

STRATEGIC ALLIANCES: LEGAL AND ETHICAL CHALLENGES

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I. INTRODUCTION

In recent years, the trends of globalization and technological innovation have made strategic alliances¹ more critical for business success and profitability. Companies have varied reasons for entering into a strategic alliance. Some, in search of greater efficiency and flexibility, pare down by selling off peripheral businesses, and then enter into alliances that are more cost-effective. Others, in order to take advantage of new technologies, enter into alliances with start-up or established companies, and at times, even non-profit organizations.²

Strategic alliances may be formed under a spectrum of legal structures, ranging from a licensing agreement to a merger of corporations. No matter what legal structure is used, however, certain economic and other realities often determine the outcome of the alliance. According to one study, 55% of strategic alliances fail within three to five years.³ The rest survive an additional 3.5 years on average.⁴ It has been suggested in most successful alliances, value creation takes at least a decade.⁵ Also, while conventional partnerships serve defined objectives and are clearly bounded, the objectives and boundaries of strategic

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¹ There is no strict definition of a strategic alliance. They have been referred to, however, as "any arrangement that combines resources from two or more sources to create a synergy." Ruthanne Kurtyka, *Strategic Alliances: What, Why and How?*, reprinted in JAMES ASHE-TAYLOR & KENNETH A. CLARK, *STRUCTURING, NEGOTIATING & IMPLEMENTING STRATEGIC ALLIANCES* 41, 43 (2000).

² See Karl Taro Greenfeld & David S. Jackson, *Venture Philanthropists*, *TIME*, July 24, 2000, at 54. Venture capitalists are making a dent in philanthropy by requiring higher standards for management, talent and expertise of non-profit endeavors in funding social entrepreneurs. *Id.*

³ *Id.*

⁴ LARRAINE SEGIL, *INTELLIGENT BUSINESS ALLIANCES: HOW TO PROFIT USING TODAY'S MOST IMPORTANT STRATEGIC TOOL* xvi (1996) (citing Kathryn Rudie Harrigan, *Beyond the Vision: Making Strategic Alliances Work*, Keynote Address at the Corporate Venturing Conference (June 1989)).

⁵ YVES L. DOZ & GARY HAMEL, *ALLIANCE ADVANTAGE: THE ART OF CREATING VALUE THROUGH PARTNERING* xi (1998).

alliances may evolve.⁶ Therefore, renegotiations may be ongoing,⁷ making the legal structure all the more important.

Part II of this article explores numerous legal and ethical issues involved with strategic alliances, including legal structuring and fiduciary duties. Part III introduces the notion of *shalom*, the ancient Hebrew tenet of physical and spiritual wholeness and justice, as an ethical framework for strategic alliances. This framework has been chosen to provide a biblical perspective on strategic alliances. Part IV discusses the attorney's role in assisting clients in navigating the above issues. A well-planned alliance takes six months to a year to develop; international alliances may take as long as two years.⁸ A successful alliance endures through changing markets, technologies, and geographies. Therefore, an attorney involved in the planning, negotiating, or counseling of a strategic alliance must be nimble and flexible in this dynamic business environment.

II. WHY STRATEGIC ALLIANCES?

Globalization and technological advances have contributed to the rise of strategic alliances.⁹ It is alleged that traditional, or vertically-integrated companies cannot deliver the levels of quality, low cost, innovation, and fast response times that competition demands.¹⁰ Vertically-integrated companies either manufacture products in-house or rely on a series of arms-length subcontractors for components or distribution.¹¹ The ills, however, of these traditional companies include "bureaucratization, lack of innovation, bloated costs," and "unresponsiveness,"¹² all of which make them less effective.

In contrast, a strategic alliance provides products or services through companies that have developed a "web of close relationships [designed to operate] in a coordinated way."¹³ McDonald's is a prime example. McDonald's controls the raw materials, equipment, and standards that are known world-wide in its franchises. From the point of view of ownership, however, McDonald's is not an integrated company, but rather a network of franchisees and closely-tied suppliers.¹⁴

⁶ *Id.* at 19-20.

