



FRIDAY, MAY 5 11:15 a.m. – 12:15 p.m.

**INSIDE/OUTSIDE - EFFECTIVE PARTNERING AMONG
COUNSEL IN REAL ESTATE TRANSACTIONS**

PROGRAM CHAIR AND MODERATOR:

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Legal Fees and Controlling Costs

Charles B. Higgins, CIGNA Corporation
ABA Section of Real Property, Probate and Trust Law
17th Annual Symposia, May 5, 2006

A. Impact:

- i. Outside counsel should establish credibility and sensitivity to billing issues.
- ii. Outside counsel should recognize the need for balancing costs with the gravity of likely risks.
- iii. In-house counsel should rely on professional judgment of outside counsel and not nitpick.
- iv. Approach to billing and impact on relationship must be considered from start to finish.
- v. Billing issues have the potential to sour an otherwise good relationship if not appropriately handled.
 1. Contrast, for example, an outside counsel who recognizes its bill will be controversial and proactively offers to cut it, if necessary, with an outside counsel who is asked to make a modest cut for the good of the transaction and who argues the point.
 2. Outside counsel should handle the relationship as if it is more than a unilateral advantage on any given transaction.
 3. In-house counsel should be alert to rewarding cooperative outside counsel.

B. At the Outset- the Estimate:

- i. Outside counsel should recognize the need for a credible, realistic estimate:
 1. Essential in non-routine transactions and other representation.
 2. Care required regardless of who is paying the bill.
 3. Method of billing should be discussed (see Section D below).
- ii. Estimate should detail assumptions about known issues and what appears to be unknown:
 1. In-house counsel should provide as much salient information as possible that may be appropriate for consideration in the estimate, including the identity of all

- parties to the transactions and their representatives (including counsel), the scope of work, timing and deadlines, and any known substantive issues.
2. In-house counsel should consider providing a breakdown of the services anticipated to be performed by outside counsel (or asking outside counsel to provide such a breakdown) and having outside counsel estimate each service separately rather than just the ultimate bottom line.
 3. Difficulty in predicting should not prevent outside counsel from providing a well thought out estimate based on professional judgment:
 - a. Thoughtfulness of estimate will enhance credibility.
 - b. Assumptions should be disclosed (e.g. that estimate is based on x number of drafts of major transaction documents).
 4. Impact of issues that it is not clear will arise but which have a reasonable possibility of arising should be identified (for example, in a leasehold mortgage transaction extensive negotiations may or may not be needed with the ground lessor depending on whether appropriate leasehold mortgage protections are included in the ground lease).
 5. Low estimates to obtain retention will undermine a long-term relationship.
 6. Credibility is essential.
- iii. In-house counsel should recognize (and should assure that in-house counsel's business counterpart recognizes) the difficulty of predicting legal fees in the face of multiple unknowns and should recognize an estimate as just that - an estimate.

C. During the Representation - Impact on Billing:

- i. Discuss allocation between in-house counsel and outside counsel where appropriate:
 1. Discuss efficiency in allocation (e.g. SNDA's in loan transactions may be more efficiently done by in-house counsel, but the allocation may need to vary transaction by transaction based on in-house capacity).
 2. Avoid duplication regarding any work retained in-house.
- ii. Need for delegation to appropriate level:
 1. A lead attorney who fails to delegate to assure work quality in order to preserve the lead attorney's relationship with the client may have the opposite effect.

2. Efficiency requires delegation to lawyers with appropriate levels of expertise, including subject matter experts, associates (junior and senior) and paralegals.
 3. Lead attorney should be up to speed on issues, but not necessarily mired in the detail.
 4. Choice of professional for communicating individual issues should be based on both the relationship and efficiency.
- iii. While delegation is important, clients do not want to pay for learning curve:
1. Bills should be edited before presentation to deduct for extra time for learning the ropes (e.g. unneeded research, spinning wheels, etc.).
 2. In-house counsel should recognize that young associates may not be as quick to accomplish tasks, but overall bill should reflect a savings from delegation.
- iv. Clients do not want to pay for over-lawyering:
1. Establishing a balance between risks and costs is essential.
 2. Lead attorney should manage time spent on all services.
 3. Doubts should be resolved by discussion with in-house counsel of risks and rewards.
- v. Outside counsel should monitor the bill frequently throughout the transaction or engagement, which will allow outside counsel to:
1. Effectively manage the cost of delivering the required services.
 2. Notify in-house counsel promptly when outside counsel comes to believe that the bill will differ materially from the estimate:
 - a. Surprise issues likely to have a material impact on the bill should be discussed prior to work being done where possible, and alternate approaches discussed - for example, there may be numerous approaches to a surprise zoning issue depending on the nature of the issue.
 - b. Issues taking longer than expected should be communicated as they occur rather than at the time of billing with appropriate level of detail given the impact - if title turns out to be unexpectedly complex, for example, or the intercreditor agreement raises unanticipated issues, in-house counsel should not learn of the added cost just prior to closing.

- c. Rightly or wrongly in-house counsel will assume that no news is good news (or at least not bad news).

D. Billing Methods:

i. Traditional Hourly Billing:

1. Most common.
2. Advantages- simplicity and objectivity.
3. Disadvantages- inherent conflict; discourages efficiency; may not reflect quality; and may not reflect actual value of particular services.

ii. Alternate Billing Methods:

1. Fixed Fees/Firm Estimates:

- a. Holds outside counsel to pre-determined fee
- b. May be appropriate where many similar transactions involved

2. Contingency Fees

3. Rate Caps

4. Volume discounts

5. Retainer Arrangements:

- a. Theory that law firms should share responsibility for budgeting and cost over-runs.
- b. Aligns interests between clients and outside counsel.

