

The Business Magazine
For The Chief Legal Officer

CORPORATE COUNSEL

corp.counsel.com • October 2005

An incisivemedia publication

What the Billion-Dollar Man Wants From Outside Litigators

Altria's litigation chief has spent more than \$1.5 billion on outside counsel. Here's what he asks for in return

Krysten Crawford
Corporate Counsel
October 26, 2005



William Ohlemeyer stands up, brimming with excitement. He rushes to his desk and rummages around. He holds up a magazine triumphantly. "This," says the associate general counsel of Altria Group Inc., "is great stuff." Just the kind of stuff he thinks his outside counsel should be reading.

Fortune or *Business Week*? Try *The New Yorker* – the annual food issue, to be exact.

Ohlemeyer, litigation chief of the New York-based tobacco and snack-food giant, flips to an article about a cookie contest where different teams at a food research and development company were charged with creating the perfect low-fat gourmet cookie.

One team leader came up with a strawberry shortcake concoction after looking at, of all things, a salty tortilla chip. (The salty coating imparts lots of flavor quickly; making a healthy cookie taste good is hard to do). The recipe didn't win the contest, but that doesn't matter to Ohlemeyer. What he loves is how the team leader crafted a solution to a problem by looking at a seemingly unrelated product. Why, wonders Ohlemeyer, can't lawyers apply the same nonlinear, creative mind-set to legal problems? "It sounds so simple," says the 46-year-old attorney. "But you get a room full of smart lawyers and they'll say we're not selling cookies. We're selling the law and the facts."

Ohlemeyer, who has signed more than \$1.5 billion in outside counsel invoices since coming to Altria in 1999, is known for being rather dramatic. At one meeting for outside counsel, he erected track hurdles at the entrance to the room to dramatize the difficulties his legal team faced. "Bill is

entertaining, and he knows very interesting ways to get his message across," says Kenneth Reilly, a partner and former colleague of Ohlemeyer's at Kansas City, Mo.'s Shook, Hardy & Bacon.

The grand gestures have paid off. Working with his team of 10 deputies, Ohlemeyer has cut the company's docket roughly in half, to 230 individual lawsuits as of earlier this year. That's approaching a 10-year low. At the same time, Altria's defense costs in product liability cases fell 31 percent to \$268 million between 2001 and 2004.

However, appeals in three critical cases are pending, including the federal government's so-far unsuccessful bid to recover \$280 billion in smoking-related health care costs and a five-year-old \$145 billion verdict in a Florida class action (of which Altria is on the hook for \$74 billion). Losses in these cases could derail Altria's plan to spin off its Philip Morris tobacco operations from its Kraft Foods snack division. So despite the recent gains, Ohlemeyer and his company still need all the top-notch outside legal help they can get.

With this in mind, we asked Ohlemeyer, one of the Fortune 250 litigation chiefs on our chart, to tell us five things he insists on from his outside litigators. On a steamy late summer day, the boyish 46-year-old held forth on law firm staffing, diversity and cost containment.

FIVE IS BETTER THAN 10

By the time Ohlemeyer joined Altria in 1999, the company was racking up \$1 million a day in legal fees. Soon after his arrival, the tobacco giant held one of its periodic

convocations where hundreds of outside company lawyers show up. Looking around, Ohlemeyer concluded there were too many attorneys. "We finally realized that bigger isn't better," he says.

Altria could have shortened its outside counsel roster by cutting some firms, just like many *Fortune* 500 companies. Or it could have held large-scale beauty contests and ordered firms to outsource functions like legal research and use more contract lawyers, like E.I. du Pont de Nemours and Co. has done. But Altria's problem was about more than just the number of outside law firms – it was about the teams assigned to each case.

So Ohlemeyer reviewed the billing history in a few of the company's cases – including one that he had defended when he was the company's outside lawyer – and says he was "astounded" to discover that nearly 150 Shook Hardy timekeepers had billed time on the matter. The vast majority of them were paralegals and had billed fewer than 10 hours in all. He reviewed bills submitted by other Altria firms and found the same thing. "In this kind of litigation, you can very quickly get dozens, if not hundreds, of people involved in a file or involved in a case," says Ohlemeyer. "It's not that they're not adding value or not doing anything, but 20 of them are doing 90 percent of the work."

Ohlemeyer started bringing smaller teams together for a few days at a time, to talk exclusively about defense strategies. No cell phones. No BlackBerries. "Three people in a room with enough time to think creatively are better than one. But five people in a room are better than 10," said Ohlemeyer.

Has this approach been a success? Ohlemeyer points to a number of examples. Most recently, Shook Hardy's Reilly won a jury trial on Altria's behalf earlier this year with a small team comprised mainly of women lawyers.

