

## STRATEGIC Partnerships Require STRATEGIC Analysis Sam Poss



**Sam Poss**

Strategic alliances have become more popular than ever. They allow businesses to leverage their technologies, expertise, infrastructures, product lines, financing, market penetration and

other assets. By creating synergies, they can move quickly to keep up with rapid developments in e-commerce.

The possibilities for strategic partnerships are virtually unlimited, being subject only to market forces and the creativity of the people who conceive them. A successful "bricks and mortar" company may partner with a company experienced in conducting Internet business to put the offline business online. Or a software developer with innovative software may seek access to the infrastructure, capital or marketing resources of a large potential user in return for an initial exclusive license or a royalty on prototype licenses. Or two manufacturers with complementary products may join forces to exploit their product fit and the greater distribution capabilities of one of them.

Because of the structural complexity of strategic ventures and the uniqueness of each relationship, they tend to be governed by nonstandard documentation. It is crucial to understand their risks and legal ramifications and proceed analytically when negotiating and shaping the partnership. As too many strategic casualties can attest, inadequate analysis and cursory documentation can be catastrophic!

Begin by developing a strategic checklist of goals, risks and other fundamental issues. Determine your strategic objectives and how they align with your business plan. However, nothing is more important than choosing the

right partner. Develop and prioritize a list of partner candidates. Evaluate how the size and strength of each partner may impact the relationship relative to your business' size and strength. Study each potential partner's track record and foreseeable business needs. Could they become targets for an acquisition or seek a merger? Consider the people behind the potential partnership. Who are the senior executives and are they likely to give their personal support to make the alliance work? Ask colleagues what it is like doing business with them.

When it comes to negotiating the alliance, aim for a collaborative atmosphere, building consensus on how you will achieve both parties' goals. If the prospective partners cannot interact cooperatively at a preliminary stage, a successful alliance is not likely. A letter of intent (LOI) can reveal a good deal about the parties' negotiating styles and general compatibility, while helping to define the nature of their intended relationship. The LOI can also help determine whether there is a meeting of the minds before investing too much time, effort and cost in preparing definitive documentation.

Be prepared for problems before they arise. Allow sufficient flexibility to promote creative solutions to unanticipated roadblocks. Continue to use your strategic checklist to evaluate the alliance and keep it on the right track. It is essential to anticipate potential competition between the parties, although contractual provisions will not always resolve the serious problems that may arise when allies become competitors. So choose your partners wisely! And give considerable attention to control issues, remembering that in any alliance you will give up some control. It is important to design an exit strategy at the outset. Mutual disengagement provisions built into the definitive agreement can make the inevitable separation less painful. Leaving termination to chance or later negotiation can be disastrous.

Careful attention to key issues in structuring the alliance will increase the likelihood that the goals of the parties are realized. Remember: both partners must be winners or they run the risk that both will end up losers. Lawyers who are creative negotiators and have broad business and legal experience can be valuable assets on your team.

When planned and executed strategically, strategic partnerships can be invaluable in giving companies a competitive edge and the flexibility to move at Internet speed.

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### FEATURED ARTICLES

- **Strategic Partnerships Require Strategic Analysis - Sam Poss**
- **Five Questions With RH&D's Newest**
- **Sex And Liability - Fred Fenster**
- **What's Going On**

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## 5 QUESTIONS WITH RHD'S NEWEST

Legal Update interviews RHD's three new arrivals, Fred A. Fenster (FAF), Duane Kumagai (DK), and Jeanne C. Wanlass (JCW). Fred is a trial attorney with over 28 years of experience representing notable sports figures as well as a multitude of other clients in complex business disputes. Duane, with over 15 years of litigation experience, represents commercial creditors and prominent trade suppliers throughout the U.S., Canada, and Japan. Jeanne, who recently joined the firm's bankruptcy department, focuses her practices on business and personal reorganizations. Here they each answer questions about law, their practices, and their move to RHD.



*Fred A. Fenster*



*Duane Kumagai*



*Jeanne C. Wanlass*

### 1 *How have the challenges of practicing law changed since you began your practice?*

FAF: Since I started practicing law, there have been three major developments: attorneys have become far more specialized; the complexity of the issues has dramatically increased; and there is far less time for personal enjoyment.

DK: The biggest impact has been from the expanded use of technology, especially communications technology such as e-mail and voice mail. As attorneys, we are more productive than before, but we are also responsible for managing more information. In this sense, technology has made practicing law (like a lot of other jobs) more challenging. But, I do enjoy the element of precision it adds.

JCW: We are seeing many more Internet companies file for bankruptcy protection.

Dot. coms can grow and fail very rapidly. This increased pressure on the bankruptcy process has forced both attorneys and the courts to adapt their traditional timing (short version: I feel the need, the need for speed).

### 2 *What is your biggest accomplishment as a lawyer?*

FAF: Enjoying the practice for 30 years and enthusiastically looking forward to future challenges.

DK: Somewhere along the line, I became technically proficient enough that the practice of law became enjoyable. As a young associate, I wondered when this would ever happen.

JCW: Every case has its triumphs. My favorite was the successful reorganization of a company according to the plan proposed by the debtor where a competing plan of reorganization was filed by a creditor.

### 3 *What do you enjoy most about practicing law?*

FAF: Having an opportunity to help clients solve their problems.

DK: It keeps you sharp. It is never boring. Every single case is unique and challenging. It makes you write well.

JCW: Developing relationships and finding solutions.

### 4 *Why did you choose RHD?*

FAF: The people are highly supportive, their work product is first rate and everyone has a productive life outside the practice of law.