6. Combinations.

E. Presenting the Bill:

- i. Billing should be at a frequency agreed upon using method agreed upon.
- ii. Outside counsel should assess potential impact of bill on relationship before providing:
 1. Costs resulting from mistakes should be written off before presenting a bill.
 2. Assess if bill reflects management of issues identified in Section C above – outside counsel should consider reducing the fee below the result of strict application of quoted hourly rates or the quoted bill if in retrospect the bill is higher than it should be because of such items as inefficient staffing, excess time spent by subordinates,

- failure to delegate appropriately, or if the bill is high in proportion to the type of transaction.
- 3. Assess if cost is disproportionate to value received.
- 4. Consider impact of bill on outside counsel's credibility.
- iii. Bill should provide sufficient information for client to assess it and identify:
 - 1. Professional performing each service.
 - 2. Time devoted to each service.
 - 3. Billing rate of all applicable professionals.
 - 4. Cost for each service.
 - 5. All information should be on a daily basis.
- iv. Outside counsel should provide a comparison to estimate or expectation:
 - 1. Variances should be explained.
 - 2. Unexplained variances should be written off.

Communication and Use of Technology

Janis Cohen, UnumProvident Corporation
ABA Section of Real Property, Probate and Trust Law
17th Annual Symposia, May 5, 2006

I. In-house and outside counsel need to communicate effectively with each other.

A. What do I mean by “communicate?”

1. Generally, communication is the act of transmitting information and exchanging information and thoughts using spoken or written words; a give and take of facts, ideas, and analysis.
2. Communication is self-expression that is readily understood. This speaks to clarity. But more than clarity is involved, which I hope we will get to during this panel presentation.

B. What is “effective” communication in this context?

1. Clear, frank, honest two-way dialogue as a transaction progresses to address the factual and legal issues at hand, as well as the relationship.
2. Dialogue that is both about substantive issues and the process of the relationship between or among the attorneys and all others involved in the closing.
3. The interpersonal rapport or even the relationship between the attorneys ideally facilitates and enhances what is communicated, how it’s communicated, how frequently, and how effectively.
4. The communication must be on-going throughout the life of both the transaction and the relationship.
5. Responsiveness is crucial.
6. Remember the Golden Rule.
7. Don’t forget about the value, proper use and effectiveness of humor.

C. Effective communication is more than the act of transmitting information in a useful, helpful, efficient way. Communication is important between in-house and outside counsel for several reasons:

1. It’s a relationship, and ideally one that is on-going for multiple transactions. It may be a regional representation, or one tied to work on a particular property

- type. As such, the relationship operates on at least two tracks, the microcosmic or the transaction at hand, and the macrocosmic or the larger picture of the on-going relationship.
2. It's a partnership in which in-house and outside counsel must work together to achieve the goal of successfully closing a transaction.
 3. The attorneys in the relationship typically have different, sometimes even partially overlapping roles. This can get confusing: talk about it.
 4. It is critical to talk regularly about:
 - a. Who is doing what and what needs to be done to get the deal done efficiently and timely;
 - b. The issues, factual and substantive, that arise during a transaction;
 - c. How you are working together and what, if anything, you need to do to work together more effectively and/or efficiently;
 - d. Once the transaction is completed, discuss how to improve the working relationship to do it better the next time; and
 - e. Discuss particular challenges in the relationship—easier said than done.
 5. It is best to address conflicts when they first become apparent.
 6. Trust and respect are basic qualities of all positive relationships, especially among in-house and outside counsel. Their strong presence can facilitate more difficult discussions.
 7. A good and successful partnering relationship is likely to result in a successful transaction for the client, kudos for the in-house counsel and additional work for the outside counsel and/or his or her firm.
- D. Identify what is important to be communicated, as well as how, when and to whom? (In addition to the items in C. above.)
1. During the first phone call between the in-house and outside counsel, we relate the facts necessary to enable outside counsel to conduct a conflicts check, as well as the basics about the deal, including the closing date, significant deal elements points, and important deadlines.
 2. Once outside counsel confirms there is no conflict, I send via email copies of the Application or Contract, relevant submission materials, our standard documents (they change regularly) and possibly a draft checklist of items needed to close the loan.
 3. In a subsequent call, we discuss the specifics of the particular deal, timing, the process and expectations.

- a. If I'm working with this attorney for the first time, I will spend more time talking about what's involved in working with us on a transaction. (For purposes of this outline, I have assumed that I am working with the outside counsel for the first time.)
- b. I will want to know how outside counsel will staff this transaction.
- c. Items we cover during the initial calls include:
 - The deliverables expected of outside counsel and the timing for delivery;
 - The estimated legal fees, how outside counsel will be paid, and the need to notify me in advance if fees will exceed the estimate;
 - The team and the division of labor—who will be working on the transaction and the roles of each person;
 - General expectations as to responsiveness and communication (whether a preference for telephone calls or email, who needs to be in the loop/who should be copied on what sorts of correspondence, that I like to be copied on everything, etc.);
 - Who has authority and what are the scope and limits of such authority;
 - The business climate and issues that are important to the client or to which the client is sensitive;
 - How decisions will be made and by whom. Issues can be legal or business, or both. Identifying the decision maker and the various negotiating positions we might take is important (For example: In our company the internal business clients make the decisions about what we can and cannot do. Having worked with them for a long time, I can often predict how the clients will respond. But if there is any question, I ask the client. The ultimate decision will not be made by me alone, and clearly not by outside counsel. Having said that, outside counsel can offer invaluable help by sharing their perspectives, advice and suggestions from his or her other experience with other clients who do the same type of work); and
 - Need to avoid duplication and coordinate tasks.
- d. Discuss contacts between outside counsel and in-house team: I am the primary contact for outside counsel, but when can or should outside counsel contact in-house team members directly?
- e. Regarding communication modalities, use the appropriate modality for the issue, whether email, snail mail, memoranda, telephone or fax; and use an appropriate identifying title that reflect the context of the communication.
- f. General rules for working together:
 - Keep each other informed of status, issues, and problems.