⁷ *Id.*

⁸ SEGIL, *supra* note 4, at 113.

⁹ J. CARLOS JARILLO, STRATEGIC NETWORKS: CREATING THE BORDERLESS ORGANIZATION 7-9 (1993).

¹⁰ *Id.* at 5.

¹¹ *Id.*

¹² *Id.* at 6.

¹³ *Id.* at 7.

¹⁴ *Id.*

With the advent of electronic commerce, biotechnology, digital manufacturing,¹⁵ and other new ways of doing business, many companies are racing to be the first in a new market niche. Business growth comes through building “systems and solutions rather than discrete products.”¹⁶ According to one Silicon Valley attorney, “the velocity of business creation is unprecedented.”¹⁷ According to Tom DeFilips, a partner at Wilson Sonsini Goodrich & Rosati, “Once you get these companies organized and financed, they’re out there doing deals. . . . They need partners, and they need partners right away. The day after they get their seed money, they’re telling you that they have three deals they need to put together.”¹⁸ These new alliances provide instant capital, expertise, and other resources, helping some firms gain significant advantages over their competitors.

The strengths of strategic alliances have even led some businesses to partner with their competitors. One author, part owner of a family printing company, writes of joining with rivals to land new customers and create new materials.¹⁹ One rival even lent the company its operations manager.²⁰ Such alliances provide opportunities for turning potential competitors into allies, gaining synergy from combining resources, and learning core competencies from alliance partners.²¹

Successful alliances require (1) communication channels at all levels; (2) the development of joint capabilities; (3) the exchange of proprietary information; (4) shared information on goals and objectives; and (5) mutual cost reduction strategies.²² Unlike the traditional joint venture, successful strategic alliances also require more “dynamism, collaboration and mutual learning.”²³ They evolve in ways that are hard to predict,²⁴ and require a managerial and legal framework that is not static.²⁵ So while alliances may be attractive, businesses need to proceed cautiously when structuring the alliance to ensure all the partners are satisfied, not only when they enter the alliance, but also when they leave

¹⁵ Frank Gibney, Jr., *The Revolution in a Box*, TIME, July 31, 2000, at 30-32.

¹⁶ DOZ & HAMEL, *supra* note 5, at 5.

¹⁷ Kevin Cool, *Virtually Indispensable: How Stanford Lawyers Help Sustain the Dot-com Phenomenon*, STAN. LAW., Spring 2000, at 10, 14.

¹⁸ *Id.* at 14-15.

¹⁹ Kevin Kelly, *My Rival, My Partner*, BUS. WK., May 22, 2000, at F64.

²⁰ *Id.*

²¹ DOZ & HAMEL, *supra* note 5, at 4-5.

²² *Elements of a Successful Partnership*, SUPPLIER SELECTION & MGMT. REP., May 2000, at 8.

²³ DOZ & HAMEL, *supra* note 5, at xv.

²⁴ *Id.*

²⁵ *Id.* at 19.

it. Thus, strategic alliances raise a host of legal and ethical issues before, during, and after formation.

A. Legal Structures and Issues

As varied as the purposes for a strategic alliance are, so too, are the legal structures that embody them. In fact, these structures often fall along a spectrum ranging from traditional contractual arrangements to joint ventures to corporate acquisitions.²⁶

Even before structuring begins, however, legal issues arise in the planning process. Parties contemplating an alliance must explore very sensitive information about each other's companies. Nondisclosure agreements, evaluation agreements, and letters of intent are often helpful in facilitating communication.²⁷ Nondisclosure agreements ensure that confidential information is protected. Evaluation agreements allow the parties to examine each other's "information or products for the purpose of evaluating strategic fit."²⁸ Letters of intent are often used to define the scope of discussions between the companies.²⁹ These documents must be meticulously drafted to protect all parties. None of these agreements, however, is adequate to develop the trust necessary for this type of alliance. Potential alliance parties should also understand each other's firewall policies, agree on the ownership of joint inventions, and determine who will retain ownership of specific items when the alliance ends.³⁰

