SOME BUSINESS AND LEGAL THOUGHTS ABOUT STRATEGIC ALLIANCES

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A Strategic Alliance is a formal relationship between two or more parties to pursue a set of agreed upon goals or to meet a critical business need while remaining independent organizations. Parties may provide the strategic alliance with resources such as products, distribution channels, manufacturing capability, project funding, capital equipment, knowledge, expertise, or intellectual property. The alliance is a cooperation or collaboration which aims for a synergy where each party hopes that the benefits from the alliance will be greater than those from individual efforts.

Strategic alliances can take many forms[1] and are not new[2]. They have been the subject of innumerable blogs, conferences, and articles ranging from global

[1] *See*, "Building Strategic Alliances Can Strengthen Your Business", RBC Royal Bank. ("Strategic alliances are typically formed for joint endeavors, including marketing, sales or distribution, production, design, licensing of technology, and research and development. By partnering with another business, you could conceivably take on larger projects and expand your products and services offering.") *See also*, "Strategic Alliances: Alternate Road to Success", http://library.findlaw.com/1997/Jan/1/126788.htm. (hereinafter "Alternative Road to Success")("The structure of the strategic alliance can take many forms—license, cross-license, joint marketing, joint R&D, co-

service firms to articles in The Costco Connection.[3] They have been used in connection with providing health care services[4]. They have been used in the airline industry, the telecommunications industry, the pharmaceutical industry[5] and the automotive industries. Strategic alliances have also been used by innovative technology entrepreneurs[6].

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marketing, or joint venture. These various structures involve common issues such as the applicable geographic markets, the applicable technological or product applications, the exclusiveness of the relationship, which party is adding the most value to the relationship, and present and future equity participation.")

2 *See* "How To Make Strategic Alliances Work", MIT Sloan Management Review, July 15, 2001. ("The past decade has witnessed an extraordinary increase in alliances. Currently, the top 500 global businesses have an average of 60 major strategic alliances each.") See also, "The Role of Alliances in Corporate Strategy", The Boston Consulting Group ("According to one estimate, approximately 35 percent of global corporate revenues in 2002 were a direct result of alliances.") (Hereinafter "BCG Alliances Report"). See also "Strategic Alliance as a Prelude to Merger", http://library.findlaw.com/2003/August/7/174623.html ("Strategic alliances are not new. US/Japanese/European auto makers have used them to compete more effectively in foreign markets. Airlines use them, e.g. Star Alliance, One World, etc.")

3 "Better Together: Stretch Your Business Opportunities Through Strategic Alliances". January 2010, The CostCo Connection. http://www.costcoconnection.com/connection/201001/?pg=30#pg30 (hereinafter Costco, Better Together ("Great results can come from pursuing strategic alliances with like-minded firms, in terms of both finding exciting ways to serve existing customers and enter new markets. Doug Burgoyne, Costco member and founder of Vancouver, British Columbia-based Frogbox, knows firsthand how having a strategic partner can open up a world of new opportunities. After finding success renting plastic boxes to movers as an environmentally conscious alternative to cardboard, Burgoyne knew that he could repeat his model outside the Vancouver market. Burgoyne's expansion plan received a boost after he embrace 1-800-GOT-JUNK as a strategic partner…Ultimately Frogbox was able to launch its Seattle operations much sooner than Burgoyne initially planned. 'We've been able to leverage our partner's skills and expertise to more quickly ramp up business in Seattle. In return, our partner is now able to offer his customers an eco-friendly service when they are moving.")

4 *See,* Partners: Forming Strategic Alliances in Health Care. ("Strategic alliances have been incorporated into the healthcare filed as an ever-present operational and strategic consideration. The rationale to form strategic alliances is the same for healthcare organizations as it is for other business entities. Organizations form strategic alliances because they recognize value in engendering flexibility and bringing access to an ever-broadening array of resources and markets.")

5 *See,* BCG Alliance Report. ("With patent expirations increasing and the existing stock of blockbuster drugs leveling off, the global pharmaceutical industry needs to find new ways to fill its diminishing pipelines. One important way companies are addressing this challenge is by licensing new compounds developed by small biotech companies. Alliance deals involving big pharmaceutical and small biotech companies are growing in value by more than 20 per cent per year and penetrating into earlier and earlier stages of drug development.")

6 *See* "Strategic Alliances: Alternate Road to Success", http://library.findlaw.com/1997/Jan/1/126788.htm. ("The standard playbook for the technology entrepreneur says: develop the technology yourself, market the resulting product yourself, and try to keep as much profits as possible for yourself. The only 'outsiders' are investors who are needed solely for their money and who are often seen as necessary evils. While this strategy can be made to work, it ignores the benefits of strategic alliances which can provide R&D expertise, marketing channels, investment dollars, and an imprimatur for your company and its technology from a player in the industry. This alternative strategy of collaborative relationships allows technology companies to grow their businesses by accessing the technology, markets and money of industry leaders.")