DK: Before joining RHD, I handled commercial litigation and bankruptcy matters with a large law firm and, for several years, as a solo practitioner. I enjoyed the solo practice and my clients treated me well. Nonetheless, in RHD I saw an opportunity to take my practice to a higher level. At RHD I can offer my business clients a full range of legal services, and I have the ability to properly staff the larger litigation matters.

JCW: The firm has a reputation for excellent work and a congenial atmosphere.

### 5 *What do you like to do in your spare time?*

FAF: I like to play jazz piano and experience the city.

DK: Play with my two sons - ages six and four. I am teaching them how to play baseball and golf - or rather, golf *safely*. You do not realize how dangerous a golf club can be until you see one in the hands of a four-year old.

JCW: Read, sail, shop—not necessarily in that order.



# SEX AND LIABILITY

By Fred Fenster

## In Employment

Workplace romances pose a host of problems for both employers and employees.

For employers, the risk is that one of the parties will continue to pursue the relationship after the other person decides it is over. This almost inevitably leads to a sexual harassment lawsuit against the employer.

Under the California Fair Employment and Housing Act ("FEHA"), absolute liability is imposed on an employer if the harassment is engaged in by its *supervisory* employees, regardless of whether the employer knows of the harassment or should have known and failed to intervene. As one Court noted, "the policy of deterring and eliminating harassment and retaliation in employment is served by holding a supervisor liable for his own acts which are violative of FEHA."

The employer may also be held liable for harassment by its *non-supervisory* employees but only if it knew or should have known of the conduct and failed to take immediate and appropriate corrective action.

The danger of workplace relationships for employees is that once the romance sours, they may be sued individually for sexual harassment. Effective January 1, 2001, the Amended Provisions of the FEHA impose personal liability upon all employees for sexual harassment, regardless of their supervisory status.

To constitute unlawful harassment, the alleged conduct must comprise a "concerted

pattern of harassment of a repeated, routine, or generalized nature." The conduct must also "be sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." (Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal.App.3d 590.)

Additionally pertinent in harassment claims, and of critical importance in the case of a workplace romance gone awry, is whether "the harassment complained of is based on sex." In other words, did the harassment arise out of the individual's gender, or as a result of terminating the intimate personal relationship. In the later instance, the United States Supreme Court has determined that laws against unlawful discrimination do not provide for a general "civility code for the American workplace." In essence, the Supreme Court specifically recognized that some amount of flirting, roughhousing and teasing are normal occurrences in the workplace and do not amount to actionable conduct.

While no California Court has directly addressed the significance of a failed interpersonal relationship in the context of a subsequent sexual harassment claim, several Federal decisions bear on this subject. For instance, in one case, the Court rejected a sexual harassment claim filed by a teacher based upon his ill-fated relationship with another teacher. In support of his claim, the Plaintiff alleged that after he broke off the affair, his former lover made verbal threats, used foul language, placed notes on his windshield, criticized him, embarrassed him in front of students and teachers, assaulted him, ripped his shirt and kicked him. Despite this evidence, the trial court ruled in favor of the Defendant after deciding that the relevant inquiry was

whether the Plaintiff was targeted specifically because of his gender or as a result of the termination of an intimate relationship.

In another case, Plaintiff sued for sexual harassment based upon conduct by his supervisor after he abruptly ended their affair. According to the Plaintiff, his supervisor reacted spitefully by insulting him and recommending that he be terminated from a probationary program. In dismissing the claim, the Court decided that the alleged conduct was motivated by the resentful feelings of a jilted lover and not because of his gender.

In one decision, the Court specifically recognized that even in the employment setting, "people do have the right to react to rejection, jealousy and other emotions." Indeed, the Equal Employment Opportunity Commission Guidelines indicate that "sexual relationships between co-workers should not be subject to Title VII scrutiny so long as they are personal, social relationships." As one Court trenchantly noted, "it is not an employer's responsibility to mediate relationship disputes between employees unless and until there is active sexual harassment," and such sexual harassment should not include "simple hostility between co-workers of the opposite sex, with sexual overtones."

The lesson to be learned by the employer in these circumstances is to remain vigilant regarding claims of sexual harassment and to fully investigate them as soon as possible to determine whether the conduct "was simply part of the social intercourse that occasionally occurs in modern office settings," or, constitutes a violation of applicable law.

Fred Fenster is a commercial litigator specializing in business problems. He can be reached at (310) 286-1700 or at FAF@RUTTERHOBBS.com.

## What's Going On

Duane Kumagai recently spoke at the seventh annual Minority Corporate Counsel Conference, held in Costa Mesa and presented by the California Minority Counsel Program ("CMCP"). The CMCP's mission is to promote the assignment of corporate legal work to attorneys of color.

Olivia Goodkin participated in a panel presentation at the National Aircraft

Finance Association's annual meeting on workouts and recovery of secured debt. Olivia is also scheduled to deliver a presentation in June on "Everything You Wanted to Know About Sexual Harassment" at the North Hollywood Rotary Club.

Brian Davidoff has certainly enjoyed a busy season! In addition to working with several growing enterprises, in the last few months Brian gave a presentation to the National Business Institute; published an article in *Bankruptcy Court Decisions* on the subject of Internet company reorganizations; and spoke at the National Conference of Bankruptcy Judges in Boston on the same subject. Brian and the firm have represented many "dot.coms" in their recent struggles.

Margaret Echevarria took the lead in a case for a computer consulting client in obtaining a settlement of more than 90% of the amount owed. Key to this recovery was obtaining a pre-judgment right to attach order permitting the plaintiff to freeze the defendants' assets. Brian Davidoff and Geoff Gold also worked on the case.

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