Once companies choose to participate in a strategic alliance, the proper legal arrangement must provide both structure and flexibility. There are many options for structuring these alliances, such as traditional contracts, equity investments, joint ventures, and mergers and acquisitions. Regardless of the structure chosen, the major legal considerations, governance, control, and fiduciary duties, remain the same. Each of these concerns is discussed below.

The nature of a strategic alliance is organic, meaning it needs to breathe, grow, and adapt with market changes. If the scope of an "alliance is too narrow, or the terms too restrictive," an "alliance participant may lock itself into" an unsatisfactory arrangement.³¹ In particular, a small company may be concerned that what was thought to

²⁶ David E. Brown, Jr. et al., *Strategic Alliances: Why, How, and What to Watch for*, 3 N.C. BANKING INST. 57, 71 (1999).

²⁷ SEGIL, *supra* note 4, at 146.

²⁸ *Id.*

²⁹ *Id.*

³⁰ JORDAN D. LEWIS, TRUSTED PARTNERS: HOW COMPANIES BUILD MUTUAL TRUST AND WIN TOGETHER 12 (1999).

³¹ Brown, et al., *supra* note 26, at 85.

be an alliance is actually an inadvertent acquisition by the larger participant.³² Selecting the appropriate structure is, therefore, critical.

The traditional contractual arrangement is the most straightforward way to structure strategic alliances. These include licensing and servicing arrangements, such as outsourcing the "back-office" function.³³ Further along the spectrum and somewhat more complex are equity investments in alliance partners. These structures can be "useful device[s] to help close a valuation gap or to provide some measure of equity participation short of full control."³⁴ The equity participation structure is helpful when "an existing company is in need of capital to finance growth or research and development."³⁵ The joint venture is also used to form strategic alliances. Classically, "two or more firms form a separate entity" that is subject to joint control.³⁶ The separate entity, in turn, "may be a corporation, general or limited partnership, or limited liability company."³⁷

Joint control can take several forms. Parent companies may decide policy and operating matters together, or divide them up, or one firm may control both.³⁸ Traditional joint ventures, however, differ from some strategic alliances in that strategic alliances more likely involve multiple venturers,³⁹ and new and unknown technologies and markets.⁴⁰ Therefore, while "traditional joint ventures rely heavily on initial structure and governance," new strategic alliances must focus on the "management process over time."⁴¹ This focus requires much flexibility and foresight on the part of the companies themselves and their legal counsel.

Factors to consider when deciding to structure the strategic alliance as a separate entity include task integration, economic uncertainty (e.g., about the "nature and value of trade between partners"), and the urgency of decisionmaking (e.g., giving price concessions).⁴² The higher the level of each of these factors, the more attractive an institutional

³² *Id.* at 85-86.

³³ *Id.* at 73-75.

³⁴ *Id.* at 75.

³⁵ *Id.*

³⁶ *Id.* at 78.

³⁷ *Id.* at 79.

³⁸ LEWIS, *supra* note 30, at 88.

³⁹ DOZ & HAMEL, *supra* note 5, at 3, 7. Iridium, an alliance developed by Motorola to develop and build a global satellite-based mobile communications network, had seventeen main partners. *Id.*

⁴⁰ *Id.* at 6.

⁴¹ *Id.* at 11.

