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COMMENT: THE ROLE OF OUTSIDE COUNSEL IN FORMING STRATEGIC ALLIANCES

Hewitt B. Shaw, Jr.[†]

Thank you for having me here today. For all of the reasons that the prior speakers have described, strategic alliances and joint ventures are becoming more and more prevalent. So, I commend Professor Dent and the Case Western Reserve School of Law for convening this group and for addressing this topic.

I am basically going to second the motions that you have heard all day today from the different speakers. There have been a lot of insightful remarks, and I hope to give you some of my perspectives on the same topics, particularly, the one that interests me the most: the roll of the practicing attorney in these strategic alliances and how lawyers can be even more effective in trying to help clients accomplish their goals.

I would like to pick up on Professor Dent's marriage metaphor.¹ As I have told many clients, a joint venture agreement is very much like a prenuptial agreement. I say this for two reasons: (1) it is an arrangement between two parties that hopefully are going to spend at least some amount of time together after the deal is struck and are not going to go on their separate ways, and (2) it is hopefully a document that once drafted will be put in a drawer and never read again.

As mentioned by some of the other speakers today, I bring my own biases to this topic that I should share with you. The first is my belief that ethically zealous representation of clients on two sides of a commercial transaction by sophisticated, well-trained people typically leads to a pretty efficient result. And so, I am here to advocate zealously representing the client. I think that continues to be very important to achieve a good result. However, even though I think that zealously representing the client is as important in a joint venture setting as in any other commercial relationship, I think that in a joint venture and strategic alliance set-

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¹ George W. Dent, Jr., *The Role of Lawyers in Strategic Alliances*, 53 CASE W. RES. L. REV. 953 (2003).

ting, zealous representation means something different. It requires more finesse, more understanding, and more appreciation for the situation at hand than in many other commercial arrangements. So, it is not a matter of relaxing; it is a matter of working harder to understand the context of the transaction, all the while trying to represent the client very zealously.

I do not view this as a compromise of the ethical obligation to zealously represent the client. Rather, I think it is a recognition of the fact that the best way to represent the client is to understand the unique nature of the joint venture setting and to behave accordingly. To use an imperfect golf metaphor: a good golfer doesn't pull a driver out of his bag and tee off and continue to use the driver the whole way down the fairway up onto the green until the ball gets into the hole. There's a time to use a driver, and there's a time to pull out a pitching wedge and try to put the ball softly and accurately onto the green. I would suggest that in the strategic alliance setting, the role of the lawyer is to know which club to get out of the bag and how to use it effectively. And good lawyers know how to do that.

The experiences I have had in joint ventures have run the gamut. They've involved clients that have looked for different distribution channels; clients who were looking to get into different geographic markets, very often, foreign markets; and clients looking for R&D support or cooperation. My experiences have included dealing with larger, supportive, incubating-type parties to the relationship as well as a smaller, more reliant and very often more entrepreneurial parties to the relationship. My experience has typically been one of bringing these two cultures together, often resulting from different markets, different technologies, or different distribution channels. The challenge is trying to meld those two cultures together in an effective way.

Attorneys are very well-trained for this is because we are trained to memorialize the commercial arrangements that are struck between commercial parties. That memorialization could be in the form of a contract or the charter documents for an entity. The bottom line is: we try to write it down and to get it right to accurately reflect the deal. That is what we are trained to do, and it brings a lot of value to the process.

When one thinks more specifically about the process of writing it down, there are really two things that the attorney is trying to do. First, the attorney is trying to write down the rights between the parties that hopefully can be legally enforced, if necessary. To put it bluntly, the attorney's job is to write a document that gives

his or her client enforceable rights against the other party, and reliance upon that result is an important thing in any type of commercial relationship.

The other thing that I think documents do, and the lawyers can be helpful with, particularly in a strategic relationship setting, is to use the writing as the process for memorializing what the parties believe the deal is – i.e., to document what the meeting of the minds is. I would suggest that in strategic alliance settings, the second process is probably more important than the first.

In a non-joint venture setting, for instance involving a trust indenture or promissory note – the parties are concerned almost exclusively about that document being enforceable someday and seldom, as a practical matter, understand what the specifics are of the provisions in the document.

On the other hand, in a strategic alliance document, I believe that the process serves a critical function to taking the parties to as complete an understanding of the commercial arrangement as possible so that the parties can predict the outcome of the events in the future and make sure none of the outcomes will be unintended or unanticipated. That's not to suggest that this is an exercise in altruism. I think it's in each party's own self-interest to try to accomplish that result. Therein lies the challenge in these relationships.

With regard to the complexity of the documents, for consumers of legal services, I would suggest that short documents are not always inexpensive, and long documents are not always expensive. In fact, it's far easier to change some words in a well-thought out form that has every provision imaginable than it is to write a short and eloquently thought-out document that will work in the future. I think it was Winston Churchill who said, in response to a speech which somebody said was too long, that he didn't have time to make it short. I think that can be said about a lot of the documents we draft as lawyers.

