

THE STRATEGIC LAWYER

Companies
Are Placing
Premiums on
Advisers Who
Understand
Both Business
and the Big
Picture

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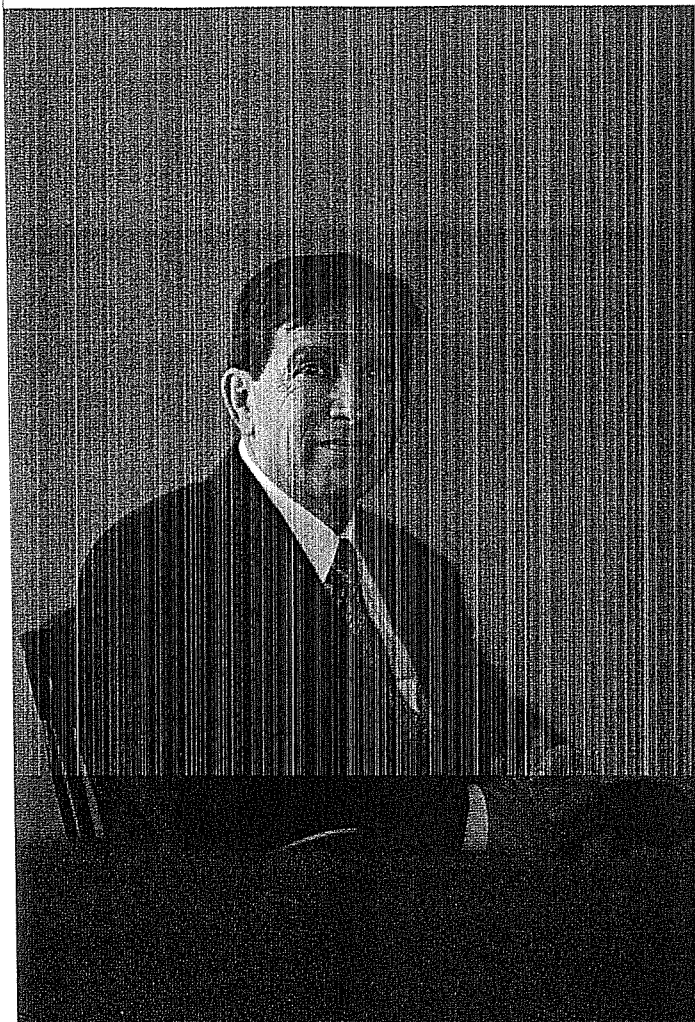
DEPENDING ON YOUR PERSPECTIVE, SAN FRANCISCO LAWYER MICHAEL A. Kahn is either the last of a dying breed or the model of what every business lawyer in the 21st century should aspire to be.

Kahn, a litigator by practice area, doesn't consider himself the world's greatest technician or even the best cross-examiner in the courtroom. But what he does have is vision. And it's the kind of vision that has business executives clamoring to meet with him.

"I very often get consulted on matters for companies, and the advice I am asked to give is not just how to handle a problem or a case, but how to approach a problem in light of the company's overall business strategy," says Kahn, a name partner in the 80-lawyer Folger, Levin & Kahn. For him, it's all about the broader implications. "Rather than deciding solely on the merits of the litigation, the overall strategy of the company is considered," Kahn explains, "which might mean acquiescing despite the merits, fighting harder or pursuing a public relations or government affairs strategy."

Call him one part consigliere, one part Sun-Tzu warrior and one part Yoda, but Kahn is that increasingly rare breed of lawyer who focuses on the big picture and how the law can be used to bring it into better focus. Professor and lawyer Richard G. Shell of the Wharton School at the University of Pennsylvania has a name for attorneys like Kahn: strategic lawyers.

The role that Kahn and others like him play may have been more common for lawyers 30 to 50 years ago, before the emergence of profit-minded, specialty-touting, multinational megalaw firms. The values of the profession itself, praising precedent and risk



MICHAEL KAHN Being a strategic lawyer is "a hard job to aspire to—you grow into it and develop it."

avoidance, tend to conflict with strategic lawyering. But experts like Shell say that now, more than ever, legal strategists who can really serve the best interests of business are needed.

