Table of Contents

Volume 1

CHAPTER 1. [Reserved]

CHAPTER 2. PRE-LITIGATION MANAGEMENT AND AVOIDANCE

§ 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
§ 2:10 Draft and negotiate contracts that avoid disputes and reduce exposure
§ 2:11 Draft and negotiate contracts that avoid disputes and reduce exposure—Role of counsel
§ 2:12 Contract drafting checklist
§ 2:13 Avoiding bad documents
§ 2:15 Avoiding bad documents—The scope of discovery
§ 2:17 Avoiding bad documents—Prevention is a function of training
§ 2:18 Avoiding bad documents—About e-mail
§ 2:19 Implement a product integrity program
§ 2:20 Implement a product integrity program—PIP goals
§ 2:24 Implement a product integrity program—Proper organizational structure—Integrate product integrity into each phase of a product’s life-cycle
§ 2:27 Early investigation and assessment
§ 2:28 Early investigation and assessment—Pre-investigation tools
§ 2:29 Early investigation and assessment—Investigation tools
§ 2:30 Early investigation and assessment—The inspection
§ 2:33 Manage crises to avoid litigation—Establishing a CMT
§ 2:34 Manage crises to avoid litigation—Announcing the CMT
§ 2:35 Manage crises to avoid litigation—Identifying a crisis
§ 2:41 Accelerating claim resolution—Mediating the claim out of the public eye
CHAPTER 4. SELECTION OF OUTSIDE COUNSEL

§ 4:1 Scope note
§ 4:2 Objectives, concerns, preliminary considerations
§ 4:7 Planning and internal analysis—Analysis of internal resources (can it be handled in-house?)
§ 4:8 Planning and internal analysis—Budget considerations and fee arrangements
§ 4:10 Planning and internal analysis—Hiring a lawyer, or a law firm?
§ 4:11 Planning and internal analysis—Length of anticipated relationship
§ 4:13 Planning and internal analysis—Insurance
§ 4:14 Planning and internal analysis—Corporate policies
§ 4:16 Identification of potential outside counsel—Prior company experience with counsel
§ 4:17 Identification of potential outside counsel—Approved counsel lists
§ 4:17.50 Identification of potential outside counsel—Panel counsel and preferred provider programs [New]
§ 4:19 Identification of potential outside counsel—Other sources of information (surveys, online resources, LinkedIn)
§ 4:21 Selection process—Interviews and “beauty contests”
§ 4:25 Criteria for evaluating and selecting counsel
§ 4:28 Criteria for evaluating and selecting counsel—Financial issues
§ 4:31 Criteria for evaluating and selecting counsel—Conflicts of interest
§ 4:31.50 Criteria for evaluating and selecting counsel—Cybersecurity capabilities [New]
§ 4:32 Criteria for evaluating and selecting counsel—Other considerations

CHAPTER 5. REQUESTS FOR PROPOSALS, BIDDING AND PRESENTATIONS

§ 5:5 Preliminary considerations—Beauty contests and developing alternatives for the selection
§ 5:6 Requests for proposals
§ 5:7 Requests for proposals—Cost-effective RFPs
§ 5:10 Requests for proposals—Selecting the firms to participate—The initial list
Chapter 5: Developing the RFP

Section 5:15 Requests for proposals—Developing the RFP—Key components
Section 5:17 Requests for proposals—Developing the RFP—Technology
Section 5:21 Requests for proposals—Evaluation—Process
Section 5:22 Requests for proposals—Selection and notification
Section 5:23 Requests for proposals—Agreement
Section 5:25 Advanced concepts—Project management
Section 5:32 Presentations—From the law firm's perspective

Chapter 6. Marketing to Potential Corporate Clients

Section 6:1 Scope note
Section 6:4 Preliminary considerations—Self-analysis—Use of surveys
Section 6:8 Preliminary considerations—Alternative fee arrangements
Section 6:9 Preliminary considerations—Ethics
Section 6:10 Preliminary considerations—Ethics—“Unjustified expectations”
Section 6:11 Preliminary considerations—Ethics—Constitutional challenges to attorney advertising regulations
Section 6:13 Additional considerations—Diversity
Section 6:16 Marketing tools—Web sites
Section 6:20 Marketing tools—Social networking and social media
Section 6:23 Marketing tools—Requests for proposals (“RFPs”)—How to respond to a request for proposal
Section 6:24 Marketing tools—Requests for proposals (“RFPs”)—A corporate client’s perspective
Section 6:28 Marketing tools—Beauty contests—Ethical considerations
Section 6:29 Marketing tools—Beauty contests—How to prepare for and win a beauty contest
Section 6:31 Marketing tools—Newsletters, blogs and client alerts
Section 6:38 Marketing tools—Secondments—How to build client relationships through secondments
Section 6:42 Marketing tools—Client service teams

Chapter 7. Optimizing the Number of Outside Counsel Through Convergence and Partnering Strategies

Section 7:1 Scope note
Section 7:3 Preliminary considerations—Defining convergence and partnering
Section 7:4 Preliminary considerations—Convergence and partnering: genesis and historical context
Section 7:5 Objectives of convergence and partnering
§ 7:6 Objectives of convergence and partnering—Managing legal matters more efficiently
§ 7:7 Objectives of convergence and partnering—Reducing the cost of counsel
§ 7:9 Objectives of convergence and partnering—Promoting diversity in law and business [Retitled]
§ 7:10 Objectives of convergence and partnering—Advantages to partner law firms
§ 7:11 Challenges of convergence and partnering
§ 7:11.50 Challenges of convergence and partnering—Reduction of legal costs [New]
§ 7:12 Challenges of convergence and partnering—Time commitment and complexity
§ 7:15 Challenges of convergence and partnering—Loss of independent perspective/staleness
§ 7:17 Challenges of convergence and partnering—The illusory nature of client knowledge
§ 7:17.50 Challenges of convergence and partnering—Challenges to partner law firms [New]
§ 7:18 Implementing convergence and partnering strategies
§ 7:19 Implementing convergence and partnering strategies—Deciding whether to explore convergence or partnering strategies
§ 7:21 Implementing convergence and partnering strategies—Collecting information, data, and insights—Assigning responsibilities
§ 7:24 Implementing convergence and partnering strategies—Collecting information, data, and insights—The legal department’s role in company strategy
§ 7:26 Implementing convergence and partnering strategies—Selecting outside counsel—Identifying key criteria
§ 7:27 Implementing convergence and partnering strategies—Selecting outside counsel—Making the selection
§ 7:29 Current trends and results
§ 7:30 Practice checklist

CHAPTER 9. ENGAGEMENT LETTERS
(INCLUDING WRITTEN CORPORATE POLICIES AND PROCEDURES)
§ 9:2 Objectives, concerns and preliminary considerations
§ 9:3 Objectives, concerns and preliminary considerations—Ethical issues
§ 9:4 Objectives, concerns and preliminary considerations—State statutes
§ 9:5 Objectives, concerns and preliminary considerations—Discussing conflict waiver
CHAPTER 10. THE PLANNING PROCESS

§ 10:4 When to retain outside counsel—Expertise
§ 10:5 When to retain outside counsel—Resources
§ 10:5.50 When to retain outside counsel—Independence requirements [New]
§ 10:6 Corporate policies and procedures for the selection and retention of outside counsel
§ 10:8 Outside counsel work product
§ 10:10 Having in-house counsel oversee litigation matters
§ 10:12 Having in-house counsel oversee litigation matters—Case summaries
§ 10:13 Planning for budgeting
§ 10:14 Planning for fee arrangements
§ 10:17 Creating lists of approved outside counsel
§ 10:20 Tactical planning—Choosing offensive or defensive tactics
§ 10:21 Tactical planning—Choosing a forum
§ 10:22 Tactical planning—Planning in light of special rules of the forum
§ 10:23 Tactical planning—Settlement
§ 10:26 Logistical planning—Staffing—In-house counsel
§ 10:27 Logistical planning—Staffing—Corporate employees
§ 10:28 Logistical planning—Staffing—Transaction counsel, advisors, investment bankers, auditors, proxy solicitors
CHAPTER 11. BUDGETING AND CONTROLLING COSTS

§ 11:2 Objectives, concerns, preliminary considerations
§ 11:7 Budgets generally
§ 11:12 Legal department budgets
§ 11:13 Cost controls
§ 11:14 Cost controls—Selecting counsel
§ 11:16 Cost controls—Establishing billing guidelines
§ 11:17 Cost controls—Maximizing the benefits of bill review
§ 11:19 Cost controls—Allocating work among inside and outside counsel
§ 11:20 Cost controls—Alternative fee arrangements
§ 11:21 Cost controls—Early case assessment
§ 11:22 Cost controls—Technology
§ 11:24 Macro-management issues—Convergence/unbundling
§ 11:25 Macro-management issues—Purchasing power
§ 11:26 Macro-management issues—Bringing work in-house
§ 11:29 Macro-management issues—Cycle time management

CHAPTER 12. EVALUATING LEGAL RISKS AND COSTS WITH DECISION TREE ANALYSIS

§ 12:3 Selecting an approach for evaluating legal risks—The need for risk analysis
§ 12:5 Selecting an approach for evaluating legal risks—Practical considerations—Objectives
§ 12:18 Analysis of risk, cost and value—Decision trees
§ 12:21 Analysis of risk, cost and value—Compound probabilities and the expected value
§ 12:28.50 Benefits of using decision tree analysis in the courtroom (New)
§ 12:31 Benefits to the business client of using decision tree analysis
CHAPTER 13. COMMUNICATION METHODS AND SKILLS

I. INTRODUCTION

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

II. COMMUNICATION SKILLS

§ 13:5 Listening
§ 13:6 Responding
§ 13:7 Building the relationship
§ 13:9 No surprises

III. COMMUNICATION TOOLS

§ 13:11 Security
§ 13:15 Texting
§ 13:17 Written reports
§ 13:22 Vehicles for collaboration—Videoconferencing
§ 13:24 Vehicles for collaboration—Extranet
§ 13:25 Social media

IV. COMMUNICATIONS IN PARTICULAR SETTINGS

§ 13:28 Staying in touch with inactive clients
§ 13:29 Possible new client relationships
§ 13:32 Delivering bad news and dealing with dysfunction
§ 13:33 Clearing conflicts
§ 13:33.50 Electronic discovery [New]
§ 13:33.60 Cyber-security agreements [New]

V. FINAL WORDS AND PRACTICE AIDS

§ 13:34 Communications checklist

CHAPTER 14. BILLING

§ 14:1 Scope note
§ 14:2 Hourly billing—Is it inherently inefficient or just a terribly misunderstood scapegoat?
§ 14:5 Modernizing the review process via e-management

TABLE OF CONTENTS

xxvii
§ 14:6 Streamlining the payment process through electronic billing
§ 14:7 Legal fee auditors
§ 14:10 The presentation and review of outside counsel invoices
§ 14:12 Alternative fee arrangements