- Understand who has authority for what purposes and how decisions will be made.
 - Understand who is the point person, and for what.
 - Understand the distinction between business and legal issues.
 - Discuss any gray areas such as:
 - i. The limits of business authority (rule of reason)
 - ii. Policy v. transactional responsibilities of individuals at client organization
 - iii. Issues of ethics and honesty
 - iv. Client “reputational” issues
 - Don’t call the in-house attorney after hours on a regular basis and think you are really communicating (what is being communicated is what you think of the relationship).
 - When in doubt, ask.
3. We schedule an initial checklist or closing call with all of the parties to the transaction to talk about what is needed to close the transaction, who will do it and by when.
 4. We have regular and as-needed status calls throughout the closing process. This helps keep all parties on track.
 5. We evaluate and discuss post-closing what went right and what could be improved.

E. Communication Challenges (and what I appreciate from outside counsel):

1. Clarity:
 - a. Use clear English; avoid legalese.
 - b. Get to the point.
 - c. Develop a strong ability to communicate effectively with both lawyers and non-lawyers.
2. Be frank and candid, especially about sensitive issues:
 - a. Display sensitivity to time constraints and act with a sense of urgency to meet deadlines.
 - b. Avoid an adversarial relationship.
 - c. Provide feedback as necessary.
3. Maintain regular communication between busy people: In-house and outside counsel must keep each other informed on a timely basis.

4. Responsiveness/promptness/quick turn around: Exhibit an appropriate sense of urgency with respect to both the deal as a whole and certain individual issues.
5. Anticipate issues, disputes and conflicts before they occur: Avoid surprises and develop win-win solutions to conflicts.
6. Develop strategies for amicably and constructively resolving the inevitable issues that arise during transactions.
7. Keep the transaction on track—When either outside counsel or in-house counsel asks the other for deliverables, information or clarification on any point, the response must be quick and clear.

II. Effective and Creative Use of Technology

1. Be sure software used by outside counsel is compatible with that used by in-house counsel and businesspeople, including that used to redline drafts:
 - a. This means use WORD (not WordPerfect), Outlook, etc. (Microsoft products); and
 - b. Use compatible document comparison tools (DeltaView is becoming the standard).
2. Importance of sending and receiving documents in secure .pdf format (Adobe Acrobat is the standard).
3. Importance of the ability to reliably scan and send documents (many printers will now print, scan and email in .pdf format).
4. Importance of consistently naming transmitted documents.
5. Keep in-house counsel informed of developments in technology, especially as to developments that pertain to transactional practice, such as:
 - a. Status of the eMortgage, eNotary, eRecording, etc.;
 - b. Use of Extranets for larger deals;
 - c. Use of “standard” naming conventions for .pdf documents across the client's entire platform; and
 - d. Use document prep applications (HotDocs).
6. Stay ahead of the technology curve. It’s helpful for both in-house and outside counsel to remain accessible through use of a handheld PDA (e.g. Blackberry, Treo, etc.) and through remote access to their office desktop, especially for documents and e-mails.

7. Anticipate and precipitate changes that would lead to better service for clients.
8. Practice in a manner that promotes “repetitive” actions and uses standard form documents so that others can handle the task and also improve the uniformity, consistency and quality of the work product.
9. Be innovative and suggest ideas to help make efficient use of advances in technology.
10. Use technology to facilitate rapid and effective communication. For example, use “action requested” by-lines in communications.

Getting Hired

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ABA Section of Real Property, Probate and Trust Law
17th Annual Symposia
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- I. Identify key factors to the hiring decision (treat the process like preparing for a job interview).
 - A. Who is the client (consider both its business and culture)?
 - You need to know for whom you would be working.
 - The client and its business will shape the expectations for your representation.
 - Just like a new job, both parties need to find a good “fit”.
 1. Are you potentially representing a bank, conduit, life insurance company or private equity or capital firm?
 - The client’s source of capital is one factor that will shape representational needs.
 - Do not make assumptions, however, that a client’s classification necessarily means they will follow an “old school” model about how to approach their business.
 2. What are the client’s primary lines of business?
 - Whole mortgage loans, mezzanine financing, loan participations, conduit lender or issuer, CMBS bond investor, CDO investor or issuer, equity investor, or REIT?
 - Identify your expertise and where there is alignment with the client’s businesses and legal needs.
 - While you might want to “do it all”, clients appreciate more honesty about your expertise rather than being given the “big sale.”
 - It is still helpful, however, to know that a firm has the ability to handle other areas.
 3. What are the regulatory requirements that apply to your prospective client’s source of money?
 - Do you know what regulatory framework governs your prospective client?

- Even if compliance is outside the scope of your representation, the regulatory environment and climate will affect the business and legal decisions your prospective client will make during the course of the representation.
 - You need to show sensitivity to regulatory issues and understand how they shape decision-making.
4. To whom will you report? In-house lawyers or directly to the business group?
 - Identify your “immediate” audience, but understand how parties work together internally inside your client’s organization; you may need to report to more people than you originally thought.
 5. How involved will the client be in the closing process?
 - The client’s desired philosophy of how the transaction is managed will affect the entire relationship. The client may hand the entire matter over to you to work independently with little oversight, or the client may expect to be extremely involved and to approve every piece of the transaction due diligence and documentation.
 6. How does the client distinguish its business from that of its competitors?
 - What the client believes sets it apart from competitors could become your mandate as well. For example, is it responsiveness? If so, the client will expect expert professional advice, but might not desire representation in a traditional model of the “learned” attorney dispensing measured advice. Instead, your expertise may be a necessary ingredient, but you may be expected to show your expertise in a highly responsive manner that addresses a borrower’s concerns in balance with your client’s needs.

