 24:38 —Employee or independent contractor—
  Checklist
§ 24:39 —Taxes
§ 24:40 —Benefits
§ 24:41 Employment laws
§ 24:42 —Title VII
§ 24:43 —Age Discrimination in Employment Act
§ 24:44 —Americans with Disabilities Act of 1990
§ 24:44.50 —Rehabilitation Act of 1973
§ 24:45 —Fair Labor Standards Act
§ 24:46 —Family and Medical Leave Act of 1993
§ 24:47 —Unemployment compensation laws
§ 24:48 —Immigration laws
§ 24:49 —Workers’ compensation
§ 24:50 Ethical considerations
§ 24:51 —Unauthorized practice of law
§ 24:52 —Disclosure to client
§ 24:53 —Division of fees
§ 24:54 — —Sharing fees with outside lawyers
§ 24:55 — —Sharing fees with non-lawyers
§ 24:56 —Markup of charges to clients
§ 24:57 —Conflict of interest
§ 24:58 —Confidentiality
§ 24:59 Ethical consideration—Duty to supervise
§ 24:59.50 Constitutional considerations—First Amendment
§ 24:60 Practice checklist
§ 24:61 Form: contingent legal staffing request for
  proposal (relevant provisions)
§ 24:62 Form: confidentiality policy and agreement
§ 24:63 Form: insider trading policy and agreement
§ 24:64 Form: conflict of interest statement
§ 24:65 Form: independent contractor, not employee,
  agreement

CHAPTER 25. REPRESENTING A
CLIENT WITH INSURANCE
§ 25:1 Scope note

ccxxxiv
CHAPTER 25A. INSURANCE FOR BUSINESS DISRUPTIONS AND OTHER FIRST-PARTY CLAIMS

I. INTRODUCTION
§ 25A:1 Scope note

II. PRELIMINARY DISCUSSION
§ 25A:2 First-party property insurance

© 2019 Thomson Reuters, 4/2019
§ 25A:3 — Named peril and all risk coverage
§ 25A:4 — Trigger of coverage
§ 25A:5 — Extent of coverage for property loss; actual cash value, replacement cost, or repair or replace by insurer
§ 25A:6 — Time element coverages
§ 25A:7 — — Business interruption coverage
§ 25A:8 — — Contingent business interruption coverage
§ 25A:9 — — Coverage for prohibited access by order of civil authority
§ 25A:10 — — Coverage for the prevention of ingress and egress
§ 25A:11 — — Extra expense and contingent extra expense coverage
§ 25A:12 — — Computer/cyberspace coverage
§ 25A:13 — — Construction projects

III. OBTAINING INSURANCE
§ 25A:14 Counsel's role in obtaining and analyzing insurance policies
§ 25A:15 — Disclosures required for applications
§ 25A:16 — Certificates of insurance
§ 25A:17 — Analysis of insurance policy provisions
§ 25A:18 — — Insurance binders
§ 25A:19 — — Insurance policies
§ 25A:20 — — Manuscript provisions
§ 25A:21 — — Contracts with insurance brokers

IV. INTERPRETING POLICIES
§ 25A:22 Insurance policy interpretation
§ 25A:23 — Which state’s law applies?
§ 25A:24 — — Forum law will be applied where there is no conflict-of-laws
§ 25A:25 — — The most significant relationship test
§ 25A:26 — — Lex loci contractus
§ 25A:27 — — Legal rules of insurance policy interpretation
§ 25A:28 — — Analysis of provisions in property insurance policies
§ 25A:29 Important provisions in property insurance policies
§ 25A:30 — — Exclusions and anticoncurrent causation clauses

ccxxxvi
TABLE OF CONTENTS

§ 25A:31 —Flood exclusions
§ 25A:32 —Choice-of-laws clauses
§ 25A:33 —Analysis of dispute resolution options and provisions
§ 25A:34 —Consideration of the wider effects of a catastrophe
§ 25A:35 —Blanket coverage
§ 25A:36 —Margin clauses
§ 25A:37 —Lenders and mortgageholders endorsements

V. PURSUING CLAIMS

§ 25A:38 Counsel’s role in the evaluation and pursuit of coverage claims
§ 25A:39 —The roles of in-house and outside counsel
§ 25A:40 —Protecting sensitive communications
§ 25A:41 —When counsel should communicate directly with insurers
§ 25A:42 Best practices for the pursuit of coverage claims
§ 25A:43 —Identify all potential sources of coverage
§ 25A:44 —Perform a coverage analysis
§ 25A:45 —Satisfy all conditions to coverage
§ 25A:46 ——Report losses promptly
§ 25A:47 ——The duty to cooperate
§ 25A:48 ——Loss mitigation
§ 25A:49 ——Insurance policy deadlines
§ 25A:50 —Assemble the right team for the pursuit of coverage
§ 25A:51 —Develop a plan for moving the claim to a prompt and successful resolution
§ 25A:52 —Document everything that transpires in connection with the claim
§ 25A:53 —Demand partial payments
§ 25A:54 —Do not prejudice the insurer’s rights
§ 25A:55 Important issues which often arise in the pursuit of coverage claims
§ 25A:56 —Dealing with reservations of rights
§ 25A:57 —Anticoncurrent causation practice tip
§ 25A:58 —The wind v. flood problem in hurricane losses
§ 25A:59 —Business interruption calculation practice tips
§ 25A:60 —Minimizing time element deductibles
§ 25A:61 —Extra expense practice tip

© 2019 Thomson Reuters, 4/2019 ccxxxvii
VI. RESOLVING CLAIMS

§ 25A:62 Settlement of claims

§ 25A:63 —Try to limit the amount that is subject to final negotiation

§ 25A:64 —Releases and indemnifications

§ 25A:65 —The impact of piecemeal settlements upon remaining coverage

§ 25A:66 Strategic considerations for resolution of insurance coverage disputes

§ 25A:67 —Litigation

§ 25A:68 — —Forum selection

§ 25A:69 — —Discovery concerning contract interpretation

§ 25A:70 —Arbitration


§ 25A:72 —London arbitrations

§ 25A:73 — —Selection of arbitrators

§ 25A:74 — —Selection and roles of outside counsel

§ 25A:75 — —Unique aspects

§ 25A:76 — —The prevailing party is awarded its attorneys fees and costs

§ 25A:77 — —Is the deck stacked against the policyholder?

§ 25A:78 —Appraisal

§ 25A:79 — —Appraisals decide the amount of loss, not disputes over the scope of coverage

§ 25A:80 — —Appraisal procedure and practice

§ 25A:81 Practice checklist

CHAPTER 25B. DISASTER PREPAREDNESS

§ 25B:1 Scope note

§ 25B:2 Objectives, concerns, and preliminary considerations

§ 25B:3 Top mistakes that companies make in disaster planning

§ 25B:4 Differences between emergencies, crises, and disasters

§ 25B:5 —Emergencies

§ 25B:6 —Crisis

§ 25B:7 —Disasters
CHAPTER 26. SPECIALIZED APPROACHES TO OUTSOURCING LEGAL WORK

§ 26:1 Scope note
§ 26:2 Current trends
§ 26:3 —Convergence
§ 26:4 —Increased oversight of outside firms
§ 26:5 —Offshoring
§ 26:6 —Onshoring
§ 26:7 Specialized outsourcing options and strategies
§ 26:8 —Secondments
§ 26:9 —Using contract lawyers
§ 26:10 —Using electronic discovery vendors
§ 26:11 —Technology-assisted review and predictive coding
§ 26:12 Deciding whether to outsource
§ 26:13 —Potential benefits
§ 26:14 —Potential risks and pitfalls
§ 26:15 —Considering the costs
§ 26:16 —Comparing quality and level of service
§ 26:17 Developing an outsourcing plan
§ 26:18 —Considering corporate culture
§ 26:19 —Designing a different management approach
§ 26:20 —Identifying roles and responsibilities
§ 26:21 —Fees and billing arrangements
§ 26:22 —Defining other terms of the outsourcing relationship
§ 26:23 Managing the outsourcing relationship
§ 26:24 Ethical considerations
§ 26:25 —Competence
§ 26:26 —Supervision
§ 26:27 —Disclosure and consent
§ 26:28 —Diligence
§ 26:29 —Communication
§ 26:30 —Scope
§ 26:31 —Confidentiality
§ 26:32 —Conflicts of interest
§ 26:33 —Unauthorized practice of law
§ 26:34 —Professional independence
§ 26:35 —Reasonable fees
§ 26:36 —Reporting fraud
§ 26:37 — Strategies for maximizing ethical conduct in outsourcing arrangements

§ 26:38 Practice checklist

CHAPTER 27. SPECIALIZED APPROACHES TO INSOURCING LEGAL WORK

§ 27:1 Scope note
§ 27:2 Setting and implementing goals
§ 27:3 Centralizing or decentralizing the in-house department
§ 27:4 Staffing the legal department with the expertise required
§ 27:5 Evaluating the department involves more than budgetary considerations
§ 27:6 How the in-house legal department can meet its goals
§ 27:7 — Recruiting and hiring inside counsel
§ 27:8 — Compensation structures
§ 27:9 — Training and evaluating
§ 27:10 — Technology and cutting-edge solutions
§ 27:11 Managing the transition
§ 27:12 Entergy Corporation—A new team required
§ 27:13 — Building the team
§ 27:14 — — General corporate and transactional work
§ 27:15 — — Employment litigation, labor issues and benefits
§ 27:16 — — Litigation
§ 27:17 — — Regulatory affairs
§ 27:18 — — Nuclear
§ 27:19 — — FERC
§ 27:20 — — Growth areas
§ 27:21 — — — Keeping up with industrial demand
§ 27:22 — — — New corporate governance rules
§ 27:23 — How Entergy attracts and keeps its lawyers
§ 27:24 — Beyond dollars and cents: Entergy’s commitment to diversity and inclusion
§ 27:25 Selected specific insourcing decisions
§ 27:26 — Transactional
§ 27:27 — Contract drafting
§ 27:28 — Routine corporate work
§ 27:29 — Environmental

© 2019 Thomson Reuters, 4/2019
§ 27:30 —Intellectual property
§ 27:31 —Labor/employment
§ 27:32 —Arbitration/litigation
§ 27:33 —Securities
§ 27:34 —Real estate
§ 27:35 —Regulatory
§ 27:36 —Advertising/consumer
§ 27:37 —Insurance/risk management
§ 27:38 Other considerations used to evaluate insourcing decisions
§ 27:39 —Attorney-client privilege in the corporate context
§ 27:40 —Conflicts of interest, reliance on advice of counsel
§ 27:41 —Document destruction and retention decisions
§ 27:42 Practice checklist

CHAPTER 28. TECHNOLOGY

§ 28:1 Scope note
§ 28:2 Preliminary considerations
§ 28:3 Communications technology
§ 28:4 —The limitations of telephone communication
§ 28:5 —The e-mail solution
§ 28:6 ——Organizing e-mail
§ 28:7 —Texts
§ 28:8 —Social media
§ 28:9 —Conferencing
§ 28:10 ——Telephone
§ 28:11 ——Video, web and “always-on” technologies
§ 28:12 —In-courtroom
§ 28:13 Information technology
§ 28:14 —Federal agency documents and data
§ 28:15 —State agency documents and data
§ 28:16 —Legal information databases
§ 28:17 —Commercial research services
§ 28:18 —Access to Internet information and VPNs
§ 28:18.50 —Artificial intelligence
§ 28:18.70 —The proliferation of “fake news” and curated information
§ 28:19 Trial and settlement strategy
§ 28:20 —Mock jury and focus group exercises
§ 28:21 —Estimating costs of litigation
TABLE OF CONTENTS

§ 28:22 Managing information
§ 28:23 —Internally created materials
§ 28:24 —Externally created documents
§ 28:25 Storing information
§ 28:26 —Finding stored information
§ 28:27 —Folders
§ 28:28 —Template searching
§ 28:29 —Search engines
§ 28:30 Removing information
§ 28:31 Litigation support
§ 28:32 Electronic discovery
§ 28:33 Creating an extranet
§ 28:34 —Inside counsel's extranet
§ 28:35 —Outside counsel's extranet
§ 28:36 Electronic billing
§ 28:37 Security and privacy
§ 28:38 —External security
§ 28:39 ——E-mail security
§ 28:40 ——Database security
§ 28:41 —Internal security
§ 28:42 ——Privileged and confidential information
§ 28:43 ——Misuse of e-mail, instant messaging and social media
§ 28:44 ——Trademark and copyright infringement
§ 28:45 ——Office policies
§ 28:46 Allocating the costs of technology
§ 28:47 Practice checklist
§ 28:48 Form: Corporate e-mail policy
§ 28:49 Form: Law firm social networking policy
§ 28:50 Form: Corporate social media policy
§ 28:51 Form: Litigation hold notice

CHAPTER 28A. ARTIFICIAL INTELLIGENCE

§ 28A:1 Scope note
§ 28A:2 Preliminary considerations
§ 28A:3 AI applications in litigation and investigations
§ 28A:4 —Case assessment
§ 28A:5 —Discovery
§ 28A:6 —Legal research
§ 28A:7 AI applications outside the litigation context
§ 28A:8 —Commercial law

© 2019 Thomson Reuters, 4/2019
§ 28A:9 — Corporate transactions
§ 28A:10 — Investigations and compliance
§ 28A:11 — Intellectual property
§ 28A:12 Professional considerations
§ 28A:13 — Counsel’s ethical duties
§ 28A:14 — — Duty of competence
§ 28A:15 — — Duty to supervise
§ 28A:16 — — Other practical considerations
§ 28A:17 — — Litigation considerations
§ 28A:18 — — Acceptance by courts and regulators
§ 28A:19 — — Use by courts and adverse parties
§ 28A:20 Implications for the legal profession
§ 28A:21 Practice checklist
§ 28A:22 Form: Questions to ask when vetting prospective AI service providers

CHAPTER 28B. SOCIAL MEDIA
§ 28B:1 Scope note
§ 28B:2 Objectives, concerns, preliminary considerations
§ 28B:3 — Why social media matters
§ 28B:4 — Principal social media sites utilized by businesses
§ 28B:5 Effective social media law firm partnering strategies
§ 28B:6 — Social media cost management strategy
§ 28B:7 Principal legal issues for corporate counsel and key case law and statutory framework
§ 28B:8 — Advertising
§ 28B:9 — — Monitoring user comments
§ 28B:10 — — Influencer marketing
§ 28B:11 — — Use of “Bots”
§ 28B:12 — — Social media sweepstakes
§ 28B:13 — — Corporate online presence concerns
§ 28B:14 — — Hacking
§ 28B:15 — — Monitoring non-company social media pages
§ 28B:16 — — Defamation suits
§ 28B:17 — — Fake testimonials
§ 28B:18 — — Intellectual property
§ 28B:19 — — Security concerns for publicly traded companies
§ 28B:20 — — Guarding against insider trading
CHAPTER 29. INFORMATION GOVERNANCE
§ 29:1 Scope note
§ 29:2 Objectives, concerns, preliminary considerations
§ 29:3 —Key concepts
§ 29:4 —Evolution of Information Governance
§ 29:5 —Complexities
§ 29:6 Navigating the legal and regulatory landscape
§ 29:7 —Risks
§ 29:8 Importance of Information Governance strategy
§ 29:9 Building the strategy
§ 29:10 —Scope of the Information Governance program
§ 29:11 —Governance model including executive ownership, leadership and proper delegation
§ 29:12 —Proactive Information Governance practices
§ 29:13 —Flexibility
§ 29:14 —Identifying existing Information Governance challenges

© 2019 Thomson Reuters, 4/2019
§ 29:15 — Unearthing issues that need attention when assessing strategic objectives
§ 29:16 — Incorporating technological solutions
§ 29:17 — Framework for policies and other directives
§ 29:18 — Communication and training
§ 29:19 — Compliance, audit and enforcement
§ 29:20 — Implementation plan
§ 29:21 — Maintaining and continuously improving the strategy
§ 29:22 — The governing model
§ 29:23 — Fostering collaboration to drive a successful Information Governance strategy
§ 29:24 — Identifying key players and stakeholders
§ 29:25 — The governing board/committee embedding collaboration into the strategy
§ 29:26 — The tactical teams that drive implementation of the strategy and ongoing maintenance
§ 29:27 — The Program Office which manages the Information Governance program day to day
§ 29:28 — The role of legal counsel in Information Governance
§ 29:29 — The records retention schedule
§ 29:30 — Philosophy
§ 29:31 — Scope
§ 29:32 — Planning, development, and maintenance
§ 29:33 — Trends
§ 29:34 — Legislating information
§ 29:35 — Cybersecurity
§ 29:36 — Safeguarding information with outside counsel
§ 29:37 — Blockchain
§ 29:38 — Checklist for implementing an information management policy
§ 29:39 — Practice checklist

CHAPTER 30. BENCHMARKING
§ 30:1 — Scope note
§ 30:2 — Benchmarking the corporate legal department
§ 30:3 — Preliminary considerations
§ 30:4 — — Benchmarking objectives
§ 30:5 — — Importance of early assessment
§ 30:6 — — Pitfalls
§ 30:7 — — Advantages and disadvantages
§ 30:8 — — Process
CHAPTER 31. ETHICS
§ 31:1  Scope note

© 2019 Thomson Reuters, 4/2019
§ 31:2 Preliminary considerations
§ 31:3 Norms and guidelines
§ 31:4 —Model Rules of Professional Conduct
§ 31:5 —Model Code of Professional Responsibility (superseded)
§ 31:6 —Restatement of the Law Governing Lawyers
§ 31:7 —Advisory opinions
§ 31:8 —Resources
§ 31:9 Relationship factors
§ 31:10 —Commitment of the corporation
§ 31:11 —Commitment of counsel
§ 31:12 —Selection of outside counsel
§ 31:13 —Scope of engagement
§ 31:14 —Supervision
§ 31:15 —Difference of opinion
§ 31:16 The corporate entity
§ 31:17 The client’s view of counsel
§ 31:18 Authority reserved to client
§ 31:19 Duty to communicate
§ 31:20 The ethical use of technology
§ 31:21 Protecting confidential information
§ 31:22 Independent professional judgment
§ 31:23 Acting as advocate
§ 31:24 Rendering legal opinions
§ 31:25 Privacy and recordings
§ 31:26 Corporate crime or fraud and counseling on illegal conduct
§ 31:27 Whistle-blowing
§ 31:28 Withdrawal from representation
§ 31:29 Multi-jurisdictional practice
§ 31:30 ADR ethics
§ 31:31 Fostering ethical behavior
§ 31:32 Practice checklist
§ 31:33 Forms—Sample policy on professional conduct
§ 31:34 —Sample disclosure for website
§ 31:35 —Sample email disclaimer
§ 31:36 —Sample facsimile disclaimer
§ 31:37 —Sample engagement letter, including law firm billing guidelines and expert fees and billing guidelines
§ 31:38 —Sample mediation agreement

CHAPTER 32. CONFLICTS OF INTEREST
§ 32:1 Scope note

cxlviii
§ 32:2 Introduction: client-attorney expectations, client-attorney relationships, and conflicts of interest
§ 32:3 Conflicts checks and dialogue between inside and outside counsel: some preliminary considerations
§ 32:4 An overview of current client conflicts
§ 32:5 An overview of former client conflicts
§ 32:6 Current client conflicts
§ 32:7 — Loyalty, adversity, and material limitation: the ABA Model Rules approach
§ 32:8 — Client identity and multiple representation
§ 32:9 — Illustration: simultaneous representation of the company and an employee
§ 32:10 — Withdrawal arrangements
§ 32:11 — Joint-client exception to the attorney-client privilege
§ 32:12 — Derivative actions
§ 32:13 — “Corporate family” conflict questions
§ 32:14 — Setting ground rules at time of engagement and consents
§ 32:15 Former client conflicts of interest: a closer look at the substantial relationship test
§ 32:16 Conflicts, imputation, and screens: changes in the makeup of law firms and corporate legal departments
§ 32:17 — Overview
§ 32:18 — The revolving door: former governmental service
§ 32:19 — Lawyers in private practice changing jobs, imputation, and screening
§ 32:20 — Concerns for in-house legal departments
§ 32:21 — Non-lawyer professionals changing employment
§ 32:22 Mergers and acquisitions involving institutional clients: Conflicts “thrust upon” lawyers
§ 32:23 Withdrawal
§ 32:24 Motions to disqualify
§ 32:25 Beauty contests and initial consultations
§ 32:26 Positional conflicts
§ 32:27 Advocate-witness issues
§ 32:28 Discovery directed at client
§ 32:29 Joint defense agreements: conflicts asserted by non-clients based upon alleged receipt of confidential information

© 2019 Thomson Reuters, 4/2019 ccxlix
SUCCESSFUL PARTNERING

§ 32:30 Ex parte contacts
§ 32:31 —Contacts with represented persons, including contacts with an adverse party; direct contacts between clients
§ 32:32 —Contacts with current or former employees of corporate adversary
§ 32:33 —Communication with opposing experts or staff of opposing party or counsel
§ 32:34 Inadvertent or otherwise “improper” production or transmittal of documents: ethical considerations for the lawyer receiving them
§ 32:35 Applicable law
§ 32:36 Practice checklist
§ 32:37 Comments and caveats regarding sample illustrative forms
§ 32:38 Form: Beauty contest letter
§ 32:39 Form: Declination letter
§ 32:40 Form: Engagement letter, conflict of interest issues generally
§ 32:41 Some additional thoughts and potential engagement letter approaches to conflict of interest issues
§ 32:42 Form: Language regarding termination of engagement by either client or counsel
§ 32:43 Joint representation agreement and language regarding conflict of interest issues and withdrawal from representation
§ 32:44 Form: Joint defense agreement and language regarding potential confidentiality and disqualification issues
§ 32:45 Form: Screening survey for lateral hires
§ 32:46 Form: Screening memorandum for lateral hires
§ 32:47 Illustrative new case report first published in 1940 and selected update commentary

CHAPTER 33. ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT PROTECTION

I. INTRODUCTION

§ 33:1 Scope note
§ 33:2 Objectives, concerns, and preliminary considerations
TABLE OF CONTENTS

II. THE ATTORNEY-CLIENT PRIVILEGE

§ 33:3 Basics of the attorney-client privilege
§ 33:4 A brief history of the privilege
§ 33:5 Policy rationale for the privilege
§ 33:6 Basic elements of the privilege

III. PRIVILEGED COMMUNICATIONS

§ 33:7 Who is an “attorney” for purposes of the privilege?
§ 33:8 Legal advice vs. business advice
§ 33:9 Privilege of attorney-to-client communications

IV. THE CORPORATION AS CLIENT FOR PRIVILEGE PURPOSES

§ 33:10 Corporations are clients for privilege purposes
§ 33:11 The rights of directors, officers, and employees to waive or assert the privilege
§ 33:12 —Personal privilege
§ 33:13 —Former officers and directors
§ 33:14 Parents, subsidiaries, and related corporations
§ 33:15 Mergers, acquisitions, and change of control situations
§ 33:16 Suits by shareholders
§ 33:17 Partnerships, limited partnerships, and limited liability partnerships
§ 33:18 Bankrupt corporations

V. THE CONFIDENTIALITY ELEMENT

§ 33:19 Communications with third parties under the privilege
§ 33:20 —Facilitating legal advice
§ 33:21 —Functional equivalent of employee
§ 33:22 Maintaining confidentiality
§ 33:23 Disclosure in mergers or divestitures

VI. THE WORK PRODUCT DOCTRINE

§ 33:24 Policy and history
§ 33:25 Basic principles and elements of work product protection
§ 33:26 —“Otherwise discoverable”
§ 33:27 —documents and tangible things
§ 33:28 —intangible things
§ 33:29 —Prepared “in anticipation of litigation”
§ 33:30 —By or for another party or that party’s representative: work product prepared by non-attorneys

VII. SPECIAL WAIVER ISSUES
§ 33:31 Inadvertent production of privileged documents in litigation
§ 33:32 Documents and communications related to an internal investigation
§ 33:33 Voluntary disclosure of privileged documents to governmental agencies
§ 33:34 Compelled disclosure of privileged documents
§ 33:35 Stolen privileged documents
§ 33:36 Advice-of-counsel defense

VIII. SPECIAL PROBLEMS WITH ELECTRONIC DOCUMENTS AND COMMUNICATIONS
§ 33:37 The increasing use of electronic documents and communications by the corporate client
§ 33:38 Preserving privilege of electronic materials
§ 33:39 Inadvertent production of privileged material
§ 33:40 Metadata

IX. PRACTICE AND PROCEDURE
§ 33:41 Choice of law
§ 33:42 Privilege logs

X. CRIME-FRAUD EXCEPTION
§ 33:43 Policy and general considerations
§ 33:44 Elements of the crime-fraud exception

XI. PRACTICE AIDS
§ 33:45 Checklists
§ 33:46 Form: Model Privilege Log
§ 33:47 Form: Form Agreement Regarding Inadvertent Production
## CHAPTER 34. CROSS-BORDER INVESTIGATIONS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 34:1</td>
<td>Scope note</td>
</tr>
<tr>
<td>§ 34:2</td>
<td>Objectives, concerns, and preliminary considerations</td>
</tr>
<tr>
<td>§ 34:3</td>
<td>What objectives are implicated by the need to perform a cross-border investigation in the business context?</td>
</tr>
<tr>
<td>§ 34:4</td>
<td>External cross-border investigations potentially reach conduct having unique aspects in the international context</td>
</tr>
<tr>
<td>§ 34:5</td>
<td>Persons involved in cross-border investigations and their roles</td>
</tr>
<tr>
<td>§ 34:6</td>
<td>— Board of directors</td>
</tr>
<tr>
<td>§ 34:7</td>
<td>— Corporate officers including compliance officer</td>
</tr>
<tr>
<td>§ 34:8</td>
<td>— In-house legal counsel</td>
</tr>
<tr>
<td>§ 34:9</td>
<td>— Outside legal counsel</td>
</tr>
<tr>
<td>§ 34:10</td>
<td>— Human resource professionals</td>
</tr>
<tr>
<td>§ 34:11</td>
<td>— Employees</td>
</tr>
<tr>
<td>§ 34:12</td>
<td>— Information provided in multiple languages and translation issues</td>
</tr>
<tr>
<td>§ 34:13</td>
<td>— Social stigma of reporting on colleagues</td>
</tr>
<tr>
<td>§ 34:14</td>
<td>— Protocols to respond quickly and handle employee reports effectively</td>
</tr>
<tr>
<td>§ 34:15</td>
<td>— Additional resources</td>
</tr>
<tr>
<td>§ 34:16</td>
<td>— Local investigators</td>
</tr>
<tr>
<td>§ 34:17</td>
<td>— Translators</td>
</tr>
<tr>
<td>§ 34:18</td>
<td>— Subject matter experts (e.g. accountants)</td>
</tr>
<tr>
<td>§ 34:19</td>
<td>Importance of recognizing applicable international, national and local laws and cultural perspectives</td>
</tr>
<tr>
<td>§ 34:20</td>
<td>— Legal differences</td>
</tr>
<tr>
<td>§ 34:21</td>
<td>— Attorney client privilege</td>
</tr>
<tr>
<td>§ 34:22</td>
<td>— How U.S. courts might resolve differences between the laws of the U.S. and those of a foreign country</td>
</tr>
<tr>
<td>§ 34:23</td>
<td>— How foreign courts resolve address differences between domestic and U.S. laws</td>
</tr>
<tr>
<td>§ 34:24</td>
<td>— Attorney work product</td>
</tr>
<tr>
<td>§ 34:25</td>
<td>Investigation plan and process—Determine whether an investigation is necessary and/or desirable</td>
</tr>
<tr>
<td>§ 34:26</td>
<td>— Set objectives and procedure for measuring progress</td>
</tr>
</tbody>
</table>
§ 34:27 — Determine requirements for, and manner of, preserving data and maintaining confidentiality of corporate and third-party information

§ 34:28 — Identify actual and potential disclosure and remediation obligations, risks, and other cross-border issues

§ 34:29 — Who will lead the investigation

§ 34:30 — Reporting the outcome

§ 34:31 — Handling disclosures

§ 34:32 — Key individuals

§ 34:33 — Informing key stakeholders

§ 34:34 — Informing key management

§ 34:35 — Evaluating public disclosure

§ 34:36 — Evaluating public disclosures—Media disclosure

§ 34:37 — Customers

§ 34:38 — Regulators

§ 34:39 — Remediation

§ 34:40 — Applied to local and country wide area of investigation

§ 34:41 — Remediation applied to all worldwide corporate offices

§ 34:42 — Investigation checklist

CHAPTER 35. INTERNAL INVESTIGATIONS

§ 35:1 Scope note

§ 35:2 Should you conduct an investigation?

