CHEAT SHEET

- *A 100-year-old problem.* What if a current legal problem was rooted in documents that were either non-existent at the company head office or dealt with a subject that no present employees have any knowledge of?
- *Not a lost cause.* The ability to marshal evidence using the latest electronic research as well as manual document review and in-person interviewing can bring about a successful result.
- *The art of the deal.* How frequently does your company enter into longer-term contracts where not all of the deal history or terms end up being part of the actual signed agreement?
- *Global diversity.* One of the issues where global diversity shows its value relates to the location and procedures for resolution of business disputes.

WHAT DOES A TIMELESS AND GLOBALLY DIVERSE LEGAL DEPARTMENT LOOK LIKE?

By Mark D. Weller and Ronald J. Shaffer In the age of bookless libraries, handheld computers, ediscovery and the ongoing digitization of the legal profession, one could assume that the younger generation of lawyers has an advantage over the more senior members. In many ways they do. Yet there are certain aspects of the law practice that cannot be replaced by technology. Among these timeless qualities are knowledge of the law, experience and analytical thinking. Some suggest that as the senior veteran lawyers leave the practice due to early or normal age retirement or natural attrition, the legal profession will experience a "brain drain." The legal profession's challenge is to fuse these critical elements of a well-rounded lawyer. We have decided to write this article now and share our perspective, rather than wait and submit this article for a future legal-themed issue of *AARP The Magazine!*

Many articles have appeared on the changing dynamics of the legal profession, both domestically and abroad, and the value of diversity in the practice of law, whether dealing with the in-house legal department or with a private law firm. Diversity has come to mean many things. Traditionally, diversity has meant diversity based on race, gender and sexual orientation. In its broadest sense, diversity encompasses experience, age, culture and economic status — any differences that add value to the goal of the organization.

The authors have collaborated on a number of cases over the years. Collectively, we have dealt with virtually every area of law from antitrust to zoning, literally from A to Z. The former in-house legal team I worked with consists of a very diverse global group of approximately 100 lawyers worldwide, working in 27 countries, from approximately 29 offices, comprising 22 nationalities, speaking at least 23 languages and almost half of whom are women. (I will refer to this former team as "my team" or "my company" in this article since working for them for over three decades earns me this privilege).

The outside legal team is a national law firm with 20 offices throughout the United States comprising over 600 lawyers. The outside law firm consists of approximately 30 percent women and various diverse attorneys from around the world. In this article, we intend to highlight two aspects of diversity that have received little attention in legal literature to date, which we call "experiential diversity" and "global diversity."

Experiential diversity relates to the senior lawyers who have many years, if not decades, of problem solving, analytical thinking and an institutional knowledge that cannot be replicated or found in a database or the Internet. Global diversity relates to the cultural perspectives and analytical skills brought to problem-solving by lawyers in other countries in an increasingly international economic marketplace. This article will discuss several recent examples where both experiential diversity and global diversity were road tested in the real world with successful results.

Scenario #1: The 100-year-old pollution problem (an in-house example)

A large and extensive waterway had been polluted over time — before the EPA existed and before current laws dealt with releases from various types of manufacturing facilities close to these waterways. Our situation was unique because my client, the "company" who bought and sold many businesses over the same long-term history, was named as one of many responsible parties for current and future planned cleanup actions associated with the current waterway's substantial environmental pollution.

My company was named as the principal party allegedly responsible for the contamination that its former plant generated over a 60-plus-year period even though the facility itself was closed and ceased to operate in the 1960s. There were many other companies operating up and down the waterway, but the potential liability for even one site on the waterway could be substantial over time. My company was alleged to be principally responsible even though it acquired the plant and operated it for only a few years, later selling the business to a successor that eventually closed it down.

Both state and federal regulators brought the problem to us; they were focused on identifying at least one solvent company, rather than taking the time to identify all the various parties that had come and gone at that site. So, by chance, we were the target that regulators called on for various cleanup costs and other matters relating to this one factory — along with many other businesses up and down the river that operated factories and produced many other products for America's manufacturing base. Since our company had gone through a fair amount of corporate consolidations and mergers, locating records about either the former business conducted at that location or records about the facility itself was extremely difficult. We had no real estate file and could not readily determine when our former affiliate company owned or operated the facility, since the alleged time period stretched back to the 1950s. Did companies have record retention policies back then? The term likely had not even been coined. We had no employees still living who would have any recollection of the business at this location — nor would we even know how to find any former retired employees still around.