B. What are the client’s expectations (i.e. What is the job description?):

1. Scope of work / division of responsibilities between inside, outside and business group?
2. Scope of representation? Local? Regional? National?
 - Define initial scope first.
 - Prove that you can do that job first and deserve the opportunity to take on a bigger role when the client seeks to expand or you see an opportunity to suggest it that fits with the client’s business.
 - Do not insist on a representation that the client does not want. If you are being sought for local representation, unless you would

rather not have the business at all, strong-arm insistence on only providing regional or national representation can only decrease your chances of winning the account.

3. What is the client's expectation on fee structure?
 - Depending on the client, insistence that you will only handle fee arrangements in one manner could cause you to be passed over.
 - As an example, if a client expects alternative billing arrangements, insistence that you only represent clients by billing on an hourly basis will result in someone else winning the account. This does not mean that you need to change your practices, only that your firm and this particular prospective client are not a good fit.
3. What is the businessperson's estimate of a reasonable fee for a given transaction, as opposed to outside counsel's?
 - You may report to in-house counsel, but the business group may have very definite ideas about what constitutes an appropriate fee. There is some tendency for businesspeople to view legal representation on some types of work as a commodity, as much as lawyers would like to think otherwise. For example, on a loan transaction, your lender client's money is just as green as the next company's money. To a borrower, the deal may come down in large part to the predictability of costs. If an appraiser, environmental firm or engineering firm can estimate its fees fairly accurately, even with potential for unknowns, it is hard to understand why lawyers cannot do the same.
4. What is the client's expectation on staffing?
 - Clients often want to see some depth in your department to handle matters. The more depth you are perceived to have, the more capacity to handle multiple matters you may be perceived to have.
 - Notwithstanding depth, clients do not want to train your less experienced staff, nor do they want their opposing side's positions to be taken as being correct. It may be more efficient for you personally to manage your files by pushing the work to others, but make sure the delegation is appropriate and acceptable to the client.
 - Do not sell the traditional big-firm model if you are not clear on the client's expectation. Explore with probing questions. I once had a counsel pitch his ability to deliver cost control by having junior associates prepared to take the lead on the client's transactions. Counsel paid no attention to part of the same conversation describing the client's high degree of satisfaction with the current representation model, whereby partners and

administrative assistants handled matters, without paralegal or associate support.

5. How are conflicts treated?

- Discuss any potential conflicts up front. You don't want your client to mention, or even think, that you should have investigated and cleared a potential conflict. If you have an expectation that "x" scope of representation justifies a lawyer or firm in expecting to obtain a waiver of conflicts on other matters in the future, you may be in for a surprise.

II. Identify how client finds / hires new counsel.

A. What marketing methods are most effective?

1. Maintaining relationships with lawyers who have left your firm for in-house positions?

- Probably one of the most effective.
- In-house counsel networking through various organizations as well, and we often seek the recommendations for counsel from our peers as well.

2. Organization membership such as ABA, ACMA, ACREL, CMSA, and ICSC, as well as any other industry involvement, can create opportunities for good client contacts and referrals.

- Membership alone is not the sole means, but taking an active role within an organization, participating in speaking engagements and writing articles for its publications can facilitate a phone call from in-house counsel that might never have come your way otherwise.
- One example is a panel member's need for assistance with a transaction containing elements of Islamic financing arrangements.
- Industry involvement that circumvents in-house counsel can be productive if business personnel are decision makers regarding attorney representation (for example, MBA meetings), but not necessarily if in-house counsel make those decisions. Participation may still bolster your knowledge of what is going on in the industry in general, which can be valuable in the long-run even if it does not contribute to the initial hiring decision.

3. Law firm publications.

- Showing that the firm is in-tune with current market trends and is willing to put time and effort into giving some "free" advice is

very helpful and appreciated. Done effectively, it can put lawyers' expertise, names and phone numbers in writing in front of counsel.

4. Bar membership, section and subcommittee memberships.

- Again, not effective by itself, but coupled with active involvement can garner you business.

5. Correspondents, brokers, opposing parties, opposing counsel?

- The conduct of your representation in a matter often has a strong impression on other parties to the transaction.
- There are times when outside counsel must be a very strong advocate, but most transactions allow counsel room to do so in a manner that will enhance his or her reputation with others involved. While you do not want your client to walk away with the impression that you are spending more time marketing to everyone else in the transaction than you are handling the legal work on their matter, remember that building a good reputation of handing your client's matters in a very professional manner while treating others in the transaction with respect can bring business your way in the future.

6. Industry chat groups.

- On-line groups such as "DIRT" exist and may grow in number and utility. While most people are familiar with the internet and recognize at least some of its potential, you should be aware that the younger generation of lawyers (and businesspeople) utilize the internet and technology more regularly and comfortably than more seasoned attorneys and that this can give rise to new ways to market legal services that are preferred by such younger people.

7. National title company division.

- Building a reputation with national title insurance agents for handling closing matters well can result in recommendations.

8. Unsolicited approach?

- Probably the least successful method.