§ 35:3 Getting started

§ 35:4 — The investigative team

§ 35:5 — Retaining outside help

§ 35:6 Preserving confidentiality

§ 35:7 — Limiting the flow of information within the organization

§ 35:8 — The attorney-client privilege

§ 35:9 The work product doctrine

§ 35:10 Preserving confidentiality—The “self-evaluative” privilege

§ 35:11 Collecting and reviewing documents

§ 35:12 — Preserving potentially relevant documents

§ 35:13 — Collecting the documents

§ 35:14 — Organizing and using documents
Table of Contents

§ 35:15 Employee interviews
§ 35:16 —Who should conduct the interview?
§ 35:17 —Timing and location of interviews
§ 35:18 —Upjohn warnings
§ 35:19 —Questioning the witness
§ 35:20 —Interviews of non-employees
§ 35:21 —Memorializing interviews
§ 35:22 Avoiding allegations of obstruction of justice
§ 35:23 —Obstruction of justice relating to document issues
§ 35:24 —Obstruction of justice relating to witness interview issues
§ 35:25 Separate counsel for employees
§ 35:26 Timing and nature of disciplinary decisions
§ 35:27 Defamation of employees
§ 35:27.50 Disclosure to the government
§ 35:28 Reports of investigation
§ 35:29 —Written vs. oral reports
§ 35:30 —Structure and content of reports
§ 35:31 Analyzing and acting on the results
§ 35:32 Practice checklist
§ 35:33 Forms—Engagement letter for experts
§ 35:34 —Upjohn memorandum
§ 35:35 —Non-destruct memorandum
§ 35:36 —Shorter non-destruct memorandum

CHAPTER 36. LICENSURE AND ADMITTANCE TO PRACTICE

§ 36:1 Scope note
§ 36:2 Why licensure and admittance to practice issues are important
§ 36:3 Defining the practice of law
§ 36:4 —A clear prohibition of an ambiguously defined activity
§ 36:5 —The delegation of law-related tasks to paralegals and other assistants
§ 36:6 —Obtaining law-related services from non-lawyers
§ 36:7 —The prohibition against corporations practicing law
§ 36:8 Dealing with multijurisdictional practice
§ 36:9 —Defining the problem

© 2019 Thomson Reuters, 4/2019
§ 36:10 —Addressing the problem: different options in different contexts
§ 36:11 —Gaining full admission to another bar
§ 36:12 —Obtaining local counsel
§ 36:13 —Multijurisdictional litigation matters
§ 36:14 —Multijurisdictional transactional practice
§ 36:15 —Proposed reform from the Restatement of the Law Governing Lawyers
§ 36:16 —Major reform from revision to Model Rule 5.5
§ 36:17 —Positive developments in state law
§ 36:18 International practice
§ 36:19 Obtaining a license to practice law
§ 36:20 —A state-based process
§ 36:21 —A summary of state bar admission requirements
§ 36:22 —State bar admission: the gateway to state and federal courts
§ 36:23 —Federal district courts
§ 36:24 —Supreme Court of the United States
§ 36:25 —Federal courts of appeals
§ 36:26 —United States Tax Court
§ 36:27 —United States Court of Federal Claims
§ 36:28 —United States Court of International Trade
§ 36:29 Practice checklist
§ 36:30 Form: motion for admission pro hac vice
§ 36:31 General bar admission information for the 55 United States licensing jurisdictions

CHAPTER 37. PROFESSIONALISM
§ 37:1 Scope note
§ 37:2 Objectives, concerns, preliminary considerations
§ 37:3 What is “professionalism”?
§ 37:4 Professionalism commissions
§ 37:5 Why does professionalism matter?
§ 37:6 Ethical conduct as an element of professionalism
§ 37:7 —Ethical rules overview
§ 37:8 —Ethics rules that are fundamental to professionalism
§ 37:9 —How in-house and outside counsel may partner to promote ethical practice
§ 37:10 —Outside counsel guidelines
§ 37:11 —Suggestions for promoting an ethical mindset
TABLE OF CONTENTS

§ 37:12 Excellence in service to clients as an element of professionalism
§ 37:13 —Skills development and expertise
§ 37:14 —Nurturing continued development of expertise
§ 37:15 —Preparation
§ 37:16 Serving the public interest
§ 37:17 —Why is serving the public interest an element of professionalism?
§ 37:18 —Access to justice gap
§ 37:19 —Access to justice and why it matters
§ 37:20 —Pro bono service
§ 37:21 —Ethics rules and state requirements
§ 37:22 —State court efforts to encourage pro bono
§ 37:23 —Lawyers are rising to the challenge
§ 37:24 —In-house counsel pro bono programs
§ 37:25 —Challenges facing in-house counsel interested in engaging in pro bono
§ 37:26 —In-house pro bono committees
§ 37:27 —Pro bono partnerships between in-house legal departments and law firms
§ 37:28 —Model partnership programs
§ 37:29 —The “Clinic In A Box” program
§ 37:30 —Attorneys coming together in times of crisis
§ 37:31 —Corporate social responsibility
§ 37:32 —Approaches to corporate social responsibility
§ 37:33 —Outside counsel policies that foster professionalism
§ 37:34 —Outside counsel policies that address diversity
§ 37:35 —Outside counsel policies that address the retention of talent
§ 37:36 Diversity
§ 37:37 —Why is diversifying the legal profession an element of professionalism?
§ 37:38 —Other rationales for promoting diversity at law firms
§ 37:39 —Corporate law departments’ initiatives to promote diversity
§ 37:40 —Law firm initiatives to enhance diversity
§ 37:41 —Law firm, corporate counsel, and bar association sponsored fellowships to enhance diversity
§ 37:42 —Efforts to facilitate “on-ramping”
§ 37:43 Civility
§ 37:44 —Standards of civility
§ 37:45 — Civility and zealous advocacy
§ 37:46 — Civility to one’s clients
§ 37:47 — Promoting civility
§ 37:48 Practice checklist
§ 37:49 Illustrative forms
§ 37:50 — Attorney part-time policy
§ 37:51 — Telecommuting policy
§ 37:52 — Alternate work locations policy

CHAPTER 37A. PRO BONO

§ 37A:1 Scope note
§ 37A:2 The source and foundation of the obligation to provide pro bono services
§ 37A:3 — ABA Model Rules
§ 37A:4 — An institutional pro bono commitment
§ 37A:5 — — The law firm pro bono challenge
§ 37A:6 — — The corporate pro bono challenge
§ 37A:7 Partnering to fill a need for pro bono services
§ 37A:8 — — Reasons given for participating or not participating in pro bono service
§ 37A:9 Why law firms and in-house legal departments should partner on pro bono matters
§ 37A:10 — — A pro bono partnership helps the law firm and legal department leverage strengths
§ 37A:11 — — Mechanisms for doing pro bono work already established at law firm
§ 37A:12 — — In-house counsel often provide experience and expertise
§ 37A:13 — — Additional resources available to provide pro bono service in law firm setting
§ 37A:14 — — Attorneys in law firms may have more flexibility in their schedule to take on pro bono responsibilities
§ 37A:15 — — Recognizing mutual benefits for the law firm and in-house legal department
§ 37A:16 — — Ability to share resources and expertise
§ 37A:17 — — Opportunities for learning more about our respective counterparts
§ 37A:18 What would a pro bono partnership look like?
§ 37A:19 — — Working jointly at a clinic

SUCCESSFUL PARTNERING
cclviii
§ 37A:20 —Sponsoring letter-writing clinics together
§ 37A:21 —Taking on certain substantive areas of litigation (e.g., immigration, housing)
§ 37A:22 —Assisting administrative processes or appellate work
§ 37A:23 —Serving as moot judge for attorneys preparing for argument
§ 37A:24 —Participating in ad hoc projects of immediate need or of individualized interest
§ 37A:25 What are the challenges and other considerations that may prevent a successful partnership?
§ 37A:26 —In-house counsel’s need for malpractice insurance
§ 37A:27 —Challenges presented by the multi-jurisdictional practice of law
§ 37A:28 —Conflicts
§ 37A:29 —Managing expectations and other considerations before undertaking the partnership
§ 37A:30 Forming a pro bono partnership
§ 37A:31 —Selecting outside counsel with whom to partner
§ 37A:32 —Selecting in-house counsel with whom to partner
§ 37A:33 —Selecting a legal services or public interest organization with whom to partner
§ 37A:34 Practice checklist
§ 37A:35 Form—Pro bono income screening
§ 37A:36 —Pro bono retainer agreement

CHAPTER 38. CONTINUING LEGAL EDUCATION AND TRAINING
§ 38:1 Scope note
§ 38:2 The purpose of continuing legal education and training
§ 38:3 A brief history of the development and the current status of continuing legal education in the United States
§ 38:4 Common characteristics and differences between the needs of corporate and outside counsel
§ 38:5 Designing and monitoring effective programs
§ 38:6 —General goals for effective programs
SUCCESSFUL PARTNERING

§ 38:7 —Factors to consider in designing the program
§ 38:8 —Requirements imposed by the regulators
§ 38:9 ——Common features
§ 38:10 ——The ABA’s proposed model
§ 38:11 ——Different approaches can lead to excellent results
§ 38:12 Eliminating unworthy programs
§ 38:13 Joint inside and outside counsel programs
§ 38:14 —Law office management
§ 38:15 —Standardization of practices
§ 38:16 —Elimination of bias
§ 38:17 —Ethics
§ 38:18 —Substance abuse
§ 38:19 —Professionalism
§ 38:20 —Providing services to the community
§ 38:21 —Skills training
§ 38:22 —Postmortem sessions
§ 38:23 —Use of technology
§ 38:24 —Formal exchanges of personnel
§ 38:25 Designing and monitoring effective programs—West Pharmaceutical Services, Inc. and DLA Piper LLP (US)
§ 38:26 —West Pharmaceutical Services’ law department approach
§ 38:27 —DLA Piper LLP (US)
§ 38:28 Examples of particular CLE strategies—DLA Piper LLP (US)—Associate development
§ 38:29 ——Joint inside and outside counsel programs
§ 38:30 ——Integrating CLE and pro bono
§ 38:31 ——Secondments
§ 38:32 Practice checklist
§ 38:33 California’s MCLE deadlines
§ 38:34 California’s proportional requirements
§ 38:35 United Kingdom requirements
§ 38:36 New York’s CLE requirements
§ 38:37 Table of state MCLE requirements
§ 38:38 Paralegal/legal assistant regulation update
§ 38:39 Jurisdictional table of legislation relating to paralegals and legal assistants

CHAPTER 39. DIVERSITY (AND INCLUSION)
§ 39:1 Scope note
§ 39:2 Using this chapter and other resources
§ 39:3 —Foundational initiatives of the organized bar and related groups
§ 39:4 —Other notable initiatives
§ 39:5 —Enduring commentary and publications
§ 39:6 The law organization’s diversity baseline
§ 39:7 Distinguishing diversity from affirmative action
§ 39:8 Foundation and goals of diversity
§ 39:9 —Introduction to the diversity inclusion principle
§ 39:10 —Three levels of possible goals
§ 39:11 —Evolution of the diversity inclusion principle
§ 39:12 Principal risks of implementing the diversity inclusion principle
§ 39:13 —Discomfort and resistance by lawyers
§ 39:14 —Misguided or improperly balanced early initiatives
§ 39:15 —Potential for legal action
§ 39:16 —Potential alienation of some clients
§ 39:17 Characteristic problems
§ 39:18 —Political correctness instead of candor
§ 39:19 — —Straight talk about the “business case” thesis
§ 39:20 — —Everyone is not the same
§ 39:21 — —Calling a spade “a spade” and not “pulling punches”
§ 39:22 — —Fear of being misunderstood
§ 39:23 —Articulating the scope of diversity
§ 39:24 — —Pros and cons of transitional compromises
§ 39:25 — —Relative priority of covered initiatives
§ 39:26 — —“Self-defining” differences
§ 39:27 —Managing expectations
§ 39:28 —Deciding whether to use professional consultants
§ 39:29 —Dealing with disappointments
§ 39:30 —Handling uniquely resistant attitudes and beliefs
§ 39:31 Traps for the unwary
§ 39:32 —Declaring defeat too early
§ 39:33 —Focusing on numbers to the exclusion of attitudes and other atmospheric conditions
§ 39:34 —Adopting the universal plan
§ 39:35 —Selecting the wrong consultants

© 2019 Thomson Reuters, 4/2019
§ 39:36 —Mistaking growth pains for mortal wounds
§ 39:37 —Declaring success too early
§ 39:38 Partnering for diversity between inside and outside counsel
§ 39:39 —Collaboration and its benefits
§ 39:40 —Driving the business case within outside counsel
§ 39:41 ——Derivative nature of business interest
§ 39:42 ——The “Call to Action”: launch, potential and concern
§ 39:43 ——Potential of “empowering awards”
§ 39:44 ——Waiting for Godot?
§ 39:45 —Reducing risks and other practical intangibles for outside counsel
§ 39:46 —Transactional work opportunities for minority attorneys
§ 39:47 Mechanics of a diversity program
§ 39:48 —Obtaining the commitment of senior management
§ 39:49 —Selecting the diversity team leadership
§ 39:50 —Diversity awareness education and training
§ 39:51 —Benchmarking for best practices
§ 39:52 ——Determining areas to be examined
§ 39:53 ——Collecting benchmarker’s own data
§ 39:54 ——Identifying and soliciting counterparties
§ 39:55 ——Meetings with counterparties
§ 39:56 ——Analyzing and utilizing the data
§ 39:57 ——Responsibility and authority of the diversity team
§ 39:58 ——Appropriate discretionary spending authority
§ 39:59 ——“Business judgment rule” standard for management review
§ 39:60 ——Appropriate credit for time worked
§ 39:61 ——Liaison to other aspects of operations
§ 39:62 —Initiatives to increase numerical diversity
§ 39:63 ——Innovative minority recruiting
§ 39:64 ——Diversity students intern programs
§ 39:65 ——Mentoring for retention and advancement
§ 39:66 ———Selection, recognition and accountability of mentors
§ 39:67 ———Some mentoring fundamentals
§ 39:68 ———Strategic development/retention model
TABLE OF CONTENTS

§ 39:69 — — —Fundamental business factors and implementation elements
§ 39:70 — — —“Valuable business assets”
§ 39:71 — — —Other support initiatives
§ 39:72 — — —Business incentives from inside counsel
§ 39:73 — — —Tracking
§ 39:74 —Monitoring, evaluating and refining program initiatives
§ 39:75 —Relationship to other activities
§ 39:76 —Technology
§ 39:77 —Publicizing the diversity program externally
§ 39:78 Business case for diversity
§ 39:79 —Reality or misguided aspiration?
§ 39:80 —Differing perspectives among some diversity proponents
§ 39:81 —Historical context; evolution and business community acceptance
§ 39:82 —Specific consideration and acceptance by management
§ 39:83 Some legal considerations
§ 39:84 Practice checklist
§ 39:85 Form: Considerations for selection of diversity consultants
§ 39:86 Form: Diversity benchmarking questionnaire
§ 39:87 Form: Benchmarking confidentiality provision
§ 39:88 Form: Talking points for early-stage diversity planning session with senior management
§ 39:89 Form: Select list of professional diversity consultants
§ 39:90 Form: General Services RFP for selecting professional diversity consultants
§ 39:91 Form: Summary of design, rationale and objectives for a LCLD Summer Scholars Program
§ 39:92 Form: Illustrative diversity and inclusion mission, values or policy statements

CHAPTER 39A. LGBTQ ISSUES
§ 39A:1 Scope note
§ 39A:2 Definitions and terminology
§ 39A:3 National and state-level estimates of LGBTQ-identified adults
§ 39A:4 What corporations and law firms are doing to support LGBTQ employees

© 2019 Thomson Reuters, 4/2019
§ 39A:5 —Progressive policies
§ 39A:6 —Proliferation of LGBTQ employee resource or employee affinity groups
§ 39A:7 —Targeted recruitment
§ 39A:8 —Marketing efforts
§ 39A:9 —HRC Corporate Equality Index Ratings for corporations and law firms
§ 39A:10 —Self-identification of LGBTQ status
§ 39A:11 —Recognizing and overcoming objections to supporting LGBTQ employees
§ 39A:12 Legal issues pertaining to LGBTQ employees
§ 39A:13 —Protection of LGBTQ employees against discrimination under Title VII
§ 39A:14 —Protection of LGBTQ employees under the Americans with Disabilities Act
§ 39A:15 —Incongruous positions of the Trump administration
§ 39A:16 —Many state laws prohibit discrimination based on sexual orientation and gender identity or expression
§ 39A:17 —Impact of Supreme Court’s DOMA decisions on same-sex benefits
§ 39A:18 —The bathroom controversy
§ 39A:19 Practice checklist for in-house and outside counsel
§ 39A:20 Form: BASF employee groups
§ 39A:21 Form: Ogletree Deakins employee groups

Volume 3

CHAPTER 40. OPERATING A SMALL LAW DEPARTMENT
§ 40:1 Scope note
§ 40:2 Principal considerations in operating a small law department
§ 40:3 —Department centralization
§ 40:4 —Department structure
§ 40:5 —Department location
§ 40:6 —Encouraging the use of the legal department
§ 40:7 —Department composition
§ 40:8 —Secondments
§ 40:9 —Use of technology

cclxiv
Table of Contents

§ 40:10 Department size
§ 40:11 Recruiting staff for the small law department
§ 40:12 Decision making within the small law department
§ 40:13 —Factors that affect decision making
§ 40:14 —Work flow decisions
§ 40:15 —Make or buy decisions
§ 40:16 —Decisions regarding the handling of legal matters
§ 40:17 Required practices and procedures
§ 40:18 Successful partnering with outside counsel
§ 40:19 —The make or buy decision
§ 40:20 —Types of work that small law departments should send to outside counsel
§ 40:21 —The role of in-house counsel in matters entrusted to outside counsel: partnering versus “tossing the file over the wall”
§ 40:22 —Outside counsel selection
§ 40:23 —Budgeting
§ 40:24 —Fee arrangements
§ 40:25 —Conflicts of interest
§ 40:26 —Engagement letters
§ 40:27 —Maintenance of a healthy partnering relationship
§ 40:28 —Integrating the client into the partnering relationship
§ 40:29 —Benchmarking and evaluating the relationship
§ 40:30 Practice checklist
§ 40:31 Form: Memorandum from CEO on use of law department
§ 40:32 Form: Standard retention guidelines

Chapter 41. Mergers and Acquisitions

§ 41:1 Scope note
§ 41:2 Preliminary considerations
§ 41:3 Partnering strategies in M&A
§ 41:4 —Selecting M&A counsel
§ 41:5 —Use of inside counsel
§ 41:6 —Use of outside counsel
§ 41:7 —Coordination between inside and outside counsel
§ 41:8 Early stages of an M&A process

© 2019 Thomson Reuters, 4/2019 cclxv
§ 41:9 — Confidentiality agreements
§ 41:10 — Offering memorandum
§ 41:11 — Letters of intent
§ 41:12 — Structuring a transaction
§ 41:13 — Stock purchase structure
§ 41:14 — Asset purchase structure
§ 41:15 — Merger
§ 41:16 — Purchase price considerations
§ 41:17 — Typical forms of consideration
§ 41:18 — Typical purchase price mechanisms
§ 41:19 — Earn-out provisions
§ 41:20 — Antitrust considerations
§ 41:21 — Second Requests
§ 41:22 — Item 4(c) and 4(d) documents
§ 41:23 — Gun jumping
§ 41:24 — Antitrust risk allocation
§ 41:25 — Conducting effective and efficient due diligence
§ 41:26 — The definitive M&A agreement
§ 41:27 — Representations and warranties
§ 41:28 — Covenants
§ 41:29 — Knowledge and materiality qualifiers
§ 41:30 — Knowledge qualifiers
§ 41:31 — Materiality qualifiers
§ 41:32 — Preparing disclosure schedules
§ 41:33 — Material adverse effect provisions
§ 41:34 — Closing conditions
§ 41:35 — Indemnification provisions
§ 41:36 — General scope
§ 41:37 — Survival provisions
§ 41:38 — De minimis thresholds, baskets and deductibles
§ 41:39 — Liability caps
§ 41:40 — Other considerations
§ 41:41 — Representation and warranty insurance
§ 41:42 — Mediation and arbitration
§ 41:43 — Anti-sandbagging provisions
§ 41:44 — Non-reliance disclaimers
§ 41:45 — Noncompetition or nonsolicitation provisions
§ 41:46 — Other selected M&A considerations— Assignment provisions
§ 41:47 — Cross-border transactions
CHAPTER 42. QUALITY MANAGEMENT, SIX SIGMA, RE-ENGINEERING AND PROJECT MANAGEMENT

§ 42:1 Scope note
§ 42:2 Objectives, concerns, preliminary considerations
§ 42:3 How to develop and maintain these skills in law departments and law firms
§ 42:4 Is the practice of law “special” and do these processes have to be specially adapted to be used in law departments and law firms?
§ 42:5 When and when not to use these processes
§ 42:6 TQM, project management, and re-engineering defined
§ 42:7 Total quality management, Six Sigma, Lean Six Sigma (“TQM”)
§ 42:8 Implementation of TQM
§ 42:9 Six Sigma
§ 42:10 Short form techniques for process improvement
§ 42:11 Applications of TQM
§ 42:12 Factors that can undermine TQM
§ 42:13 TQM is a continuous journey
§ 42:14 Project management process
§ 42:15 Scaled project management
§ 42:16 Implementing project management
§ 42:17 Introducing project management into a law firm or legal department
§ 42:18 Practical examples of project management
Successful Partnering

CHAPTER 43. CIVIL JUSTICE REFORM

I. INTRODUCTION

§ 43:1 Scope note

II. CIVIL JUSTICE REFORM

§ 43:2 Civil justice reform today
§ 43:3 Is civil justice reform needed?
§ 43:4 What inside and outside counsel can do
§ 43:5 —Forum selection
§ 43:6 —Litigation strategy
§ 43:7 —Commenting on proposed changes
§ 43:8 —Proposing changes
§ 43:9 Select civil justice reform proposals
§ 43:10 —American College of Trial Lawyers and the Institute for the Advancement of the American Legal System
§ 43:11 —American Bar Association Litigation Section
§ 43:12 —Center for Constitutional Litigation
§ 43:13 —N.Y. Bar Association Committee on the Federal Courts
§ 43:14 —Lawyers for Civil Justice
§ 43:15 Results of enacted civil justice reforms and pilot programs
§ 43:16 —Colorado
§ 43:17 —New Hampshire
§ 43:18 —Seventh Circuit Electronic Discovery Pilot Program
§ 43:19 —Oregon
§ 43:20 —Arizona
§ 43:21 Specific civil justice reform proposals
§ 43:22 —Pleading
§ 43:23 —Initial disclosures
§ 43:24 —Scope of discovery
§ 43:25 —Limitations on discovery tools
§ 43:26 —Electronic discovery
§ 43:27 — —Meet and confer requirements
§ 43:28 — —Scope of requests
TABLE OF CONTENTS

§ 43:29 — —Preservation/restoration/sanctions
§ 43:30 — —Cost shifting
§ 43:31 — —Education
§ 43:32 —Experts
§ 43:33 ——Judicial management

III. TORT REFORM

§ 43:34 Introduction to tort reform
§ 43:35 Background of tort reform
§ 43:36 —Reform efforts in general
§ 43:37 —Recent reform efforts
§ 43:38 Entities involved in tort reform
§ 43:39 —Pro-reform groups
§ 43:40 —Anti-reform groups
§ 43:41 —Research groups
§ 43:42 Major topics on the tort reform agenda
§ 43:43 —Damages
§ 43:44 — —Non-economic compensatory damages
§ 43:45 — —Punitive damages
§ 43:46 —Proportionate responsibility
§ 43:47 —Arbitration
§ 43:48 Methods for advocating for reform
§ 43:49 —Lobbying and elections
§ 43:50 —Litigation
§ 43:51 —Funding research
§ 43:52 Obstacles to reform

CHAPTER 44. JOINT LEGISLATIVE AND REGULATORY LOBBYING EFFORTS BY INSIDE AND OUTSIDE COUNSEL

§ 44:1 Scope note
§ 44:2 What is lobbying?
§ 44:3 Do the rules of professional conduct apply when lawyers are lobbyists?
§ 44:4 Conflict issues when lawyers are lobbyists
§ 44:5 Confidentiality issues when lawyers are lobbyists
§ 44:6 How to select a lobbyist: Comparative strengths of candidates; lawyer versus nonlawyer-lobbyists
§ 44:7 Goals of lobbying

