



THE CORPORATE COUNSEL

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SPECIAL SUPPLEMENT

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Reminiscences—Part 2

Part 2: Our Work and Growth Over the Years

When we first started out, we ended our first year with only around 100 subscribers. Our initial issues were only four pages long and focused primarily on practical guidance relating to Rule 144 and insiders' transactions. Over time, our scope of coverage and our readership expanded. By the end of the first full year (1976), the issue length had expanded from four to six pages (we went to eight pages in 1979 and 12 pages in 2000).

We originally called the newsletter "*The Corporate Executive*." When I started out, I thought it would be presumptuous to say I was counseling lawyers, even though we were writing for the lawyers that advised companies and executives. With our March-April 1978 issue, we changed the name to *The Corporate Counsel*, saying: "The newsletter will continue to be devoted to providing practical information and guidance to corporate counsel regarding the 'nuts and bolts' of corporate practice..." (Indeed, the lead piece in that issue was devoted to Corporate Repurchases and we provided model procedures for companies to implement and for brokers to adhere to under then-proposed Rule 13e-2 (the predecessor to current Rule 10b-18.)

Some Highlights/Accomplishments

I look back on some of our accomplishments over the years:

Elimination of Annual S-8 Registration Statements

As our older practitioners will recall, the SEC used to require every company with an outstanding S-8 registration statement to file a full-blown post-effective amendment and provide a new prospectus *annually* to every plan participant. In October 1979, while I was reflecting on the waste involved (in needless time, printing costs and trees), I came upon a solution: use the same annual updating approach that applied to Form S-16 (the predecessor to Form S-3). Instead of preparing and filing annual post-effective amendments, the accountant would simply provide (with the 10-K) an annual consent to incorporation by reference of the new certified financials into the outstanding registration statement. I picked up the phone and called Ed Greene, the then Director of the Division of Corporation Finance. Ed immediately seized on the idea and told me that the Staff was putting the finishing touches on a proposal making changes to the S-8. My timing could not have been more propitious.

Ed asked me to send him a letter outlining my proposal. As a result, the following week the Staff presented to the Commission my letter together with the already prepared release (proposing the elimination of Staff review of the annual S-8s). The Commission approved both proposals, and directed the Staff to issue a release requesting public comment on both proposals. (We covered this in our November-December 1979 issue, providing a nice holiday present to many.) It was estimated that this simple change resulted in annual savings to issuers totaling over \$100 million per year.

Stan Keller's Limited Offering Chart

In that same November-December 1979 issue, we provided our readers with a chart the Staff had prepared but had not yet made generally available to the public, comparing Rules 146, 240 and proposed Rule 242. In those (pre-Internet) days, getting helpful guidance or new interpretive positions out to the public was slower (as Stan Keller, Ed Fleischman and Ron Mueller recalled in their reminiscences, posted in "The 35th Anniversary" portal on TheCorporateCounsel.net). So, with the Staff's blessing, we published the chart. With our September-October 1980 issue, we provided a greatly expanded chart listing all

the alternatives for limited offerings by issuers and summarizing the various requirements. The Limited Offering Comparison Chart has been a big favorite of readers over the years. [In fact, Stan has just put the finishing touches on his latest revisions to the chart, which we will be providing with the next issue of *The Corporate Counsel*.]

Our Wish Lists

Beginning with our November-December 1985 issue we would periodically publish our "Wish List." [As Ron Mueller recounted in his reminiscences posted in the 35th Anniversary section of TheCorporateCounsel.net: "Beyond just reporting on developments, Jesse and *The Corporate Counsel* have been a driving force behind many changes. Like Geppetto wishing on his lucky star, Jesse would annually publish his 'wish list,' an appeal to the SEC and its staff for new interpretations or new rules that would remove needless burdens or technicalities or facilitate emerging practices. Many of these wishes were granted and are reflected in rules and interpretations that continue to apply to this day under Rule 144, the Section 16 rules, Rule 701 and Form S-8, among others. While continuing that advocacy, Jesse has more recently set his sights equally on his audience, championing the use of tally sheets, a review of wealth accumulation and disclosure of "walk away" numbers, and again his influence is borne out in many compensation committee meetings and proxies each year."]

1986: Launching The Corporate Executive

In November of 1986, we launched *The Corporate Executive* to focus more on executive compensation and equity granting practices. (Note that this was when interest in executive compensation, particularly equity grants, was beginning to heat up. We always had a knack for seeing trends and issues in advance.) In addition to covering innovative compensation features and practices, page one of each issue featured "The BOX," providing an example (with preventive pointers) of an insider who had inadvertently fallen prey to Section 16 or Rule 144 or 10b-5.