"Most lawyers would probably think they are strategic because they think about how to maneuver within the legal system," Shell says. "What businesspeople think is how [the law] helps them gain a competitive position. For them it is how to use the law to gain a competitive advantage and exclude competition in a legal way."

Strategic lawyers, Shell says, pull both perspectives together, which is especially valuable in today's global economy. Once a lawyer makes this fundamental shift, from legal-centric to business-centric, he says, it will shift perspective and alter the way that lawyer practices law.

ALTERING PERSPECTIVES, ADDING VALUE

ASK BUSINESSPEOPLE WHAT THEIR LAWYERS DO FOR THEM. Some will smirk and—if they are being kind—tell you that lawyers ruin their deals because they do not understand how to think and work strategically.

Jason Mendelson says that attitude prevailed among

his colleagues when he first became general counsel for Mobius Venture Capital in Palo Alto, Calif.

He was able to change that perception by immersing himself in the inner workings of the company, its relationships and each of his colleagues' roles. He also held outside lawyers to a similar standard.

Mendelson says this requirement helped change the way he and other lawyers worked with the company. Where once they were viewed as deal-eating piranhas, they suddenly became assets for the business. "The worst thing that a lawyer can do is tell a client no and not have another suggestion for what is acceptable to the business objective," he says.

Mendelson says that change was accomplished by acquiring a true understanding of the business, including how it operates, how it makes money, who its competitors are, what its key relationships are and what its goals for growth are.

That sort of knowledge allows lawyers, both inside and outside counsel, to understand how a transaction, a court proceeding or even a simple contract provision affects the business, says Scott Darling, general counsel of Danger Inc. in Palo Alto.

Without it, Darling says, lawyers do nothing more than spend their time arguing about silly legal points, simply because that is what they are taught to do and that is academically what good lawyering is.

"There is no benefit," he says. "It just creates ill will from all the problems you have caused during the negotiation and causes ill will from the lawyers on the other side who you then have to work with."

Take a breach-of-contract situation. The typical business will see no other option but to sue. But a strategic lawyer would contemplate the underlying business relationship and weigh whether jeopardizing that relationship would hinder the company's ability to operate or even whether it would unduly cause more harm to the company than to the business in breach.

Often it's about how a lawyer approaches risk, says Kelly Frey, of counsel to Baker, Donelson, Bearman, Caldwell & Berkowitz in Nashville, Tenn. Thinking solely about minimizing risk, he says, conflicts with the goals of most businesses and provides little or no value.

The real question is: Does the lawyer understand how much risk the business accepts and in what form? "That is when you are making the transition from being an outside counsel to a trusted counsel," says Frey.

Carol Anne Been of Sonnenschein, Nath & Rosenthal in Chicago has this type of trust from her clients because she doesn't shy away from taking a course of action most beneficial to the client, even when that action deviates from what the client initially requested.

If a client calls her to prosecute a patent, for instance, she might instead steer the client toward litigation or even a licensing deal. "I often get calls from clients saying that they need to do a certain thing, but it often does not accomplish what they want to do," she says. "I have to have enough knowledge of things like their business, the industry, the media, to say, 'What is your real goal here?' I have to look at the bigger picture to see if there are other ways that strategically might help them better."

Aside from providing that intangible added value to cli-

ents, strategic practices also may be needed for the survival of law firms that charge a premium for what they do.

According to Kahn, many companies routinely hire outside counsel to perform repetitive, yet highly technical work like asbestos litigation or wage and hour litigation. But now many general counsel are starting to see this type of outsourcing as an unnecessary expense.

SURVIVAL OF THE SAVVIEST

A LAWYER MUST BE ABLE TO SHOW THE CLIENT THAT THE value of their attorney-client relationship goes further than simply the forms that are getting filled out, and the paperwork that's being shuttled to and from the courthouse. It's in the strategy, the analysis, the service. And that's something that can't be easily brought in-house.