© 2019 Thomson Reuters, 4/2019
§ 44:8 Lobbying risks
§ 44:9 Establishing a lobbying strategy
§ 44:10 Contract versus employed lobbyists
§ 44:11 Characteristics of successful lobbyists
§ 44:12 — Credibility and integrity
§ 44:13 — Relationships and access
§ 44:14 — Knowledge and expertise
§ 44:15 — Political insight
§ 44:16 — Consensus building
§ 44:17 Trade associations
§ 44:18 Successful approaches to lobbying
§ 44:19 — Strategic planning
§ 44:20 — Role of inside counsel
§ 44:21 — Role of outside counsel
§ 44:22 — Establishing contact with key legislative personnel and regulatory bodies
§ 44:23 — Identifying key constituencies to be lobbied
§ 44:24 — — Executive branch
§ 44:25 — — Legislators
§ 44:26 — Identifying opposition
§ 44:27 — Cost-benefit analysis
§ 44:28 — — Timing
§ 44:29 — — Resources allocated to lobbying
§ 44:30 — — Short-term and long-term implications
§ 44:31 Implementation procedures for successful lobbying
§ 44:32 — Building industry consensus
§ 44:33 — The role of technology
§ 44:34 — The impact of political contributions
§ 44:35 — Personal involvement of inside counsel and key executives
§ 44:36 Lobbying in a heavily regulated industry
§ 44:37 — Pre-rulemaking
§ 44:38 — Proposed rulemaking
§ 44:39 — Final rulemaking
§ 44:40 Federal legal requirements for lobbying
§ 44:41 — Revolving door prohibitions
§ 44:42 — Reporting requirements
§ 44:43 — Table of federal lobbying requirements and prohibitions
§ 44:44 Political and financial impact on lobbying and current events
TABLE OF CONTENTS

§ 44:45 State legal requirements for lobbying—Table of selected state requirements and prohibitions
§ 44:46 Practice checklist on planning and implementing a successful federal and state lobbying strategy
§ 44:47 Online resources for lobbyists

CHAPTER 45. ADMINISTRATIVE AGENCIES

I. INTRODUCTION
§ 45:1 Scope note

II. KNOW THE AGENCY
§ 45:2 Introduction
§ 45:3 Is it an independent agency or executive agency?
§ 45:4 —Independent agency
§ 45:5 —Executive agency
§ 45:6 —Significance of being an independent agency vs. an executive agency
§ 45:7 Who are the agency decision-makers?
§ 45:8 —Administrator/Board/Commission
§ 45:9 —Staff
§ 45:9.50 —Administrative law judges
§ 45:10 What does the agency do?
§ 45:11 —Hearings
§ 45:12 — —Agency initiative
§ 45:13 — —Private party initiative
§ 45:14 —Rulemakings
§ 45:15 — —Formal rulemaking
§ 45:16 — —Informal rulemaking (also known as notice and comment rulemaking)
§ 45:17 — —OMB review of executive agency rulemakings
§ 45:18 —Adjudications
§ 45:19 — —Standing
§ 45:19.50 — —Jurisdiction
§ 45:20 — —Format
§ 45:21 — —Declaratory orders
§ 45:22 — —ADR
§ 45:23 — —Discovery

© 2019 Thomson Reuters, 4/2019 cclxxi
SUCCESSFUL PARTNERING

§ 45:24 — — — Trade associations and non-parties
§ 45:25 — Enforcement and investigations
§ 45:26 — Remedies
§ 45:27 — Licensing
§ 45:28 — Emergency orders
§ 45:29 — Non-regulatory actions
§ 45:30 — Requests for information outside of rulemaking proceedings
§ 45:31 — Advisory opinions, interpretation letters, and guidance
§ 45:32 — Budgetary constraints and funding
§ 45:33 — New statutory grant of powers
§ 45:34 How does the agency make decisions?
§ 45:35 — Can the agency decision-makers speak to one another?
§ 45:36 — Does the agency use advisory committees?
§ 45:37 Strategies during appeals of agency decisions
§ 45:38 — Is the agency decision final?
§ 45:39 — Should you appeal to a court or file a petition for reconsideration/administrative appeal with the agency?
§ 45:40 — Judicial review
§ 45:41 — Jurisdiction and venue
§ 45:42 — Arbitrary and capricious standard
§ 45:43 — Judicial deference
§ 45:44 — Amici curiae
§ 45:45 — When should you participate as a party in the judicial review involving an agency decision that another party has challenged?
§ 45:45.50 How did the Trump administration impact agencies?

III. TOOLBOX FOR ENGAGING EFFECTIVELY WITH AN AGENCY

§ 45:46 Introduction
§ 45:47 Develop personal relationships with agency members and employees
§ 45:48 Allow your company to educate the agency about your business
§ 45:49 Seeking informal guidance from an agency
§ 45:50 Seeking congressional support in an agency proceeding
§ 45:51 Know the various offices within the agency
§ 45:52 Limitations on interactions with an agency

cclxxii
TABLE OF CONTENTS

§ 45:53 —Ex parte communications during pending of agency proceeding
§ 45:54 —Ethics rules
§ 45:55 Getting information from agencies
§ 45:56 —The Freedom of Information Act (FOIA)
§ 45:57 —Testimony of agency employees and production of documents in a pending legal proceeding

IV. AGENCY JURISDICTION: CHOOSING THE RIGHT FORUM TO RESOLVE A DISPUTE

§ 45:58 Introduction
§ 45:59 Exclusive agency jurisdiction
§ 45:60 —Statutory foundation
§ 45:61 —Ambiguity in the statutory language
§ 45:62 —Relationship to exhaustion of remedies
§ 45:63 ——Agencies must have an adequate chance to address issues within the scope of their authority
§ 45:64 ——Exhaustion may require initial action by an agency before pursuing other relief
§ 45:65 ——How far does the exhaustion requirement extend?
§ 45:66 Preemption
§ 45:67 —Constitutional foundations
§ 45:68 —Express statutory preemption
§ 45:69 ——Railroads
§ 45:70 ——Motor carriers
§ 45:71 ——Airline prices, routes and services
§ 45:72 ——Pipelines
§ 45:73 —Implied preemption
§ 45:74 —Federal law
§ 45:75 Shared regulatory authority
§ 45:76 —Formal agency allocation agreements
§ 45:77 —Agency cooperation
§ 45:78 —Conflicts over shared jurisdiction
§ 45:79 Primary jurisdiction
§ 45:80 —Underlying principles
§ 45:81 —Application of primary jurisdiction doctrine
§ 45:82 —Strategic considerations

V. PRACTICE AIDS

§ 45:83 Practice checklist

© 2019 Thomson Reuters, 4/2019
CHAPTER 46. CORPORATE GOVERNANCE

§ 46:1 Scope note
§ 46:2 Objectives
§ 46:3 Duties of directors
§ 46:4 — Duty of care
§ 46:5 — Guidelines for board decision making
§ 46:6 — Board's oversight responsibility
§ 46:7 — Duty of loyalty
§ 46:8 — The duty of loyalty of a dual fiduciary
§ 46:9 — Potential conflicts for dual fiduciaries
§ 46:10 — Duty of good faith
§ 46:11 — Evidence of good faith
§ 46:12 — Duty of disclosure
§ 46:13 — Materiality standard
§ 46:14 — Pleading standard of a claim of breach of duty of disclosure
§ 46:15 — General corporate disclosures
§ 46:16 — Consequences of a director's breach of fiduciary duty
§ 46:17 Business judgment rule
§ 46:18 — Presumption in favor of sound business judgment
§ 46:19 — Burden of proof under the business judgment rule
§ 46:20 — Rebutting the presumption
§ 46:21 Entire fairness
§ 46:22 — Fair price, fair dealing
§ 46:23 — Coercive conduct and violations of fiduciary duty
§ 46:24 — Shifting the burden of proof
§ 46:25 — Special committees
§ 46:26 — Composition of an independent committee
§ 46:27 — Functioning of the independent committee
§ 46:28 — Approval by a majority of the minority shares
§ 46:29 — Conditioning the transaction upon approval by the majority of the minority
§ 46:30 — The necessity of full disclosure
§ 46:31 Duties when faced with a takeover proposal
§ 46:32 — Duties when taking defensive measures
§ 46:33 — The defensive measure must be proportional
§ 46:34 Duties when selling the corporation

cclxxiv
CHAPTER 46A. CORPORATE SECRETARIAL

§ 46A:1 Scope note
§ 46A:2 Objectives
§ 46A:3 Core competencies
§ 46A:4 Corporate secretary's role with respect to record keeping
§ 46A:5 —Corporate minutes and resolutions
§ 46A:6 ——Drafting corporate minutes
§ 46A:7 Corporate secretary's role with respect to stock records
§ 46A:8 Corporate secretary's role with respect to the board of directors and committees of the board
§ 46A:9 —Director election/appointment
§ 46A:10 —Duties of directors
§ 46A:11 —Corporate governance policies
§ 46A:12 —Meetings of the board of directors
§ 46A:13 ——Planning the agenda for board and committee meetings
§ 46A:14 ——Collection and dissemination of information to the board of directors
§ 46A:15 Corporate secretary's role with respect to subsidiaries
§ 46A:16 Corporate secretary's role in shareholder relations
§ 46A:17 Corporate secretary's role in setting company shareholder disclosure practices
§ 46A:18 Corporate secretary's role in determining effective communications with shareholders
§ 46A:19 Corporate secretary's role in coordinating the annual meeting of shareholders
§ 46A:20 —Planning the annual meeting
§ 46A:21 ——Set the date of the annual meeting
§ 46A:22 ——Location of the annual meeting
§ 46A:23 ——Preparing admissions procedures, an agenda, rules of conduct and the script for the meeting
§ 46A:24 ——Notice of the annual meeting
§ 46A:25 ——Inclusion of proxy statements, annual
**Table of Contents**

- Report and soliciting proxies for the annual meeting
  - § 46A:26 Shareholder proposals
  - § 46A:27 Corporate secretary's relationship with the public
    - § 46A:28 - Corporate secretary's roles in various company structures
  - § 46A:29 Advancing corporate secretary qualifications through networking and group affiliations
  - § 46A:30 Emerging topics
  - § 46A:31 Practice checklist
  - § 46A:32 Form of board of directors meeting agenda
  - § 46A:33 Form of board of directors meeting minutes
  - § 46A:34 Annual shareholder meeting task list
  - § 46A:35 Annual shareholder meeting script
  - § 46A:36 Notice of annual shareholder meeting
  - § 46A:37 Rules of shareholder conduct

**CHAPTER 46B. SHAREHOLDER ACTIVISM**

- § 46B:1 Scope note
- § 46B:2 Objectives, concerns, preliminary considerations
- § 46B:3 Activist focus
  - § 46B:4 - Corporate governance reform
  - § 46B:5 - Social, political, and environmental change
  - § 46B:6 - Compensation
  - § 46B:7 - Mergers and acquisitions and strategic alternatives
  - § 46B:8 - The balance sheet
  - § 46B:9 - Operations
  - § 46B:10 Identifying an activist campaign
  - § 46B:11 - Private activism
  - § 46B:12 - Public activism and media campaigns
  - § 46B:13 - 13D filings
  - § 46B:14 - Requests for books and records
  - § 46B:15 Activist tactics
  - § 46B:16 - Shareholder proposals and proxy solicitations
  - § 46B:17 - Private proxy solicitation and “testing the waters”
  - § 46B:18 - “Vote no” campaigns or withhold the vote campaigns

© 2019 Thomson Reuters, 4/2019
§ 46B:19 —Public disclosure of voting intentions
§ 46B:20 —Special meetings, actions by written consent, and ambush proposals
§ 46B:21 —Shareholder litigation
§ 46B:22 Preparing for an activist
§ 46B:23 —Vulnerability assessment
§ 46B:24 —Establishing a response team
§ 46B:25 —Communications plan
§ 46B:26 —Bylaw fortification
§ 46B:27 —Shareholder rights plan
§ 46B:28 —Partnership among in-house and outside counsel
§ 46B:29 Responding to an activist campaign
§ 46B:30 —Communication strategies
§ 46B:31 —Poison pills
§ 46B:32 —Proxy contest considerations
§ 46B:33 —Litigation options
§ 46B:34 Legislative developments
§ 46B:35 —13D filing requirements
§ 46B:36 —Increased regulation of proxy advisory firms
§ 46B:37 Practice checklist

CHAPTER 47. COMPLIANCE
§ 47:1 Scope note
§ 47:2 Need for an effective compliance program
§ 47:3 Benefits of an effective compliance program
§ 47:4 Historical underpinnings
§ 47:5 United States Sentencing Guidelines
§ 47:6 Caremark and other decisions
§ 47:7 High level support and industry standards
§ 47:8 Burdens and potential pitfalls
§ 47:9 Context and goal of chapter’s action plan
§ 47:10 Formalizing the structure for compliance program accountability
§ 47:11 —Criteria for selection of the compliance officer
§ 47:12 —Establishment of a compliance and ethics council
§ 47:13 —Assignment of a responsible executive/lawyer team for each compliance topic
§ 47:14 —Ethics vice president provides centralized administrative support for compliance officer
§ 47:15 Review established programs and policies to ensure they are up-to-date and comprehensive
§ 47A:2 What do we mean by corporate sustainability?
§ 47A:3 Ways in which any organization can promote its own sustainability
§ 47A:4 —Integrated thinking and reporting
§ 47A:5 —Environmental responsibility
§ 47A:6 —Governance and ethics
§ 47A:7 —Financial strength and business strategy
§ 47A:8 —Community service
§ 47A:9 How inside and outside counsel can partner on sustainability initiatives
§ 47A:10 —Environmental compliance assessment
§ 47A:11 —Sustainability compliance assessment
§ 47A:12 —Joint client outreach on sustainability matters
§ 47A:13 —Joint community service projects
§ 47A:14 —Mutual financial support
§ 47A:15 —Governance and enterprise risk management
§ 47A:16 JLL Case Study
§ 47A:17 —Actively keeping each other informed
§ 47A:18 —Business reciprocity
§ 47A:19 —Client cross-referrals
§ 47A:20 —Joint community service projects
§ 47A:21 —Promoting diversity
§ 47A:22 —Reciprocal sustainability work
§ 47A:23 —Joint promotional efforts
§ 47A:24 —Comparing management best practices
§ 47A:25 Practice checklist

CHAPTER 48. TRANSACTIONS
§ 48:1 Scope note
§ 48:2 Preliminary considerations
§ 48:3 Assembling the team
§ 48:4 —Establishing chains of command
§ 48:5 —Identifying strengths and weaknesses in liaisons and chains of command
§ 48:6 Defining the role of outside counsel
§ 48:7 Managing multiple outside firms in transactions
§ 48:8 Educating outside counsel
§ 48:9 —Organizational considerations
§ 48:10 —Prior transactions
§ 48:11 —Uniform business practices
§ 48:12 —Goals, precedents and policies
CHAPTER 49. CORPORATE INFORMATION TECHNOLOGY TRANSACTIONS AND DISPUTES

I. INTRODUCTION

§ 49:1 Scope note

II. INFORMATION TECHNOLOGY TRANSACTIONS AND OUTSOURCING

§ 49:2 What is information technology?
§ 49:3 Business objectives of major information technology projects
§ 49:4 The players in major IT transactions
§ 49:5 —Executive sponsor
§ 49:6 —Negotiation team
SUCCESSFUL PARTNERING

§ 49:7  —Legal team
§ 49:8  — —Role of outside counsel
§ 49:9  — —Role of in-house counsel
§ 49:10 —Secondary vendors
§ 49:11 —Implementation consultants
§ 49:12 Managing the deal
§ 49:13 —Project timelines
§ 49:14 —Selection of transactional counsel
§ 49:15 —RFPs and vendor selection
§ 49:16 —Specifications
§ 49:17 —Structural negotiations
§ 49:18  — —Preliminary selection of vendors
§ 49:19  — —Timing considerations
§ 49:20  — —Third-party maintenance
§ 49:21  — —Hardware and software considerations
§ 49:22  — —Cloud-based services
§ 49:23  — —“Sizing” the hardware and software
§ 49:24  — —Long-term IT strategy of client
§ 49:25  — —Roles of corporate counsel, outside counsel, and client’s IT staff
§ 49:26  — —Hardware leasing
§ 49:27  — —Software licensing
§ 49:28  — —Keeping the project “on time”
§ 49:29  — —Limitation of liability
§ 49:30  — —Support and maintenance services
§ 49:31  — —Use of consultants to configure, implement or train
§ 49:32  — —Tax considerations

III. TYPICAL IT CONTRACT PROVISIONS

§ 49:33  Introduction
§ 49:34  Contract scope
§ 49:35  —Master services agreement
§ 49:36  —Term
§ 49:37  —Statements of work
§ 49:38  —Sweep clauses
§ 49:39  —Change orders
§ 49:40  —Pricing
§ 49:41  —ARCs/RRCs
§ 49:42  —Benchmarking
§ 49:43  —IT asset/staff transfers and transition
§ 49:44  —Transformations
IV. DISPUTES REQUIRING ARBITRATION OR LITIGATION

§ 49:55 Introduction to IT disputes
§ 49:56 Issues leading to adjudicated disputes
§ 49:57 —Billing disagreements
§ 49:58 ——Client resists paying
§ 49:59 ——Vendor is perceived to over bill or bill at the wrong price
§ 49:60 ——Vendor is perceived to fail to accurately bill the use of defined pricing metrics
§ 49:61 ——The parties dispute whether billing procedures were followed
§ 49:62 —Significant performance failures
§ 49:63 ——“Transformation” problems
§ 49:64 ——Service level problems
§ 49:65 ——Asserted “bad service”
§ 49:66 —Refusals to perform
§ 49:66.30 —Misuse of proprietary information
§ 49:66.70 —Data security
§ 49:67 —Termination
§ 49:68 The adjudication of IT disputes
§ 49:69 —The forum
§ 49:70 —Specified relief
§ 49:71 —Document issues
§ 49:72 —Experts
§ 49:73 —Presentation challenges
§ 49:74 —Avoiding litigation
§ 49:75 —Claims and case law
§ 49:76 Practice checklists

CHAPTER 49A. CONTRACTS
§ 49A:1 Scope note
| § 49A:2 | Preliminary considerations |
| § 49A:3 | — Improving your writing skills |
| § 49A:4 | — Approaches to contract drafting |
| § 49A:5 | — Drafting and interpretation techniques |
| § 49A:6 | Effective strategies for contracting |
| § 49A:7 | — Teams |
| § 49A:8 | — Negotiations |
| § 49A:9 | — Contract management |
| § 49A:10 | Principal legal issues |
| § 49A:11 | Contract framework |
| § 49A:12 | Smart contracts |
| § 49A:13 | Specific drafting tips |
| § 49A:14 | Sample contract outline |
| § 49A:15 | Smart contract checklist |

| CHAPTER 50. JOINT VENTURES |
| § 50:1 | Scope note |
| § 50:2 | Preliminary considerations |
| § 50:3 | — Potential advantages and disadvantages of joint ventures |
| § 50:4 | — Special considerations affecting joint ventures involving U.S. and non-U.S. participants |
| § 50:5 | Effective partnering strategies between inside and outside counsel |
| § 50:6 | — To venture or not to venture |
| § 50:7 | — Planning for the long haul |
| § 50:8 | — Implementation |
| § 50:9 | — Post-closing administration |
| § 50:10 | — Organizing the team |
| § 50:11 | Getting in: structuring the joint venture |
| § 50:12 | — Typical joint venture documentation |
| § 50:13 | Staying in: operating the joint venture |
| § 50:14 | — Management structures |
| § 50:15 | — Resolving deadlocks |
| § 50:16 | — Conflicts of interest |
| § 50:17 | — Non-competition |
| § 50:18 | — Other potential conflicts of interest |
| § 50:19 | Getting out: exit strategies and dissolution of the joint venture |
| § 50:20 | — Exit strategies |
| § 50:21 | — Dissolution |
| § 50:22 | Protecting proprietary information—Antitrust considerations |
CHAPTER 50A. GOVERNMENT CONTRACTS

I. INTRODUCTION
§ 50A:1 Scope note
§ 50A:2 Preliminary considerations

II. EFFECTIVE PARTNERING STRATEGIES
§ 50A:3 The nature of the client's business
### III. OVERVIEW OF PRIMARY LEGAL ISSUES

§ 50A:17 Primary legal issues
§ 50A:18 —Statutory framework
§ 50A:19 —Regulatory framework and the Federal Acquisition Regulation (“FAR”)
§ 50A:20 —Commercial items
§ 50A:21 —Bid and proposal process
§ 50A:22 —Bid protests
§ 50A:23 —Organizational conflicts of interest (OCI)
§ 50A:24 —Accounting, cost, and pricing matters
§ 50A:25 ——FAR Part 31 Cost Principles
§ 50A:26 ——Cost Accounting Standards
§ 50A:27 ——Contractor Business Systems
§ 50A:28 —Performance matters
§ 50A:29 ——Products
§ 50A:30 ——Services
§ 50A:31 ——Contract changes
§ 50A:32 —Contract terminations for convenience
§ 50A:33 —Contract terminations for default
§ 50A:34 —Subcontracts
§ 50A:35 —Intellectual property
§ 50A:36 —Cybersecurity
§ 50A:37 —Claims and disputes
§ 50A:38 —Civil False Claims Act
§ 50A:39 —Criminal investigations
§ 50A:40 —Suspension and debarment
§ 50A:41 —Mandatory disclosure
§ 50A:42 —Procurement Integrity Act
### Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 50A:43</td>
<td>Revolving door rules</td>
</tr>
<tr>
<td>§ 50A:44</td>
<td>Ethics and compliance program</td>
</tr>
<tr>
<td>§ 50A:45</td>
<td>General Services Administration multiple award schedule contracts</td>
</tr>
<tr>
<td>§ 50A:46</td>
<td>Mergers and acquisitions</td>
</tr>
</tbody>
</table>

#### IV. PRACTICE AIDS

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 50A:47</td>
<td>Practice checklist</td>
</tr>
<tr>
<td>§ 50A:48</td>
<td>Form: Subcontractor due diligence checklist for government contracts</td>
</tr>
</tbody>
</table>

### CHAPTER 51. VALUATION OF A BUSINESS IN AN ACQUISITION CONTEXT

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 51:1</td>
<td>Scope note</td>
</tr>
<tr>
<td>§ 51:2</td>
<td>Caselaw on fairness opinions, appraisal remedies, and duty to understand valuation process</td>
</tr>
<tr>
<td>§ 51:3</td>
<td>Fairness opinions and duty to understand valuation process</td>
</tr>
<tr>
<td>§ 51:4</td>
<td>Valuation in appraisal remedies</td>
</tr>
<tr>
<td>§ 51:5</td>
<td>Some traditional valuation methods</td>
</tr>
<tr>
<td>§ 51:6</td>
<td>Book value</td>
</tr>
<tr>
<td>§ 51:7</td>
<td>Replacement value</td>
</tr>
<tr>
<td>§ 51:8</td>
<td>Liquidation value</td>
</tr>
<tr>
<td>§ 51:9</td>
<td>Price/earnings ratio</td>
</tr>
<tr>
<td>§ 51:10</td>
<td>Past earnings capitalization</td>
</tr>
<tr>
<td>§ 51:11</td>
<td>Financial principles underlying the discounted cash flow method: time and the value of money</td>
</tr>
<tr>
<td>§ 51:12</td>
<td>Future value or compounding</td>
</tr>
<tr>
<td>§ 51:13</td>
<td>Present value</td>
</tr>
<tr>
<td>§ 51:14</td>
<td>Present value of a series of cash flows</td>
</tr>
<tr>
<td>§ 51:15</td>
<td>Present value of an uneven series of cash flows</td>
</tr>
<tr>
<td>§ 51:16</td>
<td>Net present value</td>
</tr>
<tr>
<td>§ 51:17</td>
<td>Internal rate of return</td>
</tr>
<tr>
<td>§ 51:18</td>
<td>Overview of discounted cash flow method</td>
</tr>
<tr>
<td>§ 51:19</td>
<td>Basic steps in discounted cash flow model</td>
</tr>
<tr>
<td>§ 51:20</td>
<td>Step 1: estimate cash flows of acquisition candidate</td>
</tr>
<tr>
<td>§ 51:21</td>
<td>Step 2: determine the appropriate discount rate</td>
</tr>
</tbody>
</table>

© 2019 Thomson Reuters, 4/2019
CHAPTER 52. SECURITIES

I. INTRODUCTION

§ 52:1 Scope note

II. OBJECTIVES, CONCERNS, PRELIMINARY CONSIDERATIONS

§ 52:2 Preliminary considerations
§ 52:3 Regulatory framework
TABLE OF CONTENTS

§ 52:4 —Evolution of the securities laws
§ 52:5 —Where to find the securities laws and related guidance
§ 52:6 —Securities Act
§ 52:7 —Exchange Act
§ 52:8 —Other federal securities laws
§ 52:9 —Exchange requirements
§ 52:10 —Other considerations
§ 52:11 Key basic terms
§ 52:12 Key external stakeholders
§ 52:13 —Securities and Exchange Commission
§ 52:14 —National stock exchanges
§ 52:15 —Public Company Accounting Oversight Board
§ 52:16 —Others
§ 52:17 Key company stakeholders
§ 52:18 —Securityholders
§ 52:19 —Board of directors and committees
§ 52:20 —Executive management
§ 52:21 —The general counsel and legal department
§ 52:22 —Finance, internal audit, risk management and compliance teams
§ 52:23 —Corporate secretary
§ 52:24 —Investor relations department
§ 52:25 —Independent public accountant
§ 52:26 —Outside securities counsel
§ 52:27 Other key stakeholders
§ 52:28 —Rating agencies
§ 52:29 —Financial analysts
§ 52:30 —Shareholder advisory services and internal proxy voting departments

III. EFFECTIVE PARTNERING STRATEGIES

§ 52:31 Overview of securities law partnering
§ 52:32 When to engage outside securities counsel
§ 52:33 —Periodic reporting
§ 52:34 —Insider reporting
§ 52:35 —General compliance
§ 52:36 How to choose outside securities counsel
§ 52:37 —Legal expertise and experience
§ 52:38 —Scope and needs
§ 52:39 —Cultural fit
§ 52:40 —Costs

© 2019 Thomson Reuters, 4/2019 cclxxxix
SUCCESSFUL PARTNERING

§ 52:41 —Practical pointers and common pitfalls
§ 52:42 Assigning roles and responsibilities to inside counsel and outside securities counsel
§ 52:43 —Partnering models
§ 52:44 —Staffing
§ 52:45 —Fee arrangements
§ 52:46 —Budgeting and planning
§ 52:47 Keys to a successful relationship
§ 52:48 —Onboarding your outside securities counsel
§ 52:49 —Developing and maintaining a collaborative environment
§ 52:50 —Maintaining effective communication
§ 52:51 —How to use outside securities counsel to develop and maintain good working relationships with the SEC and other third parties
§ 52:52 —Cost-effective and value-added legal services
§ 52:53 —Using technology and other resources