1988: Cashless Exercises Our Pivotal Role

Before 1988, cashless stock option exercises were not permissible because Federal Reserve Regulation T prevented brokers from providing or arranging for loans to optionees to exercise their options. I got involved in an effort to fix the problem. In our September-October 1987 issue, we alerted readers to a new Federal Reserve approach that would open the door to cashless exercises. The procedure would involve the delivery of an "exercise notice" to the company, with a concurrent instruction to a broker to sell the stock and deliver to the company the sale proceeds necessary to pay for the exercise. The amendments were adopted by the Fed in December, to be effective January 25, 1988. In anticipation, I developed detailed procedures for compliance with the new requirements for Dean Witter (where I served as securities counsel for over 36 years). In anticipation of the effectiveness of the change and the big deal that it would be (as my family knows, *anticipation* and *perseverance* are my two favorite words), I was able to obtain a no-action letter from the SEC Staff (with the blessing of the Fed Staff) permitting Dean Witter to become the first brokerage firm to implement and offer cashless exercises before the Fed change became effective. Needless to say, this gave the firm a big edge over the competition. I should also point out that we coined the term "cashless exercise." (Together with "tally sheets," these are the best-known terms that I have coined.)

Launching Peter Romeo and Alan Dye's Section 16 Treatise

In July 1979, I encountered a 100+ page comprehensive Section 16 outline that Peter Romeo had prepared for a panel presentation. I asked Pete if we could publish it; we sold the "Outline" in a soft spiral binder for \$35. A major legal publisher saw the Outline and approached Peter to write a book. As Peter recounted in his reminiscences "After I left the SEC in 1984, a well-known publishing firm invited me to prepare a book on Section 16, which led me to call Jesse for advice because of his publishing expertise. He paused briefly after I explained why I was calling and then offered to publish the book on terms better than those presented by the other publisher. Knowing of his devotion to quality, marketing ability and pleasant demeanor, I quickly accepted. Shortly thereafter, I recruited Alan Dye to come to Hogan & Hartson (now Hogan Lovells) to work with me on the book project... The rest is history."

We had never published a book before and soon learned how hard that could be. As Peter and Alan Dye found, the job of writing a definitive Treatise is a daunting task—and can take a while—especially as rules change while you are in the process of writing. The *Section 16 Treatise* was finally published in 1994 to great acclaim. The Section 16 Annual Service was launched (consisting of the *Section 16 Updates* newsletter and the annual Comprehensive Section 16 Outline—which is now the annual *Section 16 Deskbook* and is 888 pages long). The *Section 16 Forms and Filings Handbook* was added in 1991. Looking back, we are proud that we created, and have continued to serve as, the Section 16 resource for companies and counsel.

1989: Our Model Insider Trading Policy and Procedures

In November 1989, we published in *The Corporate Executive* a model Insider Trading Policy Statement with model forms and procedures for issuers to implement. We gave our readers permission to use our forms and procedures (we only asked that our law firm readers that provided the procedures to their clients give us credit). We were flattered that so many companies and firms embraced our forms and procedures—verbatim. [We should mention that Alan Dye and David Lynn are right now in the process of revising and updating our model insider trading procedures and forms—which we are planning to provide with the upcoming January 2011 issue of *The Corporate Counsel*.]

1990: Our First Big Conference—The Section 16 Rule Changes

The SEC's long-awaited major overhaul of Section 16 in 1990—particularly new Rule 16b-3 and the introduction of Form 5—was a big deal. Every company had to implement new procedures to ensure compliance. We had anticipated (there's that word again) and planned for over a year for a major Conference, both in New York at the Waldorf (where we had a record crowd) and in San Francisco.

Although I had been a speaker at many conferences over the years, these were the first conferences we had ever hosted on our own from start to finish, down to every logistical detail. And, thanks to my brother, Leonard, they went off without a hitch.

Behind the Scenes

Leonard came to work with me in 1982, becoming responsible for all the operational and fulfillment details of running a publishing business. He was the back office. The rest of our publishing operation consisted of Mike Gettelman and I writing the newsletters, Nona Ranjo doing the typesetting and outside contractors handling the printing and fulfillment.

Writing an issue was an experience in those days. I would generally write a first draft (over the course of a week). Mike and I would then spend three or more hours every night for another week editing and re-editing until we finally felt the issue was worthy. Because I would do the editing from home and this was before the advent of fax machines (much less computers), I would bring the edits (handwritten all over the draft) into San Francisco with me on my way to my day job at Dean Witter and then send it by messenger to Nona. (I could not type then and now I barely get along with three fingers typing on the computer, as I am doing right now as I write this.) If we were editing over a weekend, we would send messengers back and forth across the Bay Bridge (carrying my edits and Nona's next draft) between Berkeley and San Francisco.