B. What actions increase likelihood of success?

1. Respond to Part I.

- Do your homework. Ask the questions to get the answers that will help you make your sale or, to help you be honest with yourself, that your firm is not the right fit at the present time.
2. Persistence over time pays good dividends.
 - For example, a panel member left the law firm practice in 1994. They hired their former law firm partner to close very small transactions on a very sporadic basis for years. This partner continued to market, patiently maintaining contact and reaffirming interest in having opportunity to do more work. Last year, the firm closed transactions for the panel members' company earning the firm approximately \$1.0 million in fees.
 3. Capitalize on free assistance being offered to current clients by expanding delivery to include desired potential clients.
 - Does your firm have "client alerts" or other weekly or monthly email updates?
 4. Find ways to keep your firm in front of potential clients.
 - Keeping your name in front of them keeps you in their mind.
 5. When traveling, is there room to add a visit on to your trip?
 - By example, a firm in Dallas would like the opportunity to provide legal services to a panel member's company. Even if no current opportunity is available, partners extended a business trip following conclusion of work on another client's matter to host dinner for several in-house attorneys to talk about their firm, ask questions about the nature of company's business – all the while being gracious about the current need (or lack thereof) to engage additional counsel at the time. The firm's attorneys were astute to request that they be considered for opportunities to send small matters the firm's way based on their expertise in certain Texas real estate transactions and issues. This kept the firm in the forefront of the potential client's thoughts as to "what attorneys can provide the needed expertise on this Texas issue"

C. What actions decrease likelihood of success:

1. Not completing Part I.
 - Just like a job interview, if you do not do your homework, you will not get hired. Even after you are hired, the current trend is to view

inside-outside relationships as a partnership. Remember that your legal representation is about how to sell your expertise to this *particular* client, not about the client conforming its business to your firm's needs.

2. Emphasizing firm features/process without regard to answers obtained in Part I.
4. Failure to identify, failure to connect with or attempting to by-pass the real decision maker.
 - By-passing shows disrespect and does not win you ANY points. While it shows desire, it also shows the initiative to not take direction during the relationship. The decision-maker, if respected in the organization, will remain the decision maker, and you will have ruined your credibility.
 - Alternatively, asking follow-up questions to identify the right person and creatively suggesting ways in which you might have your contact arrange to coordinate discussion with both the contact and decision maker are far more effective.
4. Being overly aggressive, particularly when ignoring that the client/firm are not a well-suited match.
5. Displaying arrogance or conceit. Making the sale all about the firm or lawyer, not the client, is a big mistake.

D. What process is required?

- Find out what process you must engage in to get the nod.
- Ask questions.
- Once the method is identified, is there a format preference?
- If the client advises third parties, the client may be expected to shop the deal or shop the representation in order to satisfy advisory mandates / requirements.
- It is recommended that a general written arrangement regarding the scope of representation and billing arrangements be memorialized in writing and updated periodically as the relationship evolves.
 1. RFP?
 2. Beauty contest?
 3. Other informal process?
 4. Written proposal?

E. Who is the ultimate hiring decision maker?

- The first rule of communication is to know your audience. The same principle applies to legal marketing.
 1. In-house counsel? Is your entrée attorney the decision maker?

2. Business personnel?
3. Have you had your conversations with the right people to formulate a responsive proposal?

III. Focus on key elements in this presentation and my other panelists' presentations that add value for your client and build a positive relationship so that they want to think of you first when hiring for the next deal:

- Always deliver on your promises.
- Understand what will make the company look good in the business transaction, and then organize and carry out your work with this goal in mind.
- Understand what will make your primary client contact successful and then if you work hard to help them be successful, your success will follow.
- Build trust by your words, deeds and actions.
- Realize that the client, your firm, the relationship and the business are all dynamic on a number of levels and to succeed you will also need to constantly adjust and improve your approach and the relationship.
- Make yourself invaluable.

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Kelly Mancini
ING Investment Management LLC
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- I. Identifying key factors to the hiring decision (treat the process like preparing for a job interview).
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 - Just like a new job, both parties need to find a good “fit”.
 1. Are you potentially representing a bank, conduit, life insurance company or private equity or capital firm?
 - The client’s source of capital is one factor that will shape representational needs.
 - Do not make assumptions, however, that a client’s classification necessarily means they will follow an “old school” model about how to approach their business.
 2. What are the client’s primary lines of business?
 - Whole mortgage loans, mezzanine financing, loan participations, conduit lender or issuer, CMBS bond investor, CDO investor or issuer, equity investor, or REIT?
 - Identify your expertise and where there is alignment with the client’s businesses and legal needs.
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6. How does the client distinguish their business from that of their competitors?
- What the client believes sets them apart from competitors could become your mandate as well. For example, is it responsiveness? If so, the client will expect expert professional advice, but might not desire representation in a traditional model of the “learned” attorney dispensing measured advice. Instead, your expertise may be a necessary ingredient, but you may be expected to show your expertise in a highly responsive manner that addresses a borrower’s concerns in balance with your client’s needs.
- B. What are the client’s expectations (i.e. What is the job description?):
1. Scope of work / division of responsibilities between inside, outside and business group?
 2. Geographic scope of representation? Local? Regional? National?
- Define initial scope first.
 - Prove that you can do that job first and deserve the opportunity to take on a bigger role when the client seeks to expand or you see an opportunity to suggest it that fits with the client’s business.