Strategic alliances have also been used by law firms[7]. To the best of our knowledge, the first domestic strategic alliance of African American law firms in different states was created by an alliance between the law firm started by my cousin, Harrison Fitch--- Fitch, Wiley, Richlin, & Tourse-- in Boston and the law firm of Lewis, White and Clay[8] in Detroit Michigan.

> "Fitch, Wiley, Richlin & Tourse grew from the 1991 merger of New England's two largest minority-owned law firms: Fitch, Miller & Tourse and Wiley & Richlin. Before the merger, each had about 10 lawyers, and they were forced to compete against each other in the public finance area. (After the union), Fitch, Wiley landed a place among the 12 elite firms to serve as bond counsel to the Commonwealth of Massachusetts. The state's initial bond offering of 1991 - a $567 million general obligation transaction - marked the first time a minority firm acted as sole bond counsel in the state. Positioning itself as a player in the narrow but lucrative bond field required more than being a quick study. It also meant forging strategic alliances with firms like Detroit's Lewis, White & Clay (and its network of affiliates in eight states). And sometimes it was necessary to import specialists when the work demanded more bodies than Fitch, Wiley had in-house. Frequently, the firm served as co-counsel with a majority firm. In 1989 Fitch, Wiley, tapped Boston's 250-lawyer Goodwin, Procter & Hoar to play second fiddle in a $225million equity real estate transaction with Aetna Life Insurance Co. It was one of the largest real estate deals Aetna had ever done" [1].

There are a variety of more recent examples of law firm utilizing strategic alliances.[9]

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[7] *See, for example*, Strategic alliances, planning come first for foreign law offices – South Florida Business Journal: ("When it comes to opening foreign beachheads and trying to acquire new clients in other countries, U.S. law firms employ a host of strategies. Some firms form strategic alliances with foreign partners. Some open full-fledged offices in foreign countries, hiring or importing lawyers and staff, and making a big splash. And others choose a hybrid, planting law firm representatives inside foreign law firms, but with separate phone lines, stationary and letterhead.")

[8] http://www.lewismunday.com/CM/FirmNews/L-MPresentation.pdf

[9] See http://www.pbnlaw.com/pages/diversity/diversity.php?page=strategicalliance(As part of an ongoing commitment to advancing diversity in the legal profession, Porzio, Bromberg & Newman P.C. has formed a strategic alliance with Love and Long, L.L.P., a boutique, minority and woman-owned law firm with offices in Newark, NJ and Philadelphia, PA. The alliance enables each firm to expand its client base, and to provide enhanced client service. While remaining separate and independent law firms, the alliance focuses on joint representation of clients on cases and projects, cross referrals and joint client pitches. The alliance was an initiative of Porzio's Workplace Diversity Committee, whose mission is to develop and implement strategies to advance diversity within the firm and legal profession. The alliance will assist both firms in meeting designated client service needs, while providing quality legal work by a team of sophisticated attorneys of diverse backgrounds, in a variety of legal practice areas. The alliance provides Porzio with the benefit of additional talented minority attorneys with a wealth of legal experience in the areas of banking and institutional investing, corporate law, real estate, municipal and public agencies law, and related litigation. The alliance, in turn, provides Love and Long with access to the resources of a large firm with experience in a broad range of practice areas. The alliance also increases the geographic reach of each firm through Porzio's New York office and Love and Long's Philadelphia office.See also "McCarter & English Enters Alliance With Minority-Owned Chicago Firm", http://www.mccarter.com/new/PDF/BusLawReprint9.15.08.pdf ("McCarter & English of Newark has formed a strategic alliance with a minority-owned Chicago, in part to enhance its attractiveness to diversity-conscious clients. The Chicago firm is 24-lawyer Pugh, Jones, Johnson & Quandt, with which McCarter has had a longtime co-counsel

As illustrated by the above transactional work, though there are many different reasons for entering into a strategic alliance, in our experience the three most common reasons are:

- To do more and better with someone else than you can do by yourself.
- To enter a new business market or geographic territory that might otherwise be closed to you.
- As a tool to execute a well thought out strategic business development plan and strategy.