So — how did we bridge this information gap? The old-fashioned way! One of our senior lawyers who was working for us on a part-time consulting basis, who himself had no knowledge of the former business or this location, did remember one very important fact — he recalled that the old acquired company, which was a small public company at one time, had published annual reports. This seasoned attorney was able to locate several of these annual reports from the relevant time period, which contained information about the company's operations at this site in the 1950s. The annual reports had no specific references to the underlying contracts

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that were created to buy and sell the business at this location — but — the same senior lawyer also knew that our current company and our likely predecessor company had likely worked with the same Wall Street law firm that we still use. Our part-time senior lawyer contacted that firm and astoundingly it still had client files dating back to the 1950s. Like the proverbial needle in a haystack, we were able to locate and acquire the actual contracts used to buy and sell this particular business unit at this particular site.

Once we drilled into these contracts, we found that although the transaction involved the acquisition of stock, an unlimited indemnity clause was included in the deal for any liabilities or claims related to the past operations of the plant at this location. This unlimited indemnity included not only the operations of the immediate company that sold us the plant, but also applied to the operations of the past owners of the plant that dated back to the early 1900s!

Now with these newly found contract documents from the 1950s and 1960s, we were able to approach the former owner of the plant, which is still a viable and substantial company today. The predecessor company agreed to reimburse us and take on a substantial share of these costs in accordance with the contract documents we discovered. We were able to go from 100 percent environmental liability for a plant to paying less then 50 percent thanks to the experience, knowledge and determination of our part-time senior lawyer.

How would your company have handled a current legal problem that was rooted in documents that were either nonexistent at the company head office or dealt with a subject that no present employees or even recently retired ones have any knowledge of? But for the resource of some of our senior lawyers who were creative and knowledgeable about tackling this problem using links to the past — which had nothing to do with the Internet or modern technology, we would have been liable for many hundreds of thousands of dollars more than we should have incurred. Thus, we see examples of how our most senior and experienced lawyers may still be worth their weight in gold and worthy of keeping them part of the team, either in a full time or part-time capacity.

Scenario #2: The lost insurance policy case (the outside counsel perspective)

I received a telephone call from an in-house counsel at a major chemical company in the Philadelphia area. They had just been sued in an asbestos case. The plaintiff alleged that a ship-decking product sold by one of their former subsidiaries contained asbestos. The decking material had been applied to ships in the 1940s and a ship worker was claiming that he developed lung cancer as a result of being exposed to this product. The client's former subsidiary had gone out of business many years earlier. The first task was to find people who were with the subsidiary when it was still in business and had knowledge of the product and the operation of the company. Since the events that led to the lawsuit occurred decades earlier, information concerning potential insurance coverage was critical. The company did not have copies of any insurance policies from the 1940s and all of the former subsidiary's employees had died or were long retired. There were no databases maintained by the company that contained relevant information. One of the current client's longtime employees recalled the name of a person who worked for the subsidiary and might still be alive. I asked one of our associates, who is skilled at electronic research, and our knowledge management department (formerly known as the library) to see what information was available online. There was no information on the Internet regarding this individual.

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In the end, I hired a private investigator who was able to locate the individual. The former employee was in his nineties, in ill health and could not travel. In-house counsel and I interviewed the individual in his living room and we received some basic information regarding the product. He was able to identify another former employee who worked in management for the former subsidiary. The second individual remembered that the company had some type of insurance coverage but could not remember the name of the company or the type of insurance.

Armed with this information, in-house counsel went back into the many boxes of documents stored in a dirty warehouse from the former subsidiary. They discovered that check registers dating back to the 1940s still existed. A team of lawyers, including in-house and outside counsel began the painstaking task at looking in old check registers for the names of any insurance companies to whom premiums may have been paid. After many hours of review, the name of an insurance company was identified. It was the same insurance

Herb Bass

Herb Bass, a nationally recognized authority in the area of eminent domain, was fast approaching the firm's mandatory retirement age of 72. Bass is the founder of the firm's condemnation law group, a former chair of the real estate department and a member of the firm's executive committee for many years. He literally wrote the book on Pennsylvania condemnation law. At age 70, his practice continued to grow and he was working harder than many attorneys almost half his age. More importantly, Bass had a long history of mentoring young attorneys, taking time to review their work product, explaining complex areas of law, and giving professional advice, i.e., teaching them how to think like a lawyer. Bass was responsible for developing and mentoring some of the most successful lawyers a generation or two behind him. He understood the importance to the firm's future success of developing exceptional lawyers with vibrant practices. The mandatory retirement age was contained in the firm's partnership agreement and required a vote of the partnership to change. In its form then, being retired was referred to, at least economically, as falling off the cliff. Some firm partners felt that mandatory retirement at age 72 (later than many other firms that required retirement at 65) was essential to the smooth succession of leadership and a transition of clients to a younger generation of lawyers. Other partners felt equally strongly that many lawyers continue to play significant roles in law firms well into age 80 and beyond and are vigorous both mentally and physically. Cutting them off at 72 was arbitrary and deprived the firm of significant resources in knowledge, experience and profitable practices.