- Do not insist on a representation that the client does not want. If you are being sought for local representation, unless you would rather not have the business at all, strong-arm insistence on only providing regional or national representation can only decrease your chances of winning the account.
3. What firm demographics are most important to the potential client (importance will vary from client to client)?
- Location? Is proximity to the client important or proximity to the practice or property?
 - Size of the firm? Does the client have certain preferences or perceptions about the size of the firm and how it might shape interaction?
 - Reputation of the firm?
 - Diversity of the law firm overall or particular team servicing the client? To some companies, diversity is very important internally and externally. Some companies' cultures expect their service providers to reflect company values or assume that the provider cannot best represent their business if it is not reflective of customer demographic. Importance of this factor is varied.
4. What is the client's expectation on fee structure?
- Depending on the client, insistence that you will only handle fee arrangements in one manner could cause you to be passed over.
 - As an example, if a client expects alternative billing arrangements, insistence that you only represent clients by billing on an hourly basis will result in someone else winning the account. This does not mean that you need to change your practices, only that your firm and this particular prospective client are not a good fit.
5. What is the businessperson's estimate of a reasonable fee for a given transaction, as opposed to outside counsel's?
- You may report to in-house counsel, but the business group may have very definite ideas about what constitutes an appropriate fee. There is some tendency for businesspeople to view legal representation on some types of work as a commodity, as much as lawyers would like to think otherwise. For example, on a loan transaction, your lender client's money is just as green as the next company's money. To a borrower, the deal may come down in large part to the predictability of costs. If an appraiser, environmental firm or engineering firm can estimate its fees fairly accurately, even with potential for unknowns, it is hard to understand why lawyers cannot do the same.

6. What is the client's expectation on staffing?
 - Clients often want to see some depth in your department to handle matters. The more depth you are perceived to have, the more capacity to handle multiple matters you may be perceived to have.
 - Notwithstanding depth, clients do not want to train your less experienced staff, nor do they want their opposing side's positions to be taken as being correct. It may be more efficient for you personally to manage your files by pushing the work to others, but make sure the delegation is appropriate and acceptable to the client.
 - Do not sell the traditional big-firm model if you are not clear on the client's expectation. Explore with probing questions. I once had a counsel pitch his ability to deliver cost control by having junior associates prepared to take the lead on the client's transactions. Counsel paid no attention to part of same conversation describing the client's high degree of satisfaction with the current representation model, whereby partners and administrative assistants handled matters, without paralegal or associate support.
7. How are conflicts treated?
 - Discuss any potential conflicts up front. You don't want your client to mention, or even think, that you should have investigated and cleared a potential conflict. If you have an expectation that "x" scope of representation justifies a lawyer or firm in expecting to obtain a waiver of conflicts on other matters in the future, you may be in for a surprise.

II. Identifying how client finds / hires new counsel.

A. What marketing methods are most effective?

1. Maintaining relationships with lawyers who have left your firm for in-house positions?
 - Probably one of the most effective.
 - Market to your former colleagues.
 - Make the effort to stay in touch, have lunch.
 - Even if your practice area is different, the in-house lawyer may have other in-house peers who could use your expertise.
2. Personal recommendations from other in-house lawyers at other companies?

- Another very effective method.
 - In-house counsel network through various organizations as well, and we often seek the recommendations for counsel from our peers as well.
 - Building and maintaining a good relationship with a current client can pay dividends down the road. In-house counsel like to be able to say positive things to others about their experiences with a good firm or good lawyer.
3. Organization membership such as ABA, ACMA, ACREL, CMSA, and ICSC, as well as any other industry involvement, can create opportunities for good client contacts and referrals.
- Membership alone is not the sole means, but taking an active role within an organization, participating in speaking engagements and writing articles for its publications can facilitate a phone call from in-house counsel that might never have come your way otherwise.
 - One example is a panel member's need for assistance with a transaction containing elements of Islamic financing arrangements.
 - Are there opportunities to invite in-house lawyers with the client or prospective client to participate in an organization as a guest?
 - Industry involvement that circumvents in-house counsel can be productive if business personnel are decision makers regarding attorney representation (for example, MBA meetings), but not necessarily if in-house counsel make those decisions. Participation may still bolster your knowledge of what is going on in the industry in general, which can be valuable in the long-run even if it does not contribute to the initial hiring decision.
4. Law firm publications.
- Showing that the firm is in-tune with current market trends and is willing to put time and effort into giving some "free" advice is very helpful and appreciated. Done effectively, it can put lawyers' expertise, names and phone numbers in writing in front of counsel.
5. Bar membership, section and subcommittee memberships.
- Again, not effective by itself, but coupled with active involvement can garner you business.
6. Correspondents, brokers, opposing parties, opposing counsel?
- The conduct of your representation in a matter often has a strong impression on other parties to the transaction.

- There are times when outside counsel must be a very strong advocate, but most transactions allow counsel room to do so in a manner that will enhance his or her reputation with others involved. While you do not want your client to walk away with the impression that you are spending more time marketing to everyone else in the transaction than you are handling the legal work on their matter, remember that building a good reputation of handing your client's matters in a very professional manner while treating others in the transaction with respect can bring business your way in the future.

7. Industry chat groups.

- On-line groups such as “DIRT” exist and may grow in number and utility. While most people are familiar with the internet and recognize at least some of its potential, you should be aware that the younger generation of lawyers (and businesspeople) utilize the internet and technology more regularly and comfortably than more seasoned attorneys and that this can give rise to new ways to market legal services that are preferred by such younger people.

8. National title company division.

- Building a reputation with national title insurance agents for handling closing matters well can result in recommendations.

9. Unsolicited approach?

- Probably the least successful method without laying a prior groundwork for the approach.

B. What actions increase likelihood of success?

1. Respond to Part I.

- Do your homework. Ask the questions to get the answers that will help you (a) make your sale, (b) be honest with yourself, that your firm is not the right fit at the present time or (c) respond with flexibility and tailor a new approach.

2. Persistence over time pays good dividends.

- For example, a panel member left law firm practice in 1994. They hired their former law firm partner to close very small transactions on a very sporadic basis for years. This partner continued to market, patiently maintaining contact and reaffirming interest in

having opportunity to do more work. Last year, the firm closed transactions for the panel members' company earning the firm approximately \$1.0 million in fees.