Accompanying these reasons is increased discussion about the role of legal counsel in strategic alliances[10], including addressing senior executive management's areas of priority concern.[11]

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relationship in products liability cases. The new alliance gives Pugh Jones, whose senior partners Stephen Pugh and Walter Jones Jr. are African-American and roughly half of whose total lawyers are minorities, an East Coast platform to develop business. Like other large firms, McCarter is faced with corporate clients' heightened scrutiny of the ethnicity and gender of lawyers working on their cases. A "Call to Action," executed by 110 general counsel at large corporations, sets diversity goals for legal departments and their outside counsel.";"Law Firms Brown & Sheehan and Venable Form Strategic Alliance".http://www.brownsheehan-venable-strategicalliance.com/sa-news4Jan06.pdf (As part of an ongoing commitment to promote diversity efforts in the legal community, Brown & Sheehan, LLP, the largest Minority Business Enterprise law firm in Maryland, and Venable LLP, an *AmLaw* 100 law firm, have forged a strategic alliance to further provide clients with a diverse pool of legal professionals and high-quality legal services, as well as to reinforce ties within the region. The new, shared business platform is one of only a few such alliances in the legal industry and the largest in the Mid-Atlantic. Brown & Sheehan and Venable will maintain their separate identities and independence, but will also work as co-counsel on specifically identified litigation, labor and employment, public finance, business transactions, and real estate matters."); and "Forming Strategic Alliances: Creating New Opportunities for Diverse Attorneys", http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=1394 ("In the quest for an inclusive workplace, some large corporate law departments now require the law firms that serve them to utilize diversity plans and ensure that women and minority attorneys work on their accounts. But do these requirements really make a difference? Recently, *Diversity & the Bar*® magazine sat down with Eaton Corporation, an industrial manufacturer with 60,000 employees, to learn how this company turned its diversity requirements into strong partnerships with the law firms that serve it. It found that not only did Eaton benefit from its diversity initiatives, but the desire to work with women and minority attorneys created a chain reaction that benefited inclusive law firms across the country.")

[10] For a broad discussion of this topic see Rachelle C. Sampson, "The Role of Lawyers In Strategic Alliances", 53 Case Western Reserve Law Review 909, http://www.rhsmith.umd.edu/faculty/rsampson/papers/CWLR.pdf

[11] See, for example, "The Changing Role of Legal Counsel When Launching New Technologies" http://www.martindale.com/xp/c2c/Forums/2001/Atlanta/atlanta_findings.xml ("The associate general counsel at BellSouth discussed how his company is pursuing more technology alliances and product/service bundling arrangements, rather than acquisitions or even joint ventures with other organizations. The general counsel at Cox Interactive Media observed that these sorts of "marketing alliances" historically had shelf lives of three to five years, but now are running at terms of just 12 months with 30-day exit clauses. Another challenge involves questions about customer service. Unlike more structured agreements between two entities, it can sometimes be unclear as to which organization is ultimately liable for managing the actual customer relationship. For starters, who owns the customer list? Who owns the derivative works that are produced by the alliance and delivered to the customers? How does a company measure customer satisfaction in an informal alliance, and who is responsible for the problem when something goes wrong? Also, as a partner from Sutherland Asbill & Brennan posited, what transition plans are put in place for customers who are stuck with dying products because one of the alliance partners went out of business?To this last point, one of the general counsel in the forum pointed out that there has been more focus lately on whether a company can take over the new technology produced by an alliance if that company's marketing partner closes its doors. This becomes especially important in some alliances where source code or key employees on the other side are crucial to the survival of the new technology offering. This led to an important conversation about the ugly reality for lawyers charged with negotiating agreements: the exit strategy. One general counsel at the session plainly stated that his company will simply not enter into an informal marketing alliance for launching new services unless there is a very specific exit strategy in place - and he looks to his business management team to help

It is also true that every strategic alliance entails some amount of faith and at least two forms of trust. Anyone who has ever been in a strategic alliance has had to have faith in the future success of the alliance. And perhaps even had to make a leap of faith in the face of innumerable uncertainties in a strategic alliance.

By way of contrast, and in general, a **joint venture** (**JV** or **J-V**) is a legal entity formed between two or more parties to undertake an economic activity together. The JV parties agree to create, for a finite time, a new entity and new assets by contributing equity. They then share in the revenues, expenses and assets and "control" of the enterprise. Here is another definition of a joint venture: "A joint venture is the long-term commitment of funds, facilities and services by two or more legally separate interests, to a combined enterprise for their mutual benefits. A joint venture need not be a separate legal entity or company.[12] Other forms of joint ventures include an agreement to work together formalized through a Heads of Agreement or a Strategic Cooperation Agreement."[13]

Are there joint ventures that are not legal entities, or which do not have the foregoing characteristics? Of course there are. For example, Dorothy, the Scarecrow, the Tin Man, and the

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develop those exit strategies. A law firm partner from Womble Carlyle added that the creation of the exit strategy in a marketing alliance is particularly challenging because it sometimes requires outside lawyers to make the recommendation that an agreement just isn't going to work and that the company needs to get out while it can.")

[12] For a summary discussion of strategic alliances and joint ventures, see http://www.1000ventures.com/business_guide/strategic_alliances_main.html

[13] http://www.exportmichigan.info/ibp_pfs_strategic_alliances_and_jvs.htm

Cowardly Lion had a joint venture to see the Wiz[14], 

, the Temptations[15] and the Four Tops[16] had a joint venture when they collaborated on an album 

, and one frequently encounters joint ventures in superhero collaborations in comic books, such as The Legion of Superheroes[17].