⁴² *Id.* at 128.

form, as opposed to contractual form, of governance becomes.⁴³ New entities,⁴⁴ however, also “mean overhead, board meetings, filing fees, franchise taxes, books and records, and tax returns.”⁴⁵ Most laws governing these entities were not designed with alliances in mind.⁴⁶ So an alliance may be a “square peg in the entity law’s round holes.”⁴⁷

Other factors may also direct the form of legal structure used to create an alliance. Shareholder agreements in a joint venture may dictate the form of contractual arrangements made outside that venture.⁴⁸ Also, when the alliance participants enjoy a high level of trust, the legal structure may be more informal.⁴⁹ For example, Canon and Hewlett-Packard’s successful two-decade collaboration, including their laser printer alliance, operated without a contract.⁵⁰

Mergers and acquisitions represent the ultimate combination in strategic alliances, and while it is the most integrated it can be accomplished in stages.⁵¹ Extreme dexterity, however, is required by the drafting attorneys, when the original structure is short-term, with an option to expand into a long-term arrangement, possibly even an acquisition. In such instances, the question of valuation of the acquired company becomes a sensitive one if increased valuation is due to the joint activities.⁵² Assessing value becomes even harder in the case “of underdeveloped markets and uncertain technologies.”⁵³

The decision to acquire another company is made even more difficult when the desired resources in a company, such as key employees and business relationships, may not survive the acquisition.⁵⁴ In sum, the choices for legal structures for a strategic alliance are numerous. Even when traditional legal structures are used for a strategic alliance, for example a contract or a partnership, fluidity must be allowed for within and among these structures.

⁴³ *Id.* at 128-29.

⁴⁴ For example, a new corporation. Other institutional forms are limited liability companies and limited partnerships.

⁴⁵ Brad L. Peterson, *International Law: Global Joint Ventures and Strategic Alliances*, 11 CHI. B. ASS’N REC., Feb./Mar. 1997, at 37-38.

⁴⁶ *Id.* at 38.

⁴⁷ *Id.*

⁴⁸ DOZ & HAMEL, *supra* note 5, at 131.

⁴⁹ *Id.* at 130.

⁵⁰ LEWIS, *supra* note 30, at 7.

⁵¹ See SEGIL, *supra* note 4, at 14-17 (describing a “pyramid of alliances,” where lower-level alliances may “migrate up the pyramid” into a takeover).

⁵² *Id.* at 147.

⁵³ *Id.*

⁵⁴ DOZ & HAMEL, *supra* note 5, at 3.

B. Control of Strategic Alliances

Determining the control of a strategic alliance can be very complex and may be structured in many different ways, including supermajority voting requirements, affirmative and negative covenants, and required board votes on certain issues.⁵⁵ Strategic alliances work well when control is shared. Shared control, however, has its own challenges, most notably avoiding deadlock. Therefore, just as in closely-held corporations, measures to prevent deadlock are necessary.⁵⁶ Such measures may include appropriate alternative dispute resolution options.⁵⁷

Given strategic alliances' cooperative nature, what type of alternative dispute resolution is appropriate? It has been suggested that dispute resolution provisions relating to a strategic alliance should *not* be centered on "mediation, arbitration or litigation options," but on positive methods that facilitate a good working relationship.⁵⁸ While courts and arbitrators may resolve a dispute over contractual language, "they don't do well on business judgments."⁵⁹ Additionally, evoking an external arbitration clause undermines the process of collaboration in a strategic alliance.⁶⁰ Business decisions usually necessitate a quicker resolution, making alternative dispute resolution impractical.⁶¹ Alliance-friendly solutions "might include being able to refer a problem to various higher levels of management in order to ensure the participants will receive assistance in resolving their difficulties,"⁶² or to a joint operating committee with power to break a deadlock.⁶³

The control structure has far-reaching effects, including exit strategies for the participants.⁶⁴ The alliance agreement should specify under what circumstances the alliance will terminate, which may include changes in control of any of the alliance parties.⁶⁵ Other conditions for termination usually include an agreed alliance lifetime, one firm's underperformance, a shift in any of the firm's priorities, or a change in government regulations.⁶⁶ The agreement should also address

⁵⁵ Peterson, *supra* note 45, at 37.