3. Capitalize on free assistance being offered to current clients by expanding delivery to include desired potential clients.
 - Does your firm have “client alerts” or other weekly or monthly email updates?
4. Find ways to keep your firm in front of potential clients.
 - Keeping your name in front of them keeps you in their mind.
5. When traveling, is there time in your schedule to add a personal visit with a potential client on to your trip?
 - By example, a firm in Dallas would like the opportunity to provide legal services to a panel member's company. Even if no current opportunity is available, partners extended a business trip following conclusion of work on another client's matter to host dinner for several in-house attorneys to talk about their firm, ask questions about the nature of company's business – all the while being gracious about the current need (or lack thereof) to engage additional counsel at the time. The firm's attorneys were astute to request that they be considered for opportunities to send small matters the firm's way bases on their expertise in certain Texas real estate transactions and issues. This kept the firm in the forefront of the potential client's thoughts as to “what attorneys can provide the needed expertise on this Texas issue”

C. What actions decrease likelihood of success:

1. Not completing Part I above.
 - Just like a job interview, if you do not do your homework, you will not get hired. Even after you are hired, the current trend is to view inside-outside relationships as a partnership. Remember that your legal representation is about how to sell your expertise to this *particular* client, not about the client conforming its business to your firm's needs.
2. Emphasizing firm features/process without regard to answers obtained in Part I.

3. Failure to identify, failing to connect with or attempting to by-pass the real decision maker.
 - By-passing shows disrespect and does not win you ANY points. While it shows desire, it also shows the initiative to not take direction during the relationship. The decision-maker, if respected in the organization, will remain the decision maker, and you will have ruined your credibility.
 - Alternatively, asking follow-up questions to identify the right person and creatively suggesting ways in which you might have your contact arrange to coordinate discussion with both the contact and decision maker are far more effective.
4. Being overly aggressive, particularly when ignoring that the client/firm are not a well-suited match.
5. Displaying arrogance or conceit. Making the sale all about the firm or lawyer, not the client, is a big mistake.

D. What process is required?

- Find out what process you must engage in to get the nod.
- Ask questions.
- Once the method is identified, is there a format preference?
- If your potential client is an advisor to third parties, the client may be expected to shop the deal or shop the representation in order to satisfy advisory mandates / requirements.
- Recommended that a general written arrangement regarding the scope of representation and billing arrangements be memorialized in writing and updated periodically as the relationship evolves.
 1. RFP?
 2. Beauty contest?
 3. Other informal process?
 4. Written proposal?

E. Who is the ultimate hiring decision maker?

- The first rule of communication is to know your audience. The same principle applies to legal marketing.
 1. In-house counsel? Is your entrée attorney the decision maker?
 2. Business personnel?
 3. Have you had your conversations with the right people to formulate a responsive proposal?

III. Focus on key elements in this presentation and my other panelists' presentations that add value for your client and build a positive relationship so that they want to think of you first when hiring for the next deal:

- Always deliver on your promises.
- Understand what will make the company look good in the business transaction, and then organize and carry out your work with this goal in mind.
- Understand what will make your primary client contact(s) successful and then if you work hard to help them be successful, your success will follow.
- Build trust by your words, deeds and actions.
- Realize that the client, your firm, the relationship and the business are all dynamic on a number of levels and so for you to succeed you also will need to constantly adjust and improve your approach and the relationship.
- Make yourself invaluable.

Maintaining and Growing The Client Relationship

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There is no magic bullet. Your success is mostly dependent upon hard work, common sense and good interpersonal skills. Maintaining and growing the client relationship is more about what a lawyer should have learned in kindergarten rather than what he or she learned in law school.

- I. Know thy client: Establish open communications and strong personal relationships.
 - A. Face-to-face client encounters in business and social settings are invaluable, while at the same time opportunities have become scarcer in the electronic age.
 - B. Volunteer to help out with whatever your client needs if you have the appropriate skills and expertise to offer.
 - C. Be an accessible expert. Form a partnership with your clients to help them achieve their individual and organizational goals.
 - D. Keep your face in front of your client. Send them information and alerts about recent developments in the law that affect their business.
 - E. Know the business and culture of your client's organization.
 - F. Know the personalities of both the decision-makers and other client contact persons.
 - G. Consider what will improve both your client's overall business success as well as that of your individual contacts.
 - H. Spend the majority of your marketing efforts maintaining existing relationships with clients and working to expand those existing relationships.
 - I. Avoid arrogance, insincerity, egocentricity and abrasiveness in your words, actions, and demeanor when dealing with everyone. Clients want to hire people they respect and admire.
 - J. Clients want to hire a legal expert, not a know-it-all bore who claims to be their savior. Clients want you to display your legal expertise to the extent it helps you to be a more effective advocate for their interests, but not to impress anyone or to engage in an intellectual debate.
 - K. How you treat the people who appear to be least important to your success (e.g. the waiter, the cab driver, the receptionist) will speak volumes about you as a person and an attorney, and you will be judged accordingly.
 - L. Be respectful, persistent and patient in your marketing efforts. This requires a careful balance. You need to make yourself as available and helpful as you can whenever your client needs help and yet avoid crowding your client –Nobody

wants to feel pressure that someone is depending upon him or her to hire them or to refer them business.

- M. Be available when it is important and helpful to your client, regardless of whether or not there is any business for you in sight. If you do this consistently, then eventually their appreciation for your skills, responsiveness and helpfulness may bear fruit. They may either hire you directly and/or say praiseworthy things about you and your legal skills to others who may hire you.

