
A Three-Point Immigration Manifesto For Chief Legal Officers And Outside Counsel

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This article will help avoid assorted immigration nastiness from ruining an otherwise stellar legal career. The article is written to equip chief legal officers (CLOs) and outside counsel with a declaration of principles that, if diligently followed, will help prevent company executives from howling and growling: “Why were our lawyers asleep on immigration? Why did they let this immigration catastrophe happen?” Other purposes for writing are to assure lawyers reading this piece, who studiously apply the three immigration principles below, that they will never hear the Trumpian declaration (“You’re fired!”) or pull that dreaded Monopoly card (“Go to jail. Go directly to jail. Do not pass ‘GO’. Do not collect \$200.”).

Immigration has been described by some observers as the “third rail” of American politics. Other pundits have compared immigration to a downed power line that snakes along the ground, electrocuting all within its reach. This electrifying, career-destroying feature of immigration is not limited to American or foreign politicians. The damage and destruction that immigration – in all its aspects (law, policy, demographics, etc) – often wreaks must also concern in-house counsel and the corporate lawyers in private practice who advise business entities anywhere in the world.

In years past and still today, many CLOs or business lawyers have happily offloaded responsibility for immigration functions to others while candidly, if foolishly, proclaiming that they knew as much about immigration law as could fill a capacious thimble. In-house counsel would assign immigration “ownership” to the human resources department while the company’s outside counsel would task his employment-law practice group or an immigration solo practitioner or boutique to assist clients in procuring immigration “benefits” – work visas or permanent residency (described with chromatic inaccuracy as a “green” card).

Recent history teaches, however, that the insouciant delegation of responsibility for immigration-related legal issues is often dangerous and downright stupid. A CLO should appreciate how serious such matters can get. What the immigration police at US Citizenship and Immigration Enforcement (ICE), US Customs and Border Protection (CBP) and their counterparts in other countries dub “worksite enforcement” and “border security”, ordinary people describe as “raids” and “G-men” tactics. What the dispensers of work visas and employment-based green cards at US Citizenship and Immigration Services (USCIS), and their kindred bureaucrats abroad call immigration “quotas”, business executives see as artificial obstacles to profitability and red-tape impediments to the business mission.

Immigration, if wrongly managed, will disrupt business operations, damage the corporate brand, and lead to the imposition of civil and criminal sanctions, the plummeting of stock price and shareholder confidence, Sarbanes-Oxley headaches, and the loss of key personnel. If managed with a steady legal

hand at the helm, however, immigration can be a marvelous recruiting and retention tool and an enhancement to a counsel's career.

Here, then, are three key principles for enlightened immigration-related legal management:

1. Own and control the immigration legal function.
2. Choose your teammates wisely.
3. Put your house in order.

Own And Control The Immigration Legal Function

Have no doubt. The chief legal officer of any business entity will be blamed if immigration outcomes turn sour (even if culpability lies in another department or externally). The blame will also spread to the company's outside counsel who chanted the "cross-selling" mantra and incautiously handed off immigration legal services to the firm's employment lawyers or blithely referred the client's immigration work to an immigration-lawyer friend at the health club.

To paraphrase Colin Powell's warning to George Bush before the Iraq war, as CLO you own immigration; if it breaks, you still own it – and it's your fault.

Owning immigration does not mean mastering it. The subject is simply too complex and ever changing. Owning entails gaining a basic understanding of immigration law and procedure, devising sound policies, wisely choosing and leading others who possess both technical knowledge and a skill-set to manage the complex process, and creating a real-time immigration dashboard and feedback loop. Just as one need not be a mechanic to drive a car, a CLO – or even outside company counsel – need not know every aspect of the immigration process to own and lead the immigration legal function.

A simple way to stay up to date on immigration is to regularly peruse a few of the best online immigration websites and sign up for their newsletters. A good list of immigration sites would include those run by Bender's Immigration Bulletin – Daily Edition (www.bibdaily.com), Immigration Daily (www.ilw.com), the American Immigration Lawyers Association (www.aila.org), the Immigration Policy Center (www.immigrationpolicy.org), Compete America (www.competeamerica.org), the American Council on International Personnel (www.acip.com), and ImmigrationWorks USA (www.immigrationworksusa.org).

Choose Your Teammates Wisely

The second principle in this immigration manifesto is probably the most important.

The successful immigration team will include the CLO as its leader along with internal corporate resources and external professional and vendor support. The internal team should include an immigration manager and directly reporting subordinates whose numbers will vary depending on the size

and scope of the corporation's immigration mission, needs and strategies (discussed below). The immigration manager can be an in-house lawyer or seasoned human-resources manager, or perhaps a tag-team of the two. Other internal team members, full and part-time, who will not report directly to the immigration manager, may include one or more recruiters, technical managers, communications specialists, IT professionals, a business manager and a procurement officer.