IV. CASE STUDY

§ 52:54 The partnership between Chubb Limited and Mayer Brown
§ 52:55 —The IPO and the early years
§ 52:56 —Global expansion and the expansion of the legal team
§ 52:57 —A modern legal department
§ 52:58 —The partnership today

V. SECURITIES LAW COMPLIANCE

§ 52:59 Overview of securities law compliance
§ 52:60 Sales of securities
§ 52:61 —Scope
§ 52:62 —Sales of securities by management
§ 52:63 —Sales of securities in connection with employee benefit plans
§ 52:64 —Shelf registration and other types of registrations
§ 52:65 —Insider trading concerns and Rule 10b5-1
§ 52:66 (Re)purchases of securities
§ 52:67 —Insider trading concerns and Rule 10b5-1
§ 52:68 Periodic reporting
§ 52:69 —Annual and quarterly reporting
TABLE OF CONTENTS

§ 52:70  —  —Preparation of reports
§ 52:71  —  —Disclosure controls and certification of annual and quarterly reports
§ 52:72  —  —Quarterly earnings calls and releases
§ 52:73  —Annual report, proxy statement and annual meeting
§ 52:74  —  —Annual report
§ 52:75  —  —Proxy statement and annual meeting
§ 52:76  —  —The voting process and proxy advisory firms
§ 52:77  —  —Conducting the annual meeting
§ 52:78  —  —Reporting of significant events
§ 52:79  —Reporting of significant events—Form 8-K
§ 52:80  —  —Stock exchange requirements
§ 52:81  Insider reporting
§ 52:82  Liability issues
§ 52:83  Corporate governance
§ 52:84  —Board composition and committees
§ 52:85  —Code of ethics
§ 52:86  —Code of conduct
§ 52:87  —Whistleblowing
§ 52:88  —Prohibition on loans to insiders
§ 52:89  —ESG
§ 52:90  Shareholder engagement and activism
§ 52:91  Corporate communication and web site
§ 52:92  —Press releases
§ 52:93  —Corporate web sites
§ 52:94  —Selective disclosure and Regulation FD

VI.  PRACTICE AIDS

§ 52:95  Practice checklist
§ 52:96  Form: SEC filing deadlines
§ 52:97  Form: 10-K checklist
§ 52:98  Form: 10-Q checklist
§ 52:99  Form: 8-K checklist
§ 52:100  Form: Proxy statement checklist
§ 52:101  Form: Sample memo to directors, officers and significant shareholders regarding ongoing obligations
§ 52:102  Form: Securities trading policy
§ 52:103  Form: Sample Regulation FD policy
§ 52:104  Form: Sample Non-GAAP legend
Chapter 53. Commercial Finance

§ 53:1 Scope note
§ 53:2 Alternative models for in-house law department structure
  § 53:3 —No inside lawyer or general counsel
  § 53:4 —Single inside lawyer or small legal department with commercial expertise
  § 53:5 —Mid-size legal department
  § 53:6 —Large legal department
  § 53:7 Partnering between inside and outside counsel for financial institutions
  § 53:8 —Number of outside firms to use
  § 53:9 —Selection of outside counsel
  § 53:10 —Fee arrangements
  § 53:11 —Hiring and training of lawyers
  § 53:12 —Conflict issues
  § 53:13 —Position or issue conflicts
  § 53:14 —Appropriate way to charge for inside counsel time
§ 53:15 Use of technology in commercial finance transactions
§ 53:16 Development of forms
§ 53:17 Preliminary considerations for counsel for lender and counsel for borrower
§ 53:18 Principal considerations regarding the commitment letter or term sheet
§ 53:19 Principal considerations in drafting a questionnaire
§ 53:20 Principal considerations in drafting a loan agreement
  § 53:21 —Credit facility
  § 53:22 —Conditions precedent
  § 53:23 —Representations and warranties
  § 53:24 —Affirmative covenants
  § 53:25 —Negative covenants
  § 53:26 —Events of default

SUCCESSFUL PARTNERING
TABLE OF CONTENTS

§ 53:27 —Remedies
§ 53:28 —Assignments and participations
§ 53:29 —Miscellaneous
§ 53:30 Drafting the security agreement and UCC financing statements
§ 53:31 Drafting the promissory note
§ 53:32 Real estate transactions
§ 53:33 Mold in construction: implications for lenders
§ 53:34 Guarantees
§ 53:35 Stock pledge agreement
§ 53:36 Landlord’s waivers
§ 53:37 Mortgagee waivers
§ 53:38 Subordination agreements and intercreditor agreements
§ 53:39 Lock box agreements and dominion accounts
§ 53:40 Opinions
§ 53:41 Payoff and lien release letter
§ 53:42 Closing checklist
§ 53:43 Amendments and extensions
§ 53:44 Post-closing document
§ 53:45 Practice checklist
§ 53:46 Form: Term sheet
§ 53:47 Form: Commitment letter
§ 53:48 Form: Questionnaire
§ 53:49 Form: Landlord’s waiver
§ 53:50 Form: Payoff letter
§ 53:51 Form: Closing checklist
§ 53:52 Form: Post-closing follow-up checklist
§ 53:53 Form: Pre-closing financing statement authorization letter
§ 53:54 Form: Contract for electronic signatures
§ 53:55 Form: Form for perfecting security interest in intellectual property
§ 53:56 Form: Form for waivers of prior conduct

CHAPTER 53A. FINANCIAL INSTITUTIONS

I. INTRODUCTION

§ 53A:1 Scope note

© 2019 Thomson Reuters, 4/2019 ccxciii
II. OBJECTIVES, CONCERNS, PRELIMINARY CONSIDERATIONS

§ 53A:2 Preliminary considerations
§ 53A:3 Traps for the unwary
§ 53A:4 —Affirmative reporting obligations
§ 53A:5 ——Disputes
§ 53A:6 ——Violations of regulations and industry rules
§ 53A:7 ——Investigations
§ 53A:8 ——Suspicious activity reports
§ 53A:9 ——Acquisitions and investments
§ 53A:10 ——FCM chief compliance certifications
§ 53A:11 ——Volcker Rule attestation
§ 53A:12 —The attorney-client privilege
§ 53A:13 —Confidential supervisory information
§ 53A:14 —Personal jurisdiction
§ 53A:15 —Forum selection for dispute resolution
§ 53A:16 —Parallel investigations
§ 53A:17 —Joint representations
§ 53A:18 —Give-ups, trading authorizations, and CMTAs
§ 53A:19 —Separating from whistleblowers
§ 53A:20 —Collateral consequences
§ 53A:21 ——Federal securities laws
§ 53A:22 ——ERISA
§ 53A:23 ——FINRA/self-regulatory organizations
§ 53A:24 ——Federal banking laws
§ 53A:25 ——State licensing authorities and securities commissions
§ 53A:26 ——Federal and state contracts
§ 53A:27 ——International courts and regulators
§ 53A:28 ——Civil litigation
§ 53A:29 —Liability for counsel

III. EFFECTIVE PARTNERING STRATEGIES

§ 53A:30 Effective partnering strategies
§ 53A:31 —Assessing legal matters
§ 53A:32 ——Regulatory and civil crossover
§ 53A:33 ——Impact on a product or business
§ 53A:34 ——Reputational issues
§ 53A:35 ——Structural complexity

cxcxiv
IV. PRINCIPAL LEGAL ISSUES

§ 53A:56 Principal legal issues
§ 53A:57 Regulatory foundation
§ 53A:58 — The securities and security-based swaps markets
§ 53A:59 — Broker-dealers
§ 53A:60 — Investment advisers
§ 53A:61 — Swap dealers and major swap participants
§ 53A:62 — The futures and swaps markets
§ 53A:63 — FCMs and introducing brokers
§ 53A:64 — Commodity trading advisers and commodity pool operators
§ 53A:65 — Swap dealers and major swap participants
§ 53A:66 — Banks
§ 53A:67 — Bank holding companies
§ 53A:68 — Foreign banks
§ 53A:69 — Consumer protection
§ 53A:70 — Enforcement
§ 53A:71 — Core regulatory responsibilities
§ 53A:72 — Risk management
§ 53A:73 — System of supervisory controls
§ 53A:74 — Individual regulation
§ 53A:75 — Recordkeeping requirements
§ 53A:76 Customer relationships
§ 53A:77 — Scope of business
§ 53A:78 — General customer issues
§ 53A:79 — Location
§ 53A:80 — Qualifications
§ 53A:81 — Specific customer issues
§ 53A:82 — Due authorization
§ 53A:83 — Investment restrictions
§ 53A:84 — Governmental entities
§ 53A:85 — ERISA and plan assets
§ 53A:86 — Suitability obligations to customers
§ 53A:87 — Broker-dealers
§ 53A:88 — Futures commission merchants
§ 53A:89 — Investment advisers
§ 53A:90 Counterparties
§ 53A:91 — Financial institutions as counterparties
§ 53A:92 — Know your counterparties
§ 53A:93 — Case Study: Lehman Brothers
§ 53A:94 — U.S. regulated entities
§ 53A:95 — Broker-dealers
§ 53A:96 — Customer protections
§ 53A:97 — Capital requirements
§ 53A:98 — Monitoring a counterparty
§ 53A:99 — What happens if a broker-dealer fails?
§ 53A:100 — Broker-dealer liquidation under SIPA
§ 53A:101 — Managing the risks of a broker-dealer counterparty
§ 53A:102 — Futures commission merchants
§ 53A:103 — Segregation of customer funds
§ 53A:104 — FCM capital requirements
§ 53A:105 — What happens if an FCM fails?
§ 53A:106 — Managing the risks of an FCM as a counterparty
§ 53A:107 — Banks
§ 53A:108 — Bank capital and liquidity requirements
§ 53A:109 — What happens if a bank fails?
§ 53A:110 — Managing the risks of a bank as a counterparty
§ 53A:111 — Bank holding companies

SUCCESSFUL PARTNERING

ccxcvi
### Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 53A:112</td>
<td>Orderly liquidation authority for certain financial services firms</td>
</tr>
<tr>
<td>V.</td>
<td>PRACTICE AIDS</td>
</tr>
<tr>
<td>§ 53A:113</td>
<td>Practice checklist</td>
</tr>
<tr>
<td>§ 53A:114</td>
<td>Form: Sample joint representation letter</td>
</tr>
<tr>
<td><strong>CHAPTER 53B. FINANCIAL TECHNOLOGY</strong></td>
<td></td>
</tr>
<tr>
<td>§ 53B:1</td>
<td>Scope note</td>
</tr>
<tr>
<td>§ 53B:2</td>
<td>Objectives, concerns, preliminary considerations</td>
</tr>
<tr>
<td>§ 53B:3</td>
<td>FinTech in consumer lending and banking</td>
</tr>
<tr>
<td>§ 53B:4</td>
<td>—Traditional consumer lending</td>
</tr>
<tr>
<td>§ 53B:5</td>
<td>—Banking</td>
</tr>
<tr>
<td>§ 53B:6</td>
<td>—Regulatory framework</td>
</tr>
<tr>
<td>§ 53B:7</td>
<td>——OCC</td>
</tr>
<tr>
<td>§ 53B:8</td>
<td>——CFPB</td>
</tr>
<tr>
<td>§ 53B:9</td>
<td>——FTC</td>
</tr>
<tr>
<td>§ 53B:10</td>
<td>——State regulators</td>
</tr>
<tr>
<td>§ 53B:11</td>
<td>—Principal legal issues</td>
</tr>
<tr>
<td>§ 53B:12</td>
<td>——Fair Credit Reporting Act</td>
</tr>
<tr>
<td>§ 53B:13</td>
<td>——Unfair and deceptive acts and practices</td>
</tr>
<tr>
<td>§ 53B:14</td>
<td>——Truth in lending</td>
</tr>
<tr>
<td>§ 53B:15</td>
<td>——Fair lending</td>
</tr>
<tr>
<td>§ 53B:16</td>
<td>——Fair debt collection practices</td>
</tr>
<tr>
<td>§ 53B:17</td>
<td>——Bank Secrecy Act</td>
</tr>
<tr>
<td>§ 53B:18</td>
<td>Virtual currencies</td>
</tr>
<tr>
<td>§ 53B:19</td>
<td>—CFTC regulation and jurisdiction</td>
</tr>
<tr>
<td>§ 53B:20</td>
<td>——CFTC enforcement actions</td>
</tr>
<tr>
<td>§ 53B:21</td>
<td>—SEC regulation and jurisdiction</td>
</tr>
<tr>
<td>§ 53B:22</td>
<td>——SEC enforcement actions</td>
</tr>
<tr>
<td>§ 53B:23</td>
<td>—Tension between CFTC and SEC regulation</td>
</tr>
</tbody>
</table>

### CHAPTER 54. WORKOUTS AND BANKRUPTCY

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 54:1</td>
<td>Scope note</td>
</tr>
<tr>
<td>§ 54:2</td>
<td>Objectives, concerns, and preliminary considerations</td>
</tr>
<tr>
<td>§ 54:3</td>
<td>Managing the workload</td>
</tr>
<tr>
<td>§ 54:4</td>
<td>—Which matters should be sent to outside counsel?</td>
</tr>
</tbody>
</table>

© 2019 Thomson Reuters, 4/2019 ccxcvii
§ 55:3 Objectives, concerns, and preliminary considerations—The changing landscape of ERISA

§ 55:4 — Staffing and expertise

§ 55:5 — Continuing fiduciary responsibilities

§ 55:6 — Regulatory investigations

§ 55:7 — Attorney-client privilege issues

§ 55:8 — Conflicts of interest

§ 55:9 — When is counsel an ERISA fiduciary?

§ 55:10 — The use of third-party non-legal advisors and service providers

§ 55:11 — — The unauthorized practice of law as a constraint on third-party advisors

§ 55:12 — — Agreed-upon limits on administrators’ duties

§ 55:13 Effective partnering strategies

§ 55:14 — Factors affecting the allocation of duties

§ 55:15 — Partnering strategies for specific tasks

§ 55:16 — — Plan design

§ 55:17 — — Drafting the plan

§ 55:18 — — The trust agreement

§ 55:19 — — Plan compliance

§ 55:20 — — Mandatory reporting and disclosure

§ 55:21 — — Communicating with participants and beneficiaries

§ 55:22 — — Amending the plan

§ 55:23 — — Plan termination

§ 55:24 — — Handling investigations

§ 55:25 — — Handling benefits claims disputes and litigation

§ 55:26 — — Contracting with third-party providers

§ 55:27 — — Fiduciary issues

§ 55:28 — — The effect of technology

§ 55:29 Key aspects of ERISA for inside counsel

§ 55:30 — Fiduciary duties

§ 55:31 — — ERISA’s four fiduciary duties

§ 55:32 — — Co-fiduciary liability

§ 55:33 — — Litigation

§ 55:34 — — Benefits claims

§ 55:35 — — Fiduciary litigation

§ 55:36 — — Settlement of claims

§ 55:37 — — ERISA and the subprime mortgage crisis

§ 55:38 — Plan amendments

§ 55:39 — — Claims administration

§ 55:40 — — Reporting and disclosure requirements

© 2019 Thomson Reuters, 4/2019
§ 55:41 —Qualification requirements
§ 55:42 —Multi-employer plans
§ 55:43 —Prohibited transactions
§ 55:44 —Bonding rules and fiduciary insurance
§ 55:45 —Anti-retaliation provision
§ 55:46 —Attorneys’ fees
§ 55:47 —HIPAA
§ 55:48 —COBRA
§ 55:49 —Healthcare reform
§ 55:50 —Correcting violations
§ 55:51 —Civil enforcement procedures
§ 55:52 —Mergers and acquisitions
§ 55:53 Practice checklist
§ 55:54 Form: allocation of duties within the plan sponsor
§ 55:55 Form: board resolution delegating powers to employee benefits committee
§ 55:56 Form: committee resolution amending plan
§ 55:57 Form: Model representations by seller regarding employee benefit plans for a stock purchase acquisition agreement (to be proposed by buyer)

CHAPTER 55A. EXECUTIVE COMPENSATION
§ 55A:1 Scope note
§ 55A:2 Objectives, concerns, preliminary considerations
§ 55A:3 Effective partnering strategies on key engagements in executive compensation
§ 55A:4 Governance
§ 55A:5 —Principal parties
§ 55A:6 —Role of the compensation committee
§ 55A:7 —Appointment and composition
§ 55A:8 —Executives
§ 55A:9 ——Named Executive Officers
§ 55A:10 ——Top hat group
§ 55A:11 —General counsel
§ 55A:12 ——Duties and responsibilities
§ 55A:13 ——Best practices
§ 55A:14 ——Other internal business units
§ 55A:15 ——Outside counsel
§ 55A:16 —Compensation consultant
§ 55A:17 —NYSE and NASDAQ listing standards
§ 55A:18 —Independent compensation committee
§ 55A:19 —Compensation Committee Charter
§ 55A:20 —Duties of the committee
§ 55A:21 —Conducting the meeting of the committee
§ 55A:22 —Securities laws
§ 55A:23 —Insider trading and pre-clearance
§ 55A:24 —10b5-1 trading plans
§ 55A:25 Drafting the CD&A
§ 55A:26 —Securities laws
§ 55A:27 —Reg. S-K
§ 55A:28 —Shareholder outreach
§ 55A:29 —Common components of executive compensation
§ 55A:30 —Shareholder approval of equity compensation arrangements
§ 55A:31 —Accounting standards
§ 55A:32 Negotiation and documentation of executive employment arrangements—Corporate transactions and changes in control
§ 55A:33 —Form of transaction
§ 55A:34 —Due diligence
§ 55A:35 —Negotiating the definitive agreement
§ 55A:36 —Identifying problem areas
§ 55A:37 —Executive employment agreements
§ 55A:38 —Key provisions
§ 55A:39 —Introductory statement
§ 55A:40 —Position/reporting responsibilities
§ 55A:41 —Term and renewal
§ 55A:42 —Base compensation
§ 55A:43 —Benefits and perquisites
§ 55A:44 —Special compensation matters
§ 55A:45 —Termination provisions
§ 55A:46 —Termination benefits
§ 55A:47 —Restrictive covenants
§ 55A:48 —Change in control
§ 55A:49 —Miscellaneous
§ 55A:50 Correcting deferred compensation operational errors
§ 55A:51 Principal legal issues
§ 55A:52 —Internal Revenue Code

© 2019 Thomson Reuters, 4/2019
CHAPTER 55B. HEALTH LAW

§ 55B:1 Scope note
§ 55B:2 Objectives, concerns and preliminary considerations
§ 55B:3 Effective partnering strategies
§ 55B:4 Key aspects of health benefit alternatives for in-house counsel
§ 55B:5 Legal and regulatory framework
§ 55B:6 Federal health care legislation
§ 55B:7 Substantive provisions and timeline
§ 55B:8 Grandfathered plans
§ 55B:9 Exemptions from PPACA
§ 55B:10 Changes required for all plans
§ 55B:11 Special rule for collectively bargained plans
§ 55B:12 Special rule for retiree-only plans and excepted benefits as defined under HIPAA
§ 55B:12.50 Health insurance exchanges
§ 55B:13 Insured health plans
§ 55B:14 Self-insured health plans
§ 55B:14.50 Employee contributions
§ 55B:15 Consumer directed health plans
§ 55B:16 VEBA trusts
§ 55B:16.50 Exchanges for large employers
§ 55B:17 Vehicles for achieving economies of size: group purchasing arrangements, MEWAs and risk retention groups
CHAPTER 56. ADVERTISING

§ 56:1 Scope note
§ 56:2 Preliminary considerations
§ 56:3 —Objectives
§ 56:4 ——Company advertising
§ 56:5 ——Competitors’ advertising
§ 56:6 ——Litigation
§ 56:7 ——Potential obstacles
§ 56:8 ——Education
§ 56:9 ——Substantiation
§ 56:10 ——Advertising review
§ 56:11 ——Monitoring
§ 56:12 Effective partnering strategies
§ 56:13 —Internal coordination
§ 56:14 —Education
§ 56:15 —Role of outside counsel
§ 56:16 Overview of advertising law
§ 56:17 —Scope of advertising
§ 56:18 —Substantiation
§ 56:19 —The spectrum of advertising claims
§ 56:20 ——Express claims
§ 56:21 ——Implied claims and survey evidence
§ 56:22 ——Establishment claims
§ 56:23 ——Puffery
§ 56:24 ——Disclaimers
§ 56:25 ——Third-party rights
§ 56:26 ——Testimonials and endorsements
§ 56:27 ——Right of publicity
§ 56:28 ——Trademarks
§ 56:29 ——Copyrights
§ 56:30 ——Unique issues raised by online advertising
CHAPTER 56A. NEGOTIATION

§ 56A:1 Scope note
§ 56A:2 Objective, concerns, preliminary considerations
§ 56A:3 Effective strategies
§ 56A:4 — Timing, time-saving and other efficiency considerations
§ 56A:5 — Leadership
§ 56A:6 — Multi-party negotiations
§ 56A:7 — Confidentiality
§ 56A:8 — Privilege
§ 56A:9 — Understanding the lay of the land
§ 56A:10 — Modes of negotiation
§ 56A:11 — “Separating the people from the problem”
§ 56A:12 — Evaluating Best Alternatives to a Negotiated Agreement (BATNA)
§ 56A:13 — Dealing with irrational negotiators
§ 56A:14 — Understanding the economics of a negotiation
§ 56A:15 — Other considerations
§ 56A:16 — Reciprocity
§ 56A:17 — Deadlock, tying, and other obstacles
§ 56A:18 — Reaching a partial agreement to ensure that negotiations move towards closing
§ 56A:19 — International negotiations
CHAPTER 56. ISSUES SPECIFIC TO IN-HOUSE COUNSEL

§ 56A:20 —Issues specific to in-house counsel
§ 56A:21 — —Salary/employment contract negotiations
§ 56A:22 — —Negotiation of engagement letters
§ 56A:23 The legal framework for negotiations
§ 56A:24 —Ethical rules
§ 56A:25 —Attorney-client privilege
§ 56A:26 —Attorney’s authority to act as agent in negotiations
§ 56A:27 —Duties of good faith and fair dealing
§ 56A:28 —Due diligence
§ 56A:29 —Confidentiality agreements
§ 56A:30 —Issues specific to the litigation context
§ 56A:31 — —The meet-and-confer requirement
§ 56A:32 — —Mediation and settlement of disputes
§ 56A:33 — —Privileges and protections that apply to settlement discussions and mediation proceedings
§ 56A:34 Practice checklist—Key points to discuss with your client before walking into the negotiation room
§ 56A:35 —Other considerations

CHAPTER 57. ALTERNATIVE DISPUTE RESOLUTION

§ 57:1 Scope note
§ 57:2 Alternative dispute resolution defined
§ 57:3 The goals of ADR
§ 57:4 Corporate ADR strategies: 10 best practices in ADR
§ 57:5 The vocabulary of ADR
§ 57:6 Forces driving the movement for ADR
§ 57:7 Corporate use of ADR
§ 57:8 Selecting dispute resolution options
§ 57:9 —Counseling the client
§ 57:10 —Decision tree analysis
§ 57:11 —Negotiations
§ 57:12 —The processes of mediation and arbitration compared
§ 57:13 —Mediation vs. Arbitration vs. Litigation
§ 57:14 ADR providers
§ 57:15 The process of mediation
§ 57:16 —Mediation as facilitated negotiation
SUCCESSFUL PARTNERING

§ 57:17 —Joint and caucus sessions
§ 57:18 —Mediator styles and approaches
§ 57:19 —Why mediations succeed or fail
§ 57:20 The practice of mediation
§ 57:21 —Proposing mediation
§ 57:22 —Selecting the mediator
§ 57:23 —Selecting key participants
§ 57:24 —Selecting outside counsel for mediation
§ 57:25 —Recognizing key relationships
§ 57:26 —Preparing for the mediation session
§ 57:27 —25 practice tips for effective mediation advocacy
§ 57:28 Mediation legal issues
§ 57:29 —Confidentiality
§ 57:30 —Enforceability
§ 57:31 —Conflict of interest
§ 57:32 —Mediator’s conduct
§ 57:33 —Uniform Mediation Act
§ 57:34 Court-ordered and court-annexed mediation
§ 57:35 Trends in ADR—healthcare and medical malpractice disputes
§ 57:36 —Religious disputes
§ 57:37 —Use in technology transactions
§ 57:38 Arbitration: the process and practice
§ 57:39 The process of arbitration
§ 57:40 —Drafting arbitration clauses
§ 57:41 —Scope of agreement
§ 57:42 —The Federal Arbitration Act
§ 57:43 —Binding v. non-binding arbitration
§ 57:44 —Fast-track arbitration
§ 57:45 —Considerations for selecting arbitrators
§ 57:46 The practice of arbitration
§ 57:47 —Discovery limitations
§ 57:48 —Depositions
§ 57:49 —Motion practice
§ 57:50 —Form of awards
§ 57:51 Arbitration trends and limitations
§ 57:52 —Litigation-style arbitration
§ 57:53 —Jurisdiction for motions to compel arbitration in federal court
§ 57:54 —Grounds for review of arbitration awards
§ 57:55 —Class action arbitration

cccvii
TABLE OF CONTENTS

§ 57:56 —Use and enforceability of consumer arbitration provisions
§ 57:57 —Court-ordered and court-annexed arbitration
§ 57:58 —Uniform arbitration acts
§ 57:59 Code of ethics for arbitrators in commercial disputes
§ 57:60 Employment ADR
§ 57:61 —Internal management structures
§ 57:62 —Mediation of employment disputes
§ 57:63 —Arbitration of employment disputes
§ 57:64 —Due process protocols
§ 57:65 —Steps to implement employment ADR programs
§ 57:66 Mandatory arbitration of employment disputes
§ 57:67 —Fashioning enforceable arbitration procedures
§ 57:68 Practice checklist
§ 57:69 CPR corporate and law firm policy statements on alternatives to litigation
§ 57:70 The CPR mediation procedure
§ 57:71 American Arbitration Association commercial dispute resolution procedures (mediation rules)
§ 57:72 Forms—Sample dispute resolution clause
§ 57:73 —CPR ADR suitability guide
§ 57:74 —Bickerman Dispute Resolution Group Mediation Agreement

CHAPTER 58. ARBITRATION OF INTERNATIONAL COMMERCIAL DISPUTES
§ 58:1 Scope note
§ 58:2 Preliminary considerations
§ 58:3 —Problems with litigating international disputes
§ 58:4 —The benefits of international arbitration
§ 58:5 Effective partnering strategies
§ 58:6 —The team approach
§ 58:7 ——Selecting outside counsel
§ 58:8 ——Selecting other team members
§ 58:9 ——Roles of in-house and outside counsel
§ 58:10 ——Developing a strategy
§ 58:11 ——Potential benefits of the team approach
§ 58:12 The arbitration clause