⁵⁶ Brown, et al., *supra* note 26, at 97.

⁵⁷ *Id.*

⁵⁸ SEGIL, *supra* note 4, at 147.

⁵⁹ Peterson, *supra* note 45, at 37.

⁶⁰ DOZ & HAMEL, *supra* note 5, at 131. Foreign countries may also have very specific provisions relating to outside control. Peterson, *supra* note 45, at 37.

⁶¹ DOZ & HAMEL, *supra* note 5, at 131.

⁶² SEGIL, *supra* note 4, at 147.

⁶³ Brown, et al., *supra* note 26, at 97.

⁶⁴ *See id.* at 99.

⁶⁵ *Id.* at 98.

⁶⁶ LEWIS, *supra* note 30, at 266.

buy/sell and liquidation options.⁶⁷ If the alliance involves a license, its continued post-alliance use should be considered.⁶⁸ Control during any transition periods while new service providers are found (as substitutes for the to-be former alliance partner), if necessary, should be considered as well. Another factor includes the right to hire people from the former alliance partner who provided services during the alliance.⁶⁹ Terminating the strategic alliance may be appropriate for short-term alliances, but other options should be considered when viable.⁷⁰

C. Fiduciary Duties

If the strategic alliance results in a new corporation, the fiduciary duties of the directors and officers of the new company are often very complex. Most often these directors and officers are simultaneously serving in these same positions at their original companies.⁷¹ As a result these directors and officers have fiduciary duties to both companies.⁷²

First, directors and officers owe fiduciary duties of care and loyalty to their original corporation.⁷³ The decision to enter into a strategic alliance is presumed to be a valid exercise of these duties.⁷⁴ According to the "business judgment rule," courts defer to the board of directors in deciding what is best for the corporation. Absent fraud, lack of good faith, an irrational business decision or gross negligence,⁷⁵ courts will not inquire further into board action. Procedurally, these directors should inform themselves of all relevant considerations and act with fair deliberation.⁷⁶

When a new entity is formed, fiduciary duties multiply. If the new entity is a partnership, then partners owe fiduciary duties to their new partners.⁷⁷ If the new entity is a corporation, the directors and officers of the corporation owe fiduciary duties to the new corporation.⁷⁸

⁶⁷ Brown, et al., *supra* note 26, at 100.

⁶⁸ Peterson, *supra* note 45, at 37.

⁶⁹ *Id.*

⁷⁰ SEGIL, *supra* note 4, at 147.

⁷¹ For a discussion on interlocking directors, see JAMES D. COX & THOMAS LEE HAZEN, COX & HAZEN ON CORPORATIONS, INCLUDING UNINCORPORATED FORMS OF DOING BUSINESS 533-34 (2003).

⁷² *Id.*

⁷³ See MODEL BUS. CORP. ACT §§ 8.30, 8.31, 8.42 (2002). For a discussion of the duty of care, see 1 DENNIS J. BLOCK ET AL., THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS 109, 261 (5th ed. 1998).

⁷⁴ See COX & HAZEN, *supra* note 71, at 533-34.

⁷⁵ Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985).

⁷⁶ *Id.* at 880-81.

⁷⁷ See Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928) (discussing the fiduciary duties partners owe to each other).

⁷⁸ See BLOCK ET AL., *supra* note 73, at 109, 261.

The duty of loyalty can become quite complex when dealing with alliances. For example, if Corporation A and Corporation B form Corporation C, they will most likely place directors from the two original corporations onto the board of the new corporation. These directors owe duties of loyalty to both their original corporation and to the new corporation.⁷⁹ They must reveal conflicts of interest when they arise.⁸⁰ They must also present "corporate opportunities" to their respective boards when they arise.⁸¹ In general, a transaction involving either a conflict-of-interest or a "corporate opportunity" must be fair, or be approved by a majority of disinterested directors or shareholders.⁸²

One way to avoid contradictory duties of loyalty is to define contractually and to "limit the scope of corporate opportunities that must be given to the joint venture."⁸³ This limitation may be coupled with a presumption that corporate opportunities should be assigned to the "interested parents except in limited circumstances"⁸⁴ to decrease further the possibility of a conflict. This web of fiduciary duties becomes even more complex when the alliance involves multiple parties.