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[14] The Wiz was"a 1978 musical film produced by Motown Productions and Universal Pictures, and released by Universal on October 24, 1978." http://en.wikipedia.org/wiki/The_Wiz_(film)

[15] The Temptations is a registered trademark of Motown Records.

[16] The Four Tops is a registered trademark of Motown Records.

[17] The Legion of Superheroes is a registered trademark of D.C. Comics.

Using A Strategic Alliance to Maximize Success and to Minimize (By Reaping the Benefits of) Failure

A strategic alliance can be a vehicle for maximizing success and minimizing failure. In that sense, a strategic alliance is simply a business tool. Increasing your understanding of how and when the use of a strategic alliance as a tool can assist you in progressing on your path to business success.

In deciding to pursue an opportunity through a strategic alliance rather than miss that opportunity because of false perceptions of limitation, one has to put into practice an observation embraced by the late Duke Ellington: "Life has two rules. 1. Never quit! 2. Always, remember rule #1."

Failure has a value if you can learn a lesson from it and if it reinforces an unshakeable determination to succeed the next time. When failure is not an option, make it a transforming opportunity. But if you must fail, then, as Maximus (Russell Crow) in the movie "Gladiator" might advise, do so with "strength and honor", meaning with dignity and character meeting the highest ethical standards.

When Winston Churchill was asked if he had failed a year in grade school, Churchill replied "I never failed anything in my life. I was given a second opportunity to get it right". In order to pursue a strategic alliance, you may need to learn to face fear of failure and have the courage to step out of your business boat onto the deeper waters, even fail faster if necessary but never forget what it takes to be a water-walker.[18] "Water-walkers must master fear management. Walking on water means facing your fears and choosing not to let fear have the last word".[19]

Key Success Factors/Key Performance Indicators

Just as every business and industry has key success factors and key performance indicators, so too will a strategic alliance and you will need to identify, monitor, and manage them. Key performance indicators are important to any professional services firm[20]. For example, in a project based professional services firm, there are at least four critical key performance indicators.[21] To give another illustration, airlines are in part a service business enterprise and to be successful "an airline must be effective in four general areas: (1) attracting customers; (2)

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[18] Ronald W. Brown, "Eight Rules to Use In Meeting The Challenge of Changing Times."

[19] "Peter Swims With The Fishes", www.cc.ww.org/sermons/Matthew14.htm

[20] See for example "Key Performance Indicators of Sales Success in a Professional Services Firm" http://www.beyondreferrals.com/graphics/Key%20Performance%20Indicators.pdf

[21] Id. ("Four major factors affect the performance of project based professional service firms: The ratio of senior to junior staff referred to as the firm's leverage, the average fee charged per unit of time, the percentage of billable time referred to as utilization, and the profit margin) http://www.systemdynamics.org/conferences/2009/proceed/papers/P1279.pdf

managing its fleet; (3) managing its people, and (4) managing its finances."[22] If the word "assets" is substituted for "fleet" in this formulation it could apply to and be among the success factors in any service business.[23]

Never, enter into a strategic alliance with anyone who does not share your values. In the largest sense, we are using the word values in these senses: what you believe in and the code of personal conduct you try to live by, your fundamental beliefs in what is fair, right and wrong; your common sense reflected in your business ethics. Maintaining high ethical standards can be considered a matter of risk management[24] that is not incompatible with achieving superior financial results but can be a challenge[25], particularly when a service business enterprise operates in more than one country[26]. There is on-going discussion on whether ethics are local[27] or

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[22] "Airline Industry Key Success Factors" by Richard M. McCabe, Ph.D., Graziadio Business Report, Volume 09, Issue 4. See also, BCG Alliance Report. ("In the 1990's the airline industry witnessed the development of a handful of global multi-carrier alliances. These alliances provided airlines with a highly effective means of skirting legal and regulatory barriers to consolidation and capturing incremental revenue. By 2004, the three major airline alliances accounted for roughly half the global passenger market and more than half of global revenue.")

[23] Id. (Key success factors have several direct and several possible uses for any business unit whether it is for-profit or not-for-profit, large or small, domestic or foreign. In strategic analysis of a business unit, key success factors often initially appear as analytical tools for examining the character of the industry in which the business unit competes. In the startup and early growth phases of an industry, the general guidance from Thompson et al. may be sufficient: "Only rarely are there more than five or six key factors for future competitive success." However, as an industry approaches maturity, rivalry among competing business units often increases. Consolidation of the industry often follows. As a rivalry increases and consolidation proceeds, the number of key success factors is likely to increase. Although there are few purely domestic industries today, as rivalry increases in an industry, business units are increasingly likely to expand into foreign markets in order to grow. For several stakeholders—at least for customers, employees, and suppliers—additional key success factors may also be required as the business grows more complex, if only because of the increase in national and regional cultures to be considered.")