Until 1988, we did not have an office or a phone number, which frustrated librarians, but we were operating bare bones and did not have the time to add staff etc.—until Vicki, Leonard's wife, joined the operation in 1985. Leonard and Vicki have been crucial to the operation, which has grown substantially over the years. It was Leonard and Vicki who handled all the logistics for our first Conferences (on top of all the day-to-day operations) and continue to be vital to the operation (now with the help of dedicated, wonderful staff in our office where we have taken on all the fulfillment and customer service functions).

The 1990s

We kicked off the decade of the '90s with our first conferences, in response to the SEC's major overhauls of Section 16 and the proxy disclosure rules (discussed above).

Launching The National Association of Stock Plan Professionals

At the end of 1992, we launched the NASPP and had our first organization meetings (via the ALI-ABA television network to 30 chapter locations in major cities across the country) on the second day of our big conferences addressing the SEC's major new compensation proxy disclosure requirements and Section 16 developments. [We were not in the conference business, but when major changes came along where it was clear that real practical guidance was needed, we rose to the occasion. Once again (almost two years to the day from our big Section 16 Conference) we were bursting at the seams at the Waldorf and in San Francisco.] The NASPP was a hit from the start and is now in its 18th year with over 6,000 members. This year's 18th Annual NASPP Conference is coming up in just two weeks on September 20-23. Our attendance at the NASPP Annual Conference has grown from a few hundred people at the start to over 1,500 people. What makes me proudest is the mix of attendees that provide the various important inputs and perspectives—in-house and outside counsel, compensation consultants, HR and Corporate Secretary personnel, stock plan administrators, brokers and providers of financial and stock plan services and more.

"The Hot Dog and The Hungry"

The lead piece in our November-December 1992 issue of *The Corporate Executive* was entitled "the Hot Dog and The Hungry." We recounted how a friend asked a board member of a major sports arena what happened to all the leftover hot dogs and hamburgers after each game. The board member didn't know but promised to find out. What he learned was the food was dumped. We pointed out in that issue—and we remind people at every one of our Conferences—that it is important that each of us ask these questions so that we each do our part to help those who, by no fault of their own, are in need. Whenever we choose a hotel for our big annual conference, we require that all the leftover food be distributed to the local food bank to feed the needy. [We ask that all our readers do the same and that whenever your company or firm holds an event, please insist that all leftover food goes to those in need. Hotels are even protected from liability by the federal Good Samaritan Act.] We are posting the Hot Dog and the Hungry piece and the Good Samaritan Act on the NASPP website and on TheCorporateCounsel.net. We'd like to hear from readers who have had successful experiences.

Charitable Stock Options

At the 1999 NASPP Conference, I heard from an attendee about a program that Honeywell had instituted where they made gifts of stock options to charities. In November of 1999, we brought to our readers' attention the concept of companies (from large established companies to start-ups) making gifts of at-market options to charities. In subsequent issues, we provided step-by-step guidance showing how to do it. Charitable Options caught on and we were instrumental in the formation of local non-profit organizations that coordinated with venture capitalists and others to encourage start-ups to gift options to local community programs for those in need. (The Entrepreneurs Foundation is still going strong today.) Several of our readers, including major law firms, got behind the concept, bringing it to the attention of clients and providing *pro bono* assistance in establishing programs.

Entering the 21st Century—Part 3

In our next issue, we will wrap up our reminiscences by covering the important developments over this past decade—during which, thanks to the key contributions of our next generation of contributors, we have been able to utilize the Internet and new websites and blogs to keep our community abreast of all the changes and developments that have been occurring at breakneck speed.

See You in Chicago

We are looking forward to seeing so many of our friends and colleagues at the upcoming week of Conferences starting on September 20 in Chicago (or *virtually*, via the Video Webcast) as we celebrate our 35 years.

—JMB

The Publisher of *The Corporate Counsel*, **Jesse M. Brill**, is a member of the New York and California Bars and received his J.D. from Yale Law School. Mr. Brill, formerly an attorney with the Securities & Exchange Commission, is Chair of the NASPP, CompensationStandards.com and DealLawyers.com. Mr. Brill has chaired and participated on numerous panels and seminars. Editor: **Michael Gettelman**, LL.B. Harvard University (mike@thecorporatecounsel.net).

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Executive Press, Inc. • P.O. Box 21639 • Concord, CA 94521-0639 • Tel. (925) 685-5111 • Fax (925) 930-9284 • info@TheCorporateCounsel.net

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