

E-Memo

TO: INVESTORS/MEMBERS/PARTNERS AND FRIENDS
FROM: Elliot H. Berman, JD and William F. Bruss, JD—*Guest Authors**
DATE: April 30, 2017
SUBJECT: **Is in-house counsel a solution for some of your bank's challenges?**

Who do you turn to for guidance on bank and consumer protection regulations, assistance on thorny regulatory matters and difficult personnel issues, advice on loan structure and documentation on larger and “out of the box” transactions, contract negotiations, branching, real estate transactions, corporate governance, or selecting, managing and coordinating outside counsel for more complex litigation matters or corporate transactions? For many community banks, the answer is one or more outside law firms. Some community banks, however, need only look down the hall to their in-house attorney. Before labeling it an expensive luxury and disregarding the idea of bringing your legal work in-house, you should consider whether the expertise and accessibility of in-house counsel would benefit your organization.

- **Can your risk management practices be improved?** Given that he or she works with and among you every day, an in-house attorney may be better positioned to understand and truly know your business, your objectives, your people and your risk culture. This presence and familiarity may allow for the in-house attorney to become involved in the early stages of a business transaction, complex loan, or product development and help strike the right balance between risk mitigation and achieving the business objective.
- **Who on your executive team serves as the primary interface with outside counsel?** For many community banks, the answer is probably the CEO or CFO. Significant transactions and lawsuits can be a drain on internal resources and a major distraction to bank management. And while no in-house attorney is likely to have the time or subject matter expertise to handle every matter that comes through his door, in-house counsel is almost certainly better situated to identify and understand the legal or regulatory issues that may be presented in a particular transaction or litigation matter, engage appropriate outside counsel, and be the primary manager of the relationship with outside counsel, all allowing the bank's executive team and other key personnel to focus on their core responsibilities. In-house counsel will also have a level of knowledge about the details of the institution's business not held by outside counsel. During many transactions and disputes understanding the details of the client's business processes can be critical in reaching efficient and effective outcomes. In-house counsel often has more in-depth knowledge of specific regulatory requirements or expectations and how the bank has responded to those requirements and expectations. Additionally, in-house counsel will be familiar with the bank's overall approach to transactions and dispute resolution and able to guide each specific transaction or lawsuit to conclusion consistent with the bank's approach.

In-house counsel can also be effective in working with outside counsel on intellectual property matters—copyrights, trademarks and patents. While many in-house attorneys are not experts in these areas, they have the training to ask the right questions and ensure that the bank's overall approach in these areas is consistently applied by outside counsel.

- **Do your employees engage regularly with outside counsel on more routine matters?** The answer is probably “no”, and it's probably because they know that the five minute phone call or three sentence email is likely to lead to a billable hour or two. An effective in-house lawyer will quickly establish relationships with bank personnel that make it easy (and cost effective) for the bank's employees to place a quick telephone call or send an email on that non-disclosure agreement, lien perfection, or tricky personnel issue. While many of these

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situations may result in simple reassurance to the employee that they are doing the correct thing, some will present more significant issues that, but for the employee's engagement with counsel, may result in legal exposure and greater expense down the road.

- **Are your directors sufficiently informed?** Are your board meetings focused on the right issues? In-house counsel can assist in corporate governance best practices by supporting effective agenda planning, reporting and decision-making. With bank regulators paying more attention to governance processes within community banks, including at the board level, adopting best practices is more important than ever. Implementing committee charters which clearly outline the key responsibilities of committees, establish an agenda planning cycle which ensures that the board is providing oversight to senior management and the bank in alignment with regulatory expectations and its legal duties, supporting consistent reporting of key matters to the directors in an effective manner and ensuring that the board is also focusing on strategic matters are all state-of-the-art actions which in-house counsel can support. As with managing disputes and litigation, having in-house counsel focus on governance allows the bank's executive team and other key personnel to focus on their core responsibilities.
- **Would you gain from having additional management talent?** Many lawyers have experience and talents beyond simply lawyering – in management, operations, compliance or risk management. Each of these areas (and others as well) can benefit from the skills of an in-house counsel. As community banks grow, in-house counsel often take on responsibility for various staff functions, leveraging their expertise and training to enhance the value of these parts of the business. In-house counsel also brings business acumen to the table, adding an additional perspective to the decision-making process.
- **Who on your executive team serves as the primary interface with the bank regulatory agencies?** For many community banks the answer (as with transactions and litigation) is the CEO or CFO. With the growing intricacies of financial regulation, having a single point of contact with the regulatory agencies (which is generally how they are organized) can be a very effective method.
- **Is your bank primarily owned by a single family?** Where a community bank is closely held, and owned primarily by members of a single family, in-house counsel who understand the complexities of the family's dynamics and how ownership of the bank relates to other family business activities can assist in ensuring that none of the complex regulatory issues relating to ownership and control become an issue.

In-house counsel will not be a solution for every community bank, however should a bank evaluate some of the factors discussed above and determine that bringing their legal work in-house is worth further exploration, it is important that the candidate understands and can support the bank's culture (risk, credit and people), has a demonstrated ability to find solutions to business problems and regulatory issues (bank management doesn't like to be routinely told "we can't do that"), and a willingness to engage outside counsel where appropriate.

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