CHAPTER 15. EXPENSES AND DISBURSEMENTS

§ 15:1 Scope note
§ 15:2 Objectives, concerns, and preliminary considerations
§ 15:4 Preliminary considerations—Perspectives from outside counsel
§ 15:5 Preliminary considerations—Controversy over expense and disbursement billing
§ 15:7 Ethical guidance—ABA Formal Opinion No. 93-379
§ 15:9 Ethical guidance—The Model Rules
§ 15:10 Ethical guidance—The Code of Professional Responsibility
§ 15:11 Ethical guidance—Markups/surcharges
§ 15:12 Ethical guidance—Use of contract attorneys
§ 15:13 Ethical guidance—Billing for computerized research
§ 15:14 Current trends
§ 15:15 Current trends—Development of standard guidelines for outside counsel
§ 15:16 Current trends—Development of standard guidelines for outside counsel—Charging for expenses
§ 15:17 Current trends—Development of standard guidelines for outside counsel—Charging for expenses—Computerized research
§ 15:18 Current trends—Development of standard guidelines for outside counsel—Charging for expenses—Phone, facsimile, and photocopying charges
§ 15:19 Current trends—Development of standard guidelines for outside counsel—Charging for expenses—Messenger/courier services
§ 15:20 Current trends—Development of standard guidelines for outside counsel—Charging for expenses—Other technology related expenses
§ 15:21 Current trends—Development of standard guidelines for outside counsel—Charging for expenses—Other technology related expenses—Electronically stored information
§ 15:22 Current trends—Development of standard guidelines for outside counsel—Charging for expenses—Other technology related expenses—Extranets and collaboration systems
TABLE OF CONTENTS

§ 15:24 Current trends—Development of standard guidelines for outside counsel—Charging for disbursements—Travel policies
§ 15:25 Current trends—Development of standard guidelines for outside counsel—Charging for disbursements—Client’s preferred vendors
§ 15:26 Current trends—Development of standard guidelines for outside counsel—Charging for disbursements—Supporting documentation for invoices
§ 15:28 Current trends—Carrying costs of client disbursements
§ 15:30 Recommended practices—Economic concerns—Knowledge of cost structure
§ 15:32 Recommended practices—Economic concerns—Budgeting
§ 15:33 Recommended practices—Economic concerns—Be creative
§ 15:34 Recommended practices—Economic concerns—Avoid overstaffing
§ 15:40 Recommended practices—Trust—Attention to the bill

CHAPTER 16. THE RELATIONSHIP BETWEEN THE LEGAL DEPARTMENT AND THE CORPORATION

§ 16:21.50 More agile legal teams [New]

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

xxix
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
§ 19:7 Legal research specialization—Seven habits of highly effective legal researchers
§ 19:8 Legal research specialization—Checklist for hiring research attorneys
§ 19:10 Vital role of the legal research director
§ 19:11 Impact of technology on legal research management
§ 19:12 Impact of technology on legal research management—A brief review of technology options
§ 19:13 Reusing and leveraging legal research work product
§ 19:15 Reusing and leveraging legal research work product—Law firm case studies
§ 19:16 Building the legal research knowledgebase
§ 19:17 Building the legal research knowledgebase—Staffing
§ 19:18 Building the legal research knowledgebase—Selecting a platform
§ 19:21 Building the legal research knowledgebase—Creating the structure
§ 19:24 Outsourcing and “unbundling” legal research
§ 19:25 Outsourcing and “unbundling” legal research—The traditional model
§ 19:26 Outsourcing and “unbundling” legal research—Role of specialized firms
§ 19:27 Outsourcing and “unbundling” legal research—Establishing trust and confidence
§ 19:28 Outsourcing and “unbundling” legal research—Ethical and professional considerations
§ 19:29 Outsourcing and “unbundling” legal research—Economic considerations and billing options
§ 19:30 Outsourcing and “unbundling” legal research—Checklist for selecting a research firm
§ 19:31 Outsourcing and “unbundling” legal research—Managing the relationship
§ 19:32 Outsourcing and “unbundling” legal research—Deciding which research projects to outsource
§ 19:34 Outsourcing and “unbundling” legal research—Pitfalls to avoid
§ 19:35 Outsourcing and “unbundling” legal research—Case study
§ 19:36 Reducing compliance costs: multi-jurisdictional surveys

xxx
TABLE OF CONTENTS

§ 19:38 Reducing compliance costs: multi-jurisdictional surveys—Employee education

CHAPTER 20. LOCAL AND SPECIALIZED OUTSIDE COUNSEL
§ 20:4 Objectives, concerns, preliminary considerations—When to retain local counsel for litigation matters
§ 20:6 Objectives, concerns, preliminary considerations—When to retain specialized counsel for litigation matters
§ 20:9 Strategies for identifying and selecting local and specialized counsel—Identifying the characteristics of the attorney needed
§ 20:11 Strategies for identifying and selecting local and specialized counsel—Who should select local or specialized counsel?
§ 20:12 Strategies for identifying and selecting local and specialized counsel—Locating candidates to serve as local or specialized counsel
§ 20:17 Controlling costs associated with local and specialized counsel
§ 20:26 Working with and monitoring the performance of local and specialized counsel—Establishing an efficient division of labor

CHAPTER 21. COORDINATING COUNSEL
§ 21:1 Scope note
§ 21:2 Objectives
§ 21:5 Selection of coordinating counsel
§ 21:8 Practices and responsibilities—Early risk analysis
§ 21:10 Practices and responsibilities—Discovery document management

CHAPTER 22. COUNSEL FOR INTERNATIONAL LEGAL WORK
§ 22:1 Scope note
§ 22:5 Methods and strategies for identifying international counsel—Foreign offices of United States firms
§ 22:6 Methods and strategies for identifying international counsel—Global alliances
§ 22:7 Methods and strategies for identifying international counsel—Direct identification
§ 22:8 Requests for proposals
§ 22:9 Selection criteria
§ 22:13 Selection criteria—Knowledge of the relevant local laws—Data privacy regulations
SUCCESSFUL PARTNERING

§ 22:14 Selection criteria—Relevant substantive experience
§ 22:17 Selection criteria—Practical considerations
§ 22:20 Selection criteria—Knowledge of applicable United States laws—The Foreign Corrupt Practices Act
§ 22:23 Selection criteria—Local communications infrastructure
§ 22:24 Selection criteria—Ethical conflicts and concerns
§ 22:26 The interview
§ 22:27 Managing the working relationship
§ 22:28 Managing the working relationship—Engagement letter
§ 22:35 Managing the working relationship—Billing and budgets
§ 22:36 Managing the working relationship—Cultural considerations
§ 22:37 Managing the working relationship—Parent/subsidiary considerations
§ 22:38 Managing the working relationship—Evaluation of foreign counsel
§ 22:39 Managing the working relationship—Common problems and suggested solutions
§ 22:41 Form: Outside counsel guidelines [Retitled]
§ 22:42 Form: Foreign Corrupt Practices Act—Vendor Due Diligence Questionnaire [Retitled]
§ 22:42.50 Form: Foreign Corrupt Practices Act—Vendor Registration Questionnaire—To be completed by internal business sponsor [New]
§ 22:44 Form: Engagement (retainer) letter: Practical considerations checklist [New]
§ 22:45 Form: Outside counsel evaluation process checklist [New]
§ 22:46 Form: Legal RFP cover letter [New]
§ 22:47 Form: Law firm RFP [New]
§ 22:48 Form: Managing Legal Costs Checklist [New]

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

§ 23:37 Motion practice—Specific motions—Subject matter and personal jurisdiction
§ 23:41 Discovery—Hague Evidence Convention and letters rogatory
§ 23:44 Discovery—Document production—Resolving conflicts with European data protection and privacy laws
CHAPTER 27. SPECIALIZED APPROACHES TO INSOURCING LEGAL WORK

§ 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
§ 27:8 How the in-house legal department can meet its goals—Compensation structures
§ 27:10 How the in-house legal department can meet its goals—Technology and cutting-edge solutions

CHAPTER 28. TECHNOLOGY

§ 28:1 Scope note
§ 28:2 Preliminary considerations
§ 28:3 Communications technology
§ 28:4 Communications technology—The limitations of telephone communication
§ 28:5 Communications technology—The e-mail solution
§ 28:6 Communications technology—The e-mail solution—Organizing e-mail
§ 28:7 Communications technology—Texts
§ 28:9 Communications technology—Conferencing—Telephone
§ 28:10 Communications technology—Conferencing—Video, web and “always-on” technologies [Retitled]
§ 28:14 Information technology—Federal agency documents and data
§ 28:17 Information technology—Commercial research services
§ 28:18 Information technology—Access to Internet information and VPNs [Retitled]
§ 28:18.50 Information technology—Artificial intelligence [New]
§ 28:18.70 Information technology—The proliferation of “fake news” and curated information [New]
§ 28:19 Trial and settlement strategy
§ 28:21 Trial and settlement strategy—Estimating costs of litigation
§ 28:25 Storing information
§ 28:26 Storing information—Finding stored information
CHAPTER 29. INFORMATION GOVERNANCE

§ 29:4 Objectives, concerns, preliminary considerations—Evolution of Information Governance
§ 29:25 The governing model—The governing board/committee embedding collaboration into the strategy
§ 29:28 The role of legal counsel in Information Governance
§ 29:34 Trends—Legislating information
§ 29:35 Trends—Cybersecurity [Retitled]
§ 29:36 Trends—Safeguarding information with outside counsel
§ 29:37 Trends—Blockchain

CHAPTER 30. BENCHMARKING

§ 30:1 Scope note
§ 30:2 Benchmarking the corporate legal department
§ 30:4 Benchmarking the corporate legal department—Preliminary considerations—Benchmarking objectives
§ 30:6 Benchmarking the corporate legal department—Preliminary considerations—Pitfalls
§ 30:7 Benchmarking the corporate legal department—Preliminary considerations—Advantages and disadvantages
§ 30:8 Benchmarking the corporate legal department—Process
§ 30:9 Benchmarking the corporate legal department—Metrics
§ 30:24 Benchmarking the corporate legal department—Non-litigation metrics
§ 30:26 Benchmarking the corporate legal department—Governance and compliance metrics
## Table of Contents

§ 30:28 Benchmarking outside counsel—Preliminary considerations

### CHAPTER 31. ETHICS

§ 31:4 Norms and guidelines—Model Rules of Professional Conduct
§ 31:7 Norms and guidelines—Advisory opinions
§ 31:9 Relationship factors
§ 31:10 Relationship factors—Commitment of the corporation
§ 31:11 Relationship factors—Commitment of counsel
§ 31:12 Relationship factors—Selection of outside counsel
§ 31:13 Relationship factors—Scope of engagement
§ 31:20 The ethical use of technology [Retitled]
§ 31:21 Protecting confidential information
§ 31:23 Acting as advocate
§ 31:25 Privacy and recordings
§ 31:29 Multi-jurisdictional practice [Retitled]
§ 31:33 Forms—Sample policy on professional conduct
§ 31:37 Forms—Sample engagement letter, including law firm billing guidelines and expert fees and billing guidelines [Retitled]