© 2019 Thomson Reuters, 4/2019
SUCCESSFUL PARTNERING

§ 58A:5 —Create the strongest possible counseling team
§ 58A:6 — —In-house counsel
§ 58A:7 — —Outside counsel
§ 58A:8 — —Professional support
§ 58A:9 —Build high-quality relationships
§ 58A:10 —Communicate closely with management
§ 58A:11 —Always be cost-sensitive
§ 58A:12 —Take preventive action in the ordinary course
§ 58A:13 Form: Sample allocation of responsibilities
§ 58A:14 Form: Sample litigation report
§ 58A:15 Form: Sample case assessment, company as defendant

CHAPTER 59. DETERMINATION OF LITIGATION FORUM

§ 59:1 Scope note
§ 59:2 Preliminary considerations
§ 59:3 —Goals
§ 59:4 —Traps for the unwary
§ 59:5 —Key questions
§ 59:6 Partnering strategies for decision making and achieving your forum selection objectives
§ 59:7 Declaratory judgment opportunities and options
§ 59:8 —The federal declaratory judgment statute
§ 59:9 —Burden of proof
§ 59:10 Defense opportunities to influence forum selection
§ 59:11 —Forum selection clauses
§ 59:12 —Basic removal principles
§ 59:13 —Limitations on traditional removal jurisdiction
§ 59:14 —Attacking plaintiff’s techniques to avoid federal jurisdiction
§ 59:15 —Critical time deadlines for removal action
§ 59:16 Defense opportunities to influence forum determination—Venue change
§ 59:17 —Federal transfer and forum non conveniens
§ 59:18 —Transfer vs. dismissal
§ 59:19 —State transfer and dismissal
§ 59:20 The Class Action Fairness Act of 2005
§ 59:21 Multidistrict litigation as an option

cccx
Chapter 60a. Class Actions

§ 60a:1 Scope note
§ 60a:2 Objectives, concerns, preliminary considerations
§ 60a:3 — Objectives
§ 60a:4 — Concerns
§ 60a:5 — Preliminary considerations
§ 60a:6 — Media relations
§ 60a:7 — Insurance coverage
§ 60a:8 — Financial reporting
§ 60a:9 — Customer relations
§ 60a:10 — Government relations
§ 60a:11 — Business or technical expertise
§ 60a:12 — Authority
§ 60a:13 — Document preservation
§ 60a:14 — Selection of outside counsel
§ 60a:15 — Discovery and investigation issues
§ 60a:16 — Venue and jurisdiction
§ 60a:17 — Related proceedings
§ 60a:18 — Early assessment
§ 60a:19 Effective partnering
§ 60a:20 — Planning is crucial
§ 60a:21 — Discussions should be confirmed in writing
§ 60a:22 — Introductions
§ 60a:23 Strategies in class action engagement
§ 60a:24 — Elements of claims and defenses; classwide proof
§ 60a:25 — Understand the nature of the claims
§ 60a:26 — Focus on elements that defeat predominance
§ 60a:27 — Complementary roles of inside and outside counsel
§ 60a:28 — Discovery
§ 60a:29 — Special requirements
§ 60a:30 — Bifurcation
§ 60a:31 — Focus on the named plaintiffs
§ 60a:32 — Deposing the named plaintiff
§ 60A:33 — —Third-party depositions
§ 60A:34 —Experts
§ 60A:35 —Case management considerations
§ 60A:36 —The class certification hearing
§ 60A:37 —Response to class certification
§ 60A:38 —Notice to the class
§ 60A:39 —Trial of class actions
§ 60A:40 Settlement strategies
§ 60A:41 —Individual settlement before certification
§ 60A:42 —Timing of initiating discussions
§ 60A:43 —Class wide settlements
§ 60A:44 —Settlement notice
§ 60A:45 —Open and frequent communication
§ 60A:46 —Structure of settlement
§ 60A:47 —Class administration
§ 60A:48 —Dealing with objectors
§ 60A:49 Post-matter analysis
§ 60A:50 Principal legal issues, key cases, and statutory framework
§ 60A:51 —Various kinds of class actions
§ 60A:52 —“Rigorous analysis”
§ 60A:53 —Key cases
§ 60A:54 —Evolving standards of proof
§ 60A:55 —Rule 23(a) requirements for class certification
§ 60A:56 ——Numerosity
§ 60A:57 ——Commonality
§ 60A:58 ——Typicality
§ 60A:59 ——Adequacy
§ 60A:60 —Class definition
§ 60A:61 —Rule 23(b) requirements
§ 60A:62 ——Rule 23(b)(1)(A)
§ 60A:63 ——Rule 23(b)(1)(B)
§ 60A:64 ——Rule 23(b)(2)
§ 60A:65 ——Rule 23(b)(3)
§ 60A:66 Other Rule 23 subdivisions
§ 60A:67 —Rule 23(c)
§ 60A:68 —Rule 23(d)
§ 60A:69 —Rule 23(e)
§ 60A:70 —Rule 23(f)
§ 60A:71 —Rule 23(g)
§ 60A:72 —Rule 23(h)
§ 60A:73 Class Action Fairness Act

© 2019 Thomson Reuters, 4/2019
§ 60A:74 —Evidence
§ 60A:75 —Amount in controversy
§ 60A:76 —Exceptions to removal jurisdiction
§ 60A:77 —Appeal
§ 60A:78 —Settlements
§ 60A:79 The law of class action settlements
§ 60A:80 Class action arbitration
§ 60A:81 ALI Aggregate Litigation project
§ 60A:82 Practice checklists
§ 60A:83 Forms—Class notice (certified class action)
§ 60A:84 —Class notice (settlement)
§ 60A:85 —Notice of removal

CHAPTER 60B. EXPEDITING AND
STREAMLINING LITIGATION
§ 60B:1 Scope note
§ 60B:2 Objectives, concerns, and preliminary
considerations
§ 60B:3 Early planning and assessment
§ 60B:4 Anticipate client needs and non-litigation
factors
§ 60B:5 Daily interactions and responsibilities
§ 60B:6 Internal and external deadlines
§ 60B:7 Effective use of legal talent: how to staff
and assign roles to attorneys
§ 60B:8 Structure and continuity of a litigation
team
§ 60B:9 Exercising professional judgment to focus
on core cases and issues
§ 60B:10 Responding to unexpected developments in
an expeditious, streamlined manner
§ 60B:11 Relationships with opposing and co-counsel
§ 60B:12 Agreements with opposing and co-counsel
§ 60B:13 Build and nurture a cooperative relationship
between inside and outside counsel
§ 60B:14 The forum selected
§ 60B:15 Evaluate performance during and after
litigation
§ 60B:16 Problems in expediting and streamlining
litigation
§ 60B:16.50 Expediting and streamlining discovery in federal
cases
§ 60B:17 Practice checklist

ccxxiv
## CHAPTER 61. DISCOVERY AND INFORMATION GATHERING

| § 61:1 | Scope note |
| § 61:2 | Objectives, concerns and preliminary considerations |
| § 61:3 | Goals of discovery management |
| § 61:4 | — Accuracy, consistency and timeliness |
| § 61:5 | — Scope of discovery |
| § 61:6 | — Control of dispute outcome |
| § 61:7 | — Protection of proprietary information |
| § 61:8 | — Limiting burden on corporate employees |
| § 61:9 | — Support of the litigation |
| § 61:10 | — Cost-effectiveness |
| § 61:11 | Considerations affecting use of particular discovery devices |
| § 61:12 | — Investigation methods |
| § 61:13 | — Informal discovery |
| § 61:14 | — Formal written discovery |
| § 61:15 | — Depositions |
| § 61:16 | — — Deposition of a corporate party |
| § 61:17 | — — Time and place issues |
| § 61:18 | — — Objecting to deposition notices |
| § 61:19 | — — “Apex” depositions |
| § 61:20 | — — Repeat depositions of key employees |
| § 61:21 | — — Depositions of non-parties |
| § 61:22 | — — Expert witnesses |
| § 61:23 | — Automatic disclosures |
| § 61:24 | Effective partnering strategies |
| § 61:25 | — Offensive discovery |
| § 61:26 | — Defensive discovery |
| § 61:27 | — Considerations affecting team configuration |
| § 61:28 | — Use of information systems |
| § 61:29 | Legal issues regarding protective orders |
| § 61:30 | Legal issues regarding apex depositions |
| § 61:31 | Legal issues regarding discovery of settlement agreements |
| § 61:32 | — Relevance |
| § 61:33 | — Public policy favoring negotiated settlement |
| § 61:34 | — Prejudice |
| § 61:35 | Practice checklist |
| § 61:36 | Form: Protective order; no sharing |
| § 61:37 | Form: Protective order; sharing allowed |

© 2019 Thomson Reuters, 4/2019
CHAPTER 62. EXPERT WITNESSES

I. INTRODUCTION

§ 62:1 Scope note
§ 62:2 Objectives, concerns, preliminary considerations

II. INITIAL CONSIDERATIONS

§ 62:3 Do you need an expert?
§ 62:4 What type of expert do you need?
§ 62:5 When to retain an expert

III. FINDING AN EXPERT

A. WHAT TO LOOK FOR

§ 62:6 Credentials
§ 62:7 Background checks
§ 62:8 Practical considerations
§ 62:9 —Time
§ 62:10 —Support
§ 62:11 —Location
§ 62:12 Intangibles

B. OTHER CONSIDERATIONS

§ 62:13 Deciding between inside and outside experts
§ 62:14 Searching for the right expert
§ 62:15 Sharing an expert with other parties

IV. HIRING AN EXPERT

§ 62:16 Fee structure
§ 62:17 Letter/contract and terms

V. COMMUNICATING

§ 62:18 Communicating with your expert
§ 62:19 —Who should communicate?
§ 62:20 —What gets communicated to your expert?
§ 62:21 —What does your expert communicate to you?

cccxvi
VI. WORKING WITH YOUR EXPERT DURING LITIGATION

A. DEVELOPMENT OF YOUR EXPERT'S OPINIONS

§ 62:22 Early stages of litigation
§ 62:23 The expert report
§ 62:24 —Investigation and research
§ 62:25 —Contents
§ 62:26 —Related issues: role of counsel in preparing the expert report
§ 62:27 —Related issues: drafts of the expert report
§ 62:28 —Related issues: supplementing the expert report

B. DISCOVERABILITY OF YOUR EXPERT

§ 62:29 Discoverability of your expert
§ 62:30 Mandatory disclosures and depositions for experts who may testify
§ 62:31 Non-testifying experts
§ 62:32 Special issues: experts serving in both testifying and consulting roles
§ 62:33 Special issues: in-house experts
§ 62:34 Special issues: discovery from experts informally consulted

C. DEPOSITIONS

§ 62:35 Deposition of your expert
§ 62:36 Depositions of opposing experts

D. DAUBERT HEARINGS

§ 62:37 Admissibility of expert evidence
§ 62:38 Evolving admissibility standards for expert testimony
§ 62:39 Current case law on the admissibility of expert testimony
§ 62:40 —The expert is qualified
§ 62:41 —The testimony will assist the trier of fact
§ 62:42 —The testimony is reliable: sufficient factual basis
§ 62:43 —The testimony is reliable: acceptable process or methodology

© 2019 Thomson Reuters, 4/2019
§ 62:44 — The testimony is reliable: proper application to the facts of the case
§ 62:45 Manners in which the court may perform its Daubert gatekeeping functions

E. TESTIMONY OF YOUR EXPERT
§ 62:46 Presentation and demeanor
§ 62:47 Content of testimony
§ 62:48 Principal legal issues and case law regarding the scope of expert testimony

VII. DATABASES
§ 62:49 Keeping a database of all experts used

VIII. PRACTICE AIDS
§ 62:50 Practice checklist
§ 62:51 Form: common interest agreement
§ 62:52 Form: letter agreement with testifying expert

CHAPTER 63. TRIAL PREPARATION AND PRESENTATION
§ 63:1 Scope note
§ 63:2 Objectives, concerns, preliminary considerations
§ 63:3 — Objectives
§ 63:4 — Cost-benefit analysis
§ 63:5 — Early case assessment
§ 63:6 — Preparation, project management and the trial plan
§ 63:7 The rules of engagement
§ 63:8 Inside counsel as gatekeeper
§ 63:9 — A central role
§ 63:10 — Role of outside counsel
§ 63:11 — Litigation plan
§ 63:12 Identifying and establishing the client’s goals
§ 63:13 — A collaborative process
§ 63:14 — Examples and suggestions
§ 63:15 — Defining victory
§ 63:16 — — Implementing the trial plan and the cost-benefit analysis
§ 63:17 — — Risk-reward analysis
§ 63:18 — — Class action perspectives
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 63:19</td>
<td>Acknowledging the client’s stakeholders</td>
</tr>
<tr>
<td>§ 63:20</td>
<td>Maintaining flexibility</td>
</tr>
<tr>
<td>§ 63:21</td>
<td>Special issues in cyber litigation and regulatory proceedings</td>
</tr>
<tr>
<td>§ 63:22</td>
<td>— Breach response</td>
</tr>
<tr>
<td>§ 63:23</td>
<td>— Early case assessment and trial plan</td>
</tr>
<tr>
<td>§ 63:24</td>
<td>— Adapting to business and financial changes</td>
</tr>
<tr>
<td>§ 63:25</td>
<td>Allocation and delegation of responsibility</td>
</tr>
<tr>
<td>§ 63:26</td>
<td>— Establishing a system for making tactical decisions</td>
</tr>
<tr>
<td>§ 63:27</td>
<td>— Marshaling the internal resources of the company</td>
</tr>
<tr>
<td>§ 63:28</td>
<td>— The “client’s ombudsman”</td>
</tr>
<tr>
<td>§ 63:29</td>
<td>— Allocating responsibility between multiple outside firms</td>
</tr>
<tr>
<td>§ 63:30</td>
<td>— Delegating responsibility</td>
</tr>
<tr>
<td>§ 63:31</td>
<td>Organizing and implementing the company’s position</td>
</tr>
<tr>
<td>§ 63:32</td>
<td>— The importance of trial graphics and technicians</td>
</tr>
<tr>
<td>§ 63:33</td>
<td>— Public disclosure; obligations and concerns</td>
</tr>
<tr>
<td>§ 63:34</td>
<td>— Telling the company’s story to the public</td>
</tr>
<tr>
<td>§ 63:35</td>
<td>— Social media</td>
</tr>
<tr>
<td>§ 63:36</td>
<td>— Trade and industry media</td>
</tr>
<tr>
<td>§ 63:37</td>
<td>— Business partner and customer relations</td>
</tr>
<tr>
<td>§ 63:38</td>
<td>Trial strategy partnership</td>
</tr>
<tr>
<td>§ 63:39</td>
<td>— Selecting strategies</td>
</tr>
<tr>
<td>§ 63:40</td>
<td>— Primary</td>
</tr>
<tr>
<td>§ 63:41</td>
<td>— Secondary</td>
</tr>
<tr>
<td>§ 63:42</td>
<td>— Jury consultants</td>
</tr>
<tr>
<td>§ 63:43</td>
<td>— Mock trials</td>
</tr>
<tr>
<td>§ 63:44</td>
<td>— Unique issues in preparing a class action case for trial</td>
</tr>
<tr>
<td>§ 63:45</td>
<td>Overview of trial preparation</td>
</tr>
<tr>
<td>§ 63:46</td>
<td>— Identifying the issues of law</td>
</tr>
<tr>
<td>§ 63:47</td>
<td>— Identifying the critical fact issues</td>
</tr>
<tr>
<td>§ 63:48</td>
<td>— Identifying and preparing witnesses</td>
</tr>
<tr>
<td>§ 63:49</td>
<td>— Company witnesses</td>
</tr>
<tr>
<td>§ 63:50</td>
<td>— Experts</td>
</tr>
<tr>
<td>§ 63:51</td>
<td>— Business partners/agents</td>
</tr>
<tr>
<td>§ 63:52</td>
<td>— The formalities</td>
</tr>
<tr>
<td>§ 63:53</td>
<td>— Pre-trial conferences and orders</td>
</tr>
<tr>
<td>§ 63:54</td>
<td>— Attendance at pre-trial conferences</td>
</tr>
</tbody>
</table>
§ 63:55 — Final pre-trial order and final pre-trial conference
§ 63:56 — Pre-trial admissions and stipulated facts
§ 63:57 — Identifying and exchanging exhibits
§ 63:58 — The exhibit list
§ 63:59 — Motions in limine
§ 63:60 — Special issues in trying class actions
§ 63:61 — Other necessary formal preparation
§ 63:62 — Advancing themes
§ 63:63 — Graphics
§ 63:64 — Demonstrative exhibits
§ 63:65 — Selecting a vendor
§ 63:66 Trial coordination and participation
§ 63:67 — Attendance at trial
§ 63:68 — Communication during trial
§ 63:69 — Between inside and outside counsel
§ 63:70 — Between inside counsel and the business client
§ 63:71 — Trial and settlement analysis
§ 63:72 — Witness preparation and coordination
§ 63:73 — Fact and expert witnesses
§ 63:74 Post-trial coordination
§ 63:75 — Prepare for good or bad news
§ 63:76 — Managing the post-trial process
§ 63:77 Practice checklist
§ 63:78 Form: Sample joint pre-trial order

CHAPTER 64. USE OF JURY CONSULTANTS
§ 64:1 Scope note
§ 64:2 Types of consulting services
§ 64:3 — Trial simulation/mock trials/virtual or online jury research
§ 64:4 — Issue focus groups
§ 64:5 — Witness reaction/preparation
§ 64:6 — Exhibit development
§ 64:7 — Community attitude surveys
§ 64:8 — Opening statement and closing argument consultation
§ 64:9 — Jury selection
§ 64:10 — Trial monitoring
§ 64:11 — Trial presentation in the digital age
TABLE OF CONTENTS

§ 64:12 —Post-trial juror interviews
§ 64:13 —Computer software
§ 64:14 Jury consulting during settlement discussions
§ 64:15 The timing of jury consulting services
§ 64:16 Objectives
§ 64:17 —Using a jury consultant to assist in jury selection
§ 64:18 —Using jury research to test specific issues, arguments, witnesses or exhibits
§ 64:19 —Using jury research to develop settlement strategy
§ 64:20 —Using jury research to evaluate the effectiveness of trial counsel
§ 64:21 —Using jury research to obtain feedback at trial; the shadow jury
§ 64:22 Concerns
§ 64:23 —Composition of the mock jury panel(s)
§ 64:24 —Balancing the presentations
§ 64:25 —Communicating with the jury consultant about the objectives and timing of the research
§ 64:26 —The jury consultant’s visibility at trial
§ 64:27 —The cost of jury consulting services
§ 64:28 —Impact of jury research on the jury pool
§ 64:29 Effective partnering strategies
§ 64:30 —Deciding when to use jury research
§ 64:31 —Getting the corporate client to “buy in”
§ 64:32 —Selecting the jury consultant
§ 64:33 —Reviewing jury reaction and interpreting results
§ 64:34 Discoverability of the jury consultant’s work
§ 64:35 Practice checklist
§ 64:36 Form: Sample letter of engagement (telephone survey)
§ 64:37 Form: Sample letter of engagement (focus group exercise)
§ 64:38 Form: Sample confidentiality agreement for research participant
§ 64:39 Form: Sample mock jury demographics summary report
§ 64:40 Form: Sample “juror polarization matrix”
§ 64:41 Form: Summary of post-witness evaluations
§ 64:42 Listing of selected jury consulting firms

© 2019 Thomson Reuters, 4/2019 cccxxi
CHAPTER 65. SETTLEMENT

§ 65:1 Scope note

§ 65:2 Understanding the client’s case objective and litigation philosophy

§ 65:3 —Take a result-oriented approach

§ 65:4 —Examples of litigation philosophies affecting settlement

§ 65:5 —Examples of specific case objectives affecting settlement

§ 65:6 —Where does settlement fit in?

§ 65:7 Common concerns of inside counsel regarding settlements

§ 65:8 Questions that should be addressed with the client

§ 65:9 Risks and traps for the unwary

§ 65:10 Timing of the settlement

§ 65:11 —Considering settlement at the outset of litigation

§ 65:12 —Cost-benefit analysis

§ 65:13 —Favoring early settlement

§ 65:14 —Favoring delay

§ 65:15 —During litigation

§ 65:16 —Before beginning discovery

§ 65:17 —During discovery

§ 65:18 —On the courthouse steps

§ 65:19 —Before the appeal

§ 65:20 Settlement and the litigation budget

§ 65:21 Partnering strategies in settlement

§ 65:22 —Role of inside counsel

§ 65:23 —Outside counsel’s authority

§ 65:24 —The client’s role

§ 65:25 The duty to advise the client of settlement negotiations

§ 65:26 Management’s role in settlement

§ 65:27 The role of the insurance carrier in settlement

§ 65:28 The role of the board of directors and shareholders in settlement

§ 65:29 Preparing for settlement

§ 65:30 —Investigations

§ 65:31 —Decision tree analysis
CHAPTER 65. SETTLEMENT

§ 65:32 Early neutral evaluation
§ 65:33 Focus groups and mock juries
§ 65:34 Achieving the settlement
§ 65:35 Use of alternative dispute resolution techniques
§ 65:36 Judicial settlement conferences
§ 65:37 Negotiations among the lawyers
§ 65:38 — Using separate settlement counsel
§ 65:39 — Negotiating techniques
§ 65:40 Negotiations among the parties
§ 65:41 — Offers of judgment
§ 65:42 Alternatives to cash settlements
§ 65:43 — Special problems in business litigation
§ 65:44 — Special opportunities in business litigation
§ 65:45 The settlement agreement
§ 65:46 — Who should draft the agreement?
§ 65:47 — Terms
§ 65:48 — Definitions and recitals
§ 65:49 — Conditions, consideration and dismissal
§ 65:50 — Release and other covenants limiting further litigation among the parties
§ 65:51 — Common terms
§ 65:52 — Problem of continuing relations between the settling parties
§ 65:53 — Dealing with non-settling persons
§ 65:54 — Maintaining confidentiality
§ 65:55 Obtaining judicial approval of the settlement
§ 65:56 Enforcing the settlement
§ 65:57 — Continuing jurisdiction
§ 65:58 — Settlements dependent on subsequent events
§ 65:59 Attacking the settlement
§ 65:60 Showing required to set aside settlement agreement
§ 65:61 Defending against a challenge to the settlement
§ 65:62 Practice checklist

CHAPTER 66. APPEALS

§ 66:1 Scope note
§ 66:2 Overview of appellate process
§ 66:3 Turning appeals into litigation opportunities
§ 66:4 Role of special appellate counsel
§ 66:5 Special role of inside counsel

© 2019 Thomson Reuters, 4/2019
§ 66:6 —Selecting appellate counsel
§ 66:7 —Make it clear who is driving the bus
§ 66:8 —Good appeals start with attention in the trial court
§ 66:9 —Making the appellate team work
§ 66:10 —Marshaling the client’s resources
§ 66:11 —The decision to appeal
§ 66:12 —Cost of appeal and alternative fee structures
§ 66:13 —Appeal and supersedeas bonds
§ 66:14 —Coordination of the appeal with other litigation efforts
§ 66:15 —Coordination of amicus curiae efforts
§ 66:16 —Handle an opponent’s appeal the same as your own
§ 66:17 What can and cannot be accomplished on appeal
§ 66:18 —The occasional wisdom of not appealing
§ 66:19 —Think carefully about what to appeal
§ 66:20 —Need to raise issues in trial court
§ 66:21 —Winning nothing on appeal
§ 66:22 Certification of questions of law
§ 66:23 Briefing
§ 66:24 Amicus curiae
§ 66:25 Oral argument
§ 66:26 —Helping counsel prepare
§ 66:27 —Moot arguments
§ 66:27.50—Observation of arguments
§ 66:28 —Attendance at and evaluation of the argument
§ 66:29 Settlement in the appellate process
§ 66:29.50—Vacatur of prior decisions
§ 66:30 —Court-annexed settlement programs
§ 66:31 —Use of separate counsel for settlement discussions
§ 66:32 Decision and subsequent proceedings
§ 66:33 —Costs
§ 66:34 —Rehearing and further review
§ 66:35 —Discretionary appeal
§ 66:36 Practice checklist

CHAPTER 67. HIGH PROFILE LITIGATION
§ 67:1 Scope note
### CHAPTER 67A. REGULATORY LITIGATION

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 67A:1</td>
<td>Scope note</td>
</tr>
<tr>
<td>§ 67A:2</td>
<td>Objectives</td>
</tr>
<tr>
<td>§ 67A:3</td>
<td>Concerns and principal risks</td>
</tr>
<tr>
<td>§ 67A:4</td>
<td>Key distinctions between regulatory litigation and private litigation</td>
</tr>
<tr>
<td>§ 67A:5</td>
<td>Pre-litigation best practices</td>
</tr>
<tr>
<td>§ 67A:6</td>
<td>Preliminary considerations: questions to raise</td>
</tr>
<tr>
<td>§ 67A:7</td>
<td>Building the right team</td>
</tr>
<tr>
<td>§ 67A:8</td>
<td>Partnering to build (and implement) an effective defense strategy</td>
</tr>
<tr>
<td>§ 67A:9</td>
<td>—Know the rules of the forum</td>
</tr>
<tr>
<td>§ 67A:10</td>
<td>—Strategies relating to discovery</td>
</tr>
<tr>
<td>§ 67A:11</td>
<td>—Use of FOIA</td>
</tr>
<tr>
<td>§ 67A:12</td>
<td>—Strategies to deal with judicial deference to regulators</td>
</tr>
<tr>
<td>§ 67A:13</td>
<td>Communication strategy</td>
</tr>
<tr>
<td>§ 67A:14</td>
<td>Cost control</td>
</tr>
<tr>
<td>§ 67A:15</td>
<td>Managing ongoing relations with regulators</td>
</tr>
<tr>
<td>§ 67A:16</td>
<td>Settlement considerations</td>
</tr>
<tr>
<td>§ 67A:17</td>
<td>Practice checklist</td>
</tr>
<tr>
<td>§ 67A:18</td>
<td>Form: FOIA request letter</td>
</tr>
</tbody>
</table>

### CHAPTER 67B. SECURITIES LITIGATION

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 67B:1</td>
<td>Scope note</td>
</tr>
</tbody>
</table>