[24] "Where Morals and Profits Meet: The Corporate Value Shift", Harvard Business School Working Knowledge, November 18, 2002. ("Many companies are making a 'turn to values'—focusing on ethics, values, and examining company culture—but for varied reasons, including risk management, organizational functioning, market positioning and civic positioning."

[25] Id. ("Companies that seek to do an excellent job serving their core constituencies, including investors, customers, employees, and the public [face] an inherently challenging task in any country, but it is more difficult in some environments than others, particularly those plagued by high levels of corruption. The effects of corruption are insidious and they go well beyond requests for bribes and favors. Obviously, the economic implications can be significant when your competitors can get away with paying off officials—either public or corporate—to win major contracts or secure exemptions from health, safety, or other requirements.")

[26] "Value Judgments: Business Ethics Across Borders", Harvard Business School Working Knowledge, October 12, 1999. ("Named Asia's most ethical company by Asian executives polled several years ago in *Asian Business* magazine's annual most admired companies survey, Siam Cement Group (SCG) was one of the first firms in Thailand to develop its own written code of ethics. SCG's philosophy is rooted in the Buddhist concept of fairness and also stresses product quality, the value of the individual, and concern for social responsibility. As Siam Cement expanded beyond Thailand, however, managers felt pressured to compromise the corporate code of ethics. The company's standards regarding improper payments, for example, made it difficult to compete in places where such transactions are a way of life."

[27] *See* "Business Ethics: Pay the Bribe?" http:/blogs.bnet.com/Harvard/?p=217, ("Ethical behavior is not a global standard."). *See also* "Corruption Is Not Necessarily Immoral" the Lusaka Times, January 13, 2009.

global[28], and how business leaders should respond[29], especially when "it" is involved. There is even a Transparency International Bribe Payers' Index that purports to show which countries by the biggest bribes[30], and in one country, "it" has five different levels of classification.[31]

In addition it is important to recognize that increasingly entrepreneurs are not just entering into those alliances in their home markets, but also globally[32], and to understand, monitor, and execute using the critical/key success factors for your business and industry.
On balance, when properly structured, and in the right situations, a strategic alliance[33] can be a very useful business tool that works well, and launches the beginning of a great enterprise. A

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http://www.lusakatimes.com/?p=7294. ("Someone related a story of how he made a stopover in [Country 'ABC'] sometime in the early 80's during a flight to Europe. He presented his passport to the immigration officer who flipped through it and gave it back saying 'There's a page missing in your passport'. 'What do you mean' he asked the officer. 'Next please!" As the person stood there confused wondering what was going on, a Catholic priest behind him whispered in their ear, 'He wants you to put some money inside your passport'. 'Why should I bribe him just to stamp my passport when it is part of his job?' he asked. 'Just do it unless you want to be here locked up for days', came the reply. He grudgingly did what they told him and viola, the officer stamped the passport in triple quick time with a grin on his face.")

[28] *See* Harvard Business School Professor Bill George, "Ethics Must Be Global, Not Local", Business Week, April 26, 2010. ("These days the business world has gone global, which has intensified the ethics debate. Making payments to obtain business is common practice in many developing markets in Asia, Africa, the Middle East, and Eastern Europe, and some companies feel obligated to play the game to compete. What's significant about [cited] ethical scandals is the damage they do to great institutions. If you were leading such an organization, would you risk permanently damaging your company in order to win a few overseas contracts? Regrettably, for some executives the answer is yes.")

[29] *See* "Teaching the Moral Leader", Q& A with Sandra J. Sucher, HBS Working Knowledge, November 19, 2007. http://hbswk.hbs.edu/item/5801.html. ("One of the things I noticed, as so many of us in business do, is that some of the hardest leadership decisions are the ones that have moral or ethical stakes. For example, while on the board of a nonprofit, I was approached by an employee—a whistleblower—who accused the program director of manipulating the organization's books. The employee threatened to tell the media if the board didn't intervene. While it was clear who we could turn to for legal advice, and we had our own business sense to apply to strategic and tactical implications of the situation, we also had to address matters that seemed decidedly moral or ethical. How could we be fair to the accused director? How could we protect the complaining employee from retaliation during the investigation?")

