CHAPTER 18

The FDIC's Use of Outside Counsel

Introduction

This chapter describes the Federal Deposit Insurance Corporation's (FDIC) use of outside counsel from 1980 to 1996. It covers the increased use of outside counsel from 1989 to 1993 during the peak of the financial institution crisis, payments to outside counsel during the period, the advent of the FDIC's Outside Counsel Minority and Woman Outreach Program, the formation of a section to oversee the use of outside counsel, the development of uniform policies and procedures governing the use of outside counsel, the use of information systems, and the various statutory provisions that relate to the FDIC's use of outside counsel.

Increased Use of Outside Counsel

The FDIC turned to outside counsel between 1980 and 1988 to handle matters arising from the failure of financial institutions. The use of outside counsel skyrocketed between 1989 and 1993, the peak of the financial institution crisis.

Historically, the FDIC turned to outside counsel to meet an increasing demand for legal services which grew from the increase of receiverships for failed financial institutions. Until 1982, with the exception of legal work in one office in San Juan, Puerto Rico, virtually all legal work relating to the FDIC's role as receiver was managed by FDIC headquarters with a minimal in-house legal staff. As institutions failed in different parts of the country, it was common practice for the in-house staff to retain outside counsel to assist with the daily and long-term legal needs of those receiverships. The need for outside counsel existed because of (1) the limited number of in-house legal staff in relationship to the growing number of receiverships, (2) the diverse geographic locations of the receiverships, and (3) the wide variety of legal issues arising from those receiverships that required specialized knowledge of state laws and legal practice, as well as federal law. The legal work encompassed a broad range of areas such as foreclosure, loan workout, bankruptcy, contract disputes, asset sales, collecting on notes and guarantees, state and federal tax issues, pension funds, environmental issues relating to the institution's property, torts, and shareholder suits. In addition, the FDIC investigated whether the officers, directors, and other professionals who ran the institutions before failure upheld their fiduciary obligations to the institutions. In many instances, the FDIC determined that the most cost-effective and practicable way for the legal work to be done was to continue to use the outside counsel previously retained by the failed institution. In other instances, and for new work, the FDIC retained new outside counsel.

Beginning in early 1984, the FDIC Legal Division, in conjunction with the then Division of Liquidation, established regional legal offices. Many of the regional offices were supplemented by consolidated offices in which numerous receiverships were handled from a single office. The regional offices oversaw and provided support to the consolidated offices. The FDIC established sizable in-house legal offices in the regional and consolidated offices.

The extensive use of outside counsel by the FDIC between 1989 and 1993 was more a function of the very rapid increase in the FDIC legal workload than of a deliberate management choice. The FDIC employed rapid recruiting programs and hired hundreds of temporary in-house attorneys and support staff to handle the backlog. The tremendous workload left little choice, however, but to refer a large portion of the legal matters to outside counsel, particularly matters related to the liquidation of assets and bank failures.

The Resolution Trust Corporation (RTC) experienced a similar rapid increase in legal work from S&L failures and made extensive use of outside counsel from its inception in 1989 through 1993. Under the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) of 1989, the RTC was required to use contractors to carry out its mission when the use of contractors was practicable and efficient. Not until the passage of the Resolution Trust Corporation Completion Act (Completion Act) of 1993 was the RTC required to use in-house legal staff if that staff could provide the same quality of work as outside counsel at the same or lower estimated cost.

The payments to outside counsel increased dramatically during the height of the financial institution crisis. The FDIC continued its practice of handling as much of its work in-house as possible; in fact more than half of its legal workload was performed in-house. Before FIRREA's mandate to use private-sector contractors to the fullest extent possible, RTC matters were referred primarily to outside counsel until 1993, when the Completion Act dictated that the RTC "may only employ outside counsel if the use of outside counsel would provide the most practicable, efficient, and cost-effective resolution to the action."[1]

1. *U.S. Code*, volume 12, section 1441a(w)(20).

Outside Counsel Minority and Woman Outreach Program

An Outside Counsel Minority and Woman Outreach Program began in the mid-1980s with efforts to increase the use of minorities and women as in-house attorneys and outside counsel for the FDIC. The FDIC was a pioneer, when compared with other government agencies and corporations, in its efforts to use minority and women attorneys for FDIC work. The FDIC participated in programs sponsored by national minority bar associations, including the National Bar Association, the Hispanic National Bar Association, the Native American Bar Association, and the National Asian Pacific American Bar Association. The FDIC co-sponsored two symposia (in 1992 and 1993) with the national minority and women bar associations in an effort to increase its referrals to minority and women outside counsel. The FDIC was an early participant and the first governmental entity to become a member of the American Bar Association's Minority Demonstration Program. The program was designed to provide an avenue for large corporations to meet minority and women attorneys seeking to provide services as outside counsel, or to serve as in-house counsel. The FDIC participated in several symposia co-sponsored by federal banking agencies in conjunction with the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac).