CONNECT WITH THY JURY

One of the first steps Ohlemeyer took when he joined Altria, then known as Philip Morris, was to hunt for new litigators. Big Tobacco, which has long refused to settle cases and for decades had successfully convinced jurors that it was not responsible for smoker illnesses, suddenly had run into trouble. New evidence strongly suggested that industry executives, despite repeated denials, had long known about the dangers of nicotine. In 1998 Philip Morris lost its first trial over an individual smoker. That same year, the industry struck the landmark \$206 billion settlement with the states. Cases against Big Tobacco spiked.

One day, Ohlemeyer looked in the mirror and realized that he didn't look like any of the jurors he had stood before in recent years. Like all members of the Big Tobacco defense bar, he was white, male, and had been working on tobacco matters for more than a dozen years. The jurors were much more diverse: They were both young and old, male and female. They came from different ethnic and racial backgrounds.

Altria, concluded Ohlemeyer, needed to find new blood, lawyers who looked and talked more like the juries. More women. More minorities. Younger lawyers. "We had to start bringing them into cases early on," said Ohlemeyer. "Not at trial," he added, "when it's too late."

Ohlemeyer says he and his team went to Altria's outside firms and told them that the company needed more diverse trial lawyers. Some firms delivered. Others didn't. (He wouldn't say which ones, or whether he fired any of those firms.) Ohlemeyer also found new lawyers, at new firms. The two biggest beneficiaries: DLA Piper Rudnick Gray Cary and Latham & Watkins – neither of which had represented Altria until Ohlemeyer came on board. And they've given Ohlemeyer the results he wanted, too.

Among the newcomers was DLA Piper's Amy Schulman, who was 39 when she caught Ohlemeyer's attention while speaking at a Philip Morris lawyer retreat six years ago. Schulman and her team have since won pretrial dismissals in all 17 cases she's handled for Altria. Another is Latham & Watkins partner Beth Wilkinson, a former

federal prosecutor new to tobacco work who pulled together a team of young lawyers that came up with novel ways to challenge jury selection rules in California – and won a crucial victory for the company in 2003.

PREMIUM SERVICE FOR PREMIUM PRICE

Ohlemeyer is no fan of time sheets, even though more than 75 percent of Altria's bills are based on hourly fees from firms that charge some of the highest rates in the country. Ohlemeyer says he'd like to experiment more with alternative fee arrangements – but he says getting firms to go along is difficult. "There's been a misconception, especially in the last five years, that there's a buyers' market for legal services. That's not true," he says. "More big, successful companies are involved in major high-profile litigation than ever before. When they get involved in that kind of litigation, they want the same people you want. It's very competitive [for companies]."

If he can't necessarily control the costs, he can make them more predictable – both for the company and its roster of law firms. To that end, Ohlemeyer convinced all of Altria's 10 top litigation firms to dicker over rate hikes and other financial arrangements once every two years instead of annually.

Did he get push-back? "For sure," says Ohlemeyer. "They said, 'We don't do this. We've never done it. We can't do it.' " But they went along, and in exchange for locking in rates for two years at a time, firms were paid most of their monthly invoice by the 10th of each month.

DOING (E-BILLING) TIME

"My pet peeve," explains Ohlemeyer, "is when you look at a bill and see dozens or hundreds of names, the majority of which are [one person] billing two hours [a month]," says Ohlemeyer. "I'm not saying it's not valuable work, but I don't want to [micromanage]

that. I want you as a law firm to manage who you decide is going to work on this matter, and I want to know who these people are." Ohlemeyer says he demands staff plans and budgets from his outside counsel, to keep them mindful of costs. One immutable rule: No one can bill the firm more than 200 hours a month, trials excepted.

And how does he track staffing and hours billed? Electronic invoicing, which was introduced under his watch. "When you're talking about hundreds of cases and hundreds of people working on those cases, you're talking about feet – not inches – of invoices," he explains. "We had an obvious problem at our end processing invoices quickly." With electronic billing, bills get pushed through quickly. They're audited automatically for compliance with approved rates and timekeepers. If red flags pop up, the bills are kicked back to the firms. At the same time, Ohlemeyer can sort the data in myriad ways, which helps him track costs better.

SHOW, DON'T TELL

Like any top *Fortune* 500 lawyer, Ohlemeyer gets pitched for business – a lot. But the unsolicited brochures and cold calls don't work. Instead, Ohlemeyer takes a different approach: He says he asks someone at the firm to tell him the next time one of their litigators is on trial or arguing an appeal. He or someone in his department will go watch. "I want to see them on their feet," Ohlemeyer said. So far, no firm has taken him up on the offer. He won't name names, but Ohlemeyer is incredulous that outside counsel don't jump at his offer: "When you think about it, it's hard to believe."

Reprinted with permission from the October 2005 edition of CORPORATE COUNSEL © 2009 Incisive US Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@customerservice@incisivemedia.com. # 016-01-09-03

BOIES, SCHILLER & FLEXNER LLP

Dawn Schneider
Director of Communications
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue, 7th Floor
New York, NY 10022
212.446.2308 (direct)
212.446.2300 (main)
DSchneider@bsflp.com