D. Other Legal Issues

Strategic alliances face numerous other legal challenges, such as alliance-specific taxes, intellectual property ownership rights, anti-trust issues, environmental regulation,⁸⁵ other regulatory issues, and finally, cross-border issues. Contributions to an alliance may reduce or increase a participant's tax liabilities.⁸⁶ "For example, [a company] may incur taxable imputed royalty, dividend or other income for technology contributed to the alliance."⁸⁷ Strategic alliances among banking institutions must take into account the myriad of federal and state banking laws and regulations.⁸⁸ Strategic alliances with government agencies may call procurement laws into relevance.⁸⁹ An attorney structuring a strategic alliance with a company that handles hazardous

⁷⁹ See COX & HAZEN, *supra* note 71, at 533-34. For an interesting case involving conflicts of interest among directors in two companies in a merger, see *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983).

⁸⁰ See COX & HAZEN, *supra* note 71, at 533-34.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Zenichi Shishido, *Conflicts of Interest and Fiduciary Duties in the Operation of a Joint Venture*, 39 HASTINGS L.J. 63, 65 (1987).

⁸⁴ *Id.*

⁸⁵ SEGIL, *supra* note 4, at 129.

⁸⁶ Peterson, *supra* note 45, at 36.

⁸⁷ *Id.*

⁸⁸ Brown, et al., *supra* note 26, at 102-21.

⁸⁹ *Emery Worldwide Airlines, Inc. v. United States*, 49 Fed. Cl. 211 (2001).

waste must resolve the issue of liability for environmental clean-up.⁹⁰ In addition to foreign law considerations, a more subtle issue of a cross-border alliance includes the amount of documentation American lawyers normally produce.⁹¹ While this recordkeeping may merely be annoying to American businesspeople, it may be incomprehensible to those in other countries. A cultural interpreter may be necessary to explain the nature of the documentation.⁹² Besides those concerns mentioned here, other regulatory issues may either bolster or destroy an alliance.

III. SHALOM AS AN ETHICAL FRAMEWORK

In addition to the legal issues addressed above, the attorney who counsels a strategic alliance and the business clients who participate in them face several ethical challenges. Some of these challenges may be peculiar to strategic alliances; others are common to enterprises in general.

The ancient concept of *shalom* provides a framework for viewing these ethical dilemmas. Today "shalom" is normally translated as peace, and may seem an odd framework for viewing business relationships.⁹³ Given a more complete definition of *shalom*, however, this framework provides wisdom for long-term productivity and prosperity. "Shalom" means to be "whole, sound, and safe; to be healthy and to prosper. It is to be in complete harmony with God, self, others, and the entire created order."⁹⁴ In English, the word "peace" often refers to an inner state of mind.⁹⁵ In contrast, "shalom" refers primarily to a physical state of well-being, to things being as they ought to be in the material world.⁹⁶ Moreover, whereas in English, "peace" is the absence of something (such as war), "shalom" points to the presence of well-being or health. Put another way, *"peacemaking as shalom making is striving so that those who do not now enjoy material shalom and physical well-being can do so."*⁹⁷

The German word *schillerndes* has also been used to describe *shalom*.⁹⁸ "Schillerndes" means iridescent, many-colored, like a

⁹⁰ See SEGIL, *supra* note 4, at 129.

⁹¹ *Id.* at 145.

⁹² *Id.* at 136-37.

⁹³ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2086 (1986) [hereinafter WEBSTER'S].

⁹⁴ RICHARD C. CHEWNING ET AL., BUSINESS THROUGH THE EYES OF FAITH 194-95 (1990).