© 2019 Thomson Reuters, 4/2019
§ 67B:2 Securities litigation overview
§ 67B:3 —Claims under Section 10(b) and Rule 10b-5
of the ‘34 Act
§ 67B:4 —Claims under Sections 11 and 12 of the ‘33
Act
§ 67B:5 —Claims under Section 14 of the ‘34 Act
§ 67B:6 Initial litigation phase
§ 67B:7 —Preserving documents, issuing litigation hold
notices and addressing data privacy
restrictions
§ 67B:8 —Coordinating parallel proceedings involving
the government
§ 67B:9 —Addressing directors’ and officers’ liability
insurance
§ 67B:10 —Negotiating extensions of time during the
lead plaintiff selection process
§ 67B:11 —Deciding whether to become involved in the
lead plaintiff selection process
§ 67B:12 —Strategizing about experts
§ 67B:13 —Establishing a sensible and transparent
budgeting framework
§ 67B:14 Parallel proceedings and venue
§ 67B:15 —Federal statutory framework
§ 67B:16 — —The jurisdiction and venue provisions
governing claims brought under the
Securities Act of 1933 and the Securities
Exchange Act of 1934
§ 67B:17 — —Removal, dismissal or preclusion under
the Securities Litigation Uniform Standards
Act of 1998
§ 67B:18 — —Removal under the Class Action Fairness
Act of 2005
§ 67B:19 — —The Judicial Panel on Multidistrict
Litigation and the Federal Transfer Statute
§ 67B:20 —Strategic considerations—Moving to stay or
dismiss
§ 67B:21 — —Performing jurisdiction-specific research
§ 67B:22 — —Enforcing the PSLRA’s automatic stay of
discovery
§ 67B:23 — —Controlling parallel proceedings during
discovery and beyond
§ 67B:24 — —Negotiating tolling agreements with
potential claimants
§ 67B:25 Motions to dismiss

cccxxvi
§ 67B:26 — Threshold defenses
§ 67B:27 — — Standing
§ 67B:28 — — Personal jurisdiction
§ 67B:29 — — The concept of extraterritoriality
§ 67B:30 — — SLUSA preclusion
§ 67B:31 — — Statutes of limitation and repose under the '33 Act and '34 Act
§ 67B:32 — — — The “discovery rule”
§ 67B:33 — — — Class action tolling
§ 67B:34 — — Securities fraud claims under the '34 Act
§ 67B:35 — — The “maker” requirement
§ 67B:36 — — Falsity and the particularity requirements
§ 67B:37 — — Expressions of opinion
§ 67B:38 — — Forward-looking statements
§ 67B:39 — — Materiality
§ 67B:40 — — Scintere
§ 67B:41 — — — Loss causation
§ 67B:42 — — Claims under the '33 Act
§ 67B:43 — — The heightened pleading requirement for claims that “sound in fraud”
§ 67B:44 — — Pleading requirements for claims that adequately disclaim reliance on fraud
§ 67B:45 — — Strategic considerations at the motion to dismiss stage
§ 67B:46 — — A case study on attacking falsity under Fed. R. Civ. P. 8(a)
§ 67B:47 Class certification
§ 67B:48 — Predominance, extraterritoriality, and the implications of Morrison
§ 67B:49 — Predominance, reliance, and the implications of Halliburton II
§ 67B:50 — — Rebutting the Basic presumption: Where the burden lies
§ 67B:51 — — Lower court decisions concerning “front-end” price impact
§ 67B:52 — — Decisions concerning “truth on the market”
§ 67B:53 — Strategic considerations
§ 67B:54 Discovery
§ 67B:55 — Building a case plan around alleged misrepresentations
§ 67B:56 — Considering phased discovery
§ 67B:57 — Dealing with confidential witnesses

© 2019 Thomson Reuters, 4/2019
SUCCESSFUL PARTNERING

§ 67B:58 —Reasonable investigation and reliance defenses under the '33 Act
§ 67B:59 Summary judgment
§ 67B:60 —Falsity and materiality
§ 67B:61 —Scienter
§ 67B:62 Practice checklists
§ 67B:63 Form: Sample framework for misstatements and omissions chart
§ 67B:64 Form: Sample interrogatories to plaintiffs
§ 67B:65 Form: Sample proposed discovery coordination order
§ 67B:66 Appendix: Securities litigation secondary sources

CHAPTER 68. PATENTS AND TRADE SECRETS
§ 68:1 Scope note
§ 68:2 Goals and objectives
§ 68:3 Characteristic problems
§ 68:4 —Establishing a business case for intellectual property
§ 68:5 —Getting “buy-in” from a corporate sponsor
§ 68:6 —Developing an appropriate patent strategy and related guidelines
§ 68:7 —Identifying high quality inventions
§ 68:8 —Establishing rights to the invention
§ 68:9 —Evaluation of inventions
§ 68:10 —Cycle times
§ 68:11 —Defining the working relationship between in-house and outside counsel
§ 68:12 —Identifying enforcement opportunities
§ 68:13 —Trade secret protection programs
§ 68:14 Principal risks and traps for the unwary
§ 68:15 —Securing ownership in inventions and trade secrets
§ 68:16 —Inventorship issues
§ 68:17 —Description of invention in papers
§ 68:18 —Participation in standard setting organizations
§ 68:19 —Loss of absolute novelty
§ 68:20 —Duty of disclosure to the USPTO
§ 68:21 —Best mode requirement
§ 68:22 Questions to raise with in-house counsel
§ 68:23 Selection of outside patent counsel

cccxviii
Table of Contents

§ 68:24 Partnering strategies
§ 68:25 —Timely submission of invention disclosures
§ 68:26 —Filing decisions
§ 68:27 —Preparation of a patent application
§ 68:28 —Prosecution of the application
§ 68:29 —Foreign filing decisions
§ 68:30 —Following issuance of a patent
§ 68:31 Managing the patent portfolio
§ 68:32 Profiting from the resulting patent portfolio
§ 68:33 Partnering strategies in the trade secret context
§ 68:34 —Training and education of the client
§ 68:35 —Development of procedures and documentation
§ 68:36 Overview of patent law
§ 68:37 —Statutory subject matter
§ 68:38 —Criteria for patentability
§ 68:39 —The patent specification and the examination process
§ 68:40 —Patent infringement
§ 68:41 Overview of trade secret law
§ 68:42 Attorney/client privilege in the patent preparation and prosecution arena
§ 68:43 Practice checklist
§ 68:44 Form: Confidentiality, invention, and copyright agreement
§ 68:45 Form: Simplified invention disclosure
§ 68:46 Form: Detailed invention disclosure
§ 68:47 Form: Outside counsel guidelines

Chapter 69. Trademarks

§ 69:1 Scope note
§ 69:2 Preliminary considerations
§ 69:3 —Identification of key brands and their level of protection
§ 69:4 —An audit may disclose dilution, tarnishment, infringement, or abandonment
§ 69:5 Common problems with ineffective trademark protection programs
§ 69:6 —Self-dilution or inconsistent use of mark
§ 69:7 —Lack of continuity in trademark rights
§ 69:8 —Generic use of marks
§ 69:9 —Lack of convergence with corporate objectives
§ 69:10 —Infringement by third parties
§ 69:11 —Naked licensing of marks

© 2019 Thomson Reuters, 4/2019
§ 69:12 —Lack of centralization
§ 69:13 Alternative approaches in the establishment of a
trademark protection program and effective
partnering with outside counsel
§ 69:14 —Identification of existing key brands
§ 69:15 —Registration and renewal
§ 69:16 —Monitoring the Official Gazette and “watch
services”
§ 69:17 —Domain names, social networks, and emerging
Internet law
§ 69:18 —Pop-up advertisements and use of
trademarked terms as “keywords”
§ 69:19 —Development of new marks
§ 69:20 —Altering or updating existing marks
§ 69:21 —Proper trademark use
§ 69:22 —Standardized trademark usage program
§ 69:23 —Licensing considerations
§ 69:24 Trademark litigation strategy and effective use
of outside counsel to manage litigation risks
§ 69:25 —Attempts to avoid litigation while stopping
consumer confusion
§ 69:26 —Selecting litigation counsel
§ 69:27 —Controlling litigation costs
§ 69:28 —Litigation strategy
§ 69:29 —Issues arising from bankruptcy proceedings
§ 69:30 Basic principles of trademark law
§ 69:31 —What are trademarks, service marks, and
trade dress?
§ 69:32 —What is the importance of trademarks to the
company?
§ 69:33 —How are trademark rights secured and
protected?
§ 69:34 —How are trademark rights lost or weakened?
§ 69:35 —What is the test for trademark infringement?
§ 69:36 — —Strength of the claimant’s trademark
§ 69:37 — —Similarity of the marks
§ 69:38 — —Proximity of goods or services
§ 69:39 — —Marketing channels
§ 69:40 — —Actual confusion
§ 69:41 — —Intent of the party adopting the mark
§ 69:42 — —Sophistication of the purchasers
§ 69:43 — —Expense of the goods or services
§ 69:44 — —Likelihood of the infringer or trademark
owner to expand

cccxxx
CHAPTER 70. COPYRIGHT

§ 70:1 Scope note
§ 70:2 Effective partnering strategies
§ 70:3 —Selection of outside counsel
§ 70:4 —When to delegate to outside counsel
§ 70:5 ——Portfolio management
§ 70:6 ——Clearance and licensing
§ 70:7 ——Enforcement and defending against claims
§ 70:8 Portfolio management
§ 70:9 —Copyright Act of 1976
§ 70:10 —Subject matter of copyright
§ 70:11 ——Originality and scope of protection
§ 70:12 ——Unprotectable subject matter
§ 70:13 ——Fixation
§ 70:14 —Copyright ownership
§ 70:15 ——Joint works
§ 70:16 ——Works-made-for-hire
§ 70:17 ——Works vesting in authors
§ 70:18 —Copyright notice
§ 70:19 —Copyright registration
§ 70:20 ——Federal registration process
§ 70:21 ——Duration and renewal of copyright protection
§ 70:22 —Obtaining and maintaining all necessary rights
§ 70:23 —Special cases
§ 70:24 ——Computer programs and video games
§ 70:25 ——“Hot properties”
§ 70:26 ——Architectural works
§ 70:27 ——Fashion
§ 70:28 — —Visual art
§ 70:29 — —Font and typeface
§ 70:29.50 —Moral rights
§ 70:30 Clearance and licensing
§ 70:31 —Clearance processes and procedures
§ 70:32 —Clearance audits
§ 70:33 —Keeping current on case law and statutory changes
§ 70:34 —Conducting copyright seminars for non-lawyers
§ 70:35 —Transfers and licensing of rights
§ 70:36 —Termination of a license or transfer
§ 70:37 —Compulsory licenses
§ 70:38 — —Performance rights societies
§ 70:39 — —Compulsory license for underlying composition
§ 70:40 — —Compulsory license for digital performance
§ 70:41 — —Compulsory licenses beyond music
§ 70:42 —Pre-1972 sound recordings
§ 70:43 —Moral rights [Deleted]
§ 70:44 Enforcement
§ 70:45 —The exclusive rights of a copyright holder
§ 70:46 —Additional rights
§ 70:47 —Options for copyright holders
§ 70:48 — —Cease and desist letter
§ 70:49 — —DMCA take down notice
§ 70:50 — —Temporary restraining order (TRO)
§ 70:51 — —Preliminary injunction
§ 70:52 — —Winning on motion practice
§ 70:53 — —Forfeitures and seizure
§ 70:54 — —Criminal prosecution
§ 70:55 — —Piracy/counterfeiting
§ 70:56 —Plaintiff's preliminary considerations
§ 70:57 — —Declaratory judgments and fixing a forum
§ 70:58 — —Assessing jurisdiction and venue options
§ 70:59 —Elements of proof in the plaintiff's case
§ 70:60 — —Ownership
§ 70:61 — —Copying of protectable elements of expression
§ 70:62 — —Secondary liability
CHAPTER 71. EMPLOYMENT LAW

§ 71:1 Scope note
§ 71:2 Preliminary considerations
§ 71:3 Traps/pitfalls in hiring
§ 71:4 —Medical exams
§ 71:5 —Reference checks/background investigations and verifying applicant information

TABLE OF CONTENTS

§ 70:63 —Additional causes of action under the DMCA
§ 70:64 ——Anti-circumvention
§ 70:65 ——Copyright management information
§ 70:66 ——Remedies
§ 70:67 Defending against a claim
§ 70:68 —Preliminary considerations
§ 70:69 ——Responding to a cease and desist letter
§ 70:70 ——When to file a declaratory judgment action
§ 70:71 ——Responding to a complaint
§ 70:72 —Defenses
§ 70:73 ——Statute of limitations and laches
§ 70:74 ——De minimis use
§ 70:75 ——Copyright misuse
§ 70:76 ——Unclean hands
§ 70:77 ——Estoppel and implied consent
§ 70:78 ——First sale doctrine
§ 70:79 ——DMCA—Safe harbor
§ 70:80 ——State immunity
§ 70:81 ——Fair use
§ 70:82 —Insurance
§ 70:83 Remedies
§ 70:84 —Injunctive relief
§ 70:85 —Damages
§ 70:86 —Attorneys’ fees
§ 70:87 —Seizure
§ 70:88 Comparative legal issues
§ 70:89 —Trademarks
§ 70:90 —Utility patents
§ 70:91 —Design patents
§ 70:92 —Trade secrets
§ 70:93 —When is a breach-of-contract a copyright issue?
§ 70:94 Checklist for complaint
§ 71:6 —Credit checks
§ 71:7 —Criminal history checks and driving records
§ 71:8 Traps/pitfalls in performance evaluations
§ 71:9 Traps/pitfalls in investigations
§ 71:10 —Selecting an investigator
§ 71:11 —Meet with the employee who made the complaint and other fact witnesses
§ 71:12 —Investigations conducted by outside counsel and the Fair Credit Reporting Act
§ 71:13 Traps/pitfalls in employee discipline
§ 71:14 —Termination
§ 71:15 Traps/pitfalls post-termination
§ 71:16 Advice for limiting exposure to employment claims
§ 71:17 —Workplace training
§ 71:18 —Policies and procedures
§ 71:19 —Arbitration
§ 71:20 Effective partnering strategies in employment matters
§ 71:21 —Communications
§ 71:22 —Early partnering between in-house and outside counsel
§ 71:23 —Comprehensive audit
§ 71:24 —Partnering to train the workforce
§ 71:25 —Partnering for administrative procedures and effective investigations
§ 71:26 —Partnering in litigation
§ 71:27 — —Discovery
§ 71:28 — —Trial
§ 71:29 —Gaining the client’s buy-in on settlement issues
§ 71:30 —Partnering on “business” decisions
§ 71:31 Federal employment laws
§ 71:32 —Contingent workers vs. employees
§ 71:33 —Title VII
§ 71:34 ——Remedies
§ 71:35 ——Administrative prerequisites
§ 71:36 ——Employer liability for harassment after *Faragher* and *Ellerth*
§ 71:37 ——Employer liability for “cat’s paw” discrimination after *Staub*
§ 71:38 ——Americans with Disabilities Act
§ 71:39 ——Reasonable accommodation under the ADA
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 71:40</td>
<td>Remedies</td>
</tr>
<tr>
<td>§ 71:41</td>
<td>Administrative prerequisites</td>
</tr>
<tr>
<td>§ 71:42</td>
<td>Age Discrimination in Employment Act</td>
</tr>
<tr>
<td>§ 71:43</td>
<td>Administrative prerequisites</td>
</tr>
<tr>
<td>§ 71:44</td>
<td>Remedies</td>
</tr>
<tr>
<td>§ 71:45</td>
<td>Older Workers’ Benefits Protection Act</td>
</tr>
<tr>
<td>§ 71:46</td>
<td>Family and Medical Leave Act</td>
</tr>
<tr>
<td>§ 71:47</td>
<td>Notice requirements</td>
</tr>
<tr>
<td>§ 71:48</td>
<td>Remedies</td>
</tr>
<tr>
<td>§ 71:49</td>
<td>No administrative prerequisites; statute of limitations</td>
</tr>
<tr>
<td>§ 71:50</td>
<td>Worker Adjustment and Retraining Notification Act</td>
</tr>
<tr>
<td>§ 71:51</td>
<td>Remedies</td>
</tr>
<tr>
<td>§ 71:52</td>
<td>Administrative prerequisites and statute of limitations</td>
</tr>
<tr>
<td>§ 71:53</td>
<td>The Fair Labor Standards Act</td>
</tr>
<tr>
<td>§ 71:54</td>
<td>FLSA exemptions</td>
</tr>
<tr>
<td>§ 71:55</td>
<td>FLSA statute of limitations and remedies</td>
</tr>
<tr>
<td>§ 71:56</td>
<td>Equal Pay Act</td>
</tr>
<tr>
<td>§ 71:57</td>
<td>Remedies and statute of limitations</td>
</tr>
<tr>
<td>§ 71:58</td>
<td>The Lilly Ledbetter Fair Pay Act</td>
</tr>
<tr>
<td>§ 71:59</td>
<td>Occupational Safety and Health Act of 1970</td>
</tr>
<tr>
<td>§ 71:60</td>
<td>OSHA violations</td>
</tr>
<tr>
<td>§ 71:61</td>
<td>No private right of action</td>
</tr>
<tr>
<td>§ 71:62</td>
<td>Immigration Reform and Control Act of 1986</td>
</tr>
<tr>
<td>§ 71:63</td>
<td>Employee Polygraph Protection Act</td>
</tr>
<tr>
<td>§ 71:64</td>
<td>Exceptions to EPPA</td>
</tr>
<tr>
<td>§ 71:65</td>
<td>Remedies and statute of limitations under the EPPA</td>
</tr>
<tr>
<td>§ 71:66</td>
<td>Fair Credit Reporting Act</td>
</tr>
<tr>
<td>§ 71:67</td>
<td>Specific regulations on use of consumer reports</td>
</tr>
<tr>
<td>§ 71:68</td>
<td>Adverse employment actions based on consumer reports</td>
</tr>
<tr>
<td>§ 71:69</td>
<td>Specific regulations regarding use of investigative consumer reports</td>
</tr>
<tr>
<td>§ 71:70</td>
<td>Remedies under FCRA and statute of limitations</td>
</tr>
<tr>
<td>§ 71:71</td>
<td>National Labor Relations Act/Unfair labor practices</td>
</tr>
<tr>
<td>§ 71:72</td>
<td>Filing a charge and limitations</td>
</tr>
</tbody>
</table>
§ 71:74 — —At-will employment
§ 71:75 — —Remedies and statute of limitations
§ 71:76 — —Section 1981 vs. Title VII
§ 71:77 Evidence admissible in employment discrimination suits
§ 71:78 State employment laws
§ 71:79 ——Wage payment laws
§ 71:80 ——Personnel file access statutes
§ 71:81 ——Time off for jury service statutes
§ 71:82 Overview of common law employment claims
§ 71:83 ——Invasion of privacy
§ 71:84 ——Intrusion into seclusion
§ 71:85 ——Publication of a private fact
§ 71:86 ——Use of an individual's name or likeness
§ 71:87 ——Damages
§ 71:88 ——Intentional/negligent infliction of emotional distress
§ 71:89 ——Extreme or outrageous conduct
§ 71:90 ——Severe emotional distress
§ 71:91 ——Defamation
§ 71:92 ——Damages
§ 71:93 ——Affirmative defenses
§ 71:94 ——Employment-at-will doctrine and modification of the relationship
§ 71:95 ——Public policy exceptions to at-will employment
§ 71:96 Federal and state agencies with employment law enforcement authority
§ 71:97 ——U.S. Equal Employment Opportunity Commission
§ 71:98 ——National Labor Relations Board
§ 71:99 ——U.S. Department of Labor ("DOL")
§ 71:100 ——Immigration and Customs Enforcement ("ICE")
§ 71:101 ——State deferral agencies
§ 71:102 ——State wage enforcement entities
§ 71:103 Record-keeping requirements and notice posting
§ 71:104 ——Notice posting
§ 71:105 ——Title VII record-keeping requirement
§ 71:106 ——EEO-1 reports
§ 71:107 ——Medical records
§ 71:108 ——I-9 forms

SUCCESSFUL PARTNERING
CHAPTER 71A. CORPORATE/BUSINESS IMMIGRATION

I. INTRODUCTION

§ 71A:1 Scope note

II. OBJECTIVES, CONCERNS, AND PRELIMINARY CONSIDERATIONS

§ 71A:2 Principal concerns
§ 71A:3 Need for proper management
§ 71A:4 Preliminary steps
§ 71A:5 —Establishing control of the company's immigration matters
§ 71A:6 —Assessing the company's immigration policy and practices
§ 71A:7 —Selecting the right immigration counsel

III. EFFECTIVE PARTNERING STRATEGIES IN IMMIGRATION

§ 71A:8 Overview of partnering strategies
§ 71A:9 Developing a corporate immigration policy
§ 71A:10 Building the immigration management team and system for handling employer-sponsored visas and green cards

§ 71A:11 Ensuring corporate compliance: terminations, record retention, forms I-9 and E-Verify

§ 71A:12 Hiring/retaining foreign national talent: temporary work visas and permanent visas (green cards)

IV. PRINCIPAL IMMIGRATION LAW ISSUES FOR CORPORATE COUNSEL

§ 71A:13 An overview of the current immigration framework

§ 71A:14 Temporary work visa categories
§ 71A:15 —H-1B professionals (“specialty occupation”)
§ 71A:16 —L-1 intracompany transferees
§ 71A:17 —E-1/E-2 treaty traders and investors
§ 71A:18 —TN (trade NAFTA status) for Canadian/Mexican professionals

§ 71A:19 —O-1 visas for persons of extraordinary ability
§ 71A:20 —H-3 trainees
§ 71A:21 —H-2B visas for skilled/unskilled seasonal/peak-load workers

§ 71A:22 Employment-based permanent visa (“green card”) processes

§ 71A:23 —Steps
§ 71A:24 —Allocation of immigrant visas
§ 71A:25 —Determining preference classification: EB-2 or EB-3?
§ 71A:26 —Permanent Labor Certification (“PERM”) overview

§ 71A:27 Dealing with corporate changes
§ 71A:28 Immigration compliance
§ 71A:29 Best practices to avoid or limit exposure to I-9 violations

§ 71A:30 E-Verify and requirements for certain federal contractors under FAR
§ 71A:31 Checklists—I-9 audit checklist, assessing and managing immigration law risk

§ 71A:32 Form: Sample corporate immigration policy
§ 71A:33 Form: Sample I-9 and compliance policy
§ 71A:34 Form: Form I-9, employment eligibility verification
Table of Contents

§ 71A:35 Form: Sample return transportation letter to terminated H-1B employee

CHAPTER 71B. LABOR LAW

§ 71B:1 Scope note
§ 71B:2 Objectives and concerns
§ 71B:3 Union elections
§ 71B:4 —Procedural overview
§ 71B:5 —The R-Case hearing
§ 71B:6 —Restrictions on campaign activities
§ 71B:7 —Penalties and common examples of employer unfair labor practices during a campaign
§ 71B:8 —Developing a strategy
§ 71B:9 —Pre-election proceedings
§ 71B:10 —Building the campaign team
§ 71B:11 —Implementation of the campaign strategy
§ 71B:12 Defense of unfair labor practice charges
§ 71B:13 —The ULP charge procedure
§ 71B:14 —Early strategic planning is critical
§ 71B:15 Collective bargaining
§ 71B:16 —The duty to bargain in good faith
§ 71B:17 —Putting together the team for negotiating
§ 71B:18 —Researching the union
§ 71B:19 —Developing your goals for the first-time contract
§ 71B:20 —Know what you can and cannot afford
§ 71B:21 —Have a strike plan in place
§ 71B:22 Union election campaign checklist
§ 71B:23 Forms
§ 71B:24 Form: FOIA letter
§ 71B:25 Form: Initial employer speech
§ 71B:26 Form: Sample campaign calendar
§ 71B:27 Form: Supervisor do's and don'ts
§ 71B:28 Form: NLRB Election Procedures
§ 71B:29 Form: NLRB Unfair Labor Practice Procedures

CHAPTER 71C. LABOR AND EMPLOYMENT LAW ISSUES WHEN DOING BUSINESS OUTSIDE THE UNITED STATES

I. INTRODUCTION

§ 71C:1 Scope note

© 2019 Thomson Reuters, 4/2019 cccxxxix
§ 71C:2 Objectives, concerns, preliminary considerations
§ 71C:3 —Convergence and other controls on outside legal spending
§ 71C:4 —Increasingly demanding management expectations
§ 71C:5 —Global compliance
§ 71C:6 —Patterns of growth and labor mobility
§ 71C:7 —Different approaches to addressing global labor and employment law issues

II. EFFECTIVE PARTNERING STRATEGIES

§ 71C:8 Models of management
§ 71C:9 —The decentralized model
§ 71C:10 —The centralized model
§ 71C:11 —A hybrid model
§ 71C:12 ——Areas where headquarters legal should be involved
§ 71C:13 ——Areas where local operations should take the lead
§ 71C:14 —Assembling the team of in-house and outside counsel

III. MAJOR ISSUES FACING MULTINATIONALS IN GLOBAL EMPLOYMENT LAW

§ 71C:15 Termination of employees
§ 71C:16 —Reasonable grounds for termination
§ 71C:17 ——Poor performance
§ 71C:18 ——Misconduct
§ 71C:19 ——Economic/organizational restructuring
§ 71C:20 —Procedural protections against dismissal
§ 71C:21 ——Formal requirements
§ 71C:22 ——Internal hearing processes
§ 71C:23 ——Court or government agency approval
§ 71C:24 ——Works council interaction
§ 71C:25 —Protected employees
§ 71C:26 —Typical termination scenarios
§ 71C:27 ——Gross misconduct
§ 71C:28 ——Justified dismissal based on performance, conduct, or economic reasons
§ 71C:29 ——Unjustified dismissal
§ 71C:30 ——Dismissal of a protected employee

cccxl
Table of Contents

§ 71C:31 — Employment contracts
§ 71C:32 — Discrimination law
§ 71C:33 — Reconciling the global termination context with compliance imperatives in a global enterprise
§ 71C:34 — Separation agreements
§ 71C:35 — — Language
§ 71C:36 — — Procedure
§ 71C:37 — — Timing
§ 71C:38 Works councils
§ 71C:39 — Legal framework
§ 71C:40 — — The Information and Consultation Directive
§ 71C:42 — — National law
§ 71C:43 — — Issues in works council relationships
§ 71C:44 Collective dismissals
§ 71C:45 — European Directive 98/59/EC
§ 71C:46 — Other examples
§ 71C:47 — Typical issues
§ 71C:48 Transfer of undertaking
§ 71C:49 Confidentiality agreements and post-employment restrictive covenants
§ 71C:50 — Confidentiality agreements
§ 71C:51 — Restrictive covenants
§ 71C:52 — — Non-compete clauses
§ 71C:53 — — Non-solicitation clauses
§ 71C:54 Global mobility issues
§ 71C:55 — The secondment or ex-pat arrangement
§ 71C:56 — The global employment entity
§ 71C:57 — The localization or transfer