After many decades, the partnership agreement was amended to repeal the mandatory retirement age. It is now unanimously viewed as a successful change. Bass, now in his mid-seventies, continues to practice at the highest levels, putting in significant hours. He continues to be an invaluable resource to dozens of lawyers in the firm, as well as young associates whom he mentors. He is an example of the type of experiential diversity that is necessary to maintaining the quality of lawyering, providing wise advice to clients and avoiding a brain drain based upon arbitrary rules, whether in a law firm or law department.

company used by the former subsidiary into the 1970s. More remarkably, the insurance company was still in existence, at least as part of a larger insurance company conglomerate. The next task was to attempt to identify the nature and scope of 1940s insurance coverage. There were no longer any insurance policies among the former subsidiary's records. The financial records indicated that the former subsidiary maintained comprehensive general liability ("CGL") coverage. The lawsuit concerned dates in the mid-1940s.

The next challenge was to determine the terms of the CGL policies at issue. This is where the younger associates made significant contributions. They discovered, through electronic research, that the asbestos exclusions to CGL policies did not come into existence until the 1970s. Therefore, at a minimum, the current standard asbestos exclusion would not apply. The computer research was also able to identify the standard form CGL policies used many years earlier. My client, the company, then notified the applicable carrier of the lawsuit and the dozens of cases that followed. The carrier refused to defend or indemnify my client based on the lack of evidence of coverage or the existence of any insurance policy.

This response was not unexpected. The client and I were already working together to prepare a complaint for declaratory judgment seeking coverage for the asbestos cases. The case was filed and we immediately moved for expedited discovery to preserve the testimony of the elderly employees of the former subsidiary. This type of case is referred to as a lost insurance policy case. Ultimately, sufficient evidence of coverage from the 1940s was gathered to convince the carrier to enter into a cost-sharing defense arrangement with the carriers from the 1970s and 1980s. The ability to marshal the evidence using the latest electronic research as well as old-fashioned manual document review and the in-person interviewing of individuals combined to bring about a successful result.

Scenario #3: The art of the deal – or if you have to read the contract, you already have problems!

How frequently does your company enter into longer-term contracts such as acquisition, joint-venture or long-term product and sales agreements where not all of the deal history or terms end up being part of the actual signed agreement? At my company it happened quite often. Simply picking

up a five to eight-year-old contract, some of which can be quite massive (100 pages or more, excluding schedules and exhibits), reading it and trying to figure out why some provision was negotiated or agreed to eight years earlier by the business people is not always easy. Better yet — when a new issue pops up and it is not squarely within the confines of some existing provision of the agreement, what do you do — what does the opposing party do? Your company will substantially benefit if the team of lawyers, or even a few, who worked on the deal are still around or are otherwise available. How many times does the opposite happen, when the opposing party has had substantial turnover and they lack the continuity of advisors on their end to quickly and fairly address the new issues that emerge. We usually have four to five of these a year that pay huge dividends when we have access to the lawyers who worked these deals and can add the history of what was agreed to and why. This continuity is invaluable.

Now — some suggestions as to how to keep these senior lawyers around. First off, they tend to be wise, battle-tested and possess great insights and experience. Senior lawyers can be great mentors for your more youthful and less experienced lawyers and help with their ongoing training and development. As many of these more senior lawyers have grown children, they are not burdened with as many schedule disruptions like the many conflicts that arise throughout the workweek with young children's school or extracurricular activities. Some of the senior staff may also have grandchildren and may want to move to a more flexible part-time schedule where they only work two to four days a week — but not a full-time schedule — giving them ample opportunity to help out with grandchildren or other interests.

Your company's policies and HR professionals can work out proper ways to handle these part-time employee assignments or consulting roles. My company has employed some staff in a variety of ways to retain and work with a number of our more experienced senior colleagues who are either lawyers or even in some cases paralegals to make this work. Outside law firms can retain senior lawyers as "of counsel" or "senior counsel." In almost all cases, this has been a win-win for both the employee and the company/law firm as we avoid the need to hire a younger entry-level person to fill the role, a lawyer who will typically need several years to develop and learn the skill sets needed to be effective in the role. The more experienced senior lawyers — having worked most of their lives — are anxious to keep working in many cases, but not necessarily in a full-time role and they are often very flexible to work out an acceptable arrangement that meets their objectives as well.

Scenario 4: Global diversity – the world is indeed getting smaller!