### CHAPTER 32. 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
§ 32:7 Current client conflicts—Loyalty, adversity, and material limitation: the ABA Model Rules approach
§ 32:9 Current client conflicts—Client identity and multiple representation—Illustration: simultaneous representation of the company and an employee
§ 32:11 Current client conflicts—Client identity and multiple representation—Joint-client exception to the attorney-client privilege
§ 32:19 Conflicts, imputation, and screens: changes in the makeup of law firms and corporate legal departments—Lawyers in private practice changing jobs, imputation, and screening
§ 32:20 Conflicts, imputation, and screens: changes in the makeup of law firms and corporate legal departments—Concerns for in-house legal departments
§ 32:21 Conflicts, imputation, and screens: changes in the makeup of law firms and corporate legal departments—Non-lawyer professionals changing employment
§ 32:24 Motions to disqualify

[xxxvii]
§ 32:25 Beauty contests and initial consultations
§ 32:34 Inadvertent or otherwise “improper” production or transmittal of documents: ethical considerations for the lawyer receiving them

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

II. THE ATTORNEY-CLIENT 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

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 The rights of directors, officers, and employees to waive or assert the privilege—Personal privilege
§ 33:13 The rights of directors, officers, and employees to waive or assert the privilege—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

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

VI. THE WORK PRODUCT DOCTRINE
§ 33:29 Basic principles and elements of work product protection—Prepared “in anticipation of litigation”
§ 33:30 Basic principles and elements of work product protection—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
§ 33:36 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
§ 33:40 Metadata

IX. PRACTICE AND PROCEDURE
§ 33:42 Privilege logs

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

CHAPTER 34. CROSS-BORDER INVESTIGATIONS
§ 34:1 Scope note
§ 34:2 Objectives, concerns, and preliminary considerations
§ 34:4 Objectives, concerns, and preliminary considerations—External cross-border investigations potentially reach conduct having unique aspects in the international context
§ 34:9 Persons involved in cross-border investigations and their roles—Outside legal counsel
§ 34:10 Persons involved in cross-border investigations and their roles—Human resource professionals
§ 34:20 Importance of recognizing applicable international, national and local laws and cultural perspectives—Legal differences

xxxix
§ 34:21 Importance of recognizing applicable international, national and local laws and cultural perspectives—Attorney client privilege

§ 34:22 Importance of recognizing applicable international, national and local laws and cultural perspectives—Attorney client privilege—How U.S. courts might resolve differences between the laws of the U.S. and those of a foreign country

§ 34:23 Importance of recognizing applicable international, national and local laws and cultural perspectives—Attorney client privilege—How foreign courts resolve address differences between domestic and U.S. laws

§ 34:37 Investigation plan and process—Handling disclosures—Evaluating public disclosures—Customers

CHAPTER 35. INTERNAL INVESTIGATIONS

§ 35:1 Scope note
§ 35:2 Should you conduct an investigation?
§ 35:4 Getting started—The investigative team
§ 35:5 Getting started—Retaining outside help
§ 35:7 Preserving confidentiality—Limiting the flow of information within the organization
§ 35:8 Preserving confidentiality—The attorney-client privilege
§ 35:9 The work product doctrine
§ 35:10 Preserving confidentiality—The “self-evaluative” privilege
§ 35:12 Collecting and reviewing documents—Preserving potentially relevant documents
§ 35:14 Collecting and reviewing documents—Organizing and using documents
§ 35:18 Employee interviews—Upjohn warnings
§ 35:20 Employee interviews—Interviews of non-employees
§ 35:23 Avoiding allegations of obstruction of justice—Obstruction of justice relating to document issues
§ 35:24 Avoiding allegations of obstruction of justice—Obstruction of justice relating to witness interview issues
§ 35:25 Separate counsel for employees
§ 35:27.50 Disclosure to the government [New]
§ 35:31 Analyzing and acting on the results

CHAPTER 36. LICENSURE AND ADMITTANCE TO PRACTICE

§ 36:2 Why licensure and admittance to practice issues are important
CHAPTER 37. PROFESSIONALISM

§ 37:4 Professionalism commissions
§ 37:10 Ethical conduct as an element of professionalism—Outside counsel guidelines
§ 37:18 Serving the public interest—Access to justice gap
§ 37:21 Serving the public interest—Pro bono service—Ethics rules and state requirements
§ 37:22 Serving the public interest—Pro bono service—State court efforts to encourage pro bono
§ 37:23 Serving the public interest—Pro bono service—Lawyers are rising to the challenge
§ 37:24 Serving the public interest—Pro bono service—In-house counsel pro bono programs
§ 37:25 Serving the public interest—Pro bono service—Challenges facing in-house counsel interested in engaging in pro bono
§ 37:28 Serving the public interest—Pro bono service—Model partnership programs
§ 37:29 Serving the public interest—Pro bono service—The
“Clinic In A Box” program
§ 37:30 Serving the public interest—Pro bono service—Attorneys
coming together in times of crisis
§ 37:33 Serving the public interest—Corporate social
responsibility—Outside counsel policies that foster
professionalism
§ 37:34 Serving the public interest—Corporate social
responsibility—Outside counsel policies that address
diversity
§ 37:35 Serving the public interest—Corporate social
responsibility—Outside counsel policies that address
the retention of talent
§ 37:36 Diversity
§ 37:37 Diversity—Why is diversifying the legal profession an
element of professionalism?
§ 37:39 Diversity—Corporate law departments’ initiatives to
promote diversity
§ 37:40 Diversity—Law firm initiatives to enhance diversity
§ 37:41 Diversity—Law firm, corporate counsel, and bar
association sponsored fellowships to enhance diversity
§ 37:42 Diversity—Efforts to facilitate “on-ramping”
§ 37:44 Civility—Standards of civility

CHAPTER 37A. PRO BONO

§ 37A:2 The source and foundation of the obligation to provide
pro bono services
§ 37A:7 Partnering to fill a need for pro bono services
§ 37A:8 Partnering to fill a need for pro bono services—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 Why law firms and in-house legal departments should
partner on pro bono matters—A pro bono partnership
helps the law firm and legal department leverage
strengths
§ 37A:11 Why law firms and in-house legal departments should
partner on pro bono matters—A pro bono partnership
helps the law firm and legal department leverage
strengths—Mechanisms for doing pro bono work
already established at law firm
§ 37A:12 Why law firms and in-house legal departments should
partner on pro bono matters—A pro bono partnership
helps the law firm and legal department leverage
strengths—In-house counsel often provide experience
and expertise

SUCCESSFUL PARTNERING
§ 37A:13 Why law firms and in-house legal departments should partner on pro bono matters—A pro bono partnership helps the law firm and legal department leverage strengths—Additional resources available to provide pro bono service in law firm setting

§ 37A:15 Why law firms and in-house legal departments should partner on pro bono matters—Recognizing mutual benefits for the law firm and in-house legal department

§ 37A:17 Why law firms and in-house legal departments should partner on pro bono matters—Recognizing mutual benefits for the law firm and in-house legal department—Opportunities for learning more about our respective counterparts

§ 37A:19 What would a pro bono partnership look like?—Working jointly at a clinic

§ 37A:21 What would a pro bono partnership look like?—Taking on certain substantive areas of litigation (e.g., immigration, housing)

§ 37A:25 What are the challenges and other considerations that may prevent a successful partnership?

§ 37A:26 What are the challenges and other considerations that may prevent a successful partnership?—In-house counsel’s need for malpractice insurance

§ 37A:27 What are the challenges and other considerations that may prevent a successful partnership?—Challenges presented by the multi-jurisdictional practice of law

CHAPTER 38. 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

§ 38:9 Designing and monitoring effective programs—Requirements imposed by the regulators—Common features

§ 38:16 Joint inside and outside counsel programs—Elimination of bias

§ 38:18 Joint inside and outside counsel programs—Substance abuse

§ 38:26 Designing and monitoring effective programs—West Pharmaceutical Services’ law department approach

§ 38:29 Examples of particular CLE strategies—DLA Piper LLP (US)—Joint inside and outside counsel programs

§ 38:33 California’s MCLE deadlines

§ 38:34 California’s proportional requirements

§ 38:35 United Kingdom 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
§ 39:5 Using this chapter and other resources—Enduring commentary and publications
§ 39:6 The law organization's diversity baseline
§ 39:7 Distinguishing diversity from affirmative action
§ 39:18 Characteristic problems—Political correctness instead of candor
§ 39:20 Characteristic problems—Political correctness instead of candor—Everyone is not the same
§ 39:22 Characteristic problems—Political correctness instead of candor—Fear of being misunderstood

CHAPTER 39A. LGBTQ ISSUES
§ 39A:3 National and state-level estimates of LGBTQ-identified adults
§ 39A:6 What corporations and law firms are doing to support LGBTQ employees—Proliferation of LGBTQ employee resource or employee affinity groups
§ 39A:7 What corporations and law firms are doing to support LGBTQ employees—Targeted recruitment
§ 39A:8 What corporations and law firms are doing to support LGBTQ employees—Marketing efforts
§ 39A:9 What corporations and law firms are doing to support LGBTQ employees—HRC Corporate Equality Index Ratings for corporations and law firms
§ 39A:10 What corporations and law firms are doing to support LGBTQ employees—Self-identification of LGBTQ status
§ 39A:11 What corporations and law firms are doing to support LGBTQ employees—Recognizing and overcoming objections to supporting LGBTQ employees
§ 39A:13 Legal issues pertaining to LGBTQ employees—Protections of LGBTQ employees against discrimination under Title VII
§ 39A:20 Form: BASF employee groups
Volume 3

CHAPTER 41. MERGERS AND ACQUISITIONS
§ 41:33 The definitive M&A agreement—Material adverse effect provisions
§ 41:41 The definitive M&A agreement—Indemnification provisions—Representation and warranty insurance
§ 41:43 The definitive M&A agreement—Anti-sandbagging provisions
§ 41:47.50 Other selected M&A considerations—Digital M&A

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
§ 42:7 Total quality management, Six Sigma, Lean Six Sigma (“TQM”) Implementation of TQM
§ 42:9 Six Sigma
§ 42:16 Implementing project management
§ 42:17 Introducing project management into a law firm or legal department
§ 42:19 Re-engineering
§ 42:20 Examples of re-engineering