The lawyer's role is to facilitate this process. But I think it's also the lawyer's role to make sure the client understands the difference between the extent to which the document provision is included for the purpose of being legally enforced in the future or the extent to which it is included as a way to let the parties know what the deal is.

The other speakers today, including Professor Dent, have mentioned that lawyers are always afraid of missing something or that in their effort to be accommodating, the process will not cover

something adequately.² I think it's important to explain to the client where the differences are in the document and where a decision has been made to not cover something exhaustively because in the interest of the process, it is better off not to be belabored. However, it is important to ensure that the client understands where those points are or are not in the document and to make sure there are no surprises in the future.

In these relationships, good attorneys are really good at writing down and establishing what these legal rights are. The *really* good attorneys are the ones that are good at knowing when that's not the ultimate goal. Rather, such attorneys know when the goal is to facilitate the meeting of the minds rather than to fixate on legalese and to be able to explain that difference in a way that the client understands and appreciates. If in these relationships the attorney can accomplish that, the attorney has served his or her client very well in the process.

Let me mention a few words about "trust," which I think is a scary word for many lawyers. If everyone trusted each other, lawyers would be out of business. Trust, in the sense of blind faith or belief without any reason to have belief, doesn't really make it's way too much into what we do in these relationships, nor should it. Trust is not something to be counted on in an emotional or sentimental sense. Clearly, in any kind of commercial dealing, goodwill, civility, respect, and courtesy are important and helpful to the process. But those things in and of themselves don't make for a successful business deal. People change, times change, circumstances change, attitudes change, and emotional or sentimental goodwill will not preserve a business deal that is otherwise going bad. So, when I think of trust, I think of trust that's formed out of an understanding of what the motivations are of the party on the other side, understanding what is important to them, why they are in the deal, and how the deal has to perform for it to succeed for them.

To the extent a lawyer can understand the role of "trust" in the strategic relationship, he or she can begin to predict the behavior their client can engage in that will engender that kind of result on the other side. It's rooted in understanding what the deal is and what the business goals are of the clients. At that point the lawyer can rely upon such an understanding to form decisions, rather than relying upon some general notion of goodwill and social grace to carry the day later.

² *Id.*

Another important consideration is the fiduciary duty in a joint venture setting, particularly an equity arrangement. I think it's particularly important for lawyers to be aware that that raises an important ethical component in the deal. Typically, in a joint venture there are two independent parties that come together to form an entity. Each of the parties has its own lawyers. Inevitably, out of that arrangement, one of the two, or sometimes both, appoint employees of their firm to be managers of the newly formed joint venture with different duties within the joint venture.

On many occasions, those managers of that joint venture are torn in the way they behave day-to-day. They are torn between an intuitive notion that they have a duty of loyalty to the two owners of that new firm, but also by the fact that they feel they have a duty to their sponsoring firm – a duty that a career may depend upon. And that creates some very interesting issues for those managers who are thrust into those joint venture situations. I would submit that it raises equally interesting issues for attorneys who can find themselves striking up a relationship with some of these appointed managers, who will then come to the attorney asking for advice, and it's not always clear whether the attorney is giving that advice to the joint venture or to the attorney's historic client. This can be a really different issue.

It's also interesting how infrequently this issue is addressed in the joint venture documents. One rarely sees parties who are willing to contract away from the managers of the joint venture some of the implicit fiduciary duties that managers have to the owners of the firm. So, it is treacherous ground, but it must be dealt with (and dealt with carefully). On a few occasions, I have seen a third law firm come in to represent the just-created joint venture separately from the two law firms that represented the two original sponsors; but this is rare.

Finally, it is important to know where one should be concerned with detail in documents of this sort and where the concern for details is less important. One aspect of this concern is how the details in the document affect the success or failure of the joint venture. Clearly, in some of the provisions dealing with how the economics are carved up, how deadlocks are resolved, and maybe how the joint venture is unwound at the back end, details are important; in many areas, e.g., those dealing with the day-to-day operations, all the details in the world won't adequately predict and rehearse the issues that can arise in the future.

From a practical standpoint, in my experience, one of the most used techniques for dealing with day-to-day decision-making is

where the two parties, who may bring together two very different cultures, have thought through and written down their agreement in advance. They do so not in a form that a party plans to legally enforce someday, but in a form such that the parties understand what the procedures are and have written down a mechanism to make day-to-day decisions.

Often this process takes the form of a committee, a board of advisors, or appointed executives from the sponsoring firms to whom one can go to for a decision. The point is to have an arrangement to bridge the gap between the red tape, which very often frustrates the entrepreneur, and the hip-shooting, decision-making process, which frustrates the large company. I have found it helpful to work such things out; again, not because it's going to be in court someday but because it will facilitate how the two parties can behave together in the future.

When lawyers with experience in advising on these arrangements can be creative and make suggestions, representing their client in the interest of trying to form a successful joint venture, they are able to provide an extremely valuable service.