Kahn cites a recent meeting with a client as an example. The client had lost a jury trial and was hit with a large punitive damage award. The particular case was a repetitive one, he says, and the client had hired another firm to handle all of the litigation of this kind to reduce the legal fees. "They got this terrible result and then began searching for strategic lawyers," Kahn explains.

When the client came to Kahn, his advice was not to figure out how the company could reverse the judgment on appeal or even snatch the work from the other law firm. Rather, the client wanted to strategize on the legal meth-

ods available to make sure the business was not hit again with a similar judgment, and also to evaluate how the company could prevent litigation in the first place.

Kahn helped the client re-evaluate how the original problem occurred and set up new systems for oversight. External and internal public relations campaigns also were discussed. "The judgment was the very narrow problem. What to do with the unwanted result so it does not happen again was the real issue," he says.

So why can't every lawyer at every firm do this? The bottom line is because becoming a strategic lawyer isn't that simple. Often it takes a certain type of person. Some lawyers want to be known as the go-to person for certain kinds of litigation or transactions. Others want to be rain-makers without spending a lot of down-and-dirty time with the client. The strategic lawyer is somewhere in between, Kahn says.

"It's a hard job to aspire to—you grow into it and develop it. It has to do with skills and personality," he says. And a lot of the necessary traits are antithetical to the training and personality types of many lawyers.

Kahn counts candor and humility as some traits of successful strategists. If he does not know how to help a client, he has no problem admitting it and finding someone who does. He is willing to go outside the firm to find the right expert and says lawyers need to be prepared to take the

CALCULATED RISK

In his book titled *Make the Rules or Your Rivals Will* (Crown Business, 2004), lawyer and law professor Richard Shell shows how a focus on the big picture has helped companies succeed. The book cites numerous businesses, including Ford Motor Co., Intel and Southwest Airlines, whose strategic use of the law has allowed them to rise to the top over their competitors. In each instance, lawyers provided the momentum to propel the companies toward their goals by using specific, law-based strategies.

Sumner Redstone's masterful use of antitrust laws to gain market share for some of Viacom's programming provides a good example.

According to Shell's book, when Redstone took over Viacom in the late '80s, the company was one of the leading content providers for cable television, offering up the likes of MTV and VH-1. But one of Viacom's biggest customers, Time Inc., also was a competitor. Time owned two premium cable television channels—HBO and Cinemax—and did not want to carry Viacom's movie channels, Showtime and The Movie Channel.

Redstone, a seasoned antitrust lawyer before leaving the law to go into his family's entertainment business, suspected that refusal to carry Viacom's movie channels was an antitrust violation and sued Time.

It was a risky move, Shell writes. Faced with a \$2.4 billion suit from one of its vendors, Time could have severed all ties with Viacom. But Redstone was confident of his legal strategy. He knew that Time would not want to alienate its viewers by losing Viacom's highly watched programming.

In addition, Time was in the midst of merger talks with Warner Communications, and the antitrust suit could trigger an investigation that would have stymied the merger. Ultimately, the two companies settled, and Time was forced to carry the competing premium movie channels.

More recently, legal strategists tout the bankruptcy of United Airlines as a highly strategic move. While the filing has cost many workers jobs and led to pay cuts, it also may be the one reason the airline will survive and thrive in the future. Legal experts say that the filing was strategic because it allowed the airline to gain a

competitive edge to renegotiate the terms of almost every part of its operations, from benefits and pay for unions to the terms of its airplane leases.

Strategic lawyering also can involve knowing when to push hard on an issue, perhaps all the way to the U.S. Supreme Court. Shell cites the *Grokster* case, pending before the high court in early June, as an example: MGM is trying to hold *Grokster* accountable for copyright violations by users of its file-sharing software. Many businesses see the definition of a copyright as a matter of policy. The best forum to push for a change in the policy was the Supreme Court.