⁹⁵ WEBSTER'S, *supra* note 93, at 1660.

⁹⁶ PERRY B. YODER, SHALOM: THE BIBLE'S WORD FOR SALVATION, JUSTICE AND PEACE 13 (1987).

⁹⁷ *Id.*

⁹⁸ DOUGLAS J. HARRIS, SHALOM: THE BIBLICAL CONCEPT OF PEACE 13-14 (1970).

rainbow.⁹⁹ In the community where *shalom* is present, there is both harmony and opportunity for individuals and the helpful inter-relationship of persons.¹⁰⁰ *Shalom* also has been placed in poetic parallel with wealth,¹⁰¹ and is used as an expression of a wish for success.¹⁰²

Shalom is also closely related to the notion of covenant. "Berith," or covenant, means "to cut."¹⁰³ Individuals, spouses, and nations have all entered into covenants.¹⁰⁴ Rights and obligations characterize covenants.¹⁰⁵ "A covenant could be sealed by a handshake, a kiss or the eating [of] a meal."¹⁰⁶ "The covenant consists in doing good for one another and refraining from doing harm."¹⁰⁷

Shalom is also tied closely to justice, and so the absence of *shalom* is injustice.¹⁰⁸ One ancient prophecy states, "Justice will dwell in the desert and righteousness live in the fertile field. The fruit of righteousness will be peace; the effect of righteousness will be quietness and confidence forever. My people will live in peaceful dwelling places, in secure homes, in undisturbed places of rest."¹⁰⁹ Interestingly enough, not all prosperity is *shalom* prosperity. *Shalom* prosperity comes from moral integrity and includes the well-being of all.¹¹⁰ Justice is the measuring stick of whether there is *shalom*.¹¹¹ A corrupt legal system, for example, demonstrates the absence of *shalom*.¹¹²

Shalom is also used to mean honesty and straightforwardness. Thus, *shalom* making is also "working to remove deceit and hypocrisy and to promote honesty, integrity, and straightforwardness."¹¹³

The ancient concept of *shalom* is further developed in the Christian New Testament. Here it is referred to as the Greek term *eirene*. In the

⁹⁹ *Id.* at 14.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 18. "For this is what the Lord says: 'I will extend peace to her like a river, and the wealth of nations like a flooding stream; you will nurse and be carried on her arm.'" *Isaiah* 66:12; see also *Jeremiah* 33:9 ("Then this city will bring me renown, joy, praise and honor before all nations on earth that hear of all the good things I do for it; and they will be in awe and will tremble at the abundant prosperity and peace I provide for it.").

¹⁰² YODER, *supra* note 96, at 12.

¹⁰³ HARRIS, *supra* note 98, at 21.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 22.

¹⁰⁸ YODER, *supra* note 96, at 14.

¹⁰⁹ *Isaiah* 32:16-18.

¹¹⁰ YODER, *supra* note 96, at 18.

¹¹¹ *Id.*

¹¹² *Id.* at 17.

¹¹³ *Id.* at 16.

Greek Scriptures, it included a heightened theological significance.¹¹⁴ It is used to describe divine reconciliation, even between enemies, and also ecological wholeness.¹¹⁵ Jesus Christ is described as “our peace,” who brings together those who were near and far from God and reconciles them to God.¹¹⁶ This principle provides a theological explanation for why strategic alliances often bring together competitors.

Using the *shalom/eirene* framework, alliance success and prosperity can be measured in terms of how wholeness and opportunity are promoted; wholeness among alliance partners, with employees, with the environment, with other stakeholders, and with God.

A. Ethical Challenges in Strategic Alliances

Ethical issues abound in strategic alliances, providing an opportunity for applying the *shalom* framework. Foremost, an alliance will not be successful or whole unless the partners are equal and honest. Lack of communication and trust destroys an alliance, as does one party taking advantage of the other. If the partners have unequal bargaining power, the result could be an adversarial, non-trusting relationship.¹¹⁷ “[M]ore problems in alliances are due to weak relationships than to anything else.”¹¹⁸ The *shalom* framework asks partners to covenant with each other, and to be honest and straightforward within that covenant.