IV. PRACTICE AIDS

§ 71C:58 Practice checklist
§ 71C:59 Forms—Separation Agreement and Release
§ 71C:60 — Suggestions for proper documentation of works council information/consultation requirements during global restructuring or other initiatives

CHAPTER 72. ENVIRONMENTAL LAW

§ 72:1 Scope note

© 2019 Thomson Reuters, 4/2019 cccxli
§ 72:2  Environmental laws and their impacts on corporate decision making
§ 72:3  The roles of environmental legal counsel
§ 72:4  Key issues for environmental counsel
§ 72:5  —Governmental enforcement
§ 72:6  —Standard of liability
§ 72:7  —Regulatory issues
§ 72:8  —Corporate transactions
§ 72:9  Effective partnering strategies in environmental administrative actions and litigation
§ 72:10 —Civil enforcement actions
§ 72:11 —Implementation of partnering strategy in an enforcement action
§ 72:12 —CERCLA actions
§ 72:13 —Typical environmental litigation
§ 72:14 —Implementation of partnering strategy in a private suit
§ 72:15 Partnering on environmental issues arising in corporate transactions
§ 72:16 —Purchaser’s perspective in corporate asset purchases
§ 72:17 —Seller’s perspective in corporate asset transactions
§ 72:18 —Other corporate transactions
§ 72:19 —Due diligence phase
§ 72:20 —Retaining a consultant
§ 72:21 —Contract drafting
§ 72:22 —Negotiation issues
§ 72:23 —Post-closing phase
§ 72:24 Partnering on environmental counseling issues
§ 72:25 —Environmental compliance programs
§ 72:26 —Environmental permitting issues
§ 72:27 —Corporate investigations
§ 72:28 Federal and state environmental regulatory laws
§ 72:29 —Clean Air Act
§ 72:30 —Clean Water Act
§ 72:31 —Resource Conservation and Recovery Act
§ 72:32 —Toxic Substances Control Act
§ 72:33 —Emergency Planning and Community Right-to-Know Act
§ 72:34 —Safe Drinking Water Act
§ 72:35 —Federal Insecticide, Fungicide, and Rodenticide Act

cccxlii
TABLE OF CONTENTS

§ 72:36 — Endangered Species Act
§ 72:37 — National Environmental Policy Act
§ 72:38 — Overview of state and local laws
§ 72:39 — Delegated authorities
§ 72:40 Federal and state remediation statutes
§ 72:41 — Liability under the Comprehensive Environmental Response, Compensation, and Liability Act
§ 72:42 — Resource Conservation and Recovery Act
§ 72:43 — State statutes creating environmental liability
§ 72:44 — Transfer of contaminated sites
§ 72:45 Common law liabilities for injuries to persons or property
§ 72:46 Practice checklist
§ 72:47 Forms—Environmental Auditing Tools
§ 72:48 — Consultant Retention Agreement
§ 72:49 — Due diligence checklists
§ 72:50 — Contractual provisions for the purchase and sale of contaminated property
§ 72:51 — State property transfer laws
§ 72:52 — Sample access agreement

CHAPTER 72A. CLIMATE CHANGE

§ 72A:1 Scope note
§ 72A:2 Objectives, concerns, preliminary considerations
§ 72A:3 — Climate change policy development
§ 72A:4 — Greenhouse gases believed to contribute to climate change
§ 72A:5 — Effects of climate change
§ 72A:6 — Executive, legislative and judicial actions
§ 72A:7 — New legislation and regulations
§ 72A:8 — Governmental decision-making process
§ 72A:9 — — The role of EPA
§ 72A:10 — — Interaction between White House and Congress
§ 72A:11 — — International pressures
§ 72A:12 — — How should corporations approach the issues raised by climate change to best protect their interests?
§ 72A:13 Effective partnering strategies in climate change law and litigation
§ 72A:14 Principal legal issues

© 2019 Thomson Reuters, 4/2019
CHAPTER 73. MASS TORTS

§ 73:1 Scope note
§ 73:2 The development of mass tort litigation
§ 73:3 — The rise of the mass tort plaintiffs’ bar
§ 73:4 — The coordination of the mass tort plaintiffs’ bar
§ 73:5 — The political influence of the mass torts plaintiffs’ bar
§ 73:6 — Changes in community tolerance of risk
§ 73:7 — The rise of epidemiology
§ 73:8 — The proliferation of professional expert witnesses and expert testimony in non-scientific areas
§ 73:9 — The growth of media outlets
§ 73:10 The forms of mass tort litigation
§ 73:11 — Class actions
§ 73:12 — Consolidated trials
§ 73:13 — Multidistrict litigation
§ 73:14 — Coordinated state attorney general litigation
§ 73:15 — Simultaneous individual filings of hundreds of cases by the same groups of plaintiffs’ counsel
§ 73:16 Objectives and options for corporations dealing with mass tort litigation
§ 73:17 — Removal to federal court
§ 73:18 — Identifying and trying test cases
§ 73:19 — Avoiding demonization
§ 73:20 — Promoting industry cooperation
§ 73:21 — Resisting the aggregation of liability
§ 73:22 — — Class actions
§ 73:23 — — Multidistrict litigation
§ 73:24 — — Consolidated actions

SUCCESSFUL PARTNERING
TABLE OF CONTENTS

§ 73:25 Medical monitoring and consumer fraud actions
§ 73:26 Settlement classes
§ 73:27 Forum shopping
§ 73:28 Selecting outside counsel
§ 73:29 The role of inside counsel
§ 73:30 Corporate officials and the board of directors
§ 73:31 Employee work force
§ 73:32 Investor and public relations
§ 73:33 Liability prevention—Document issues
§ 73:34 —Drafting warnings
§ 73:35 —Corporate governance issues and corporate separateness
§ 73:36 Avoiding the aggregation of liability
§ 73:37 The use of technology
§ 73:38 Practice checklist

CHAPTER 74. REAL ESTATE LAW
§ 74:1 Scope note
§ 74:2 Objectives, concerns, and preliminary considerations
§ 74:3 —When to hire outside counsel
§ 74:4 —Local counsel or national counsel: role of local laws and regulations
§ 74:5 —Local politics and community relations
§ 74:6 —Custom and practice
§ 74:7 —Roles of parties in various transactions
§ 74:8 —Malpractice and unauthorized practice of law
§ 74:9 Partnering of in-house and outside counsel
§ 74:10 —Choosing primary vs. local outside counsel
§ 74:11 —The outside counsel's perspective
§ 74:12 —The in-house counsel's perspective
§ 74:13 —Engagement of outside counsel and fee arrangements
§ 74:14 —Supervision and management of outside counsel
§ 74:15 —The use of technology
§ 74:16 —Case studies: alternative partnering models
§ 74:17 Acquisitions and sales of real estate
§ 74:18 —Roles of the parties
§ 74:19 —Contract of sale/purchase and sale agreement
§ 74:20 —Deeds
§ 74:21 —Closing adjustments

© 2019 Thomson Reuters, 4/2019  cccxliv
§ 74:22 —Real estate, conveyance, or transfer and other
taxes and special assessments
§ 74:23 —Real estate tax appeals
§ 74:24 —Construction and mechanic’s liens
§ 74:25 —Title insurance
§ 74:26 —Judgment and tax liens
§ 74:27 —Recordation
§ 74:28 Leases, licenses, and use and occupancy
agreements
§ 74:29 —Roles of the parties
§ 74:30 —Amendments
§ 74:31 —Statutory issues
§ 74:32 —Lease defaults; evictions
§ 74:33 —Rent laws
§ 74:34 —Recording of leases
§ 74:35 —Leasehold title insurance
§ 74:36 —Utility deregulation
§ 74:37 —Condemnation, casualty, and insurance
§ 74:38 —Zoning and other land use restrictions
§ 74:39 Lending and financing
§ 74:40 —Role of the parties; importance of local counsel
§ 74:41 —Forms of checklists and loan documents
§ 74:42 —Commercial mortgage backed securities
§ 74:43 —Mezzanine financing
§ 74:44 Foreclosures
§ 74:45 Brokers
§ 74:46 Environmental
§ 74:47 Americans with Disabilities Act
§ 74:48 Ownership entities
§ 74:49 Alternative dispute resolution methods
§ 74:50 Bankruptcy
§ 74:51 The creation and use of checklists and forms
§ 74:52 —The large national bank model
§ 74:53 Form: Practice checklist
§ 74:54 Form: sample acquisition checklist
§ 74:55 Form: sample leasing checklist
§ 74:56 Form: lending and financial checklist (including
construction loans)

CHAPTER 74A. SPORTS
§ 74A:1 Scope note
§ 74A:2 Understanding the professional sports
landscape
§ 74A:3 —Assessing the impact of applicable league rules and regulations upon the business of the team
§ 74A:4 —Awareness of “market” terms and conditions for particular transactions
§ 74A:5 —Monitoring trends in the sports industry generally
§ 74A:6 Creating a system for the division of legal tasks
§ 74A:7 —Routine ministerial legal matters may require little or no outside counsel involvement
§ 74A:8 —Player/team sensitivity issues typically handled primarily by inside counsel
§ 74A:9 —Templates of certain operational agreements typically drafted by outside counsel for use by inside counsel
§ 74A:10 —Significant transactions typically entail outside counsel assuming a primary role
§ 74A:11 —System should draw primary attention and recognition to inside counsel
§ 74A:12 League-wide issues
§ 74A:13 —Application of antitrust laws to teams
§ 74A:14 —Governance
§ 74A:15 —Rights reserved by the league
§ 74A:16 —Significant league rules and regulations
§ 74A:17 —Transactions requiring league approval
§ 74A:18 Significant agreements
§ 74A:19 —Credit agreements
§ 74A:20 —Stadium financing agreements
§ 74A:21 —Non-relocation agreements
§ 74A:22 —Stadium leases
§ 74A:23 —Stadium construction/development agreements
§ 74A:24 Revenue producing agreements
§ 74A:25 —Broadcasting and media rights agreements
§ 74A:26 — Who owns the property right?
§ 74A:27 — Key provisions of local agreements
§ 74A:28 —Concession services agreements
§ 74A:29 —Merchandise licensing agreements
§ 74A:30 —Naming rights and premier sponsorship agreements
§ 74A:31 Template revenue producing agreements
§ 74A:32 —Advertising/sponsorship agreements
§ 74A:33 —Suite licenses
§ 74A:34 —Full and partial season ticket licenses
§ 74A:35 —Personal seat licenses
§ 74A:36 —Food and beverage licenses
§ 74A:37 —Catering contracts
§ 74A:38 —Parking licenses
§ 74A:39 —Trademark and other intellectual property licenses
§ 74A:40 —WiFi and other technology agreements
§ 74A:41 —Sweepstakes/contests and related rules and regulations
§ 74A:42 Operational agreements
§ 74A:43 —Cleaning services agreements
§ 74A:44 —Security agreements
§ 74A:45 —Physical plant/maintenance agreements
§ 74A:46 —Insurance
§ 74A:47 —Utility contracts
§ 74A:48 —Hotel, travel and supply agreements
§ 74A:49 —Team advertising/publicity agreements
§ 74A:50 Player contracts and salary arbitration
§ 74A:51 —Player contracts
§ 74A:52 —Salary arbitration
§ 74A:53 Labor issues
§ 74A:54 —Pension plans and employee benefits
§ 74A:55 Governmental relations
§ 74A:56 —Lobbying
§ 74A:57 —Ticket sales and pricing
§ 74A:58 —Noise and light levels
§ 74A:59 —ADA and other accommodation requirements
§ 74A:60 Litigation
§ 74A:61 —Routine
§ 74A:62 ——Negligence claims
§ 74A:63 —Non-routine/significant
§ 74A:64 ——Relocation disputes
§ 74A:65 ——Sponsorship disputes
§ 74A:66 Internal investigations
§ 74A:67 Ownership arrangements
§ 74A:68 —Structure
§ 74A:69 —League ownership restrictions
§ 74A:70 —Contractual restrictions on transfer of ownership

ccxlviii
CHAPTER 75. CASE STUDY #1
DUPONT’S LEGAL MODEL FOR STRATEGIC PARTNERING

§ 75:1 Objectives, concerns, preliminary considerations
§ 75:2 Objectives, concerns, preliminary considerations
§ 75:3 —What drove DuPont to the new strategic partnering paradigm
§ 75:4 —Objectives established
§ 75:5 The solution: a new model
§ 75:6 —Convergence
§ 75:7 —Accomplishments and results
§ 75:8 —The process of being a partner
§ 75:9 —What’s in it for the client?
§ 75:10 —What’s in it for the in-house law department professional?
§ 75:11 —What’s in it for the outside professional?
§ 75:12 —Barriers, risks, and watchouts
§ 75:13 Knowledge management and decision support— Knowledge sharing and preservation
§ 75:14 —Decision support
§ 75:15 Legal practice groups
§ 75:16 Early case assessment—in general
§ 75:17 —A pro-active process
§ 75:18 —Key steps
§ 75:19 —DuPont’s experience
§ 75:20 The next step: strategic case assessment
§ 75:21 Alternative dispute resolution
§ 75:22 Mediation
§ 75:23 DuPont’s commitment to diversity
§ 75:24 —The DuPont legal model commits to diversity
§ 75:25 —Minority job fairs
§ 75:26 —Promoting diversity internally
§ 75:27 —DuPont Legal Street Law Diversity Pipeline Project
§ 75:28 —DuPont Women Lawyers Network

© 2019 Thomson Reuters, 4/2019 cccxlix
Volume 6

CHAPTER 76. COMMERCIAL EQUIPMENT LEASING

§ 76:1 Scope note
§ 76:2 Objectives and preliminary considerations
§ 76:3 —Staffing
§ 76:4 —Outside counsel
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 76:5</td>
<td>Partnering strategies</td>
</tr>
<tr>
<td>§ 76:6</td>
<td>—Selecting counsel</td>
</tr>
<tr>
<td>§ 76:7</td>
<td>—Effective partnering</td>
</tr>
<tr>
<td>§ 76:8</td>
<td>Business purpose of leasing</td>
</tr>
<tr>
<td>§ 76:9</td>
<td>—Managing cap-ex</td>
</tr>
<tr>
<td>§ 76:10</td>
<td>—To buy or not to buy</td>
</tr>
<tr>
<td>§ 76:11</td>
<td>Lease characterization</td>
</tr>
<tr>
<td>§ 76:12</td>
<td>Legal framework</td>
</tr>
<tr>
<td>§ 76:13</td>
<td>—Article 2A</td>
</tr>
<tr>
<td>§ 76:14</td>
<td>—Article 9</td>
</tr>
<tr>
<td>§ 76:15</td>
<td>—True personal property leases in bankruptcy proceedings</td>
</tr>
<tr>
<td>§ 76:16</td>
<td>—Finance leases in Chapter 11 bankruptcy proceedings</td>
</tr>
<tr>
<td>§ 76:17</td>
<td>Lease types</td>
</tr>
<tr>
<td>§ 76:18</td>
<td>—Net leases or triple net lease</td>
</tr>
<tr>
<td>§ 76:19</td>
<td>—Full service leases</td>
</tr>
<tr>
<td>§ 76:20</td>
<td>—Special leases</td>
</tr>
<tr>
<td>§ 76:21</td>
<td>——Vendor leases</td>
</tr>
<tr>
<td>§ 76:22</td>
<td>——TRAC leases</td>
</tr>
<tr>
<td>§ 76:23</td>
<td>——Article 2A statutory finance leases</td>
</tr>
<tr>
<td>§ 76:24</td>
<td>——Leveraged leases</td>
</tr>
<tr>
<td>§ 76:25</td>
<td>——Sale leasebacks</td>
</tr>
<tr>
<td>§ 76:26</td>
<td>Lease structures</td>
</tr>
<tr>
<td>§ 76:27</td>
<td>—Single transaction lease</td>
</tr>
<tr>
<td>§ 76:28</td>
<td>—Multiple transaction lease: the master lease</td>
</tr>
<tr>
<td>§ 76:29</td>
<td>—Lessor financing vehicles</td>
</tr>
<tr>
<td>§ 76:30</td>
<td>Initiating a lease transaction</td>
</tr>
<tr>
<td>§ 76:31</td>
<td>—Preliminary analysis</td>
</tr>
<tr>
<td>§ 76:32</td>
<td>—Requests for proposals</td>
</tr>
<tr>
<td>§ 76:33</td>
<td>—Term sheets</td>
</tr>
<tr>
<td>§ 76:34</td>
<td>Negotiating lease documentation</td>
</tr>
<tr>
<td>§ 76:35</td>
<td>—No offsets (“hell-or-high-water”)</td>
</tr>
<tr>
<td>§ 76:36</td>
<td>—Disclaimer of warranties</td>
</tr>
<tr>
<td>§ 76:37</td>
<td>—UCC waivers</td>
</tr>
<tr>
<td>§ 76:38</td>
<td>—Indemnification</td>
</tr>
<tr>
<td>§ 76:39</td>
<td>—Events of default and remedies</td>
</tr>
<tr>
<td>§ 76:40</td>
<td>—Subordination</td>
</tr>
<tr>
<td>§ 76:41</td>
<td>—Assignability by lessor and non-assignability by lessee</td>
</tr>
<tr>
<td>§ 76:42</td>
<td>—Inspection</td>
</tr>
<tr>
<td>§ 76:43</td>
<td>—Insurance</td>
</tr>
<tr>
<td>§ 76:44</td>
<td>—Choice of law</td>
</tr>
</tbody>
</table>

© 2019 Thomson Reuters, 4/2019
§ 76:45 — Other considerations
§ 76:46 — — Maintenance
§ 76:47 — — Compliance
§ 76:48 — — Reporting
§ 76:49 — — Delivery and return conditions
§ 76:50 — — Quiet enjoyment
§ 76:51 — — Subleasing
§ 76:52 — — Insurance
§ 76:53 — — Casualties
§ 76:54 — — Early terminations
§ 76:55 Lease documentation
§ 76:56 — Delivery considerations and transfer of risk
§ 76:57 — Term and interim term
§ 76:58 — Rent and rent payment dates
§ 76:59 — No offsets ("hell-or-high-water" clause)
§ 76:60 — Representations, warranties, disclaimers
§ 76:61 — Maintenance obligations (lessee, net lease)
§ 76:62 — Maintenance obligations (lessor, full or limited service lease)
§ 76:63 — Possession and use, compliance, reporting, and no liens
§ 76:64 — Insurance
§ 76:65 — Casualties and substitutions
§ 76:66 — Indemnification
§ 76:67 — Taxes
§ 76:68 — Subordination and quiet possession
§ 76:69 — Default and remedies
§ 76:70 — Renewal and purchase options
§ 76:71 — Subleasing and assignments
§ 76:72 — Returns and holdover rent
§ 76:73 — Choice of law and arbitration
§ 76:74 — Special appendixes, riders/schedules/supplements
§ 76:75 Closing
§ 76:76 Credit support
§ 76:77 — Guarantees in leasing transactions
§ 76:78 — Letters of credit
§ 76:79 — Other collateral
§ 76:80 Administering the lease
§ 76:81 — Delivery and acceptance
§ 76:82 — Lessor and lessee responsibilities
§ 76:83 — Mid-course events
§ 76:84 — — Amendments and waivers

ccclii
CHAPTER 77. PRODUCTS LIABILITY

§ 77:1 Scope note
§ 77:2 Objectives, concerns, and preliminary considerations
§ 77:3 Claim avoidance
§ 77:4 First steps for inside counsel in defending a claim
§ 77:5 —Notify promptly and knowledgeably the company’s board and management
§ 77:6 —Notify promptly the company’s insurance carrier
§ 77:7 —Be prepared to implement the company’s crisis-management plan
§ 77:8 —Implement a document hold
§ 77:9 —Implement a media strategy
§ 77:10 —Retain experienced outside defense counsel
§ 77:11 Devising defensive tactics
§ 77:12 —Identify and seek transfer to a preferred forum, to the extent possible
§ 77:13 —Evaluate early the merits of the claim
§ 77:14 —Determine whether there is a legal basis for an early motion to dismiss
§ 77:15 —Consider whether to request a jury trial
§ 77:16 — Find out who at the company knows what and who might be an effective company witness with respect to various key issues

§ 77:17 — Identify and consult with outside experts

§ 77:18 — Ensure that your client does not exacerbate the problem

§ 77:19 — Enter into a joint defense agreement, if appropriate

§ 77:20 General principles of products liability law

§ 77:21 — Negligence

§ 77:22 — Negligence per se

§ 77:23 — Failure to warn

§ 77:24 — Breach of warranty

§ 77:25 — Strict liability

§ 77:26 — “Consumer expectations” test for defect

§ 77:27 — “Risk-utility” test for defect

§ 77:28 — Fraud or misrepresentation claims

§ 77:29 — Violation of state consumer-fraud statutes

§ 77:30 — Claims seeking restitution for unjust enrichment

§ 77:31 — Actions seeking injunctive or other equitable relief

§ 77:32 — State products liability statutes

§ 77:33 Plaintiff’s burden of proving causation

§ 77:34 — Importance of expert evidence in establishing causation

§ 77:35 Damages

§ 77:36 — Compensatory damages

§ 77:37 — Punitive damages

§ 77:38 Who may be liable on a products liability claim

§ 77:39 — Joint and several liability

§ 77:40 — Market share or enterprise liability

§ 77:41 Common defenses to a products liability claim

§ 77:42 — Federal regulatory law and the preemption defense

§ 77:43 Methods by which plaintiffs seek to aggregate litigation

§ 77:44 — Class actions

§ 77:45 — Multidistrict litigation

§ 77:46 Criminal liability for defective products

§ 77:47 Historic illustrative case study: Michael Thorp v. James B. Beam Distilling Company

§ 77:48 Practice checklist
CHAPTER 77A. FOOD & DRUG ADMINISTRATION REGULATED INSTITUTIONS: DRUG AND MEDICAL DEVICE COMPANIES

§ 77A:1 Scope note
§ 77A:2 Objectives, concerns, and preliminary considerations
§ 77A:3 —Regulators
§ 77A:4 —The customers
§ 77A:5 —Clinical trials
§ 77A:6 —Sales and promotional activity
§ 77A:7 —Reimbursement
§ 77A:8 —Fraud and abuse and compliance
§ 77A:9 —Litigation
§ 77A:10 Evaluating and assessing legal matters
§ 77A:11 —Regulatory and litigation parallel actions
§ 77A:12 Evaluating and assessing legal risks—Reputational issues
§ 77A:13 Choosing outside counsel
§ 77A:14 —Piece meal versus broader relationship
§ 77A:15 —Evaluating company resources
§ 77A:16 —The right fit
§ 77A:17 Partnering strategies
§ 77A:18 —Responsibilities
§ 77A:19 —The value-added partnership
§ 77A:20 —Autonomy of outside counsel
§ 77A:21 Fraud and abuse risks
§ 77A:22 —Compliance plans
§ 77A:23 —Self reporting
§ 77A:24 —Fraud and abuse investigations and litigation
§ 77A:25 —Working with the FDA during investigations and inside counsel exposure
§ 77A:26 —The Park Doctrine
§ 77A:27 Relevant case law and statutes—The False Claims Act
§ 77A:28 —The Federal Anti-Kickback Statute
§ 77A:29 —The Foreign Corrupt Practices Act
§ 77A:30 —Physician Payment Sunshine Act
§ 77A:31 FDA regulations—Clinical trials
§ 77A:32 —FDA inspections
§ 77A:33 — Relevant case law and statutes—Labeling and promotion
§ 77A:34 — Post-marketing surveillance
§ 77A:34.50 Recalls
§ 77A:35 Litigation preparedness strategies to minimize risk and maximize results
§ 77A:36 Phases of litigation—The pre-crisis phase
§ 77A:37 — — Turning off the incubator
§ 77A:38 — — The signaling event & the onset of the crisis period
§ 77A:39 — Preparing the company for the fight
§ 77A:40 Effective compliance program checklist
§ 77A:41 FDA inspection checklist
§ 77A:42 Pre-crisis period checklist
§ 77A:43 Crisis period checklist

CHAPTER 77B. CONSUMER PRODUCTS
§ 77B:1 Scope note
§ 77B:2 Objectives, concerns, and preliminary considerations
§ 77B:3 Regulatory agencies
§ 77B:4 — United States
§ 77B:5 — — The Consumer Product Safety Improvement Act of 2008
§ 77B:6 — — Governmental transparency initiatives
§ 77B:7 — Canada
§ 77B:8 — European Union
§ 77B:9 — Australia
§ 77B:10 — China
§ 77B:11 International and multi-lateral cooperation among regulators
§ 77B:12 — International Consumer Product Safety Caucus
§ 77B:13 — Organization for Economic Cooperation and Development
§ 77B:14 — International Consumer Product Health and Safety Organization
§ 77B:15 — Other
§ 77B:16 Determining whether the CPSC has jurisdiction
§ 77B:17 — Definition of consumer product
§ 77B:18 — Products not governed by the CPSC
§ 77B:19 — General Counsel advisory opinions
Table of Contents

§ 77B:20 Statutes administered by the CPSC
§ 77B:21 —Consumer Product Safety Act
§ 77B:22 —Consumer Product Safety Improvement Act
§ 77B:23 —Poison Prevention Packaging Act
§ 77B:24 —Federal Hazardous Substances Act
§ 77B:25 —Child Safety Protection Act
§ 77B:26 —Children’s Gasoline Burn Prevention Act
§ 77B:27 —Labeling of Hazardous Art Materials Act
§ 77B:28 —Flammable Fabrics Act
§ 77B:29 —Refrigerator Safety Act
§ 77B:30 —Virginia Graeme Baker Pool & Spa Safety Act

§ 77B:31 Rulemaking process
§ 77B:32 —Advance notice of proposed rulemaking
§ 77B:33 —The proposed rule stage
§ 77B:34 —The final rule stage
§ 77B:35 Testing and certification
§ 77B:36 —Children's products
§ 77B:37 —Small businesses
§ 77B:38 —Bulk sales
§ 77B:39 Import surveillance
§ 77B:40 Voluntary standards
§ 77B:41 —Draft recommendations
§ 77B:42 —Research reports
§ 77B:43 Research and statistical information
§ 77B:44 —Technical reports & injury statistics
§ 77B:45 —NEISS injury data
§ 77B:46 —Consumer opinion surveys
§ 77B:47 Publicly searchable consumer product safety incident database

§ 77B:48 —Deadlines
§ 77B:49 —Investigation
§ 77B:50 —Deciding whether to submit comments
§ 77B:51 —Objections to publication
§ 77B:52 ——Confidential information
§ 77B:53 ——Materially inaccurate information
§ 77B:54 In-depth investigations
§ 77B:55 Reporting obligations
§ 77B:56 —Reporting requirements under CPSA Section 15(b)
§ 77B:57 ——Substantial product hazards
§ 77B:58 ——Unreasonable risk of serious injury or death

