

The 5th Annual Hospitality Law Conference

February 8-9, 2007

General Counsel's View on the Selection of & the Relationship with Outside Counsel

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Albert J. Pucciarelli is admitted to practice law in both New York and New Jersey. His practice is concentrated in the areas of hotel and resort development and hotel operations, aviation law, general corporate law and real estate law. In 1999, he co-founded the law firm of Hooker Pucciarelli & Tibbs, L.L.P. in which he was a partner until joining McElroy, Deutsch, Mulvaney & Carpenter, LLP in 2005 as Chair of the firm's Hotels and Resorts Practice Group. From 1988 through 1998, he was Executive Vice President and General Counsel of Inter-Continental Hotels & Resorts with over 200 hotels in 70 countries. He served on the Board of Directors of Inter-Continental, was chair of the company's Life Safety and Security Committee and a member of the Development Committee and the Pension and Benefits Committee. Prior to joining Inter-Continental, Mr. Pucciarelli served as Vice President and Counsel to Grand Metropolitan (U.S.) and its publicly owned (NYSE) predecessor, Liggett Group, Inc. He has served as Chair of the Hotels, Restaurants and Tourism Committee of the Association of the Bar of the City of New York (2001-2004) and as Chair of the Aeronautics Law Committee of the Association of the Bar of the City of New York (1998-2001). He has served as a member of the Hospitality Law Council of the Conrad N. Hilton College of Hotel & Restaurant Management, University of Houston (2003-2004), and is a member of the Hotel Industry Liaison Committee of the ABA Committee on Hotels, Resorts and Tourism. He has taught International Business Law as an adjunct professor at the Fordham University Graduate School of Business, and was member of that school's Advisory Board (1996-2004).

Mr. Pucciarelli is fluent in Russian. He is an instrument-rated commercial pilot, an FAA certified advanced ground instructor and an aircraft owner. He serves his local community as a member of the Ridgewood, New Jersey, Planning Board and the Board of the Ridgewood Public Library Foundation. Until 1998, he was Vice Chair of the Ridgewood, New Jersey, Zoning Board of Adjustment on which he served for ten years.

Mr. Pucciarelli's clients include the owners and developers of Marriott, Courtyard, Ritz-Carlton, Mandarin Oriental, Hyatt, St. Regis and Westin mixed-use hotel and resort projects, hotel management companies and owners, several closely held companies in a variety of businesses, including hotels and restaurants, the second largest dealer of Cessna aircraft in the U.S., and purchasers and sellers of general aviation aircraft.

Mr. Pucciarelli is nationally recognized for his expertise in hotel management agreements and hotel and resort development. He has recently published a two-part article, "Structure of Mixed-Use Hotel Residential Resort Projects" for HospitalityLawyer.com (March, 2006), "Selling and Buying an Existing Hotel - Structure of an Asset Transaction" for Hospitality E-Newsletter (July, 2006) that he co-authored with Eunice Moon, an associate at the firm, "Recording Hotel Management Agreements - Why?" that he authored for the 16th Annual Real Property Symposium of the Real Property, Probate and Trusts Law Section of the American Bar Association in April, 2005, and "Hotel Mixed-Use Development Projects" that he co-authored for the 2004 Hospitality Law Conference sponsored by the University of Houston School of Law in February 2004. He participated in two panel discussions at the 2006 Phoenix Lodging Conference on hotel and resort development and will be a speaker at the 2007 Hospitality Law Conference in Houston on the subject of hotel general counsel's selection and utilization of outside counsel.

Marcus Banks

Marcus A. Banks serves as Vice President - Legal, for Wyndham Worldwide Corporation ("Wyndham"), responsible for litigation management for Wyndham's hotel, timeshare development and timeshare exchange units. Marcus served as Vice President - Legal for Cendant Corporation ("Cendant") prior to Wyndham's spin off from Cendant.

Prior to joining Wyndham and Cendant, Marcus was associated with the law firm of Greenbaum, Rowe, Smith, & Davis, LLP in Woodbridge, New Jersey, where he concentrated on complex commercial litigation and white collar criminal defense matters. He is a 1996 graduate of Columbia University Law School. Marcus received his bachelor's degree in Economics and Political Science in 1993 from Stanford University in Palo Alto, California.

DAVID HOM

David Hom is a member of the Legal Department of InterContinental Hotels Group and is based in the Americas regional office in Atlanta, Georgia. Mr. Hom currently has primary responsibility for providing legal support to company-managed hotels in the Americas, working closely with Area Operations and other departments with responsibilities for these properties.