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

TABLE OF CONTENTS
§ 44:7 Goals of lobbying
§ 44:8 Lobbying risks
§ 44:9 Establishing a lobbying strategy
§ 44:10 Contract versus employed lobbyists
§ 44:11 Characteristics of successful lobbyists
§ 44:12 Characteristics of successful lobbyists—Credibility and integrity
§ 44:13 Characteristics of successful lobbyists—Relationships and access
§ 44:15 Characteristics of successful lobbyists—Political insight
§ 44:16 Characteristics of successful lobbyists—Consensus building
§ 44:17 Trade associations
§ 44:19 Successful approaches to lobbying—Strategic planning
§ 44:20 Successful approaches to lobbying—Role of inside counsel
§ 44:21 Successful approaches to lobbying—Role of outside counsel
§ 44:22 Successful approaches to lobbying—Establishing contact with key legislative personnel and regulatory bodies
§ 44:23 Successful approaches to lobbying—Identifying key constituencies to be lobbied
§ 44:24 Successful approaches to lobbying—Identifying key constituencies to be lobbied—Executive branch
§ 44:25 Successful approaches to lobbying—Identifying key constituencies to be lobbied—Legislators
§ 44:26 Successful approaches to lobbying—Identifying opposition
§ 44:27 Successful approaches to lobbying—Cost-benefit analysis
§ 44:28 Successful approaches to lobbying—Cost-benefit analysis—Timing
§ 44:29 Successful approaches to lobbying—Cost-benefit analysis—Resources allocated to lobbying
§ 44:30 Successful approaches to lobbying—Cost-benefit analysis—Short-term and long-term implications
§ 44:32 Implementation procedures for successful lobbying—Building industry consensus
§ 44:33 Implementation procedures for successful lobbying—The role of technology
§ 44:34 Implementation procedures for successful lobbying—The impact of political contributions
§ 44:35 Implementation procedures for successful lobbying—Personal involvement of inside counsel and key executives
§ 44:36 Lobbying in a heavily regulated industry
§ 44:37 Lobbying in a heavily regulated industry—Pre-rulemaking
§ 44:38 Lobbying in a heavily regulated industry—Proposed rulemaking
**Table of Contents**

§ 44:39 Lobbying in a heavily regulated industry—Final rulemaking  
§ 44:40 Federal legal requirements for lobbying  
§ 44:41 Federal legal requirements for lobbying—Revolving door prohibitions  
§ 44:42 Federal legal requirements for lobbying—Reporting requirements  
§ 44:44 Political and financial impact on lobbying and current events  
§ 44:45 State legal requirements for lobbying—Table of selected state requirements and prohibitions  

**CHAPTER 45. ADMINISTRATIVE AGENCIES**

**II. KNOW THE AGENCY**  
§ 45:9.50 Who are the agency decision-makers?—Administrative law judges [New]  
§ 45:19.50 What does the agency do?—Adjudications—Jurisdiction [New]  
§ 45:45.50 How did the Trump administration impact agencies? [New]

**CHAPTER 46. CORPORATE GOVERNANCE**

§ 46:6 Duties of directors—Duty of care—Board’s oversight responsibility  
§ 46:7 Duties of directors—Duty of loyalty  
§ 46:9 Duties of directors—Duty of loyalty—Potential conflicts for dual fiduciaries  
§ 46:10 Duties of directors—Duty of good faith  
§ 46:12 Duties of directors—Duty of disclosure  
§ 46:13 Duties of directors—Duty of disclosure—Materiality standard  
§ 46:16 Duties of directors—Consequences of a director’s breach of fiduciary duty  
§ 46:18 Business judgment rule—Presumption in favor of sound business judgment  
§ 46:20 Business judgment rule—Rebutting the presumption  
§ 46:22 Entire fairness—Fair price, fair dealing  
§ 46:23 Entire fairness—Coercive conduct and violations of fiduciary duty  
§ 46:24 Entire fairness—Shifting the burden of proof  
§ 46:26 Entire fairness—Shifting the burden of proof—Composition of an independent committee
SUCCESSFUL PARTNERING

§ 46:32 Duties when faced with a takeover proposal—Duties when taking defensive measures
§ 46:34 Duties when selling the corporation
§ 46:35 Duties when selling the corporation—Triggering Revlon duties
§ 46:36 Duties when selling the corporation—Satisfying the Revlon standard of review
§ 46:37 Duties in a proxy contest
§ 46:39 Duties in insolvency
§ 46:43 Derivative litigation—The demand requirement
§ 46:44 Derivative litigation—The demand requirement—Choice of law
§ 46:52 Derivative litigation—The demand requirement—The demand excused test for business decisions—The first Aronson prong
§ 46:53 Derivative litigation—The demand requirement—The demand excused test for business decisions—The second Aronson prong
§ 46:57 Derivative litigation—Special litigation committees—Standards of review
§ 46:65 Limitation of liability—Exculpation
§ 46:70 Limitation of liability—Contractual
§ 46:71 Limitation of liability—Advancement of litigation expenses

CHAPTER 46A. CORPORATE SECRETARIAL

§ 46A:1 Scope note
§ 46A:4 Corporate secretary's role with respect to record keeping
§ 46A:5 Corporate secretary's role with respect to record keeping—Corporate minutes and resolutions
§ 46A:6 Corporate secretary's role with respect to record keeping—Corporate minutes and resolutions—Drafting corporate minutes
§ 46A:9 Corporate secretary's role with respect to the board of directors and committees of the board—Director election/appointment
§ 46A:12 Corporate secretary's role with respect to the board of directors and committees of the board—Meetings of the board of directors
§ 46A:13 Corporate secretary's role with respect to the board of directors and committees of the board—Meetings of the board of directors—Planning the agenda for board and committee meetings
§ 46A:26 Shareholder proposals
§ 46A:30 Emerging topics

xlviii
CHAPTER 46B. SHAREHOLDER ACTIVISM

§ 46B:1 Scope note
§ 46B:2 Objectives, concerns, preliminary considerations
§ 46B:4 Activist focus—Corporate governance reform
§ 46B:5 Activist focus—Social, political, and environmental change
§ 46B:6 Activist focus—Compensation
§ 46B:7 Activist focus—Mergers and acquisitions and strategic alternatives
§ 46B:8 Activist focus—The balance sheet
§ 46B:9 Activist focus—Operations
§ 46B:13 Identifying an activist campaign—13D filings
§ 46B:16 Activist tactics—Shareholder proposals and proxy solicitations
§ 46B:18 Activist tactics—“Vote no” campaigns or withhold the vote campaigns
§ 46B:19 Activist tactics—Public disclosure of voting intentions
§ 46B:20 Activist tactics—Special meetings, actions by written consent, and ambush proposals
§ 46B:21 Activist tactics—Shareholder litigation
§ 46B:23 Preparing for an activist—Vulnerability assessment
§ 46B:24 Preparing for an activist—Establishing a response team
§ 46B:25 Preparing for an activist—Communications plan
§ 46B:26 Preparing for an activist—Bylaw fortification
§ 46B:27 Preparing for an activist—Shareholder rights plan
§ 46B:28 Preparing for an activist—Partnership among in-house and outside counsel
§ 46B:29 Responding to an activist campaign
§ 46B:33 Responding to an activist campaign—Litigation options
§ 46B:35 Legislative developments—13D filing requirements
§ 46B:36 Legislative developments—Increased regulation of proxy advisory firms

CHAPTER 47A. CORPORATE SUSTAINABILITY

§ 47A:1 Scope note
§ 47A:2 What do we mean by corporate sustainability?
§ 47A:3 Ways in which any organization can promote its own sustainability
§ 47A:5 Ways in which any organization can promote its own sustainability—Environmental responsibility
§ 47A:8 Ways in which any organization can promote its own sustainability—Community service
§ 47A:9 How inside and outside counsel can partner on sustainability initiatives
§ 47A:11 How inside and outside counsel can partner on sustainability initiatives—Sustainability compliance assessment
§ 47A:12 How inside and outside counsel can partner on sustainability initiatives—Joint client outreach on sustainability matters
§ 47A:14 How inside and outside counsel can partner on sustainability initiatives—Mutual financial support
§ 47A:15 How inside and outside counsel can partner on sustainability initiatives—Governance and enterprise risk management
§ 47A:16 JLL Case Study
§ 47A:17 JLL Case Study—Actively keeping each other informed
§ 47A:18 JLL Case Study—Business reciprocity
§ 47A:19 JLL Case Study—Client cross-referrals
§ 47A:20 JLL Case Study—Joint community service projects
§ 47A:21 JLL Case Study—Promoting diversity
§ 47A:23 JLL Case Study—Joint promotional efforts
§ 47A:25 Practice checklist

CHAPTER 48. TRANSACTIONS
§ 48:2 Preliminary considerations
§ 48:3 Assembling the team
§ 48:4 Assembling the team—Establishing chains of command
§ 48:14 The transactional process and technology—E-mail communications
§ 48:15 The transactional process and technology—E-mail communications—Limitations of e-mail use
§ 48:16 The transactional process and technology—Additional legal considerations relating to e-mail communications
§ 48:17 The transactional process and technology—Cybermeetings/document sessions
§ 48:19 Selected aspects in the process of negotiating a transaction
§ 48:20 Selected aspects in the process of negotiating a transaction—The pitfalls of letters of intent
§ 48:21 Selected aspects in the process of negotiating a transaction—Choosing the type of letter of intent
§ 48:23 Selected aspects in the process of negotiating a transaction—Things that can go wrong with letters of intent—Disputes about whether the letter of intent is binding
§ 48:24 Selected aspects in the process of negotiating a transaction—Things that can go wrong with letters of intent—Disputes about the duty to negotiate
§ 48:25 Selected aspects in the process of negotiating a transaction—Things that can go wrong with letters of intent—Additional pitfalls
CHAPTER 49. CORPORATE INFORMATION TECHNOLOGY TRANSACTIONS AND DISPUTES

II. INFORMATION TECHNOLOGY TRANSACTIONS AND OUTSOURCING

§ 49:12 Managing the deal

III. TYPICAL IT CONTRACT PROVISIONS

§ 49:53 Security/confidentiality

IV. DISPUTES REQUIRING ARBITRATION OR LITIGATION

§ 49:63 Issues leading to adjudicated disputes—Significant performance failures—"Transformation" problems
§ 49:65 Issues leading to adjudicated disputes—Significant performance failures—Asserted "bad service"
§ 49:66.30 Issues leading to adjudicated disputes—Misuse of proprietary information [New]
§ 49:66.70 Issues leading to adjudicated disputes—Data security [New]
§ 49:67 Issues leading to adjudicated disputes—Termination
§ 49:70 The adjudication of IT disputes—Specified relief
§ 49:74 The adjudication of IT disputes—Avoiding litigation
§ 49:75 The adjudication of IT disputes—Claims and case law