[30] http://www.soxfirst.com/50226711/bribe_payers_index.php

[31] *See,* "When Does Tea Money Turn to Extortion?", UPI Asia.com, April 15, 2008. http://www.upiasia.com/Society_Culture/2008/04/ ("gift of goodwill, or gift to award someone for being nice enough to accommodate the task at hand; money to buy a cup of coffee; improper behavior—an all-out departure, and an intentional one form what should be done to what should not be done; extortion or bribery)

[32] See Harvard Business Review Article, The Global Entrepreneur, by Daniel J. Isenberg http://hbr.org/product/the-global-entrepreneur/an/R0812J-PDF-ENG?Nao=330. ("For over a century, start-ups began by focusing on their home markets. More and more, however, are now being born global - chasing opportunities created by distance, learning to manage faraway operations, and hunting for the planet's best manufacturing locations, brightest talent, most willing investors, and most profitable customers wherever they may be - from day one. To succeed, Isenberg has found, global entrepreneurs must cultivate four competencies: They must clearly articulate their reasons for going global, learn to build alliances with more powerful partners, excel at international supply chain management, and create a multinational culture within their organization.")

strategic alliance is a powerful tool that can open new doors/avenues, maximize profits, and increase business networks for future partnerships, not only in times of economic downturn, but in a flourishing economy by utilizing multiple skill sets for a common goal.

Personal and Business Values

Personal values are important. Your personal values and business values should be congruent, not in conflict. For example, if honesty and integrity are important personal values you should not compromise those personal values in business. To illustrate, if you are discussing a strategic business alliance with someone abroad who tells you that in order to do business together in that country it is expected and required to pay bribes because "everyone pays bribes here", you should terminate the discussion. If you compromise your personal values of honesty and integrity and pay the business bribe because "everyone pays bribes" there, not only should your conscience bother you, but you could be charged with violating the Foreign Corrupt Practices Act.[34]

There is a lingering perception that the FCPA only applies to U.S. persons paying multi-million dollar bribes to get governmental officials to award mega-size contracts. And while that perception is supported, for example, by the following reports, it fails to recognize that payments as low as five figures have been pursued as violations of the FCPA.

> "The Foreign Corrupt Practices Act, enacted in 1977, but not taken very seriously until just a few years ago, seemed to have a simple checklist of what would

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[33] "An estimated 20,000 corporate alliances have been formed worldwide over the past two years. Such strategic alliances can provide business owners with long-term security, new revenue channels, and, often, the anchor needed to maintain stability in otherwise turbulent waters." Editorial Review, Strategic Partnerships: An Entrepreneurs Guide to Joint Ventures and Alliances."

[34] For recent developments in the area of the Foreign Corrupt Practices Act, see "Zero Tolerance: The Race To The Top of Anti-Corruption and Stringent Government Enforcement of the Foreign Corrupt Practices Act ("FCPA")", Forbes, March 15, 2011, ("I argued recently that corporations must not only implement stringent anti-corruption policies, but also "race to the top" in light of predicted stricter enforcement of the U.S. Foreign Corrupt Practices Act of 1977 ("FCPA") and this May's taking effect of the UK Bribery Act, the new international gold standard of anti-corruption legislation. I submitted then that doing so requires corporate counsel to construct, implement, and monitor comprehensive anti-corruption policies by, among other steps, (i) obtaining the express buy-in of the Board of Directors in order to create a corporate ethos of anti-corruption; (ii) instituting robust self-reporting and whistleblower policies; (iii) educating employees beginning at the date of hire; and (iv) monitoring and reviewing financial controls sensitive to bribery. This may not be enough. According to Richard Dean and Brian Whisler, Partners in the Washington office of the international law firm Baker & McKenzie, the Department of Justice ("DOJ") and the Securities Exchange Commission ("SEC") have taken a sharp tack toward far more stringent enforcement of the FCPA, including litigation strategies based on strict liability as a standard by which corporate officers should be judged for overseeing bribery schemes about which they may not know. ") http://blogs.forbes.com/benkerschberg/2011/03/15/zero-tolerance-the-race-to-the-top-of-anti-corruption-and-stringent-government-enforcement-of-the-foreign-corrupt-practices-act-fcpa/. See also"FCPA Reporting Center" http://www.foreign-corrupt-practices-act.org/foreign-corrupt-practices-act-news.html and Foley & Lardner LLP's "FCPA Enforcement" http://www.fcpaenforcement.com/documents/documents.asp?page=2

trigger prosecutions: Large pre-contract payment? Check. Offshore, numbered account? Check. Vast contract award? Check—and prosecute. These days, however, the government's treatment of bribery is far more complicated and the stakes for companies far higher. A bribe needn't even succeed to wreak havoc with a company's reputation. In 2005, [Company X] settled …for $1.5 million after a senior {Company X] executive responsible for the Asia Pacific region tried but failed to bribe an overseas official with $50,000….Once thought to be safe from the same level of scrutiny, payments to charities are not immune. [Company Y's] $76,000 contribution to a legitimate charity— the favorite of a senior [Country Z] official—resulted in a $500,000 fine in June 2004 when [Company Y] failed to account for the payment as a bribe that it was deemed to be….It seems that no bribe is too small to earn the attention of the Justice Department. [Mr. N] pleaded guilty in march 2006 to paying less than $70,000 over two years to [Country D] embassy officials with the hope that they would lend credibility to his 'diploma mill' "[35]

In addition, there is a lingering perception that the FCPA can only reach persons who are U.S. citizens. As indicated by the following, that perception is both delusional and wrong.