In addition to its national outreach initiatives, the FDIC field offices undertook local outreach initiatives. The FDIC designated outreach contact persons in each field office and at FDIC headquarters to help staff identify minority and women outside counsel for referrals. Efforts included working with local bar associations to encourage minority- and women-owned law firms to apply to be FDIC outside counsel, holding open houses and seminars to enable minority- and women-owned law firms to become familiar with FDIC work, and visiting firms already working for the FDIC to encourage them to assign minority and women staff to FDIC matters. In addition, the FDIC referred matters to minority- and women-owned law firms that co-counseled with non-minority firms.

Bringing Work In-House

The FDIC continued to perform its legal work in-house as much as possible by increasing its staff to handle an expanding amount of work remaining from failed financial institutions. In 1982, the FDIC established an in-house legal presence in San Juan in response to several bank failures in Puerto Rico. It formed an in-house legal staff in Oklahoma City in response to the Penn Square Bank, N.A., failure and subsequent bank failures in Oklahoma. In 1983 and 1984, in-house legal offices were established in various other locations, including Knoxville, Tennessee, and Midland and Houston, Texas. As the financial institution crisis moved to other geographic areas, similar in-house legal offices were established in other states, including California, Florida, Louisiana, Massachusetts, Missouri, Nebraska, New Jersey, and Oregon, and in other locations in Texas. The in-house legal offices were part of regional and consolidated offices that included a number of FDIC divisions, most notably the Division of Liquidation, which had primary responsibility for the oversight of the receivership process. In-house staff developed expertise in a number of areas, including transactional work, bankruptcy, and litigation. Even with the expanded staffs and their efforts, however, the FDIC increasingly referred work to outside counsel, because the load was still too much to handle. FDIC attorneys supervised the work of outside counsel.

In an effort to reduce its reliance on outside counsel, the FDIC established several in-house "law firms," or Legal Services Offices (LSO). The LSOs' primary function is to supply litigation and bankruptcy support to regional and consolidated offices in designated geographic or "practice" areas. The LSO mission is to provide quality legal services—equal to or exceeding those of private law firms—at substantial cost savings to the FDIC. LSOs were designed to operate like private law firms, similar to "captive" law firms used by large insurance companies. For example, LSO attorneys and paralegals electronically track time spent on each case.

LSOs have been located in geographic areas in which the cost of outside counsel is very expensive. The FDIC established an LSO in New York in 1991, followed by LSOs in Los Angeles, Dallas, Boston, and Washington, D.C. Only the New York and Washington, D.C., LSOs remain. The other LSOs were closed as the legal workload declined. Even with the LSOs assuming much of the legal workload during the early 1990s, other FDIC offices continued to handle a significant amount of legal work in-house as the FDIC historically had done.

The LSOs developed expertise in litigation as well as other areas of law. Legal Division offices did not retain outside counsel in geographic areas served by an LSO without first consulting the LSO to determine whether it could provide quality, timely, and cost-effective legal services. By handling work previously handled by outside counsel, the LSOs assisted the Legal Division in reducing its outside counsel costs. However, because of the large volume of legal work, the FDIC was still required to refer to outside counsel work.

Managing Outside Counsel

As the use of outside counsel increased, the FDIC undertook a number of measures to more effectively manage its outside counsel. The FDIC retained consultants to provide input as to what management tools could assist it in managing outside counsel. The FDIC then implemented many of the consultants' suggestions such as establishing a separate Outside Counsel Section and implementing nationwide policies and procedures to govern the selection and use of outside counsel.

Separate Legal Division Outside Counsel Unit

In the early 1980s, the FDIC limited its use of outside counsel to only a few firms in each locale to enable those firms to develop expertise in FDIC work. As the amount of legal work increased beginning in 1991, however, the FDIC elected to refer its work to a broad spectrum of law firms. Any firm could apply to be included on the FDIC's List of Counsel Available, which the FDIC reviewed to locate firms for its work.

To more effectively retain, manage, and pay the record number of outside counsel, the FDIC undertook a number of measures. In 1990, it retained outside consultants who provided recommendations for improving the management of outside counsel such as the increased use of alternative fee arrangements to contain outside counsel costs. The existing information systems were surveyed and an information system was proposed to help track and report outside counsel information. Around the same time, the FDIC Office of Inspector General (OIG) retained a large accounting firm to audit the FDIC's management of its outside counsel. The FDIC adopted many recommendations of the consultants and the auditor, including the formation of a separate Outside Counsel Section in early 1991 to handle outside counsel issues. The Outside Counsel Section was responsible for ensuring that the FDIC improved its management of outside counsel.