Mr. Hom joined the company then known as Bass Hotels & Resorts in 1998 following the acquisition of Inter-Continental Hotels & Resorts ("ICHR") by Bass PLC. He joined ICHR in 1988 and provided legal support to hotel operations and development in all major geographic areas: the Americas; Asia-Pacific; and Europe, Middle East and Africa .

Mr. Hom received a Bachelor of Arts in Government from Cornell University. Prior to earning his Doctor of Laws from Columbia University, he also received a Masters of Arts and Masters of Philosophy degrees in Political Science from Columbia. He is admitted to practice law in Georgia and New York.

Alan Rabinowitz

Alan J. Rabinowitz is Executive Vice President General Counsel & Secretary for Accor North America, Inc., which oversees the operations of the company's various hotel activities in North America under the brand names Sofitel, Novotel, Ibis, Red Roof Inns, Studio 6 and Motel 6.

Mr. Rabinowitz joined Accor North America in 1991 and has served as its General Counsel for Accor North America since January 1997. Prior to joining Accor North America, Mr. Rabinowitz spent 9 years with The Southland Corporation, the parent company for 7-Eleven convenience stores.

Mr. Rabinowitz is a member of the Company's Executive Committee and, in addition to managing the Company's legal affairs, he has overall responsibility for the Company's Risk Management and Safety & Security Departments. Throughout his in-house career, he has handled a variety of class action lawsuits, complex business litigation and the full range of employment based disputes.

Mr. Rabinowitz attended and completed his legal studies at Forham University Law School in 1981.

**HOTEL COMPANY GENERAL COUNSEL'S GUIDE FOR THE
SELECTION AND MANAGEMENT OF OUTSIDE COUNSEL**

By *Albert J. Pucciarelli,
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INTRODUCTION

The selection and management of outside counsel is a complex aspect of the job for the general counsel of a hotel management company.

The in-house law department typically will be configured to make the best use of the headcount allocated to the law department. The general counsel will most likely have selected lawyers for staff positions who can be employed in substantive areas of law that recur with sufficient frequency and have a significant impact on the corporation's general legal health. For a publicly traded hotel company, the in-house team may consist of a compliance lawyer, an employment law specialist, a lawyer to manage litigation, perhaps a franchise or IP lawyer, and transaction lawyers to assist with the routine contracts and development projects that arise almost daily.

The general counsel is likely to turn to outside counsel for other corporate work that may be less routine, such as the acquisition of another hotel company, or for special expertise at least until the expertise is acquired by in-house lawyers to the extent they require it. For example, a management company that has decided to offer franchises without on-site management may initially rely upon outside counsel's expertise for the preparation of UFOCs until in-house lawyers acquire sufficient knowledge of this area of law or an additional lawyer with this expertise is hired for a new in-house position.

The general counsel also has to consider how legal services will be provided to the owned or managed hotels that operate under the company's flag. Perhaps the management agreements require that the management company will oversee the selection and management of counsel for the managed hotel. Alternatively, the management agreement may leave all hotel legal affairs to the owning company or, more likely, make most routine hotel-related legal matters the duty of the operator while leaving major matters (e.g., claims involving an amount in excess of some agreed threshold amount) to the hotel owner. In any event, the general counsel has to consider how legal services will be provided to these hotels and to what extent, if at all, the legal services to these hotels will be charged against the law department's budget for use of outside counsel or be recovered from the hotels to which the services relate.

Multi-national hotel companies have the additional complexity of legal services for regional offices outside the U.S., for the deployment of company personnel to serve in overseas locations, and many other “international” legal issues.

The general counsel may also have responsibility for, or will at least have to work closely with corporate personnel with responsibility for, tax and risk management. Of course the CEO and the CFO will expect the general counsel and her team to be available for general consultation, for which good business judgment and interpersonal skills, in addition to solid legal knowledge, are required.

ONE BIG MULTI-NATIONAL FULL SERVICE FIRM OR “HORSES FOR COURSES”

General Counsel will have to determine if she prefers to work with one large full service firm with a “sterling” reputation, with office locations that more or less overlap with the regions where the company’s headquarters, regional offices and many hotels are located, and with the ability to advise in all or most substantive areas. This model has several advantages. Consolidation of the hotel company’s work will make the hotel company a “major client” of the firm with the consequence of immediate and prompt attention, the possibility to negotiate fees for a “volume discount” and the ability to handpick lawyers within the firm for assignment to company matters. In addition, the large firm will come to know the client and its business and legal affairs very well and will not have to expend time (i.e., fees) learning background information for each new matter. Disadvantages for general counsel may be higher cost, having a managing partner or other luminary of the firm come to supplant the general counsel as the de facto general counsel and principal advisor of senior management and the potential difficulty of parting ways with a large law firm upon whom the company has become very reliant if and when a termination of the relationship is desired by the general counsel. Large firms do not give up desirable client relationships easily.