Rare is the immigration solo practitioner with the depth of bench and the broad range of expertise in the many immigration sub-specialties that most businesses today require. Perhaps much the same may be said of many law firms or practices that repeatedly play the same tune – mass-produced, employment-based work, involving commoditized requests for routine immigration benefits. While in the past this music may have seemed sufficiently melodic, it likely will not harmonize with the future orchestral immigration needs of globally active corporations. Increasingly, as will be shown, globalised businesses will require a broader repertoire of immigration-related legal services that also include lobbying, litigation, audit, compliance, and “white-collar and government-enforcement” defense capabilities.

The CLO or outside counsel could conceivably rely on the availability in some jurisdictions, for example California and Texas in the US, of lists of lawyers with board certification in immigration and nationality law. While this may help to reduce the selection pool, immigration lawyers' practices often give significant weight to areas of only marginal interest to corporations, such as deportation and removal defense, asylum, etc. Similarly, membership in a recognized national immigration bar association, or in the immigration committee of a state, county or city bar association or lawyer-referral program may reveal little to differentiate among seemingly suitable immigration lawyers and firms.

Perhaps the best strategy is still the tried and trusted. Reliance on “relational capital,” coupled with vigilant cross-checking, is most often the wisest course. Relational capital has at least three facets.

The first involves review of publications, such as *The International Who's Who of Corporate Immigration Lawyers*, *Chambers Global and Chambers USA*, and *Best Lawyers in America*, that name the best-regarded immigration lawyers based on peer nominations, empirical research (derived through interviews of clients and competitors), or optimally, a combination of the two. Users of these guides should note, however, that they all list immigration lawyers by state or city. Increasingly, immigration law is national and transnational in scope of practice. While physical proximity to the corporate headquarters may be reassuring, it should not be the overriding criterion for the most suitable and competent immigration law firm, given the ready availability of webcams, videoconferencing and air transportation.

A second relational-capital strategy entails the CLO's or outside corporate lawyer's use of their old-fashioned Rolodexes or new-fangled contact-management software. Much valuable data can be gleaned merely by asking counterparts in businesses and law to offer feedback on the lists of peer-nominated immigration lawyers and firms, and on their own experiences with particular immigration law firms.

The third type of relational capital, perhaps less obvious, is that possessed by the immigration lawyers themselves. One recent development has been the growth of immigration-lawyer strategic networks,

such as the Alliance of Business Immigration Lawyers or IMMLAW, whose member firms serve as co-counsel in appropriate cases or share best practices in client service and can access real-time information on successful strategies and late-breaking developments through internal e-mail lists and training programs. Probing questions on the depth, quality and breadth of the relationships that the immigration lawyer or firm has cultivated over the years (in government and among colleagues and immigration service providers) should therefore yield a good harvest of useful data from which to select the optimal immigration firm.

One recent trend in law firm selection – the request for proposal (RFP) – should be used sparingly and with caution in the hiring of an immigration law firm. Much to the delight of corporate procurement officers who consider law firms as just another form of “vendor” providing a fungible commodity, the RFP process may yield useful data on cost, but only if adequate time is spent in advance to make sure that the request sent to the targeted firms precisely defines the scope of the work to allow for apples-to-apples and oranges-to-oranges pricing comparisons.

RFPs are less helpful, however, when making qualitative judgments about an immigration firm’s proactivity (the ability to anticipate and avoid or stem problems before they grow unwieldy or do harm), responsiveness, creativity (strategy formulation and problem-solving), and cost efficacy (the ability to apply just the right amount of added value – the appropriate amount of resources at a fair price that keeps both parties in business, for example, through high-level strategic counseling or lower-tier legal process outsourcing).

Put Your House In Order

National immigration laws affect all businesses. These laws restrict or prohibit foreign citizens from entering, living in, working in or bringing family members to a particular country, and penalize businesses and individuals who violate national immigration laws.

In the United States, the immigration laws impose a threefold duty on employers to: (i) verify the employment eligibility of all new applicants for employment without regard to country of birth; (ii) refrain from hiring or continuing to employ workers who the employer knows or should know lack employment authorization in the United States; and (iii) refrain from discriminating against, or impairing the wages and working conditions of, protected employees. Immigration laws and regulations will soon impose additional obligations on federal contractors and on companies engaged in business in selected states, like Arizona and Mississippi, to sign up for E-Verify, a computer-based program linked to two government databases that confirms whether all new workers and some current personnel are or remain legally employable.