The Outside Counsel Section was charged with updating and expanding outside counsel policies and procedures that the FDIC had developed since the mid-1980s, developing and administering supplemental policies and procedures as needed, and ensuring that policies and procedures were uniformly applied nationwide. The Outside Counsel Section did not retain outside counsel itself, which enabled the FDIC to avoid the possibility of any special interest in or conflict of interest with any particular outside counsel or potential outside counsel when developing and administering nationwide policies and procedures. Working closely with the FDIC offices that retained outside counsel, the section updated and expanded outside counsel policies and procedures, processed applications submitted by outside counsel interested in representing the FDIC, and maintained the Legal Division's nationwide List of Counsel Available.

The Outside Counsel Section also worked closely with the FDIC's technical staff to develop computer systems for efficiently paying the large volume of invoices from outside counsel. The procedures developed and administered by the section contain a number of checks and balances to ensure consistent application of FDIC policies and to minimize the possibility that an outside counsel may receive improper payment of its invoices.

Legal Division Outside Counsel Conflicts Committee

Outside counsel must be free of any conflicts of interest unless they receive a waiver. For the FDIC to ensure that its outside counsel do not have any unwaived conflicts of interest, the FDIC developed policies that are distributed to all outside counsel before commencing work.

An informal conflicts committee had been operating in the FDIC since 1987 to handle the conflicts of interest that arose from the FDIC retaining outside counsel. In 1990, to deal more effectively with the conflicts of interest and to consistently handle requests for conflict of interest waivers, the FDIC established a joint, more formal Conflicts Committee with the RTC. From 1990 to 1995, the joint FDIC/RTC Conflicts Committee was composed of nine members: four attorneys each from the legal divisions of the FDIC and RTC and a representative from the FDIC Office of the Executive Secretary.

At the height of its activity, the Conflicts Committee considered nearly 900 requests to waive conflicts of interest per year. With urgent needs for outside counsel increasing during the years of the financial institution crisis, it was necessary for the Conflicts Committee to grant waivers for certain conflicts of interests. Multiple safeguards were implemented, however, to protect the interests and confidentiality of the FDIC and the RTC, including placing restrictions or conditions on the usage of some firms, developing automated tracking systems, implementing extensive formal written policies and procedures, and initiating background checks on outside counsel. In 1991, an FDIC conflicts team was formed within the Outside Counsel Section to coordinate the work of the Conflicts Committee, draft policy, and serve as an information resource; a comparable RTC conflicts team was established in mid-1992. In 1996, with the merger of the RTC with the FDIC and the reorganization of the FDIC Legal Division, the composition of the Conflicts Committee was changed to five members, and the two conflicts teams were merged and reorganized.

The FDIC established a network of conflicts coordinators in its offices nationwide. The conflicts coordinators review outside counsel's request for a waiver of a conflict of interest, and if necessary, forward the request to the Conflicts Committee. The Committee reviews the information and determines whether a conflict of interest may be waived and the conditions under which it can be waived. The Committee meets biweekly and considers requests for waivers of conflicts of interest on an expedited basis whenever necessary. In addition to the FDIC's internal policies governing conflicts of interest, the FDIC adheres to federal ethics regulations to ensure the fitness and integrity of outside counsel. Conflicts coordinators also monitor general compliance by outside counsel within their jurisdiction for adherence to conflicts policies and procedures.

Outside counsel must disclose all actual or potential conflicts of interest and matters that may present the appearance of a conflict when it submits its application materials. The FDIC must consider the status of outside counsel's conflicts of interest when considering retaining outside counsel. Thereafter, outside counsel has a continuing duty to update such information. Failure to promptly disclose actual or potential conflicts of interest and any matters that may present the appearance of a conflict may result in termination of the firm's service, suspension of new referrals, or other corrective actions. Outside counsel also must observe state bar rules of professional responsibility regarding conflicts of interest, as applicable, and the American Bar Association Model Rules of Professional Conduct. Additionally, there may be other situations that could give rise to actual or potential conflicts of interest, or the appearance of a conflict.

Uniform Outside Counsel Policies and Procedures

The policies and procedures summarized below initially were developed by the FDIC during the 1980s. For example, the regional legal offices were instrumental in developing (1) the application form for use by law firms seeking to represent the FDIC as outside counsel, (2) ceilings on the hourly fees the FDIC would pay outside counsel based on the geographic location of outside counsel, (3) limitations on the amount of fee increases the FDIC would pay its outside counsel, (4) tracking fees for certain types of common legal work to establish budgets based on historical data, and (5) a computerized database of FDIC outside counsel.