The other model whereby general counsel selects various firms for corporate work based upon the ability of individual lawyers rather than firm affiliation and local firms for regional offices and hotels has the advantages of lower rates (where smaller firms are used) and the availability of a local lawyers with strong political connections and who are truly “native” to the environment. In addition, by using many smaller firms rather than a single large firm, the general counsel will have greater flexibility to replace lawyers in given subject areas or geographic regions without a major impact on other areas.

Certainly for major corporate matters, such as a chain acquisition or, as I experienced twice, the sale of the entire company, the general counsel will do well to bring the “brightest and best” (and quite likely the most expensive) legal talent to bear on the matter, and generally that argues for the large big-name firm with an

army of associates who can work through the night responding to due diligence requests or compiling closing checklists and documents.

For long-term projects, on three occasions I “borrowed” associates from large outside firms that enjoyed regular business from us. The associates were based in our offices, at least some of the time, and were made available at a favorable daily rate. One of them was offered employment after some time and accepted when it became obvious that we would need his skills for the long term and that he was a worthy candidate.

Whatever model for the engagement of outside counsel is selected, the general counsel may want to have a standardized Request for Proposal that is sent to candidate law firms that may include questions that will address the company’s criteria for selection. These criteria may include evidence of relevant experience, requests for client references and even data on racial or gender diversity within the responding law firm,. The Request for Proposal may also contain the company’s rules with respect to billing so that the responding firm will know in advance what is expected.

BILLING PRACTICES

The general counsel must establish and enforce the rules for billing. For example, she may promulgate a rule that the client will not be billed for internal conferences or for a lawyer’s “review of the file” and other matters that may lead to abuse by lawyers desperate to meet daily and annual billing quotas. Perhaps all bills from outside lawyers, almost certainly bills for corporate work such as ERISA compliance and tax restructuring, should be approved by someone within the general counsel’s office with experience to find the faults and compel corrective action. Outside counsel, who may be working directly with non-lawyer corporate personnel, such as the Director of Benefits, will be sure to satisfy also the Law Department’s expectations and “follow the rules” if the outside lawyer knows that the Law Department must approve his invoice for payment. The general counsel may require that outside counsel for some or all hotels copy the Law Department on their invoices, if only as a prophylactic against abuse, and also as a means for the general counsel and her team to stay apprised of legal issues affecting the hotels.

Are “success fees” useful? If the firm will accept a “failure discount”, then I guess that the reciprocal should be acceptable to the client.

Timing of billing should be no less frequently than monthly, unless the invoice is below some agreed “de minimis” amount, so that the invoice can be reviewed while the work performed by the firm is still in short-term memory and abuses can be corrected quickly.

Expense reimbursements must be monitored. Reimbursements should not be an opportunity for a profit generating mark-up. Travel reimbursement should be allowed only for travel undertaken at the client's request and to the extent that it complies with client guidelines, such as permitted flight class and a maximum per night hotel rate. Naturally, the client's hotels should be utilized.

COMMUNICATION

The general counsel must be clear as to what correspondence between outside counsel and company personnel and between outside counsel and other parties within the company must be shared with the Law Department lawyers. The policy will, of course, vary from client to client, taking into account the size of the company and the ability of in-house lawyers to react meaningfully to correspondence from outside counsel on which they are copied. The general counsel has to be careful not to require that Law Department lawyers be copied on more correspondence than they intend or have the time to read. Does outside counsel have to see all correspondence between ERISA counsel and members of the human resources department? Between outside counsel and each hotel's general manager or controller? As with invoices, having access to correspondence generated by outside lawyers to non-lawyer personnel is a means for Law Department lawyers to stay apprised of legal issues affecting the company.