> "Individuals who believe they have nothing to fear because they aren't U.S. citizens and reside outside of the United States could learn from Christian Sapsizian's experience. A former [Company A] executive and French citizen, Sapsizian was arrested in December 2006 by U.S. officials who boarded his plane when it touched down briefly in Miami en route from Panama to Paris."[36]

<u>13 Critical Commitments for Strategic Alliances</u>

If you are considering a strategic alliance, it is essential that you make at least the following thirteen critically important commitments.

1. Commit to having business legal counsel with experience in the area of the alliance[37] to prepare the alliance document that helps you achieve your business objectives and which reflects your business decisions.

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[35] Alexandra A. Wrage, Legal times, March 25, 2008,"Today, No Bribe Is Too Small". http://www.law.com/jsp/law/international.LawArticleIntl.jsp?id=900005560941

[36] Id. See also http://www.usdoj.gov/opa/pr/2008/September/08-crm-848.html ("In September 2008, Christian Sapsizian, 62, was ordered by the U.S. District Court for the Southern District of Florida in Miami to forfeit $261,500, to serve three years of supervised release and to pay a $200 special assessment. Sapsizian, a French citizen, pleaded guilty to two counts of violating the FCPA as charged in a superseding indictment returned on March 20, 2007. As part of his plea, Sapsizian agreed to cooperate with U.S. and foreign law enforcement officials in the ongoing investigation. The assistance provided by Sapsizian in ongoing criminal investigations was taken into consideration by the court at sentencing. According to information contained in plea documents.

[37] If the strategic alliance has intellectual property as one of its principal assets, be sure to retain the services of counsel who has experience handling that type of intellectual property in the area where the strategic alliance will

2. Commit to having clear purposes, objectives and metrics for the alliance, with Key Result Areas ("KRAs") by functional department.
3. Commit to becoming conversant with at least the basic language, history, culture, customs, and holidays in the country where the strategic alliance is located.
4. Commit to having the strategic alliance managed well using a governance structure that makes it clear how decisions will be made and by whom.
5. Commit to clearly understanding how the alliance will be financed, how losses and profits will be determined and allocated, and how future financial contributions will be addressed.
6. Commit to articulating what you will consider success or failure (so you know when to hold and when to fold) and within stated time frames.
7. Commit to managing risk by monitoring compliance with applicable regulatory, legal, and other requirements.
8. Commit to considering a code of conduct that is enforced so that everyone understands and is held accountable to the business values of the alliance.
9. Commit to being actively engaged in the operations of the alliance, to having regularly scheduled, face to face, on site operational reviews, and to having excellent internal controls including segregation of duties.
10. Commit to using alternative dispute resolution[38] when the inevitable disagreements[39] arise.
11. Commit to building and managing the alliance's "relationship capital"[40] through continuous communication[41] and pro-active exchange of information[42] before, during, and after the alliance.

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operate. See for example, "Top Ten Legal Mistakes Made by Entrepreneurs", Harvard Business School, Working Knowledge March 3, 2003. ("Patents are granted on a country-by-country basis (with a single application available for the European Union.). In the United States, if an invention is sold or made public, there's a year's grace period to filing the patent application. Everywhere else, if the invention is sold or publicized prior to filing the patent application, the invention is unpatentable in that country. For example, if the invention is publicly disclosed to a Japanese national visiting a tradeshow in the United States, then under Japanese patent law, if no patent application has been filed, that disclosure makes the invention unpatentable in Japan. The same is true with trademarks.")

[38] *See* "What Every Business Executive Needs To Know About Dispute Resolution" by Ronald W. Brown and Geraldine Reed Brown.

[39] *See* "Building Trust in Strategic Alliances: Enabling Greater Value" by Joe Kittel and Gerlach, Porst & Steiner. GmbH (GP&S), an alliance-oriented business development consultancy headquartered in Bad Homburg, Germany. ("When people or organizations attempt to work together there are always differences—differences of opinion, differences of perspective, different strategies, cultural differences or decision-making differences…As individuals collaborate in alliances, as relationships deepen over an extended period of time, significant differences will inevitably surface. The question is: 'How do we choose to look at and leverage off of those differences.") (Hereinafter "Building Trust"). *See also* Sean Silverthorne "Using the Law to Strategic Advantage, December 12, 2005. ("Every legal dispute is a business problem requiring a dispute resolution. Instead of handing over disputes to the lawyers with a 'you take care of it attitude, managers need to take responsibility for their disputes.")