Beginning in 1991, after the Outside Counsel Section was formed, the FDIC reviewed, updated, and expanded its policies to manage the large number of outside counsel more effectively, as well as to control costs. The FDIC obtained input from all offices that managed outside counsel to publish and distribute nationwide policies and procedures. As part of the merger of the RTC with the FDIC, the FDIC compared FDIC and RTC outside counsel policies according to the "Best Practices" review. In 1995, the Legal Division began updating a number of its outside counsel policies by incorporating recommendations from that review.

Guide for Outside Counsel

In 1990, the FDIC published separate pamphlets for outside counsel: *A Law Firm's Guide, How to be Considered for Retention by the FDIC and RTC* and the *Guide for Legal Representation*. In 1991, the FDIC combined the two pamphlets into the *Guide for Outside Counsel (Guide).* The general counsel, in the introduction to the *Guide*, advised law firms that "The Legal Division seeks to provide the FDIC with high-quality legal representation and advice in the most practicable, efficient and cost-effective manner." The *Guide* is incorporated by reference into the Legal Services Agreement that the FDIC enters into with outside counsel that it retains. The policies summarized below supplement the *Guide* by providing staff and outside counsel with more detailed guidance in a number of areas.

Application Process and Standard Legal Services Agreement

Beginning in 1990, the FDIC required outside counsel interested in representing the FDIC to submit a standard application package to FDIC headquarters. Before that time, each FDIC office handled its own applications from outside counsel. Beginning in 1991, all firms that submitted completed applications to the FDIC were placed on the FDIC's nationwide List of Counsel Available. The List of Counsel Available was distributed periodically to the FDIC offices that used outside counsel. Since 1992, the List of Counsel Available has been accessible electronically to staff in FDIC offices that used outside counsel.

FDIC staff referred to the List of Counsel Available to locate outside counsel in particular geographic areas. Only the law firms that were on the List of Counsel Available were eligible to enter into Legal Services Agreements (LSA) with the FDIC. An LSA is effective for a term of two years. The matrix attached to the LSA lists the personnel in the law firm who provide services to the FDIC and the rates for providing those services. Before establishing the List of Counsel Available in 1991, the FDIC maintained the List of Counsel Utilized. The List of Counsel Utilized included only those firms that were actually providing services to the FDIC.

Outside counsel submit the following information to the FDIC in its application package: (1) statement of the firm's expertise, the principal focus of the firm's practice, (2) proof of or detailed information about its malpractice insurance coverage, (3) statement of the firm's willingness to absorb the cost of developing an understanding of the FDIC's specialty areas of law, and (4) a disclosure of conflicts of interest or appearances of the same. The firm provides information about the members of the firm who practice in each area of expertise, including their number of years of experience; examples of experience; state licenses; length of time with the firm; status as a partner, associate, or paraprofessional; usual billable rates; and proposed discount rate to the FDIC.

Legal Division "Cap" Policy

The FDIC adopted its Statement of Policy and Procedures Concerning Limitations on Fee Payments to Outside Counsel (Cap Policy) in February 1991 in response to criticism that it referred an excessive amount of work to a few large law firms. The Cap Policy stated that its purpose was to enable the FDIC to avoid "unwarranted concentration of legal referrals in a few law firms."

Under the Cap Policy, referrals of new matters to law firms that the FDIC had paid more than \$7.5 million in the preceding 12 months required the written approval of the general counsel; more than \$5 million but less than \$7.5 million, the written approval of a deputy general counsel; and, more than \$2.5 but less than \$5 million, the written approval of a deputy general counsel or regional counsel. The FDIC issued quarterly reports (Cap Lists) that identified the firms that had been paid more than \$2.5 million in the preceding 12 months, as well as the firms that were approaching payments of \$2.5 million. The first Cap List, issued for the second quarter 1991, contained the names of 32 law firms.

From the third quarter of 1991 through the end of 1995, the RTC issued a separate Cap List. The FDIC revised its Cap Policy in November 1995 so that payments made by both the FDIC and the former RTC were combined to determine how much firms had been paid during the preceding 12-month period. Even with combining payments made by the FDIC and the former RTC, the Cap List for the fourth quarter 1996 showed only one firm having been paid more than \$2.5 million in the preceding 12 months.

Outside Counsel Selection and Retention Policy

The FDIC's policy on the *Selection and Retention of Outside Counsel* (Selection and Retention Policy) was published in 1992 to ensure that FDIC offices nationwide selected outside counsel in a uniform manner. The Selection and Retention Policy sets forth the factors the FDIC considers in determining whether matters should be handled in-house, as well as the factors used to select outside counsel if outside counsel handles the work. The FDIC uses in-house staff to the extent practicable to provide legal services and support in all legal matters. Certain legal areas have been handled almost exclusively in-house at the FDIC, including employment and labor law, the development and interpretation of regulations and legislation, enforcement actions and other open bank assistance and advice, and the FDIC's own corporate advice and litigation.