WINING AND DINING

As a general counsel, I was invited to Yankee, Knicks and Giant games, to spend an evening with the managing partner of a firm who would have three or four hours to tell me all about the firm's capabilities and achievements and to forge a lasting bond between his firm and my employer. I was invited to dinner at the homes of outside lawyers, and recall fondly wonderful dinners in great homes in Geneva, Paris, London and elsewhere. I was invited to speak at firm seminars, to have dinner with a U.S. Senator and with a member of the UK Parliament, to have breakfast with former President Jimmy Carter at the Carter Center, and other memorable events. These invitations were gratifying to my ego and actually made me feel like my presence was truly desired at these events. After my retirement, only a few of the friendships formed with outside counsel proved genuine and continued after I no longer had any work to direct to them and became a competitor. Sadly many of my outside lawyer "friends" seemed to have lost my number when I left my in-house position and it became clear to me that our "friendship" was really a client-relations exercise on their part that was based upon the benefit I was in a position to bestow upon their firms. The general counsel must be attentive to the conflict posed by a close personal relationship with outside counsel or the largesse of outside counsel toward the general counsel and his team

of in-house lawyers because of the obvious taint the personal relationship or perks may have on the judgment of general counsel in selecting the best outside lawyers for a particular task, managing the outside lawyer with a critical eye and terminating the services of a generous but underperforming outside lawyer.

I shamelessly let it be known to outside counsel that one of the “benefits” I expected from them was their use of our hotels for their business travel or for firm functions. To that end, I offered discounts as an incentive when needed.

CONFLICTS

When selecting outside counsel with a reputation within the hotel industry, it is quite possible that the same firm also represents competitor- hotel companies and may also represent developers and hotel owners who have legal concerns that are adverse, generally, to those of hotel management and franchise companies. I think that outside counsel who represent hotel management and franchise companies and also represent hotel developers and owners bring a good perspective and experience base to both types of clients. I once retained a well-known litigator with a reputation for suing hotel management companies for mismanagement and breach of fiduciary duty precisely because this lawyer was a great help in assisting us, as a management company, to avoid liability to our hotel owners in these areas. An added benefit was the disqualification of this lawyer from representation of parties adverse to our company.

Another conflict consideration arises in connection with development projects for which each investor may have its own counsel and the proposed management company will have its own counsel, often local counsel selected from the sometimes sparse universe of good, qualified local lawyers. After the formation of the joint venture company and execution of the related joint venture agreements and the hotel management and related agreements, presumably the entire project will select from among their local counsel one lawyer or firm to represent the “project” in the loan negotiations and in connection with other matters to which the joint venture entity is a party. In this context, previously adverse lawyers become aligned with all of the parties that are invested in the project.

CONFIDENTIALITY

As with all legal representation, outside counsel must respect the confidentiality of information concerning the hotel management company. The requirement can be put to the test when the general counsel engages a local lawyer chosen because he is well recognized as the most competent lawyer in a given jurisdiction or because he has good local political connections and can cut through the bureaucratic thicket. General counsel has to trust that the local lawyer, whose engagement may be limited, is not ethically challenged and follows the ethical rules on disclosure of

client confidences. The general counsel may nevertheless take the precaution of divulging to the local lawyer only information that is absolutely necessary for the engagement. Similarly, engagement of lawyer with recognized expertise in hotel development should not result in the hotel management company's deal terms, forms of agreements or development opportunities becoming available in any manner to other clients of the outside lawyer.

CONCLUSION

The selection and management of outside counsel is a critical role of the general counsel of any enterprise and requires good judgment of legal talent, a financial evaluation as to whether to bring the work in house or hire outside counsel, the ability to remain assertive while developing close professional and sometimes personal relationships with outside counsel, and a willingness to remain involved in the practice of law and not become just a manager of outside legal services. The best general counsel are, in my view, those lawyers who remain actively engaged in the legal affairs of the company and current in those aspects of law relevant to the company, while also functioning as a senior executive and business manager with definite and clear policies governing the provision of legal services to the company. General counsel who remain active lawyers while also filling a senior executive role are better able to work with outside lawyers than those general counsel who no longer "have the time" to review contracts, negotiate terms or stay current in legal developments within the industry, and see their role as that of manager only.

The opportunity to manage the legal affairs of a hotel management company with many locations and in many jurisdictions, while having available as necessary the best outside counsel as needed for a particular task, is a both a privilege and a challenge.

*Albert J. Pucciarelli served as Executive Vice President, General Counsel and Secretary of Inter-Continental Hotels and a board member of the company from 1988 through 1998 and since retiring from Inter-Continental he has been in private practice representing hotel companies and developers and owners of hotels and mixed-use resorts. He is currently a partner and Chair of the Hotels and Resorts Practice Group of McElroy, Deutsch, Mulvaney & Carpenter, L.L.C. (www.mdmc-law.com)

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Moderator: Albert Pucciarelli,
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- Counsel for McElroy, Deutsch, Mulvaney & Carpenter
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- Admitted to practice law in Georgia and New York



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