Immigration laws also impose quotas, maximum periods of temporary residence, complex procedures to obtain work permission or permanent residency, and civil and criminal penalties for violations. Immigration laws likewise figure prominently in the present era because of (i) heightened government scrutiny of business activities under Sarbanes-Oxley legislation requiring transparency and accuracy in

the publication of corporate financial reports, including disclosure of any materially adverse effects that immigration violations can trigger; (ii) focus on homeland security and prevention of terrorism; (iii) brand-damaging publicity of every corporate wrong or mistake in the traditional media, social media and the “blogosphere”; (iv) the contentious anti- and pro-immigration views of the local populace; and (v) corporate sentencing guidelines which place a premium on the proactive creation of internal compliance and whistleblower programs.

All of these factors lead the prudent CLO and the company’s outside counsel to order the company’s internal policies, practices and strategies so that immigration serves rather than undermines the business mission. To put the company’s house in order in this respect, the CLO – in consultation with external corporate and immigration counsel – should:

- Adopt intelligent immigration policies. These policies must include an express commitment to immigration-law compliance, ongoing training of staff tasked with immigration-related functions, published standards on terms of sponsorship of employees and their family members for immigration-related legal benefits, periodic self-audits, and prescribed chain-of-command and procedures in case of government audits, investigations or other law-enforcement actions.
- Select immigration technologies cautiously. Immigration-related software vendors who promise wondrous benefits from automation and case management are proliferating. Government laws and procedures requiring or permitting electronic filing of petitions and applications, and electronic signature and storage of immigration-related business and legal documents are similarly burgeoning. In some situations, choosing to go digital may expose an obscure and inadvertent error that violates immigration law which would otherwise have remained uncovered in a mountain of paper files. The CLO, in collaboration with the corporate IT department and immigration counsel, should therefore conduct a thorough reality-check on the supposed benefits and carefully scrutinize the hidden burdens that immigration-related technologies provide before opting to acquire and use any particular software in managing the immigration legal function.
- Adopt best practices in immigration branding and messaging. As the ageing of populations accelerates the pace of global competition among nation states and transnational businesses for top talent, the CLO, in cooperation with internal recruiters, technical managers and communications professionals, must take a fresh approach to recruitment and retention. Immigration branding and messaging can play a vital role in attracting and keeping the brightest and best workers. The CLO and the internal and external immigration teams should reinforce the message that the particular corporation is an employer of choice, an employer with immigration-friendly policies that provide comprehensive support for immigration benefits. Payment of legal fees and the provision of top-notch immigration counsel are but first steps in this effort. Immigration seminars for employees and family members, the development of an internal immigration portal or intranet with FAQs and self-service features that provide up-to-the-minute

status reports, access to documents and opportunities for interaction with the immigration team members are also important.

- Consider immigration as “global mobility”. It’s not just about US immigration any more. Increasingly, global business requires global capabilities in migration management and mobility. The CLO and the company’s outside counsel must develop readily accessible centralized or regional mobility solutions and relationships with competent local immigration lawyers or government-certified migration specialists. The effort need not entail the creation of a country-by-country structure. Increasingly, immigration-lawyer alliances and some law firms offer one-stop project-management consulting services for the corporation’s global travelers and employment-based immigrants dispatched to a new homeland. The principles of immigration lawyer selection, discussed above, apply with even greater force on the global stage.
- Network with like-minded counterparts in immigration. CLO participation in immigration-related networking groups is not just helpful but essential. Informal immigration networking through existing corporate and professional channels is also necessary. Both stratagems avoid reinvention of the wheel, and provide access to the latest news and useful recommendations that should help to identify suitable immigration law firms and software vendors.
- Visibly support immigration-friendly laws and procedures. For the past three years at least, immigration observers have witnessed a variety of distressing developments: miserly immigration quotas running out within days of each annual allotment, long backlogs in case processing and security clearances, and draconian new restrictions and penalties imposed on businesses. Aside from a few leaders in the technology sectors, most corporations have opted to maintain a very low profile in the admittedly controversial debate on immigration. Today, timidity, reticence and obscurity are not winning immigration strategies. Modern business leaders, backed by enlightened CLOs and outside counsel, must stand up collectively and individually to speak out on the urgent need for enactment of business-friendly immigration laws and policies.

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A manifesto on any subject is only as strong as the force of commitment behind it. The three points in this immigration manifesto will only work to heap praise rather than derision on the CLO and trusted outside counsel if their pledges of action are followed by meaningful and unflagging efforts. Ignore immigration at your peril. You have nothing to lose but your job and your freedom. Hyperbole? Maybe, maybe not. You decide.