But it also could be as simple as lobbying for legislation at a state level that will be more favorable to one business while being detrimental to a competitor. As an example, Shell says a car rental agency, faced with the threat of competition in a market, might be able to get a state legislature to require that all such businesses be self-insured. This type of requirement could force the smaller competitor out of the marketplace.



SYLVIA CHIN Lawyers as technicians do not give clients the extra value they seek.

heat for going outside the now-ingrained law firm culture of cross-selling. "Some of these moves are not profit-maximizing," he admits. "But I would argue that they *are* over the long term because you will have the confidence of the client and will find yourself with more business than you can handle anyway."

Many of these strategic lawyers also find themselves working as part of a team. David A. Bono of Harkins Cunningham in Washington, D.C., recalls a recent meeting with a new client to discuss possible avenues for an appeal. He soon found himself working with the client's trial counsel to devise a better strategy than appealing the losing decision.

Ultimately, the team decided that the regulatory framework in which the client operates was not beneficial and it needed to be changed. "Lawyers have a reputation for being headstrong and saying, 'I'll do it my way,'" he says.

"But if you start thinking about how a matter fits into a larger policy perspective, you start forging consensus and working well as a team."

Chicago lawyer Been says the diversity of practice areas in her firm allows the attorneys to form teams to be more strategic for their clients. She often finds herself meeting with members of the firm's litigation, transactional and regulatory practice groups to figure out what course of action most effectively helps the client accomplish its business goals.

Been recalls a recent matter that came to her as a straight licensing deal for intellectual property. But as she explored the deal with her client, she learned that the license was part of a larger real estate deal, and that the client had not thought about many of the real estate issues that were linked to the licensing transaction.

Been brought in a colleague from her firm's real estate department and the two worked on the matter together to help the client fully realize its goals in the transaction.

But an attorney who understands the role of business strategy is only one part of the equation. The client also must be similarly inclined to have the kind of vested relationship with a particular lawyer.

Shell says problems may arise if an inside counsel feels threatened or does not understand what the outside counsel is trying to do. Attempts to learn the business better could be misinterpreted as thinly disguised efforts to market or generate new business for the lawyer.

General counsel Darling sees the tension. "The in-house counsel wants to keep fees down, especially in a situation where, like us, you are a startup and have a limited budget. You do not want to spend a lot of time and just want a solution. But, at the same time, you want a solution that works. You have to give [outside counsel] enough rope to come in and interview businesspeople."

Lawyers like Kahn and Frey recognize that tension and are often willing to eat billable time to learn more about the client, its industry, its competitors and their markets.

Mendelson says his company's experience is proof that businesspeople are willing to change their attitudes about lawyers who learn to be valuable assets.

BEGINNING AT THE BEGINNING

THE DEAN OF NORTHWESTERN UNIVERSITY LAW SCHOOL, David Van Zandt, has long been a believer in the role of the strategic lawyer. He's now staking the law school's reputation on it.

Several years ago Van Zandt revamped much of the Chicago law school's curriculum to sharpen the focus on how the law affects business. "Law, like other professions, is all about the strategic environment," he says. "A good executive understands the law and how to use it. A lawyer should be helping that good executive as opposed to saying, 'I am a lawyer' and 'Ask me a legal question.'"

Van Zandt changed admission criteria to try to accept students who have had post-college work experience. He

BECOMING A TRUE ASSET TO CLIENTS

also includes cross-training with MBA students at Northwestern's Kellogg School of Management. In addition to torts and constitutional law, first years include courses on team building, problem solving and negotiating.

Van Zandt believes that, given the high salaries firms are paying lawyers, they can no longer hire attorneys who have nothing to offer besides basic legal training. "The CEOs and the business development guys are going to set the strategy, but they want a lawyer who understands that strategy and who can contribute to it and not just wait for the legal question to pop up."

Fordham University law professor Tina Stark hears similar things from law firms in New York. The demand for lawyers who can do more than walk the walk and talk the talk with their clients is so strong that firms are asking her to teach their lawyers about business and strategy.

"Being a corporate lawyer is almost a commodity at this point," she says. "One of the things you hear clients say is that they want their lawyers to better understand their business because it affects their advice."