[40] *See* Cullen, Johnson, and Tomoaki, "Success Through Commitment and Trust: The Soft Side of Strategic Alliance Management", Journal of World Business, September 22, 2000. ("Relationship capital involves having alliance partners attend to and invest in time and effort toward building positive feelings and interaction patterns in the reliance relationship. Two important areas of relationship capital are mutual trust and commitment. Other types of relationship capital include norms of reciprocity, information exchange, and cultural sensitivity.")See also Building Trust. ("Companies often under-invest in their alliances. They do not invest in the incremental people and program resources required to go beyond traditional product and services in order to start obtaining the strategic

12. Commit to having a clear, written, entrance strategy[43] and strategic plan.
13. Commit to having a clear, written exit strategy[44]; for everything there is a time and a season and nothing lasts forever.

Management

Let's focus for a moment on Critical Commitment #3 above. In order for the strategic alliance to be successful and to fulfill its stated purpose, it must be well managed[45] by a manager.[46] Here is an excellent definition of management: "the effective, efficient, correct, and timely use of another person's property and resources for the purpose for which they were delegated with a view to producing the expected added value."[47] Given that definition, managing well, may be

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value possible between companies in the alliance. Most importantly they under-invest in the human relation aspects of alliances…")

[41] *See* Building Trust. ("The root cause for alliance failure is a lack of respect, confidence and trust in the other partner or the alliance itself. Trust is affected by the degree of openness in communication; and a lack of trust is also a root cause for communication. Therefore trust is a fundamental issue, being both cause and effect.")

[42] *See* Hutt, Stafford, Walker, and Relingen, "Defining the Social Network of a Strategic Alliance", MIT Sloan Management Review, January 15, 2000. ("Communication and the proactive exchange of information can strengthen cooperative relationships in several ways. First, effective collaboration requires connection at three levels across partnering organizations, represented by continuous contact among (1) top management to develop broad goals and monitor progress, (2) middle managers to develop plans for joint activities, and (3) operational personnel, who carry out the day-to-day work of the alliance. Second, trust plays an important (often dominant) role in successful alliances and communication and information processing are instrumental in building trust between partners. Third, communication among boundary-spanning personnel produces a shared interpretation of goals and common agreement on norms, work roles, and the nature of social relationships. In turn as a strategic alliance evolves, (1) personal relationships increasingly supplement formal role relationships and (2) informal psychological contracts increasingly substitute for formal legal contracts.")

[43] One form of entrance strategy that borrows a phrase from matrimonial law, entails having strategic alliance business "pre-nup." See "The Perfect 'Pre-Nup' To Strategic Alliances: A Guide to Contracts" by Professor Africa Arino, Professor Jeffrey J. Reuer, and Antoni Valverde, www.criticaleye.net. (Hereinafter "Guide to Contracts")

[44] See Guide to Contacts. Exit strategies could range from a 'Texas shoot-out ("when both parties wish to buy and a sealed bid procedure takes place to determine who the higher bid is" to 'Russian roulette' ("that allows one party to offer to buy the shares of the other party at a certain price—but with the other party having the right to decide either to accept and sell its shares or instead to buy the first party's shares at the same price.")

[45] "The Role of Alliances in Corporate Strategy", The Boston Consulting Group. ("Alliances are also notoriously difficult to manage. In many respects, implementing an alliance is similar to conducting a merger or an acquisition. A company needs to put a structured process in place in order to define the explicit role of alliances in its strategy, identify appropriate partners, structure the right kind of relationship, and manage the relationship over time.")

[46] The shortest and best definition of a manager that I ever heard was given by Harold S. Geneen., when he said a "manager turns in the performance." See. The Hindu, online edition of India's National Newspaper, Wednesday, March 18, 2009. ("In business, words are words; explanations are explanations, promises are promises, but only performance is reality, said Harold S. Geneen way back in the 1960's. He was a management legend and guru.")

[47] Myles Munroe, Overcoming Crisis: The Secrets to Thriving in Challenging Times, at 39.

easier said than done depending on factors such as the geographic location of the alliance, its intended purpose, scope, and duration.

We all know that if everybody is responsible for all aspects of a project then nobody is responsible. In setting up a strategic alliance, the participants will have to determine what roles each will play to produce the result or purpose that has been agreed upon. Some parties may have to play a subordinate role in the alliance. Although not every member may be used to playing a subordinate role, it is necessary for the participants to remain focused on the goal and trust in the competence of their leader. Apart from ego, the parties should determine who is best suited to manage. Determining who will lead the strategic alliance, who will manage the day to day operations of the strategic alliance will be critical. Leadership must be competent, clear, and credible for a strategic alliance to be sustainable and successful.

Conclusion

Strategic alliances present unique challenges to business executives and to legal counsel who provide advice and counsel on the myriad issues that can arise in a strategic alliance. In the strategic alliance context, the strategic alliance participants through an agreement write their own rules, set their own game plan and then can go out into any field of business opportunity– hopefully, to perform better and profit greater than those who do not know how to use the strategic alliance business tool. A strategic alliance may be a means to an end: fulfilling part of a business vision.