The following factors, considered in the aggregate, determine whether the Legal Division handles work in-house: (1) staff workload, (2) staff expertise, (3) case matter type, (4) timeliness of response required for the matter, (5) cost-effectiveness of retaining outside counsel, and (6) geographic location of the asset or venue of the court proceeding. If the FDIC determines that it cannot handle matters in-house according to the Selection and Retention Policy, staff referring matters to outside counsel consider not fewer than three outside counsel whenever possible. Circumstances may exist, however, when competitive contracting is impossible or impractical, such as with time-sensitive matters, matters handled by inherited counsel, confidential matters, and matters in which only one law firm maintains specific knowledge of the matter.

The following factors contribute to the decision of which firm to retain: (1) the Cap Policy, (2) the capacity of the firm, (3) cost (that is, the firm's rates should be competitive), (4) expertise, (5) geographic location, (6) lack of conflicts of interest, (7) minority/women information, and (8) reputation.

In 1996, the FDIC updated the Selection and Retention Policy, making significant modifications that included requiring documentation of both the decision to refer a matter to outside counsel and the choice of counsel. Another modification was, as an internal control, that either a senior FDIC manager or a committee of FDIC staff review and sign the documentation used to select outside counsel to ensure compliance with the Selection and Retention Policy.

Outside Counsel Evaluation Policy

In October 1992, the FDIC adopted a nationwide evaluation policy for outside counsel. The policy was based on practices followed by different offices. The nationwide policy ensured that all FDIC offices applied uniform criteria in assessing outside counsel's performance. The FDIC revised the policy in 1996 to require that FDIC offices follow these procedures:

- Use a standard Outside Counsel Evaluation Form that is signed by a supervisory attorney;

- Annually evaluate outside counsel paid more than $5,000 per year;
- Immediately evaluate outside counsel paid more than $100,000 for a matter upon completion of that matter;
- Conduct evaluations in a timely manner;
- Maintain copies of the evaluation forms; and
- Refer to evaluations before referring matters to outside counsel.

The FDIC reviews outside counsels' performance in the following areas: (1) quality of work, (2) cost consciousness, (3) responsiveness, (4) case management, and (5) compliance with and knowledge of FDIC policies and procedures.

Retention of Minority and Women Personnel of Majority Law Firms

In 1992, the FDIC issued its policy encouraging the referral of work within majority law firms to minority and women personnel. The policy states that "Every reasonable effort should be made to become aware of all minority and women personnel of majority firms and to retain them on FDIC matters."[2]

Malpractice Insurance

In October 1992, the FDIC adopted a policy that requires law firms retained by the FDIC to maintain malpractice insurance, except in certain circumstances. Malpractice insurance is not required for firms that are retained solely to represent the FDIC on appeal. Neither is coverage required for firms retained to liquidate assets (or to represent the FDIC in litigation related to the liquidation of assets) when the aggregate value of those assets is less than $250,000. Outside counsel are required to maintain adequate malpractice coverage when representing the FDIC on all other matters, including liquidations exceeding $250,000 in value.

Encouraging Competition Among Outside Counsel

The FDIC expects to receive legal representation at fees and rates that reflect substantial discounts from outside counsel's usual rate structures and welcomes offers involving alternative rate structures such as blended, flat, contingent, and other innovative rate proposals.

In April 1993, the FDIC provided its staff with guidance concerning that goal in the policy entitled *Encouraging Competition Among Outside Counsel*, which states that the FDIC is to obtain the best possible legal services for the lowest available cost. The policy states that whenever "it is both economical and feasible, every effort should be made to negotiate alternative billing arrangements."

---

2. The FDIC is reviewing this policy in light of the Supreme Court's decision in *Adarand v. Peña.*

Co-Counsel Guidelines

In 1993, to facilitate the referral of work to minority- and women-owned law firms in co-counsel arrangements, the FDIC issued its *Co-Counsel Guidelines for Minority and Women Outreach Program (Co-Counsel Guidelines).* The *Co-Counsel Guidelines* state that "The case plan should ensure significant participation by the minority- or women-owned law firm in substantive legal matters."[3]

Outside Counsel Case Budgets

In April 1996, the FDIC updated its policy on case budgets according to the "Best Practices" review. Outside counsel were required to submit budgets on standard forms for all matters, not just those with anticipated fees greater than $25,000. The former RTC had required budgets for all matters on standard forms that it tracked electronically on the RTC Legal Information System.