Stark contends that lawyers are taught to be litigators rather than dealmakers. Students take facts and learn how to use them in persuasive arguments. Dealmakers, on the other hand, must take the terms of a business deal and translate them into contract provisions.

One of Stark's more popular courses teaches lawyers about the five business issues that almost always present themselves in contract agreements:

- Money, such as purchase price or interest rates.
- Risk and how it can be limited through mechanisms such as warranties and covenants.
- Control over the deal and its risks.
- Standards established through contract wording, such as "good repair" or "promptly deliver."
- The end game, which is how the contract ends. It could be through repayment of a loan, for example.

She uses a series of hypothetical examples to apply the framework, making her students think about the business issues involved in any contract instead of simply analyzing the legal problems. Stark says that making a lawyer think in these terms helps him or her progress from being an ordinary corporate lawyer to a "deal lawyer."

White & Case is one of the law firms where Stark has taught lawyers. New York City partner Sylvia Fung Chin says the firm has always provided training to its lawyers, but she feels now, more than ever, it is important to have lawyers who understand business and can work strategically with their clients.

"Our lawyers really should not be technicians," Chin says. Lawyers should try to understand what clients are trying to accomplish, she says, and if lawyers ignore those needs, "at some point in time the clients will essentially just push a button and get a document and fill in the blanks themselves. That is not going to accomplish the need or give them the added value of what they are looking for." ■

Foreign Fight

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Those and other signs of progress in human rights were enough for the State Department last fall to certify Colombia as eligible for continued U.S. military aid. Occidental also says the State Department's view should be enough to keep the company out of a U.S. federal court in its own backyard.

"The incident occurred in Colombia," says Occidental spokesman Meriage. "You do have a democratically elected government in Colombia. It's one of the oldest democracies in the Western Hemisphere. It has a functioning system. To suggest otherwise flies in the face of reality. Colombia is not a banana republic."

COLOMBIA'S JUSTICE SYSTEM

LUZ E. NAGLE ISN'T SO CERTAIN. AS A judge in Medellin, Colombia's notorious coca growing region, Nagle survived three assassination attempts. The last one in 1985 was enough to

make her pack her bags and flee to the United States with her American husband. Now a naturalized citizen, Nagle teaches law at Stetson University in St. Petersburg, Fla.

In a court declaration supporting Galvis, Nagle said the Colombian procedure that yielded the \$700,000 judgment is designed only to compensate people for government actions and doesn't allow resolution of disputes between private parties. A separate Colombian civil action against Oxy likely would fall victim to corruption and the system's inability to produce reliable, consistent and timely results, she predicted.

Nagle regularly returns to Colombia. Though U.S. courts can't pass judgment on the wisdom of particular policy decisions when deciding whether to allow alien tort cases to proceed, Nagle isn't similarly restrained. She reports that Colombian justice hasn't changed all that much since she left.

"I lived through the system," Nagle says, pausing. "Let's put it this way: I lived. They don't prepare you in law school for the psychological and moral battles you have to fight."

Nagle says public mistrust and fear

count among the deepest problems in the Colombian justice system. She suggests the system should engage in a little PR as a way to regain public faith and persuade plaintiffs like Galvis to use Colombian courts. "The people of Colombia stay away because they don't trust the system," Nagle says. "If someone is corrupt, bring that person to justice. Put that person in jail. Then publicize it."

Otherwise, Nagle sees a system that just can't repair itself quickly enough to render meaningful justice for Galvis.

As the clock ticks on his case, Galvis awaits the resumption of fall classes. He constantly thinks of his family members in Canada. With his mother gone, he says, they have begun to drift apart in their new home.

"She was the core of my life," Galvis says. "The only person who could keep us together was my mother. She was the queen of the castle. The only thing I want to do right now is finish my major and go to Canada."

Still, when Galvis sued Occidental, he ignored an old piece of standing advice his mother long ago had imparted to him. "My mother told me once that the cemetery is full of heroes." ■