CHAPTER 50. JOINT VENTURES

§ 50:22 Protecting proprietary information—Antitrust considerations
§ 50:23 Protecting proprietary information—Antitrust considerations—Overview of U.S. antitrust law applicable to joint ventures
§ 50:24 Protecting proprietary information—Antitrust considerations—Information-sharing
§ 50:25 Protecting proprietary information—Antitrust considerations—Information-sharing—Due diligence and negotiation periods
§ 50:26 Protecting proprietary information—Antitrust considerations—Information-sharing during HSR review
§ 50:27 Protecting proprietary information—Antitrust considerations—Information-sharing during HSR review—Item 4(c) and 4(d) documents
§ 50:28 Protecting proprietary information—Antitrust considerations—Information-sharing during HSR review—“Gun jumping”
§ 50:29 Protecting proprietary information—Antitrust considerations—Information-sharing during the life of the joint venture
§ 50:34 Regulatory pitfalls in joint ventures involving U.S. and non-U.S. venturers—Export controls
§ 50:35 Regulatory pitfalls in joint ventures involving U.S. and non-U.S. venturers—Export controls—“Dual use” products and technology
§ 50:36 Regulatory pitfalls in joint ventures involving U.S. and non-U.S. venturers—Export controls—Defense industries
§ 50:37 Regulatory pitfalls in joint ventures involving U.S. and non-U.S. venturers—U.S. economic embargoes
§ 50:38 Regulatory pitfalls in joint ventures involving U.S. and non-U.S. venturers—Exxon-Florio
§ 50:40 Regulatory pitfalls in joint ventures involving U.S. and non-U.S. venturers—U.S. antiboycott rules

CHAPTER 51. VALUATION OF A BUSINESS IN AN ACQUISITION CONTEXT

§ 51:1 Scope note
§ 51:3 Caselaw on fairness opinions, appraisal remedies, and duty to understand valuation process—Fairness opinions and duty to understand valuation process
§ 51:4 Caselaw on fairness opinions, appraisal remedies, and duty to understand valuation process—Valuation in appraisal remedies
§ 51:5 Some traditional valuation methods
§ 51:8 Some traditional valuation methods—Liquidation value
§ 51:9 Some traditional valuation methods—Price/earnings ratio
§ 51:11 Financial principles underlying the discounted cash flow method: time and the value of money
§ 51:13 Financial principles underlying the discounted cash flow method: time and the value of money—Present value
§ 55:3 Objectives, concerns, and preliminary considerations—
The changing landscape of ERISA [Retitled]

§ 55:4 Objectives, concerns, and preliminary considerations—
Staffing and expertise [Retitled]

§ 55:5 Objectives, concerns, and preliminary considerations—
Continuing fiduciary responsibilities [Retitled]

§ 55:6 Objectives, concerns, and preliminary considerations—
Regulatory investigations [Retitled]

§ 55:7 Objectives, concerns, and preliminary considerations—
Attorney-client privilege issues [Retitled]

§ 55:8 Objectives, concerns, and preliminary considerations—
Conflicts of interest [Retitled]

§ 55:9 Objectives, concerns, and preliminary considerations—
When is counsel an ERISA fiduciary? [Retitled]

§ 55:10 Objectives, concerns, and preliminary considerations—
The use of third-party non-legal advisors and service providers [Retitled]

§ 55:11 Objectives, concerns, and preliminary considerations—
The use of third-party non-legal advisors and service providers—The unauthorized practice of law as a constraint on third-party advisors [Retitled]

§ 55:12 Objectives, concerns, and preliminary considerations—
The use of third-party non-legal advisors and service providers—Agreed-upon limits on administrators' duties [Retitled]

§ 55:21 Effective partnering strategies—Partnering strategies for specific tasks—Communicating with participants and beneficiaries

§ 55:26 Effective partnering strategies—Partnering strategies for specific tasks—Contracting with third-party providers

§ 55:31 Key aspects of ERISA for inside counsel—Fiduciary duties—ERISA's four fiduciary duties

§ 55:34 Key aspects of ERISA for inside counsel—Litigation—Benefits claims

§ 55:35 Key aspects of ERISA for inside counsel—Litigation—Fiduciary litigation

§ 55:40 Key aspects of ERISA for inside counsel—Reporting and disclosure requirements

§ 55:45 Key aspects of ERISA for inside counsel—Anti-retaliation provision

§ 55:46 Key aspects of ERISA for inside counsel—Attorneys’ fees

§ 55:47 Key aspects of ERISA for inside counsel—HIPAA

§ 55:48 Key aspects of ERISA for inside counsel—COBRA

§ 55:49 Key aspects of ERISA for inside counsel—Healthcare reform

§ 55:50 Key aspects of ERISA for inside counsel—Correcting violations

§ 55:52 Key aspects of ERISA for inside counsel—Mergers and acquisitions
# Table of Contents

**CHAPTER 55B. HEALTH LAW**

§ 55B:1  Scope note  
§ 55B:6 Federal health care legislation  
§ 55B:7 Federal health care legislation—Substantive provisions and timeline  
§ 55B:8 Federal health care legislation—Grandfathered plans  
§ 55B:12.50 Federal health care legislation—Health insurance exchanges [New]  
§ 55B:13 Insured health plans  
§ 55B:14.50 Employee contributions [New]  
§ 55B:15 Consumer directed health plans  
§ 55B:16.50 Exchanges for large employers [New]

**CHAPTER 56. ADVERTISING**

§ 56:17 Overview of advertising law—Scope of advertising  
§ 56:18 Overview of advertising law—Substantiation  
§ 56:20 Overview of advertising law—The spectrum of advertising claims—Express claims  
§ 56:23 Overview of advertising law—The spectrum of advertising claims—Puffery  
§ 56:26 Overview of advertising law—Third-party rights—Testimonials and endorsements  
§ 56:28 Overview of advertising law—Third-party rights—Trademarks  
§ 56:31 Overview of advertising law—Unique issues raised by online advertising—Privacy  
§ 56:34 Overview of advertising law—Regulations and guidelines—FTC guides and enforcement  
§ 56:38 Overview of advertising law—Alternative forums for advertising challenges—Federal and state regulators  
§ 56:43 Overview of advertising law—Alternative forums for advertising challenges—Consumer challenges in state court

**CHAPTER 56A. NEGOTIATION**

§ 56A:1 Scope note  
§ 56A:2 Objective, concerns, preliminary considerations  
§ 56A:3 Effective strategies  
§ 56A:4 Effective strategies—Timing, time-saving and other efficiency considerations  
§ 56A:5 Effective strategies—Leadership  
§ 56A:6 Effective strategies—Multi-party negotiations  
§ 56A:7 Effective strategies—Confidentiality  
§ 56A:9 Effective strategies—Understanding the lay of the land  
§ 56A:12 Effective strategies—Evaluating Best Alternatives to a Negotiated Agreement (BATNA)
 CHAPTER 58. ARBITRATION OF INTERNATIONAL COMMERCIAL DISPUTES

§ 58:13 The arbitration clause—Initial considerations
§ 58:15 The arbitration clause—Elements of the arbitration clause—Institutional or ad hoc arbitration
§ 58:16 The arbitration clause—Elements of the arbitration clause—Arbitration rules
§ 58:18 The arbitration clause—Elements of the arbitration clause—Governing law
§ 58:19 The arbitration clause—Elements of the arbitration clause—Parties to the arbitration clause
§ 58:20 The arbitration clause—Elements of the arbitration clause—Scope of the arbitration clause
§ 58:21 The arbitration clause—Elements of the arbitration clause—Place of arbitration
§ 58:22 The arbitration clause—Elements of the arbitration clause—Number of arbitrators
§ 58:24 The arbitration clause—Elements of the arbitration clause—Interim measures
§ 58:25 The arbitration clause—Elements of the arbitration clause—Allocation of arbitration costs, including attorneys' fees
§ 58:26 The arbitration clause—Elements of the arbitration clause—Confidentiality
§ 58:27 The arbitration clause—Elements of the arbitration clause—Obtaining evidence
§ 58:28 The arbitration clause—Elements of the arbitration clause—Single or multiple arbitral proceedings
§ 58:30 The arbitration clause—Elements of the arbitration clause—Acting ex aequo et bono
§ 58:42 Principal considerations at the commencement of arbitration—Joining parties and claims—Joining non-signatories as parties
§ 58:44 Principal considerations at the commencement of arbitration—Interim measures
§ 58:49 Conducting the arbitration—Use of experts

 CHAPTER 58A. LITIGATION

§ 58A:2 Principles for effective collaboration
§ 58A:3 Principles for effective collaboration—Focus on the prize
§ 58A:4 Principles for effective collaboration—Make decisions calculated to win
§ 58A:7 Principles for effective collaboration—Create the strongest possible counseling team—Outside counsel
§ 58A:8 Principles for effective collaboration—Create the strongest possible counseling team—Professional support
§ 58A:9 Principles for effective collaboration—Build high-quality relationships
§ 58A:10 Principles for effective collaboration—Communicate closely with management
§ 58A:11 Principles for effective collaboration—Always be cost-sensitive

CHAPTER 59. DETERMINATION OF LITIGATION FORUM
§ 59:5 Preliminary considerations—Key questions
§ 59:8 Declaratory judgment opportunities and options—The federal declaratory judgment statute
§ 59:9 Declaratory judgment opportunities and options—Burden of proof
§ 59:11 Defense opportunities to influence forum selection—Forum selection clauses
§ 59:13 Defense opportunities to influence forum selection—Limitations on traditional removal jurisdiction
§ 59:14 Defense opportunities to influence forum selection—Attacking plaintiff's techniques to avoid federal jurisdiction

CHAPTER 60. PLEADINGS AND PRE-TRIAL MOTIONS IN COMPLEX COMMERCIAL CASES
§ 60:2 Preliminary considerations
§ 60:4 The changing landscape of pleadings and motions practice
§ 60:6 The role of pleadings—Historical perspective
§ 60:7 The role of pleadings—The seeds of change
§ 60:13 Motions attacking the pleadings
§ 60:16 Summary judgment motions
§ 60:17 Summary judgment motions—Issues amenable to summary judgment
§ 60:18 Summary judgment motions—Timing of summary judgment motions
§ 60:19 Motions to exclude expert testimony

CHAPTER 60A. CLASS ACTIONS
§ 60A:23 Strategies in class action engagement
Table of Contents

§ 60A:34 Strategies in class action engagement—Experts
§ 60A:37 Strategies in class action engagement—Response to class certification
§ 60A:41 Settlement strategies—Individual settlement before certification
§ 60A:42 Settlement strategies—Timing of initiating discussions
§ 60A:43 Settlement strategies—Class wide settlements
§ 60A:51 Principal legal issues, key cases, and statutory framework—Various kinds of class actions
§ 60A:54 Principal legal issues, key cases, and statutory framework—Evolving standards of proof
§ 60A:56 Principal legal issues, key cases, and statutory framework—Rule 23(a) requirements for class certification—Numerosity
§ 60A:60 Principal legal issues, key cases, and statutory framework—Class definition
§ 60A:64 Principal legal issues, key cases, and statutory framework—Rule 23(b) requirements—Rule 23(b)(2)
§ 60A:65 Principal legal issues, key cases, and statutory framework—Rule 23(b) requirements—Rule 23(b)(3)
§ 60A:67 Other Rule 23 subdivisions—Rule 23(c)
§ 60A:69 Other Rule 23 subdivisions—Rule 23(e)
§ 60A:70 Other Rule 23 subdivisions—Rule 23(f)
§ 60A:78 Class Action Fairness Act—Settlements
§ 60A:79 The law of class action settlements
§ 60A:80 Class action arbitration

CHAPTER 60B. EXPEDITING AND STREAMLINING LITIGATION

§ 60B:1 Scope note
§ 60B:2 Objectives, concerns, and preliminary considerations
§ 60B:3 Early planning and assessment
§ 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:12 Agreements with opposing and co-counsel
§ 60B:13 Build and nurture a cooperative relationship between inside and outside counsel [Retitled]
§ 60B:15 Evaluate performance during and after litigation
§ 60B:16.50 Expediting and streamlining discovery in federal cases [New]
CHAPTER 61. DISCOVERY AND INFORMATION GATHERING

§ 61:4 Goals of discovery management—Accuracy, consistency and timeliness
§ 61:6 Goals of discovery management—Control of dispute outcome
§ 61:12 Considerations affecting use of particular discovery devices—Investigation methods
§ 61:30 Legal issues regarding apex depositions

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?