Byrd Amendment Policy

The Byrd Amendment prohibits the expenditure of congressionally appropriated funds by any recipient of a federal contract for lobbying agency or congressional officers or employees and members of Congress in connection with the making, awarding, extension, continuation, renewal, amendment, or modification of any federal contract, grant, loan, or cooperative agreement.[4] In March 1996, the FDIC established a written policy to comply with the Byrd Amendment.

Under the Byrd Amendment, outside counsel must submit certifications and declarations concerning lobbying activities when the FDIC has paid or expects to pay more than $100,000 in fees and expenses to outside counsel. In March 1994, the RTC published a directive on the Byrd Amendment and formally incorporated the Byrd Amendment requirements into its contracting procedures issued in July 1994. The FDIC incorporated provisions of the former RTC policy.

Ensuring Compliance with Policies and Procedures

In an effort to ensure the effectiveness of its outside counsel policies and procedures, the FDIC periodically reviewed how offices implemented these policies. In addition, the FDIC's Office of the Inspector General reviewed FDIC payments to outside counsel to determine whether outside counsels' billing practices conformed to FDIC policies.

3. The Co-Counsel Guidelines currently are being reviewed in light of the Supreme Court's decision in *Adarand v. Peña*.

4. See *U.S. Code*, volume 31, section 1352.

Independent Legal Division Internal Review Office

In 1992, the FDIC established an independent Internal Review Office (IRO) to examine compliance with a broad range of corporate policies and procedures, including those governing outside counsel. The IRO visits FDIC offices on a one-to-two-year cycle. IRO reviews provide a mechanism to ensure that the FDIC efficiently and uniformly manages its outside counsel and that offices remain in compliance with outside counsel policies and procedures. The IRO continues the work originally performed by the regional offices. (Teams from FDIC regional legal offices periodically visited the legal consolidated offices to review operations, including the management of outside counsel.)

OIG Audit of Legal Division Payments to Outside Counsel

In 1990, the FDIC's Office of Inspector General began reviewing FDIC payments to outside counsel. In 1993, the OIG began contracting with independent public accounting firms to perform the audits; in 1994, it issued 21 reports; and, in 1995, it issued 26 reports. The OIG selected high-billing outside counsel and typically reviewed samples of invoices to determine whether outside counsel complied with Legal Division billing policies and procedures. According to the *Guide for Outside Counsel*, law firms are required to keep their billing records for at least four years after final payment for that purpose.

In 1996, the OIG audit functions dramatically increased in volume with the transition of the RTC and its OIG audit program into the FDIC's audit program. In addition to the 32 reports issued by the FDIC OIG in 1996, the RTC audit program brought 44 unresolved 1995 audits. The FDIC OIG issued another 48 audits already commissioned by the RTC OIG, for a total of 124 outstanding RTC and FDIC audits in 1996. To handle the unresolved RTC audits throughout the FDIC divisions and offices, the FDIC chief financial officer convened a task force to address the situation. The project became known as the RTC Backlog Project. The Legal Division had the largest part of the work, with 44 reports containing more than 600 OIG recommendations. The task force met every two weeks from March through October 1996 and accomplished the resolution of all 600 recommendations at the same time the audit staff continued to address the 1996 FDIC and RTC OIG audit reports.

The workload of the audit program continues to be substantial with an expected 60 new audit reports to be issued in 1997. The OIG has projected that, beginning in 1998, it will initiate only 10 outside counsel audits per year because of the decline in the Legal Division's use of outside counsel.

Information Systems

As the FDIC referred an increasing number of matters to outside counsel, it developed centralized computer systems to assist it in tracking and managing referrals, as well as processing invoices for payment. These systems have the additional capability of generating statistical information concerning the use of outside counsel.

Case Management System (CMS)

When the FDIC began referring matters to more law firms in 1983 and 1984, it was in the process of decentralizing its operations. To keep track of the law firms being used and to track matters referred to law firms, the FDIC used a minicomputer system. In 1984, the FDIC contracted with an accounting firm to create a database that would track 500 FDIC Legal Division cases that were being handled by outside counsel. That database was used while a mainframe tracking system was being developed. The mainframe system, called the Case Management System (CMS), went into production in January 1986. The purpose of the CMS was to help attorneys keep track of a burgeoning caseload and to assist management with statistical reporting and workload projections. Data from the CMS was used in the bill payment system, the Legal Service Invoice (LSI) System. (See below.) In 1991, the CMS was also interfaced with the FDIC's Financial Institution System database for validating financial institution information, and the Liquidation Asset Management Information System database for validating the account officer assigned to assets. Most of the features of the CMS, as well as the Legal Division systems discussed below, were combined into the Legal Management Information System (LMIS) and the Legal Payment System. The initial LMIS pilot program was implemented in 1995.