© 2019 Thomson Reuters, 4/2019  ccclvii
§ 77B:59 — Failure to comply with applicable consumer product rule

§ 77B:60 — Failure to comply with a voluntary Consumer Product Safety Standard

§ 77B:61 — Time to report

§ 77B:62 — Content of report

§ 77B:63 — Confidentiality

§ 77B:64 — Reporting products involved in lawsuits

§ 77B:65 — Reporting certain choking incidents

§ 77B:66 — Administrative lawsuits

§ 77B:67 — Product safety recalls

§ 77B:68 — Fast-track recall program

§ 77B:69 — Elements of a traditional recall program

§ 77B:70 — Classes of hazards

§ 77B:71 — Communications plan

§ 77B:72 — Monitoring

§ 77B:73 — Close-out of the recall

§ 77B:74 — Penalties and enforcement

§ 77B:75 — CPSIA Penalties and Increased Authority

§ 77B:76 — Civil penalties

§ 77B:77 — Expansion to include compliance system improvements

§ 77B:78 — Criminal penalties

§ 77B:79 — Compliance programs

§ 77B:80 — Elements

§ 77B:81 — Mitigating penalties

§ 77B:82 — Records retention

§ 77B:83 — Leadership involvement

§ 77B:84 — Whistleblower protection

§ 77B:85 — FOIA requests to the CPSC

§ 77B:86 — Timing

§ 77B:87 — Claiming confidentiality

§ 77B:88 — Other objections to disclosure

§ 77B:89 — Practice checklists

§ 77B:90 — Reporting

§ 77B:91 — Searchable database

§ 77B:92 — Compliance systems

§ 77B:93 — Forms—Monthly progress report for corrective action plan

§ 77B:94 — Delegation of authority

§ 77B:95 — General certificate of conformity

§ 77B:96 — Sample Rule 15(b) initial report to CPSC

§ 77B:97 — Sample Rule 15 full report to CPSC
CHAPTER 77C. TELECOMMUNICATIONS

§ 77C:1 Scope note
§ 77C:2 Objectives, concerns and considerations
§ 77C:3 Objectives, concerns and preliminary considerations—Understanding the landscape: evolution of the industry
§ 77C:4 —Characteristic challenges faced by in-house counsel
§ 77C:5 —Characteristic challenges faced by telecommunications customers
§ 77C:6 —Contracting for telecommunications services
§ 77C:7 —Fraudulent use of telecommunications services
§ 77C:8 —Emergency services
§ 77C:9 Effective partnering strategies in the telecommunications sector
§ 77C:10 Legal framework: What law governs this sector?
§ 77C:11 Practice checklist

CHAPTER 78. PROFESSIONAL LIABILITY

I. INTRODUCTION

§ 78:1 Scope note

II. OBJECTIVES, CONCERNS AND PRELIMINARY CONSIDERATIONS

§ 78:2 Objectives
§ 78:3 —Loss prevention
§ 78:4 —Limiting costs and exposure
§ 78:5 —Limiting injury to reputation
§ 78:6 —Minimizing disruption
§ 78:7 —Preserving client relationships
§ 78:8 Concerns
§ 78:9 —Delay in involving inside and outside counsel
§ 78:10 —Adverse publicity
§ 78:11 —Impairment of client relationships
§ 78:12 —Impact on ongoing transactions or litigation
§ 78:13 —Other disruption of client’s business
§ 78:14 —Costs

© 2019 Thomson Reuters, 4/2019 ccclix
§ 78:15 —Exposure to damages
§ 78:16 Preliminary considerations
§ 78:17 —Document preservation
§ 78:18 —Insurance coverage
§ 78:19 —Early case assessment
§ 78:20 —Privileged communications with inside counsel
§ 78:21 —Confidentiality
§ 78:22 —Selection of outside counsel
§ 78:23 —Pre-suit negotiation
§ 78:24 —Preventing impact to ongoing transactions or litigation
§ 78:25 —Pre-suit investigation and information exchange
§ 78:26 —Pre-suit mediation
§ 78:27 —Media relations

III. EFFECTIVE PARTNERING

§ 78:28 Effective partnering—Varying use of inside and outside counsel
§ 78:29 —Early involvement by counsel
§ 78:30 —Consideration of issues involving privilege and inside counsel
§ 78:31 —Sample claims policy
§ 78:32 —Forestalling reputational injury
§ 78:33 —Damage control
§ 78:34 —Example
§ 78:35 —Securing waivers to continue a challenged engagement
§ 78:36 —Example 1
§ 78:37 —Example 2
§ 78:38 —Pursuing early settlement
§ 78:39 —Selecting experts
§ 78:40 —Special considerations in trying professional liability cases
§ 78:41 —Motions practice
§ 78:42 —Availability of records
§ 78:43 —Conflicts of interest
§ 78:44 —Prior work conflicts
§ 78:45 —Presumption of knowledge
§ 78:46 —Scope of engagement
§ 78:47 —The case within the case
§ 78:48 —Avoid arbitration

ccclx
IV. KEY CASE LAW AND STATUTORY FRAMEWORK

§ 78:50 Overview
§ 78:51 Malpractice
§ 78:52 Elements of malpractice claims—Duty
§ 78:53 —Breach of duty of care
§ 78:54 —Causation
§ 78:55 —Damages
§ 78:56 —Affirmative defenses to malpractice actions
§ 78:57 Aiding and abetting claims
§ 78:58 —Elements
§ 78:59 —Defenses
§ 78:60 Breach of fiduciary duties
§ 78:61 —Basis for claims
§ 78:62 —Defenses to claims for breach of fiduciary duties

V. PRACTICE AIDS

§ 78:63 Practice checklist—Early evaluation
§ 78:64 Forms—Sample disclosures and consent: prior work conflict
§ 78:65 —Policy on dealing with claims against the firm

CHAPTER 79. ANTITRUST AND COMPETITION

§ 79:1 Scope note
§ 79:2 Preliminary considerations—Common antitrust issues
§ 79:3 —The significance of the antitrust laws
§ 79:4 —Avoiding the appearance of impropriety
§ 79:5 —Key elements and practice aspects of training and compliance programs
§ 79:6 —Identifying situations that call for non-US antitrust counsel
§ 79:7 Effective partnering strategies
§ 79:8 —Corporate structure and governance
§ 79:9 —Transactional investigations (mergers, acquisitions, and joint ventures)
§ 79:10 —Transactional investigations—Managing antitrust risk prior to signing

© 2019 Thomson Reuters, 4/2019  ccclxi
SUCCESSFUL PARTNERING

§ 79:11 — —Pre-merger notification
§ 79:12 — —The first 30 days after signing the deal
§ 79:13 — —The scope of agencies’ review (Agency Guidelines)
§ 79:14 — —Gun jumping and information sharing
§ 79:15 — —Second request investigations
§ 79:16 — —Resolving competitive issues by consent decree
§ 79:17 — —Defending challenges against a deal
§ 79:18 — —Unreported and consummated transactions.
§ 79:19 — —Disputes relating to company agreements
§ 79:20 — —Criminal antitrust proceedings
§ 79:21 — —Grand jury investigations
§ 79:22 — —Related offenses to criminal antitrust violations
§ 79:23 — —Special adjacent considerations
§ 79:24 — —Multidistrict antitrust class action litigation
§ 79:25 — —MDL procedural steps
§ 79:26 — —Motion practice
§ 79:27 — —Class certification
§ 79:28 — —Other civil investigations and litigation matters
§ 79:29 Statutory framework for antitrust
§ 79:30 — —Sherman Act
§ 79:31 — —Clayton Act
§ 79:32 — —Robinson-Patman Act
§ 79:33 — —Overlapping regulatory structures
§ 79:34 Key antitrust concepts
§ 79:35 — —Agreements
§ 79:36 — —Unilateral conduct
§ 79:37 — —Market foreclosure
§ 79:38 — —Vertical vs. horizontal arrangements
§ 79:39 — —Per se v. rule of reason
§ 79:40 — —Relevant market
§ 79:41 — —Market power
§ 79:42 Relationships with competitors
§ 79:43 — —Price fixing
§ 79:44 — —Bid rigging
§ 79:45 — —Market allocation
§ 79:46 — —Group boycotts
§ 79:47 — —Trade associations, collaborations and information sharing
§ 79:48 — —Joint ventures

cclxii
CHAPTER 79A. INTERNATIONAL TRADE

I. INTRODUCTION

§ 79A:1 Scope note
§ 79A:2 The unfair trade remedies: antidumping and countervailing duty actions

II. PRELIMINARY CONSIDERATIONS

§ 79A:3 Filings on behalf of an industry; standing and support
§ 79A:4 Antitrust liability for collective action
§ 79A:5 Data requirements and the need for management commitment

III. ANTIDUMPING DUTY CASES
§ 79A:6 Requirements for the imposition of antidumping duties
§ 79A:7 Considerations in the determination of the scope of the case
§ 79A:8 Obtaining the necessary information
§ 79A:9 Calculation of antidumping duties
§ 79A:10 The Commerce Department investigation
§ 79A:11 —Petition initiation
§ 79A:12 —Preliminary determination
§ 79A:13 —Final determination
§ 79A:14 The U.S. International Trade Commission’s injury determination
§ 79A:15 —Material injury
§ 79A:16 —Present material injury versus threat of material injury
§ 79A:17 —Like product and definition of the domestic industry
§ 79A:18 —Cumulation
§ 79A:19 —ITC process

IV. COUNTERVAILING DUTY CASES
§ 79A:20 Requirements for the imposition of countervailing duties
§ 79A:21 Subsidization
§ 79A:22 Procedures
§ 79A:23 Remedy—The imposition of countervailing duties

V. REVIEW OF DUMPING OR COUNTERVAILING DUTY ORDERS
§ 79A:24 Administrative reviews
§ 79A:25 Sunset reviews
§ 79A:26 Circumvention

VI. ESCAPE CLAUSE CASES
§ 79A:27 Relief from fair, but injurious imports
TABLE OF CONTENTS

§ 79A:28 Section 201 of the Trade Act of 1974
§ 79A:29 —Statutory criteria for relief
§ 79A:30 —Filing procedures and presidential review
§ 79A:31 —Remedy options
§ 79A:32 —Practical considerations
§ 79A:33 [Deleted]
§ 79A:34 [Deleted]
§ 79A:35 [Deleted]
§ 79A:36 [Deleted]
§ 79A:37 [Deleted]
§ 79A:38 The trade remedy cases in general—
   Considerations for respondent companies

VII. EVASION OF ANTIDUMPING AND
     COUNTERVAILING DUTIES

§ 79A:39 TFTEA
§ 79A:40 —Definition of evasion
§ 79A:41 —Initiating an investigation
§ 79A:42 —Determinations of evasion
§ 79A:43 —Effect of determination of evasion
§ 79A:44 —Review of determinations
§ 79A:45 —Considerations

VIII. NATIONAL SECURITY CASES

§ 79A:46 Section 232 of the Trade Expansion Act of 1962
§ 79A:47 —Application
§ 79A:48 —Investigation phase
§ 79A:49 —Remedy phase
§ 79A:50 —Considerations

IX. PRACTICE AIDS

§ 79A:51 Sample antidumping calculations
§ 79A:52 Timeline for an antidumping investigation
§ 79A:53 Timeline for a countervailing duty investigation
§ 79A:54 List of useful internet addresses

© 2019 Thomson Reuters, 4/2019  ccclxv
CHAPTER 80. CASE STUDY: MOVING FROM A COST-BASED TO A VALUE-FOCUSED OUTSIDE COUNSEL STRATEGIC PARTNERSHIP MODEL
§ 80:1 Scope note
§ 80:2 Preliminary considerations
§ 80:3 —Budget pressures and inconsistent results
§ 80:4 —Pre-existing relationship
§ 80:5 —Analysis of historical outside counsel spend
§ 80:6 —Selecting service-oriented partners
§ 80:7 Objectives
§ 80:8 —Deliver value to the business
§ 80:9 —Enhance the quality of legal representation
§ 80:10 —Cost consistency
§ 80:11 —Cost savings
§ 80:12 Challenges
§ 80:13 —Lack of model
§ 80:14 —Forging new relationships
§ 80:15 —Team communication
§ 80:16 —Determining off budget matters
§ 80:17 —Performance against budget
§ 80:18 —Billing transparency
§ 80:19 Analysis of alternative approaches, practices, and procedures
§ 80:20 —Traditional outside counsel model
§ 80:21 —Panel model
§ 80:22 —Budget-based v. flat fee model
§ 80:23 The Value-Focused Model
§ 80:24 —Financial arrangement
§ 80:25 —Core practice managers
§ 80:26 —Advanced annual budgeting for ordinary course matters
§ 80:27 —Monthly preliminary and final reconciliation reports
§ 80:28 —Semi-annual core practice manager meetings
§ 80:29 —Use of metrics and dashboards to track and communicate value
§ 80:30 Virtual data rooms
§ 80:31 —Litigation management
§ 80:32 —Labor and employment management
§ 80:33 —Industry information
§ 80:34 —Transactional matters

SUCCESSFUL PARTNERING
ccclxvi
CHAPTER 80A. CASE STUDY: CIT
LEGAL: ALIGNING LEGAL TO THE
BUSINESS TO SUPPORT GROWTH AND
MITIGATE RISK WHILE REDUCING
COSTS
§ 80A:1 Scope note

© 2019 Thomson Reuters, 4/2019
§ 80A:2 Background
§ 80A:3 Goal
§ 80A:4 Strategies
§ 80A:5 —Follow the money
§ 80A:6 —Dissect the work
§ 80A:7 —Understand why we do what we do
§ 80A:8 —Find the gaps
§ 80A:9 —Align legal resources to the business
§ 80A:10 —Manage and measure
§ 80A:11 —Reporting
§ 80A:12 How applying the strategy helped achieve CIT’s goals

CHAPTER 81. ELECTRONIC DISCOVERY
§ 81:1 Scope note
§ 81:2 What is electronic discovery?
§ 81:3 Process for effective electronic discovery
§ 81:4 —Step 1: identification of relevant ESI
§ 81:5 —Step 2: implementation of a legal hold
§ 81:6 —Step 3: retrieval, review, and production of ESI subject to discovery
§ 81:7 —Step 4: the special problem of backup tapes
§ 81:8 —Step 5: defense of electronic discovery process
§ 81:9 Interaction between in-house and outside counsel
§ 81:10 —Role of in-house counsel
§ 81:11 —Role of outside counsel
§ 81:12 A note about records management
§ 81:13 Pitfalls of electronic discovery
§ 81:14 Potential questions that may arise in electronic discovery hearings or in Rule 30(b)(6) depositions

CHAPTER 82. PRIVACY AND SECURITY
I. INTRODUCTION AND OVERVIEW
§ 82:1 Scope note
§ 82:2 Objectives, concerns, and preliminary considerations
§ 82:3 —Why do general counsel need to focus on privacy and security?
TABLE OF CONTENTS

§ 82:4 — Key areas of risk facing companies
§ 82:5 — Managing the expanding scope of privacy and security obligations

II. GOVERNING PRIVACY AND SECURITY

§ 82:6 Partnering to establish privacy and security
§ 82:7 — Assessing privacy in your company
§ 82:8 — The role of the board
§ 82:9 — Implementing effective privacy and security procedures
§ 82:10 — Privacy by design and default
§ 82:11 — Privacy impact assessments
§ 82:12 — Developing effective privacy notices
§ 82:13 — Ensuring privacy to facilitate information-driven business advances: the case study of smart meters
§ 82:14 Privacy and security as part of the value of a company
§ 82:15 Governing privacy and security with vendors
§ 82:16 — Evaluating possible service providers
§ 82:17 — Contracting with service providers

III. SECURING INFORMATION

§ 82:18 Managing evolving data security requirements
§ 82:19 — Data security standards
§ 82:20 — Government contracting and the Federal Information Security Management Act
§ 82:21 — Insuring against the inevitable
§ 82:22 Data security incident response
§ 82:23 — Developing internal processes for responding to a data breach
§ 82:24 — Responding to incidents
§ 82:25 — — Incident response teams
§ 82:26 — — Incident investigation
§ 82:27 — — Evaluate notice requirements
§ 82:28 — — Providing notice
§ 82:29 — — Coordinating with government authorities
§ 82:30 — — Managing communications and public relations
§ 82:31 — Partnering during enforcement/civil litigation

IV. CYBERSECURITY

§ 82:32 Cybersecurity

© 2019 Thomson Reuters, 4/2019  ccclxix
§ 82:33 —The role of the general counsel
§ 82:34 —Addressing hacking aimed at strategic assets
§ 82:35 —NIST framework
§ 82:36 —The federal role in information sharing
§ 82:37 —Governmental information sharing
§ 82:38 —Investor disclosure obligations
§ 82:39 —Examinations
§ 82:40 —The role of the board

V. INTERNATIONAL PRIVACY AND SECURITY ISSUES

§ 82:41 Challenges presented by international privacy laws
§ 82:42 EU data protection standards
§ 82:43 —European structures for data privacy
§ 82:44 —European structures for data security
§ 82:45 —Choosing international transfer compliance options
§ 82:46 ——Consent
§ 82:47 ——Privacy Shield
§ 82:48 ——Binding corporate rules
§ 82:49 ——Model clauses
§ 82:50 ——Necessity
§ 82:51 Other international privacy regimes

VI. PROTECTING PRIVACY

§ 82:52 Overview
§ 82:53 Ensuring employee information privacy
§ 82:54 —Applicants
§ 82:55 ——Background checks
§ 82:56 ——Health testing
§ 82:57 —Employees—Monitoring
§ 82:58 ——Locational privacy
§ 82:59 ——Bring your own device
§ 82:60 ——Social media
§ 82:61 ——Personnel files
§ 82:62 Unfair and deceptive business practices
§ 82:63 Protecting sensitive information
§ 82:64 —Children’s information
§ 82:65 —Health information
§ 82:66 —Genetic information
§ 82:67 — Financial information
§ 82:68 — Communications privacy
§ 82:69 — Marketing
§ 82:70 — Internet advertising
§ 82:71 — Phone and fax marketing
§ 82:72 — E-mail
§ 82:73 — Maintaining effective controls as technology changes to big data and the Internet of things
§ 82:73.50 California Consumer Privacy Act of 2018
§ 82:74 — Maintaining privacy and security during litigation
§ 82:75 — Addressing third-party information requests
§ 82:76 — Privacy-sensitive eDiscovery

VII. PRACTICE AIDS

§ 82:77 — Practice checklist: Privacy diligence requests
§ 82:78 — Practice checklist: SEC cybersecurity examination questions
§ 82:79 — Form: Litigation data protection notice for employees

CHAPTER 83. WHITE COLLAR: GOVERNMENT ENFORCEMENT, INVESTIGATIONS, AND COMPLIANCE

§ 83:1 — Scope note
§ 83:2 — Objectives, concerns, preliminary considerations
§ 83:3 — Partnering to prevent and detect misconduct
§ 83:4 — U.S. government focus on compliance programs
§ 83:5 — Partnering in transactional due diligence
§ 83:6 — Seeking guidance from enforcement agencies
§ 83:7 — Partnering to evaluate potential criminal wrongdoing
§ 83:8 — Partnering to conduct an internal investigation
§ 83:9 — Partnering to defend against government enforcement actions
§ 83:10 — The benefit of engaging outside counsel
§ 83:11 — Partnering to cooperate with the authorities
§ 83:12 — Partnering to advocate for the best available resolution

© 2019 Thomson Reuters, 4/2019
Chapter 84. Interplay Between Civil and Criminal Proceedings

I. Introduction

§ 84:1 Scope note
§ 84:2 Trends in parallel proceedings
§ 84:3 Significant legislation from 2002 to present
§ 84:4 Investigatory and prosecutorial focus from 2002 to present
§ 84:5 The Obama Administration’s renewed prosecutorial focus on financial fraud following financial crisis of 2007–2008
§ 84:6 Trump Administration’s shift in focus

II. Determining the Company’s Response—Initial Considerations

§ 84:7 Company’s role
§ 84:8 Preliminary issues facing inside counsel
§ 84:9 Identifying the client’s interests
§ 84:10 Retaining outside counsel
§ 84:11 Respective roles of inside and outside counsel
§ 84:12 Reporting to the client
§ 84:13 Ethical considerations
§ 84:14 Media issues
§ 84:15 Importance of a media plan
§ 84:16 Principal media spokesperson
§ 84:17 Legal or ethical considerations impacting a media response
§ 84:18 Impact of media response to pending criminal and/or civil proceedings
III. DETERMINING THE COMPANY’S RESPONSE—TARGET/SUBJECT/DEFENDANT

§ 84:19 Nature of the alleged wrongdoing
§ 84:20 Risks vs. benefits of cooperation
§ 84:21 —Extent of potential criminal exposure
§ 84:22 —Extent of potential civil exposure
§ 84:23 —Benefits under applicable guidelines for cooperation
§ 84:24 ——Principles of Federal Prosecution of Business Organizations
§ 84:25 ——Federal Sentencing Guidelines
§ 84:26 ——Securities and Exchange Commission (SEC) guidance
§ 84:27 ——DOJ Antitrust Guidelines
§ 84:28 ——FINRA
§ 84:29 ——Environmental Protection Agency (EPA) Parallel Proceedings Memorandum
§ 84:30 ——IRS Internal Review Manual
§ 84:31 ——Public Company Accounting Oversight Board (PCAOB) bylaws and rules
§ 84:32 ——CFTC Enforcement Advisories
§ 84:33 ——Office of Foreign Assets Control (OFAC) Economic Sanctions Enforcement Guidelines
§ 84:35 General Motors—A case study on the interplay of parallel civil and criminal proceedings involving a target corporation

IV. DETERMINING THE COMPANY’S RESPONSE—VICTIM/PLAINTIFF

§ 84:36 Preliminary considerations
§ 84:37 Referral for criminal prosecution
§ 84:38 —Strength of the evidence
§ 84:39 —Risks of referral
§ 84:40 —Additional considerations
§ 84:41 Pursuit of civil claims during pendency of criminal investigation
§ 84:42 —Considerations for pursuing civil claims
§ 84:43 ——The advantages of civil actions
§ 84:44 ——The company’s role

© 2019 Thomson Reuters, 4/2019
§ 84:45 — Timing
§ 84:46 — Pursuit of civil claims may interfere with criminal proceedings
§ 84:47 — Leveraging criminal investigation for pursuit of civil claims

V. THIRD-PARTY WITNESSES AND PARALLEL PROCEEDINGS

§ 84:48 Preliminary considerations
§ 84:49 Requirements in responding to a subpoena
§ 84:50 Grounds for objecting to a subpoena
§ 84:51 — Overbreadth
§ 84:52 — Privileges
§ 84:53 — Constitutional protections
§ 84:54 — Privacy interests

VI. FIFTH AMENDMENT ISSUES ARISING IN PARALLEL PROCEEDINGS

§ 84:55 Preliminary considerations
§ 84:56 Scope of the Fifth Amendment privilege against self-incrimination
§ 84:57 Pros and cons of invoking the privilege in a parallel proceeding
§ 84:58 Assertion of the privilege in a later proceeding after waiver in an earlier proceeding
§ 84:59 Act of production doctrine
§ 84:60 Production of corporate records and the “collective entity” rule
§ 84:61 Miranda warnings during administrative proceedings
§ 84:62 Using the Fifth Amendment to obtain an adverse inference

VII. LIMITATIONS ON THE USE OF GRAND JURY MATERIALS IN CIVIL OR ADMINISTRATIVE PROCEEDINGS

§ 84:63 The rule of grand jury secrecy
§ 84:64 Exceptions to the rule of grand jury secrecy
§ 84:65 — Disclosure of grand jury matters to an attorney for the government
§ 84:66 — Disclosure of grand jury matters upon a court determination

ccclxxiv
VIII. GAINING OR BLOCKING ACCESS TO CRIMINAL AND ADMINISTRATIVE INVESTIGATION MATERIALS

§ 84:67 — “Matter occurring before the grand jury”
§ 84:68 — Whether the materials are sought “preliminary to, or in connection with, a judicial proceeding”
§ 84:69 — Whether the parties seeking the materials have demonstrated a particularized need

IX. LEGALITY OF PARALLEL CIVIL AND CRIMINAL PROCEEDINGS

§ 84:82 Constitutionality of simultaneous proceedings
§ 84:83 The Improper Purpose Doctrine
§ 84:84 Agency information sharing
§ 84:85 — Environmental Protection Agency
§ 84:86 — Internal Revenue Service
§ 84:87 — Securities and Exchange Commission

X. STAYS OF CIVIL PROCEEDINGS ON THE BASIS OF A PARALLEL CRIMINAL PROCEEDING

§ 84:88 Seeking a stay of civil proceedings
XI. PRACTICE AIDS

§ 84:89 —Whether to seek a stay
§ 84:90 —How to obtain a stay

§ 84:91 Practice checklist
§ 84:92 Form: Sample procedures for responding to a third-party subpoena

CHAPTER 85. CRISIS MANAGEMENT

§ 85:1 Scope note
§ 85:2 Objectives, concerns, preliminary considerations
§ 85:3 One size does not fit all
§ 85:4 Assembling the crisis team
§ 85:5 —Corporate management
§ 85:6 —Board of directors
§ 85:7 —In-house counsel
§ 85:8 —Outside counsel
§ 85:9 —Consultants
§ 85:10 —Public and investor relations
§ 85:11 Developing a plan
§ 85:12 —Determining the kind of the investigation to conduct
§ 85:13 —Crafting a public relations strategy
§ 85:14 —Opening the lines of communication within the company
§ 85:15 —Opening the lines of communication with regulators and investigative agencies
§ 85:16 Executing the plan
§ 85:17 —Conducting the fact investigation
§ 85:18 —Internal reporting
§ 85:19 —Responding to regulator and investigative agency requests
§ 85:20 — —Initial steps
§ 85:21 — —Requests for information and documents
§ 85:22 — —Requests for testimony
§ 85:23 —Responding to requests from Congress
§ 85:24 —Whistleblower issues
§ 85:25 Crisis resolution
§ 85:26 —Self-reporting
§ 85:27 — —Should a company self-report?
§ 85:28 — —What should a company self-report?
§ 85:29 —Negotiations with regulators and investigative agencies
Table of Contents

§ 85:30 — Settlement options for regulators and investigative agencies
§ 85:31 — — Tools
§ 85:32 — — Agendas
§ 85:33 — — Collateral consequences
§ 85:34 — — Global settlements
§ 85:35 — Fighting the charges?
§ 85:36 — Internal responses to the crisis
§ 85:37 Practice checklist
§ 85:38 Form—Engagement letter for joint representation of employee by company counsel

Table of Laws and Rules

Table of Cases

Index

Index to Forms