III. FINDING AN EXPERT

A. WHAT TO LOOK FOR
§ 62:6 Credentials
§ 62:7 Background checks
§ 62:11 Practical considerations—Location

B. OTHER CONSIDERATIONS
§ 62:14 Searching for the right expert

V. COMMUNICATING
§ 62:18 Communicating with your expert

VI. WORKING WITH YOUR EXPERT DURING LITIGATION

A. DEVELOPMENT OF YOUR EXPERT'S OPINIONS
§ 62:24 The expert report—Investigation and research
§ 62:25 The expert report—Contents
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

C. DEPOSITIONS

§ 62:36 Depositions of opposing experts

D. DAUBERT HEARINGS

§ 62:37 Admissibility of expert evidence
§ 62:38 Evolving admissibility standards for expert testimony
§ 62:43 Current case law on the admissibility of expert testimony—The testimony is reliable: acceptable process or methodology
§ 62:44 Current case law on the admissibility of expert testimony—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

CHAPTER 64. USE OF JURY CONSULTANTS

§ 64:5 Types of consulting services—Witness reaction/preparation
§ 64:6 Types of consulting services—Exhibit development
§ 64:7 Types of consulting services—Community attitude surveys
§ 64:9 Types of consulting services—Jury selection
§ 64:11 Types of consulting services—Trial presentation in the digital age
§ 64:13 Types of consulting services—Computer software
§ 64:17 Objectives—Using a jury consultant to assist in jury selection
§ 64:22 Concerns
§ 64:27 Concerns—The cost of jury consulting services
§ 64:31 Effective partnering strategies—Getting the corporate client to “buy in”
§ 64:34 Discoverability of the jury consultant’s work
§ 64:42 Listing of selected jury consulting firms

Volume 5

CHAPTER 65. SETTLEMENT

§ 65:3 Understanding the client’s case objective and litigation philosophy—Take a result-oriented approach [Retitled]
§ 65:4 Understanding the client’s case objective and litigation philosophy—Examples of litigation philosophies affecting settlement
§ 65:6 Understanding the client’s case objective and litigation philosophy—Where does settlement fit in?
§ 65:7 Common concerns of inside counsel regarding settlements
§ 65:10 Timing of the settlement
§ 65:16 Timing of the settlement—During litigation—Before beginning discovery
§ 65:17 Timing of the settlement—During litigation—During discovery
§ 65:18 Timing of the settlement—During litigation—On the courthouse steps
§ 65:19 Timing of the settlement—During litigation—Before the appeal
§ 65:23 Partnering strategies in settlement—Outside counsel’s authority
§ 65:25 The duty to advise the client of settlement negotiations
§ 65:28 The role of the board of directors and shareholders in settlement
§ 65:29 Preparing for settlement
§ 65:30 Preparing for settlement—Investigations
§ 65:32 Preparing for settlement—Early neutral evaluation
§ 65:33 Preparing for settlement—Focus groups and mock juries
§ 65:37 Achieving the settlement—Negotiations among the lawyers
### Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 65:39</td>
<td>Achieving the settlement—Negotiations among the lawyers—Negotiating techniques</td>
</tr>
<tr>
<td>§ 65:40</td>
<td>Achieving the settlement—Negotiations among the parties</td>
</tr>
<tr>
<td>§ 65:41</td>
<td>Achieving the settlement—Offers of judgment</td>
</tr>
<tr>
<td>§ 65:43</td>
<td>Alternatives to cash settlements—Special problems in business litigation</td>
</tr>
<tr>
<td>§ 65:44</td>
<td>Alternatives to cash settlements—Special opportunities in business litigation</td>
</tr>
<tr>
<td>§ 65:45</td>
<td>The settlement agreement</td>
</tr>
<tr>
<td>§ 65:49</td>
<td>The settlement agreement—Terms—Conditions, consideration and dismissal</td>
</tr>
<tr>
<td>§ 65:50</td>
<td>The settlement agreement—Terms—Release and other covenants limiting further litigation among the parties</td>
</tr>
<tr>
<td>§ 65:51</td>
<td>The settlement agreement—Terms—Common terms</td>
</tr>
<tr>
<td>§ 65:52</td>
<td>The settlement agreement—Terms—Problem of continuing relations between the settling parties</td>
</tr>
<tr>
<td>§ 65:53</td>
<td>The settlement agreement—Dealing with non-settling persons</td>
</tr>
<tr>
<td>§ 65:54</td>
<td>The settlement agreement—Maintaining confidentiality</td>
</tr>
<tr>
<td>§ 65:55</td>
<td>Obtaining judicial approval of the settlement</td>
</tr>
<tr>
<td>§ 65:56</td>
<td>Enforcing the settlement</td>
</tr>
<tr>
<td>§ 65:57</td>
<td>Enforcing the settlement—Continuing jurisdiction</td>
</tr>
<tr>
<td>§ 65:58</td>
<td>Enforcing the settlement—Settlements dependent on subsequent events</td>
</tr>
<tr>
<td>§ 65:59</td>
<td>Attacking the settlement</td>
</tr>
<tr>
<td>§ 65:60</td>
<td>Showing required to set aside settlement agreement</td>
</tr>
<tr>
<td>§ 65:61</td>
<td>Defending against a challenge to the settlement</td>
</tr>
</tbody>
</table>

### CHAPTER 66. APPEALS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 66:2</td>
<td>Overview of appellate process</td>
</tr>
<tr>
<td>§ 66:3</td>
<td>Turning appeals into litigation opportunities</td>
</tr>
<tr>
<td>§ 66:8</td>
<td>Special role of inside counsel—Good appeals start with attention in the trial court</td>
</tr>
<tr>
<td>§ 66:13</td>
<td>Special role of inside counsel—Appeal and supersedeas bonds</td>
</tr>
<tr>
<td>§ 66:16</td>
<td>Special role of inside counsel—Handle an opponent’s appeal the same as your own</td>
</tr>
<tr>
<td>§ 66:17</td>
<td>What can and cannot be accomplished on appeal</td>
</tr>
<tr>
<td>§ 66:19</td>
<td>What can and cannot be accomplished on appeal—Think carefully about what to appeal</td>
</tr>
<tr>
<td>§ 66:20</td>
<td>What can and cannot be accomplished on appeal—Need to raise issues in trial court</td>
</tr>
<tr>
<td>§ 66:22</td>
<td>Certification of questions of law</td>
</tr>
<tr>
<td>§ 66:27.50</td>
<td>Oral argument—Observation of arguments [New]</td>
</tr>
<tr>
<td>§ 66:29.50</td>
<td>Settlement in the appellate process—Vacatur of prior decisions [New]</td>
</tr>
</tbody>
</table>
§ 66:35 Decision and subsequent proceedings—Discretionary appeal

CHAPTER 67. HIGH PROFILE LITIGATION
§ 67:1 Scope note
§ 67:2 Objectives, concerns, preliminary considerations
§ 67:3 Principal risks
§ 67:4 Principal risks—Controlling the flow of information
§ 67:7 Principal risks—The devil is in the details
§ 67:9 Choosing outside counsel
§ 67:10 Lines of communication
§ 67:11 Cost control
§ 67:12 Legal issues arising from high publicity
§ 67:14 Form: sample policy on statements to the press
§ 67:15 Form: sample press release

CHAPTER 67A. REGULATORY LITIGATION
§ 67A:1 Scope note
§ 67A:2 Objectives
§ 67A:3 Concerns and principal risks
§ 67A:4 Key distinctions between regulatory litigation and private litigation
§ 67A:5 Pre-litigation best practices
§ 67A:6 Preliminary considerations: questions to raise
§ 67A:7 Building the right team
§ 67A:9 Partnering to build (and implement) an effective defense strategy—Know the rules of the forum
§ 67A:11 Partnering to build (and implement) an effective defense strategy—Use of FOIA [Retitled]
§ 67A:12 Partnering to build (and implement) an effective defense strategy—Strategies to deal with judicial deference to regulators
§ 67A:13 Communication strategy
§ 67A:14 Cost control
§ 67A:15 Managing ongoing relations with regulators
§ 67A:16 Settlement considerations

CHAPTER 68. PATENTS AND TRADE SECRETS
§ 68:30 Partnering strategies—Following issuance of a patent
§ 68:32 Profiting from the resulting patent portfolio
§ 68:38 Overview of patent law—Criteria for patentability
§ 68:40 Overview of patent law—Patent infringement

lxiv
§ 68:42 Attorney/client privilege in the patent preparation and prosecution arena

CHAPTER 70. COPYRIGHT

§ 70:1 Scope note
§ 70:2 Effective partnering strategies
§ 70:3 Effective partnering strategies—Selection of outside counsel
§ 70:5 Effective partnering strategies—When to delegate to outside counsel—Portfolio management
§ 70:9 Portfolio management—Copyright Act of 1976
§ 70:11 Portfolio management—Subject matter of copyright—Originality and scope of protection
§ 70:12 Portfolio management—Subject matter of copyright—Unprotectable subject matter
§ 70:14 Portfolio management—Copyright ownership
§ 70:16 Portfolio management—Copyright ownership—Works-made-for-hire
§ 70:20 Portfolio management—Copyright registration—Federal registration process
§ 70:24 Portfolio management—Special cases—Computer programs and video games [Retitled]
§ 70:25 Portfolio management—Special cases—“Hot properties”
§ 70:26 Portfolio management—Special cases—Architectural works
§ 70:27 Portfolio management—Special cases—Fashion
§ 70:29 Portfolio management—Special cases—Font and typeface [Retitled]
§ 70:29.50 Portfolio management—Moral rights [New]
§ 70:35 Clearance and licensing—Transfers and licensing of rights
§ 70:36 Clearance and licensing—Termination of a license or transfer
§ 70:42 Clearance and licensing—Pre-1972 sound recordings
§ 70:43 Clearance and licensing—Moral rights [Deleted]
§ 70:45 Enforcement—The exclusive rights of a copyright holder
§ 70:46 Enforcement—Additional rights
§ 70:49 Enforcement—Options for copyright holders—DMCA take down notice
§ 70:51 Enforcement—Options for copyright holders—Preliminary injunction
§ 70:53 Enforcement—Options for copyright holders—Forfeitures and seizure
§ 70:54 Enforcement—Options for copyright holders—Criminal prosecution