II. Service.

- A. A client's evaluation of an attorney's ability to deliver timely, high quality legal work at an acceptable cost is the basis for most hiring decisions. Read the previous sentence once again since it is so basic and important.
- B. A high degree of responsiveness is an invaluable trait easily distinguished by clients.
- C. Anticipate and suggest opportunities to provide better service to clients.
- D. Be pro-active, not reactive if you hope to stand out in the crowd of qualified attorneys.
- E. Display good emotional intelligence and keep your antennae up. This takes hard work, vigilance and patience. According to Daniel Goleman, author of Emotional Intelligence, "emotional intelligence" is a measure of our capacity to recognize our own feelings and those of others, for motivating ourselves and for managing emotions well in ourselves and in our relationships.
- F. Know what issues are hot buttons for your client, what is unimportant and what may adversely affect your client's business relationships.
- G. Work to serve your clients in a broader role as a "counselor". Don't just provide a literal or legal analysis of a problem or issue, but offer suggestions, analysis and insights from a broader point of view (business, ethical, strategic, enterprise-wide) that will help your clients make better decisions and make them better informed decision makers.
- H. Make sure that your services always add value relative to the price you charge.
- I. Carefully listening to client wants, needs, complaints and compliments is critical.
- J. Anticipating and planning ahead to achieve client goals and satisfying client wants and needs is especially valued and noticed.
- K. Don't rest on your laurels. This would give your competitors a chance to shine in comparison and your client the impression that you take them for granted.
- L. Strive to exceed everyone's expectations, not just the senior person or the contact person who hired or referred you. If someone is your initial contact with a client, or refers you to a client, appreciate how much that person's reputation and credibility is at stake as you deal with everyone in that client organization. Recognize that people in most client organizations communicate freely amongst themselves about the quality of your legal work, the responsiveness you provide and the level of respect you deliver up, down and across that client's organization.
- M. Think outside the box and offer advice and help where you think it might add value based on your client's express goals and implied interests.

III. Working Together.

- A. Regularly demonstrate a high degree of responsiveness and dependability. It is very important that your client develop a high level of trust in your expected performance.
- B. Offer legal advice and answer questions in ways that are unambiguous, practical and based on common sense. Don't pontificate about legal theories or case law, or expend time doing legal research or writing memos that are not really necessary for you to give legal advice, answer questions or otherwise ably represent your client. Clients expect that a certain level of expertise is already built into a law firm's fee structure.
- C. Recognize, accept and respect the fact that some people prefer vanilla ice cream and others prefer chocolate ice cream. In other words, there is often more than one way to address an issue, solve a problem or draft a document that may be equally acceptable, so don't insist that your way is the only solution or the best or the right one.
- D. An attorney of appropriate experience and expertise should orchestrate and monitor the work product, timing and efficiency of each assigned matter. That lead person should organize assignments and delegate work to a specific working group composed of people that have the appropriate levels of experience and expertise so as to maximize efficiency and responsiveness and minimize costs.
- E. Involve in-house counsel and business people as much as they care to be involved – which you should expect will vary across people, time, resources and issues. Whenever you are unsure of how much they have decided to be involved, be sure to ask.
- F. Be the first to suggest changes in the assigned work, scope of work or billing arrangements so as to avoid transactions veering from your client's expectations and to otherwise minimize unexpected negative impacts on your client because the reasonable expectations of Borrowers and other third parties are not satisfied.
- G. Set reasonable expectations in dividing labor between outside and in-house counsel.
- H. Communicate up-front about what you will do, how you will do it, when you will do it and what it will cost to make sure you and the client are on the same page.
- I. Manage expectations carefully and diligently. Consult with the client as soon as an assignment varies in scope, direction or cost from what the client expects.
- J. Use e-mail, voice-mail, telecopy and overnight mail in ways that improve the efficiency of the transaction and make your client's life easier.

IV. Dealing with Conflicts and Dissatisfaction.

- A. Be a zealous advocate for your client, not a marketer for your firm reaching across the table to pander to other potential clients.
- B. Deal respectfully, courteously and timely with opposing counsel and their clients, even if they fail to do so.

- C. If a borrower or its counsel fails to timely and professionally fulfill its closing responsibilities, then communicate early and often to avoid disappointments, delays, higher costs and complaints.
- D. People in your firm who have or might represent a client should think twice about requesting a waiver of a legal conflict from that client so that they can represent an opposing party, even if it is a waivable conflict. Doing otherwise can sometimes lead to a marked, unexpected and irretrievable deterioration in the relationship with your original client.
- E. Admit shortcomings, mistakes and failures right away and take demonstrable steps to make things right. In addition, promptly make a specific pledge of what you will do to avoid making the same mistake again. Clients will often forgive you for making mistakes, but not for hiding them or repeating them.

V. Billing.

- A. Communicate clearly how you will bill and what it will cost. Set reasonable expectations and manage them constantly. Be ready to provide your client a reasonable estimate based on a full and candid discussion of the scope of the work. If you are engaged for a matter and you must deviate from any expectations you have created for your client, communicate the need for change clearly and as soon as you are aware of any changes.
- B. If you value a client relationship, be prepared to put a matter on a scale to determine its value to your client as though you were the consumer of legal services rather than the provider and then adjust your bill accordingly.
- C. Be prepared to take a step back from the original billing arrangement if it will be extremely damaging to your client, or to your client's relationship with others.
- D. Before issuing a bill, reflect on how well you did what you were asked to do. Did you bill for things the client would not have asked you to do if they knew about them in advance? Was the matter well orchestrated and staffed by appropriately experienced and responsive people? Were mistakes made? Was there room for significant improvement in your performance?
- E. Consider alternative billing arrangements where it makes sense for you and your client.