As I mentioned at the outset of this article, I was formerly associated with a global legal team of over 100 lawyers, and when I started working for international companies about 30 years ago, the practice was very different. Although I was part of an international company with 30 or more lawyers spread over many different countries, at least half of these lawyers were practicing on "desert islands." Each lawyer located in the respective countries pretty much kept to him or herself and we rarely collaborated or worked together. Our tasks and clients tended to be located in the country of residence where the need to connect and collaborate was not necessary or important. As a result, we kept to ourselves and did our own thing, except for the occasional parent company inquiry into some large matter or special problem.

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Since cloning the brains of these former colleagues is not yet practical, our suggestion is to consider keeping them around as either part-time employees or legal consultants that you may call upon from time to time.

In today's international and competitive environment, one must be mindful of the focus on global customers and markets, and the drive for reducing legal costs and finding efficiencies in all that we do. Today, the complete opposite is not only the norm, but also a requirement for survival. In recent years, our global department now not only has established a worldwide template of various agreements and best practice initiatives, but more importantly, we have various global practice groups. These groups are composed of various members from our global legal teams all over the world. The groups can be set by legal specialty areas or by the global business groups or the clients we serve. The groups vary a bit — but many have monthly webinars in which one or two guest presenters publish a set of slides that are then used on a telephone call — attended by a dozen or so members of this particular practice group. For the lawyers in the United States, most of these calls are very early in our day, as we are connecting with lawyers all over the world, with many different time zones including our lawyers from China, Asia and even Australia.

The fascinating aspect of these groups is to learn how legal issues and business disputes are dealt with in other parts of the world and sharing common experiences with our legal colleagues from many different cultures. What is really challenging and fascinating at the same time, is that these calls are conducted in English, which is a second, third or fourth language for our worldwide colleagues as most of our US lawyers are limited and only speak one language. This does, however, require some sensitivity and greater cultural awareness on the part of the US lawyers in that they need to speak clearly and succinctly, and be sensitive to using American slang and colloquialisms in order to effectively communicate with non-native-speakers.

Not only are these exchanges professionally interesting and valuable, but the soft or social aspects contribute to effective team building. The participating lawyers have more opportunities to meet one another and establish more informal networking as well. Discussions about World Cup football games being played in Brazil were common. That was a bit of a cultural experience in and of itself — as most of our global practice calls had usually at least two or more members about to face off in World Cup competition and there was a fair amount of pre-call discussion and good-natured boasting.

One of the issues where global diversity shows its value relates to the location and procedures for resolution of business disputes. The notion of extensive discovery, depositions, interrogatories and other forms of pre-trial discovery are unique features of the American judicial system. Discussions of ways to resolve disputes in an efficient, cost-effective and timely manner often reflect

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the cultural differences in dispute resolution. Moreover, the comparison between litigation in court and arbitration was very interesting. Mediation as an alternative to litigation or arbitration is often discussed. Our international legal colleagues have much to offer and consider, as they are indeed more accustomed to having had various experiences in a variety of jurisdictions. Also of interest were recent discussions of the differences in various laws dealing with the invocation of force majeure in a commercial contract setting. The economic stability and legal systems are stronger in some countries than others. These discussions and perspectives are eye opening for the American lawyers. All in all, we have much to learn from other systems and our colleagues abroad and we are indeed lucky to have them as part of our global team.

Conclusion

Diversity in your legal teams, whether in the in-house or private law firm setting is vitally important to make sure your ultimate clients are getting the benefit and insights of all backgrounds, experiences and cultures. Not to diminish the critical need for traditional notions of diversity encompassing sex, religion, gender, nationality and youth (much still needs to be done!) — do not fail to consider experiential and global diversity as part of that mix as well. For those companies that exist today by virtue of mergers, acquisitions and combinations, legal liabilities can emerge at any time from past years, and the knowledge to defend against those actions is not stored on a computer or database. Rather, the minds or memories of more senior lawyers are as valuable as any electronic database. How do you retain and secure that experience, information and knowledge? Since cloning the brains of these former colleagues is not yet practical, our suggestion is to consider keeping them around as either part-time employees or legal consultants that you may call upon from time to time. They are worth their weight in gold!

Even if you do not have the past historical concerns that some businesses or law firms may have, finding a way to retain some of these more experienced senior advisors is still a great tool for training, mentorship and knowledge succession. Overall attorney workload and costs can be reduced as many of these arrangements can be done at very competitive rates, while still remaining attractive to the senior staffers allowing them to continue to work albeit in a less then full-time capacity. For the same reason that we mention the need and compelling case for experiential diversity on our legal teams, the same applies for the truly international aspects of running worldwide or multiple-continent businesses or law firms, as there is no replacement for having trusted members of your own team to consult and collaborate with on complex and diverse legal problems affecting your business or clients. Taking advantage of that "fine old bottle of wine" is even more enjoyable when that bottle of wine is a non-American vintage. **ACC**