TABLE OF CONTENTS

lxv
§ 70:55 Enforcement—Options for copyright holders—Piracy/counterfeiting
§ 70:56 Enforcement—Plaintiff’s preliminary considerations
§ 70:58 Enforcement—Plaintiff’s preliminary considerations—Assessing jurisdiction and venue options
§ 70:61 Enforcement—Elements of proof in the plaintiff’s case—Copying of protectable elements of expression
§ 70:74 Defending against a claim—Defenses—*De minimis* use
§ 70:75 Defending against a claim—Defenses—Copyright misuse
§ 70:81 Defending against a claim—Defenses—Fair use
§ 70:85 Remedies—Damages
§ 70:86 Remedies—Attorneys’ fees
§ 70:87 Remedies—Seizure
§ 70:89 Comparative legal issues—Trademarks
§ 70:91 Comparative legal issues—Design patents
§ 70:92 Comparative legal issues—Trade secrets
§ 70:93 Comparative legal issues—When is a breach-of-contract a copyright issue?

CHAPTER 71. EMPLOYMENT LAW
§ 71:3 Traps/pitfalls in hiring
§ 71:19 Advice for limiting exposure to employment claims—Arbitration

CHAPTER 71A. CORPORATE/BUSINESS IMMIGRATION

IV. PRINCIPAL IMMIGRATION LAW ISSUES FOR CORPORATE COUNSEL
§ 71A:21 Temporary work visa categories—H-2B visas for skilled/unskilled seasonal/peak-load workers
§ 71A:23 Employment-based permanent visa ("green card") processes—Steps

CHAPTER 71B. LABOR LAW
§ 71B:11 Union elections—Implementation of the campaign strategy
CHAPTER 71C. LABOR AND EMPLOYMENT LAW ISSUES WHEN DOING BUSINESS OUTSIDE THE UNITED STATES

III. MAJOR ISSUES FACING MULTINATIONALS IN GLOBAL EMPLOYMENT LAW

§ 71C:22 Termination of employees—Procedural protections against dismissal—Internal hearing processes
§ 71C:31 Termination of employees—Employment contracts
§ 71C:32 Termination of employees—Discrimination law
§ 71C:33 Termination of employees—Reconciling the global termination context with compliance imperatives in a global enterprise
§ 71C:42 Works councils—Legal framework—National law
§ 71C:43 Works councils—Legal framework—Issues in works council relationships
§ 71C:45 Collective dismissals—European Directive 98/59/EC
§ 71C:47 Collective dismissals—Typical issues
§ 71C:48 Transfer of undertaking
§ 71C:50 Confidentiality agreements and post-employment restrictive covenants—Confidentiality agreements
§ 71C:52 Confidentiality agreements and post-employment restrictive covenants—Restrictive covenants—Non-compete clauses
§ 71C:55 Global mobility issues—The secondment or ex-pat arrangement

CHAPTER 72. ENVIRONMENTAL LAW

§ 72:2 Environmental laws and their impacts on corporate decision making
§ 72:3 The roles of environmental legal counsel
§ 72:5 Key issues for environmental counsel—Governmental enforcement
§ 72:6 Key issues for environmental counsel—Standard of liability
§ 72:7 Key issues for environmental counsel—Regulatory issues
§ 72:8 Key issues for environmental counsel—Corporate transactions
§ 72:10 Effective partnering strategies in environmental administrative actions and litigation—Civil enforcement actions
§ 72:12 Effective partnering strategies in environmental administrative actions and litigation—CERCLA actions
§ 72:13 Effective partnering strategies in environmental administrative actions and litigation—Typical environmental litigation

§ 72:14 Effective partnering strategies in environmental administrative actions and litigation—Implementation of partnering strategy in a private suit

§ 72:15 Partnering on environmental issues arising in corporate transactions

§ 72:16 Partnering on environmental issues arising in corporate transactions—Purchaser's perspective in corporate asset purchases

§ 72:21 Partnering on environmental issues arising in corporate transactions—Contract drafting

§ 72:25 Partnering on environmental counseling issues—Environmental compliance programs

§ 72:29 Federal and state environmental regulatory laws—Clean Air Act

§ 72:30 Federal and state environmental regulatory laws—Clean Water Act

§ 72:32 Federal and state environmental regulatory laws—Toxic Substances Control Act

§ 72:34 Federal and state environmental regulatory laws—Safe Drinking Water Act

§ 72:36 Federal and state environmental regulatory laws—Endangered Species Act

§ 72:37 Federal and state environmental regulatory laws—National Environmental Policy Act

§ 72:41 Federal and state remediation statutes—Liability under the Comprehensive Environmental Response, Compensation, and Liability Act

§ 72:42 Federal and state remediation statutes—Resource Conservation and Recovery Act

§ 72:45 Common law liabilities for injuries to persons or property

§ 72:51 Forms—State property transfer laws

CHAPTER 72A. CLIMATE CHANGE

§ 72A:2 Objectives, concerns, preliminary considerations

§ 72A:3 Objectives, concerns, preliminary considerations—Climate change policy development

§ 72A:4 Objectives, concerns, preliminary considerations—Greenhouse gases believed to contribute to climate change

§ 72A:6 Objectives, concerns, preliminary considerations—Executive, legislative and judicial actions

§ 72A:7 Objectives, concerns, preliminary considerations—New legislation and regulations

§ 72A:8 Objectives, concerns, preliminary considerations—Governmental decision-making process
TABLE OF CONTENTS

§ 72A:9 Objectives, concerns, preliminary considerations—
  Governmental decision-making process—The role of
  EPA
§ 72A:10 Objectives, concerns, preliminary considerations—
  Governmental decision-making process—Interaction
  between White House and Congress
§ 72A:14 Principal legal issues
§ 72A:16 Principal legal issues—Tailpipe standards
§ 72A:20 Principal legal issues—Project siting and NEPA

CHAPTER 73. MASS TORTS
§ 73:3 The development of mass tort litigation—The rise of the
  mass tort plaintiffs' bar
§ 73:4 The development of mass tort litigation—The
  coordination of the mass tort plaintiffs' bar
§ 73:5 The development of mass tort litigation—The political
  influence of the mass torts plaintiffs' bar
§ 73:6 The development of mass tort litigation—Changes in
  community tolerance of risk
§ 73:7 The development of mass tort litigation—The rise of
  epidemiology
§ 73:11 The forms of mass tort litigation—Class actions
§ 73:12 The forms of mass tort litigation—Consolidated trials
§ 73:13 The forms of mass tort litigation—Multidistrict litigation
§ 73:14 The forms of mass tort litigation—Coordinated state
  attorney general litigation
§ 73:16 Objectives and options for corporations dealing with mass
  tort litigation
§ 73:17 Objectives and options for corporations dealing with mass
  tort litigation—Removal to federal court
§ 73:18 Objectives and options for corporations dealing with mass
  tort litigation—Identifying and trying test cases
§ 73:20 Objectives and options for corporations dealing with mass
  tort litigation—Promoting industry cooperation
§ 73:21 Objectives and options for corporations dealing with mass
  tort litigation—Resisting the aggregation of liability
§ 73:22 Objectives and options for corporations dealing with mass
  tort litigation—Resisting the aggregation of liability—
  Class actions
§ 73:23 Objectives and options for corporations dealing with mass
  tort litigation—Resisting the aggregation of liability—
  Multidistrict litigation
§ 73:24 Objectives and options for corporations dealing with mass
  tort litigation—Resisting the aggregation of liability—
  Consolidated actions
§ 73:25 Medical monitoring and consumer fraud actions
§ 73:26 Settlement classes
§ 73:27 Forum shopping

lxix
SUCCESSFUL PARTNERING

§ 73:28 Selecting outside counsel
§ 73:32 Investor and public relations
§ 73:34 Liability prevention—Drafting warnings
§ 73:35 Liability prevention—Corporate governance issues and corporate separateness
§ 73:37 The use of technology

CHAPTER 74. REAL ESTATE LAW

§ 74:7 Objectives, concerns, and preliminary considerations—Roles of parties in various transactions
§ 74:8 Objectives, concerns, and preliminary considerations—Malpractice and unauthorized practice of law
§ 74:13 Partnering of in-house and outside counsel—Engagement of outside counsel and fee arrangements
§ 74:15 Partnering of in-house and outside counsel—The use of technology
§ 74:20 Acquisitions and sales of real estate—Deeds
§ 74:22 Acquisitions and sales of real estate—Real estate, conveyance, or transfer and other taxes and special assessments
§ 74:24 Acquisitions and sales of real estate—Construction and mechanic's liens
§ 74:25 Acquisitions and sales of real estate—Title insurance
§ 74:26 Acquisitions and sales of real estate—Judgment and tax liens
§ 74:27 Acquisitions and sales of real estate—Recordation
§ 74:30 Leases, licenses, and use and occupancy agreements—Amendments
§ 74:32 Leases, licenses, and use and occupancy agreements—Lease defaults; evictions
§ 74:33 Leases, licenses, and use and occupancy agreements—Rent laws
§ 74:34 Leases, licenses, and use and occupancy agreements—Recording of leases
§ 74:35 Leases, licenses, and use and occupancy agreements—Leasehold title insurance
§ 74:36 Leases, licenses, and use and occupancy agreements—Utility deregulation
§ 74:37 Leases, licenses, and use and occupancy agreements—Condemnation, casualty, and insurance
§ 74:39 Lending and financing
§ 74:40 Lending and financing—Role of the parties; importance of local counsel
§ 74:42 Lending and financing—Commercial mortgage backed securities
§ 74:44 Foreclosures
§ 74:45 Brokers
§ 74:48 Ownership entities
TABLE OF CONTENTS

§ 74:49 Alternative dispute resolution methods
§ 74:53 Form: Practice checklist
§ 74:54 Form: sample acquisition checklist
§ 74:56 Form: lending and financial checklist (including construction loans)