RTC Legal Information System (RLIS)

When the RTC established its Legal Division in 1991, it developed the RTC Legal Information System (RLIS) mainframe computer system that tracked information about matters referred to outside counsel, including budgets, and also processed payments to outside counsel. RLIS became operational in 1992 and was merged into the FDIC's Legal Payment System in 1997.

Outside Counsel Information System (OCIS)

Before 1993, when the mainframe Legal Division Information Management System (LDIMS) became operational, outside counsel information was stored in small PC-based systems in each field office and in Washington, D.C. Those systems contained the names and addresses of law firms that were available to perform work for the Legal Division, as well as LSA information.

LDIMS was envisioned as a system composed of several modules that would handle all legal information needs. The FDIC anticipated replacing the CMS and the LSI System with LDIMS. Although the LDIMS Outside Counsel module went online in March 1993, the remaining modules were never implemented. After the FDIC determined that LDIMS would contain outside counsel information only, the system's name was changed to the Outside Counsel Information System (OCIS). OCIS contained information submitted by outside counsel in the application to the FDIC, including areas of expertise; comments on the firm's conflicts of interests; minority and women ownership status; FDIC legal services agreement information, including effective and expiration dates; and some rate schedules. In 1997, information contained in OCIS was converted to the Outside Counsel Application Tracking System (OCATS), while legal services agreement information was transferred to the Legal Payment System. (See below.)

Fee Bill Payment Systems

Before the fall of 1990, the FDIC did not maintain an information system for processing invoices submitted by outside counsel. Fee bills for legal services were paid using a payment authorization voucher (PAV). Legal Division staff in the field offices and in Washington, D.C., prepared the PAVs and forwarded them to the Fee Bill Unit in Washington for review and approval. After the PAVs were approved, the Fee Bill Unit sent them to the Division of Finance for payment.

As the payments to outside counsel continued to increase, however, it became apparent that the Legal Division required the assistance of an information system to ensure that fee bills were being paid in a timely manner and that the appropriate procedures were being followed throughout the process.

Accelerated Payment Program

Because the FDIC was required to use an increasing number of outside counsel as institutions failed, its payment systems were not able to process the large volume of invoices submitted by outside counsel in a timely manner. Additionally, because the FDIC was unable to process the large number of unpaid fee bills that remained after the dissolution of the Federal Savings and Loan Insurance Corporation (FSLIC), a large backlog arose.

In the fall of 1990, the FDIC instituted a program called the Accelerated Payment Program (APP) in an effort to pay outside counsel in a timely manner. Law firms that submitted the FDIC's simplified payment form were paid promptly, although the firms were still required to submit detailed invoices with supporting documentation. The FDIC completed a review of those detailed invoices separately to ensure that payments and proper disallowances were made correctly.

Legal Services Invoice System and RLIS

In the fall of 1991, the FDIC implemented the Legal Service Invoice System for paying outside counsel invoices; the RTC implemented RLIS in March 1992. Those information systems enabled the legal divisions to track the entire fee bill payment process and ensure that bills were paid promptly. Both systems contained many checks and balances to ensure that invoices submitted by outside counsel were reviewed before payment. The Legal Division summarized its key fee bill payment policies in the *Guide* and provided outside counsel with detailed instructions in separate fee bill payment manuals.

Statutory Provisions Relating to the Use of Outside Counsel

Before 1989, no specific statutes directly governed the FDIC's use of outside counsel. With the enactment of FIRREA, which created the RTC, certain management and operational requirements were mandated for the new entity. FIRREA required the RTC to use private-sector service providers when such service providers were practicable and efficient. Given the volume of closed institutions inherited by the RTC at its creation and the prospect of hundreds of institutions closing, the resources of the Legal Division were stretched to the limit; therefore, law firms became one of the many private-sector service providers used by the RTC.

The Completion Act addressed many RTC and FDIC programs. Several Completion Act provisions concerned the RTC Legal Division's use of outside counsel, specifically the selection and retention of outside counsel. Additionally, the Completion Act contained several provisions affecting the selection and retention of outside counsel that expressly apply to the FDIC. The Completion Act also called for cost-consciousness and inclusion of minority-and women-owned businesses and law firms in the RTC's contracting practices. It also identified who within the RTC could execute contracts and modifications and required the inclusion of a specific notice provision in all such documents. The notice provision advised the contractor that only those contracts signed by a duly authorized contracting officer were valid. As a result, the RTC Legal Division developed and implemented a Warranted Legal Officer Program. The program limited the number of individuals within the RTC Legal Division authorized to execute engagement letters or contracts.

The RTC management reforms contained at least three provisions that affected the hiring of outside counsel regarding minority contracting or cost savings. The RTC was required to establish guidelines for achieving the goal of a reasonable, even distribution of contracts to the various subgroups of the classes of minority and women-owned certified businesses and law firms. A 5 percent threshold was established. Thus, contracts were to be evenly awarded to not fewer than 5 percent of all minority- and women-owned certified contractors. Furthermore, the RTC was directed to establish reasonable goals for those entities contracting with it to subcontract with minority- and women-owned businesses and law firms. The procedures provided that the RTC could not enter into any contract for services, including legal services, where the contractor would receive fees or other compensation of $500,000 or more, unless the RTC required the contractor to subcontract with minority- or women-owned businesses, including law firms. While the procedures provided for exceptions and limited waiver authority to exclude a contract from the requirements, the procedures also provided for the periodic review (submission of quarterly reports) of such exceptions.

Concerning controlling outside counsel costs, the Completion Act provided the following:

> (20) Management of legal services. - To improve the management of legal services, the Corporation - (A) shall utilize staff counsel when such utilization would provide the same level of quality in legal services as the use of outside counsel at the same or a lower estimated cost; and (B) may only employ outside counsel - (i) if the use of outside counsel would provide the most practicable, efficient, and cost-effective resolution to the action; and (ii) under a negotiated fee, contingent fee, or competitively bid fee agreement.[5]

While the language of the Completion Act applied expressly to the RTC, it also was underscored as applicable to the FDIC in separate provisions of the act that revised various sections of the Federal Deposit Insurance Act (FDI Act) of 1950.

One of the Completion Act's separate provisions identified legal services as an additional service available to the FDIC when managing and disposing of assets of a receivership. However, the FDIC was advised that legal services in the private sector should be obtained only when their use is most practicable.

The amended provision of the FDI Act reads as follows:

> In carrying out its responsibilities in the management and disposition of assets from insured depository institutions, as conservator, receiver, or in its corporate capacity, the Corporation shall utilize the services of private persons, including real estate and loan portfolio asset management, property management, auction marketing, legal, and brokerage services, only if such services are available in the private sector and the Corporation determines utilization of such services is the most practicable, efficient, and cost effective.[6]

The Completion Act also instructed the FDIC to use outside counsel sparingly and to accomplish previously established minority- and women-owned law firm outreach goals. In addition, this section of the Completion Act created a certification requirement by the chairman of the Board of Directors of the FDIC. The chairman must certify, among other things, that:

> (x) the Corporation has improved the management of legal services by - (I) utilizing staff counsel when such utilization would provide the same level of quality in legal services as the use of outside counsel at the same or a lower]estimated cost; and (II) employing outside counsel only if the use of outside

5. See *U.S. Code*, volume 12, section 1441a(w)(20).

6. 12 U.S.C., section 1821(d)(2)(K) as amended by section 3(d) of the Completion Act.

> counsel would provide the most practicable, efficient, and cost-effective resolution to the action and only under a negotiated fee, contingent fee, or competitively bid fee agreement.[7]

The Completion Act further required that the FDIC chairman of the board certify that the FDIC "is implementing the minority outreach provisions mandated by section 1216 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989."[8] Those certifications must be made to Congress before or during the fiscal year in which the FDIC seeks to expend amounts appropriated for payments by the secretary of the Treasury to the Savings Association Insurance Fund for losses incurred by the fund in fiscal years 1994 through 1998. The Completion Act appeared to codify the RTC's minority/women-owned contracting outreach initiatives.

Conclusion

To effectively handle the tremendous volume of legal matters resulting from the rising number of failing financial institutions, the FDIC increasingly turned to outside counsel. The use of outside counsel peaked in 1991, when the combined FDIC and RTC direct and indirect payments to outside counsel reached $701 million. It should be noted that a factor contributing to the extensive use of outside counsel was that the RTC, according to FIRREA, was required to use private-sector contractors, including outside counsel, whenever practicable and efficient for carrying out its mission. In an effort to reduce payments to outside counsel, however, the RTC, under the Completion Act, was directed to use in-house resources before retaining outside counsel. The FDIC historically had used in-house staff for a significant amount of its legal work.

To more effectively retain, manage, and pay the record number of outside counsel during the financial institution crisis, the FDIC Legal Division retained outside consultants to provide recommendations on improving its management practices. The Legal Division responded to the recommendations it received by developing uniform policies and procedures for the selection, retention, and management of outside counsel.

7. 12 U.S.C., section 1821(a)(6)(E) as amended by section 8(b) of the Completion Act.
8. 12 U.S.C., section 1821(a)(6)(E) as amended by section 8(b) of the Completion Act.

The positive product of internal controls—the prevention of mistakes and problems—is not easily quantifiable and often goes unnoticed. The negative aspects of internal controls, however, are rarely missed.