CHAPTER 74A. SPORTS
§ 74A:1 Scope note
§ 74A:5 Understanding the professional sports landscape—Monitoring trends in the sports industry generally
§ 74A:16 League-wide issues—Significant league rules and regulations
§ 74A:20 Significant agreements—Stadium financing agreements
§ 74A:32 Template revenue producing agreements—Advertising/sponsorship agreements
§ 74A:35 Template revenue producing agreements—Personal seat licenses
§ 74A:53 Labor issues
§ 74A:60 Litigation
§ 74A:71.50 eSports [New]
§ 74A:75 Form—Sponsorship agreement [New]

CHAPTER 75. CASE STUDY #1 DUPONT’S LEGAL MODEL FOR STRATEGIC PARTNERING
§ 75:6 The solution: a new model—Convergence
§ 75:7 The solution: a new model—Accomplishments and results
§ 75:8 The solution: a new model—The process of being a partner
§ 75:11 The solution: a new model—What’s in it for the outside professional?
§ 75:27 DuPont’s commitment to diversity—DuPont Legal Street Law Diversity Pipeline Project
§ 75:32 Strategic budgeting and forecasting
§ 75:33 Strategic budgeting and forecasting—Operational budget
§ 75:35 Strategic budgeting and forecasting—Rate increase requests
§ 75:37 Metrics
§ 75:39 Metrics—Creative economic incentives
§ 75:41 [Reserved]
§ 75:44 [Reserved]
§ 75:45 [Reserved]
§ 75:46 The Recovery Initiative
§ 75:50 E-discovery, outsourcing, offshoring
Volume 6

CHAPTER 76. COMMERCIAL EQUIPMENT LEASING
§ 76:11 Lease characterization
§ 76:14 Legal framework—Article 9
§ 76:15 Legal framework—True personal property leases in bankruptcy proceedings
§ 76:22 Lease types—Special leases—TRAC leases
§ 76:24 Lease types—Special leases—Leveraged leases
§ 76:25 Lease types—Special leases—Sale leasebacks
§ 76:32 Initiating a lease transaction—Requests for proposals
§ 76:44 Negotiating lease documentation—Choice of law
§ 76:56 Lease documentation—Delivery considerations and transfer of risk
§ 76:59 Lease documentation—No offsets (“hell-or-high-water” clause)
§ 76:69 Lease documentation—Default and remedies
§ 76:70 Lease documentation—Renewal and purchase options
§ 76:72 Lease documentation—Returns and holdover rent
§ 76:90 Administering the lease—Exercise of purchase and renewal options

CHAPTER 77. PRODUCTS LIABILITY
§ 77:3 Claim avoidance
§ 77:8 First steps for inside counsel in defending a claim—Implement a document hold
§ 77:12 Devising defensive tactics—Identify and seek transfer to a preferred forum, to the extent possible
§ 77:20 General principles of products liability law
§ 77:21 General principles of products liability law—Negligence
§ 77:24 General principles of products liability law—Breach of warranty
§ 77:25 General principles of products liability law—Strict liability
§ 77:26 General principles of products liability law—Strict liability—“Consumer expectations” test for defect
§ 77:27 General principles of products liability law—Strict liability—“Risk-utility” test for defect
§ 77:32 General principles of products liability law—State products liability statutes
§ 77:34 Plaintiff’s burden of proving causation—Importance of expert evidence in establishing causation
§ 77:36 Damages—Compensatory damages
§ 77:37 Damages—Punitive damages
§ 77:38 Who may be liable on a products liability claim
§ 77:42 Common defenses to a products liability claim—Federal regulatory law and the preemption defense
§ 77:44 Methods by which plaintiffs seek to aggregate litigation—Class actions
§ 77:45 Methods by which plaintiffs seek to aggregate litigation—Multidistrict litigation
§ 77:46 Criminal liability for defective products

CHAPTER 77A. FOOD & DRUG ADMINISTRATION REGULATED INSTITUTIONS: DRUG AND MEDICAL DEVICE COMPANIES
§ 77A:21 Fraud and abuse risks
§ 77A:22 Fraud and abuse risks—Compliance plans
§ 77A:26 Fraud and abuse risks—The Park Doctrine
§ 77A:27 Relevant case law and statutes—The False Claims Act
§ 77A:28 Relevant case law and statutes—The Federal Anti-Kickback Statute
§ 77A:29 Relevant case law and statutes—The Foreign Corrupt Practices Act
§ 77A:33 FDA regulations—Relevant case law and statutes—Labeling and promotion
§ 77A:34.50 Recalls [New]

CHAPTER 77B. CONSUMER PRODUCTS
§ 77B:34 Rulemaking process—The final rule stage
§ 77B:66 Administrative lawsuits
§ 77B:76 Penalties and enforcement—Civil penalties
§ 77B:77 Penalties and enforcement—Expansion to include compliance system improvements

CHAPTER 77C. TELECOMMUNICATIONS
§ 77C:3 Objectives, concerns and preliminary considerations—Understanding the landscape: evolution of the industry
§ 77C:4 Objectives, concerns and preliminary considerations—Characteristic challenges faced by in-house counsel
§ 77C:6 Objectives, concerns and preliminary considerations—Contracting for telecommunications services
CHAPTER 78. PROFESSIONAL LIABILITY

II. OBJECTIVES, CONCERNS AND PRELIMINARY CONSIDERATIONS
§ 78:24 Preliminary considerations—Preventing impact to ongoing transactions or litigation

III. EFFECTIVE PARTNERING
§ 78:30 Effective partnering—Consideration of issues involving privilege and inside counsel

IV. KEY CASE LAW AND STATUTORY FRAMEWORK
§ 78:52 Elements of malpractice claims—Duty
§ 78:54 Elements of malpractice claims—Causation
§ 78:56 Elements of malpractice claims—Affirmative defenses to malpractice actions

CHAPTER 79. ANTITRUST AND COMPETITION

§ 79:6 Preliminary considerations—Identifying situations that call for non-US antitrust counsel
§ 79:10 Effective partnering strategies—Transactional investigations—Managing antitrust risk prior to signing
§ 79:15 Effective partnering strategies—Transactional investigations—Second request investigations
§ 79:43 Relationships with competitors—Price fixing

CHAPTER 79A. INTERNATIONAL TRADE

II. PRELIMINARY CONSIDERATIONS
§ 79A:5 Data requirements and the need for management commitment

III. ANTIDUMPING DUTY CASES
§ 79A:9 Calculation of antidumping duties
§ 79A:12 The Commerce Department investigation—Preliminary determination
§ 79A:19 The U.S. International Trade Commission’s injury
determination—ITC process

IV. COUNTERVAILING DUTY CASES
§ 79A:21 Subsidization
§ 79A:22 Procedures

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

VI. ESCAPE CLAUSE CASES
§ 79A:28 Section 201 of the Trade Act of 1974
§ 79A:33 [Deleted]
§ 79A:34 [Deleted]
§ 79A:35 [Deleted]
§ 79A:36 [Deleted]
§ 79A:37 [Deleted]

VII. EVASION OF ANTIDUMPING AND COUNTERVAILING DUTIES [New]
§ 79A:39 TFTEA [New]
§ 79A:40 TFTEA—Definition of evasion [New]
§ 79A:41 TFTEA—Initiating an investigation [New]
§ 79A:42 TFTEA—Determinations of evasion [New]
§ 79A:43 TFTEA—Effect of determination of evasion [New]
§ 79A:44 TFTEA—Review of determinations [New]
§ 79A:45 TFTEA—Considerations [New]

VIII. NATIONAL SECURITY CASES [New]
§ 79A:50 Section 232 of the Trade Expansion Act of 1962—Considerations [New]

IX. PRACTICE AIDS
§ 79A:54 List of useful internet addresses
CHAPTER 81. ELECTRONIC DISCOVERY
§ 81:2 What is electronic discovery?
§ 81:3 Process for effective electronic discovery
§ 81:4 Process for effective electronic discovery—Step 1: identification of relevant ESI
§ 81:5 Process for effective electronic discovery—Step 2: implementation of a legal hold
§ 81:6 Process for effective electronic discovery—Step 3: retrieval, review, and production of ESI subject to discovery
§ 81:7 Process for effective electronic discovery—Step 4: the special problem of backup tapes
§ 81:8 Process for effective electronic discovery—Step 5: defense of electronic discovery process
§ 81:10 Interaction between in-house and outside counsel—Role of in-house counsel
§ 81:11 Interaction between in-house and outside counsel—Role of outside counsel
§ 81:12 A note about records management

CHAPTER 82. PRIVACY AND SECURITY

I. INTRODUCTION AND OVERVIEW
§ 82:5 Objectives, concerns, and preliminary considerations—Managing the expanding scope of privacy and security obligations

II. GOVERNING PRIVACY AND SECURITY
§ 82:9 Partnering to establish privacy and security—Implementing effective privacy and security procedures
§ 82:11 Partnering to establish privacy and security—Privacy impact assessments

III. SECURING INFORMATION
§ 82:27 Data security incident response—Responding to incidents—Evaluate notice requirements

IV. CYBERSECURITY
§ 82:38 Cybersecurity—Investor disclosure obligations

V. INTERNATIONAL PRIVACY AND SECURITY ISSUES
§ 82:41 Challenges presented by international privacy laws
§ 82:42 EU data protection standards
TABLE OF CONTENTS

§ 82:43 EU data protection standards—European structures for data privacy
§ 82:49 EU data protection standards—Choosing international transfer compliance options—Model clauses

VI. PROTECTING PRIVACY
§ 82:62 Unfair and deceptive business practices
§ 82:71 Marketing—Phone and fax marketing
§ 82:73.50 California Consumer Privacy Act of 2018 [New]
§ 82:75 Maintaining privacy and security during litigation—Addressing third-party information requests

VII. PRACTICE AIDS
§ 82:79 Form: Litigation data protection notice for employees

CHAPTER 85. CRISIS MANAGEMENT
§ 85:2 Objectives, concerns, preliminary considerations
§ 85:8 Assembling the crisis team—Outside counsel
§ 85:12 Developing a plan—Determining the kind of the investigation to conduct
§ 85:13 Developing a plan—Crafting a public relations strategy
§ 85:15 Developing a plan—Opening the lines of communication with regulators and investigative agencies
§ 85:18 Executing the plan—Internal reporting
§ 85:20 Executing the plan—Responding to regulator and investigative agency requests—Initial steps
§ 85:22 Executing the plan—Responding to regulator and investigative agency requests—Requests for testimony
§ 85:23 Executing the plan—Responding to requests from Congress
§ 85:24 Executing the plan—Whistleblower issues
§ 85:27 Crisis resolution—Self-reporting—Should a company self-report?
§ 85:29 Crisis resolution—Negotiations with regulators and investigative agencies
§ 85:31 Crisis resolution—Settlement options for regulators and investigative agencies—Tools
§ 85:32 Crisis resolution—Settlement options for regulators and investigative agencies—Agendas
§ 85:33 Crisis resolution—Settlement options for regulators and investigative agencies—Collateral consequences
§ 85:36 Crisis resolution—Internal responses to the crisis

Table of Cases
Index