A related issue to unequal bargaining power is that of forced alliances.¹¹⁹ A forced alliance occurs when a third party, who deals with numerous suppliers, decides to deal with only a few players. In effect, a supplier is given the choice of either entering into an alliance or being forced out of the competition.¹²⁰ In the *shalom* framework, the well-being of all must be considered.

Sometimes an alliance is extremely short-lived. Its value lies in its announcement and its purpose is to prevent a rival alliance negotiation.¹²¹ A *shalom* framework would require honesty and integrity, even with outsiders and enemies.

Differing corporate value systems present another ethical issue for alliances. No matter the legal structure used, a project may be doomed depending on the decisionmaking process and personalities involved in

¹¹⁴ *Id.* at 22.

¹¹⁵ *Id.* at 20-21.

¹¹⁶ *Ephesians* 2:11-22.

¹¹⁷ SEGIL, *supra* note 4, at 13.

¹¹⁸ LEWIS, *supra* note 30, at 20.

¹¹⁹ Interview with Neal Seymour, Commercial Director and Legal Counsel, ITT Industries-MMI (Nov. 28, 2000).

¹²⁰ *Id.*

¹²¹ DOZ & HAMEL, *supra* note 5, at 22.

the implementation.¹²² The majority of alliances fail because of a corporate personality, managerial personality, or project personality issue.¹²³ Corporate personality includes the values that an organization espouses. Increasingly, clashes in values have become deal-breakers in recent years.¹²⁴ Therefore, before entering into an alliance, corporate self-analysis may be necessary to determine the company's values.¹²⁵ The covenant aspect of the *shalom* framework would help parties choose partners wisely.

Fundamental principles of trust must form the foundation of a strategic alliance. Ground rules must be settled at the outset. The companies must agree on those areas where they will cooperate and those where they will continue to compete.¹²⁶ This includes protecting intellectual property between partners,¹²⁷ and ethical intelligence gathering about potential partners.¹²⁸ Uncertainty because of changing market conditions makes these waters especially difficult to navigate. In many traditional joint ventures, competition between partners was rare.¹²⁹ Rivalry in strategic alliances, however, "occur[s] in the marketplace, within the alliance itself, or in both."¹³⁰ For example, while Canon and Hewlett-Packard cooperate in the area of laser printers, they compete in the bubble jet and ink jet printer businesses.¹³¹ Interestingly, the *eirene* aspect of the *shalom* framework actively encourages reconciliation even with one's enemies, how much more cooperation with one's competitors.

As discussed, on-going open communication during both the planning and implementation stages is vital to building the trust necessary for a successful alliance. But how much information should be conveyed, and how much should remain a secret? These are ethical issues. A company does not want to transfer its core competency without intending to do so.¹³² On the other hand, a breakdown in trust may occur if insufficient information is conveyed or is intentionally omitted.¹³³

¹²² SEGIL, *supra* note 4, at xvii-xviii.

¹²³ *Id.* at 135-36.

¹²⁴ *Id.* at 97.

¹²⁵ *Id.* at 134.

¹²⁶ Kelly, *supra* note 19.

¹²⁷ *Rules for Romance: Tips for Wooing, Marrying, or Splitting Up with Suppliers*, INDUSTRY WK., Nov. 2, 1998, at 30.

¹²⁸ Chuck Klein, *Intelligence Challenges for Small Companies in Export Markets*, COMPETITIVE INTELLIGENCE MAG. 2 no. 1, 11-13 (Jan. 1999).

¹²⁹ DOZ & HAMEL, *supra* note 5, at 24.

¹³⁰ *Id.* at 25.

¹³¹ LEWIS, *supra* note 30, at 7.

¹³² SEGIL, *supra* note 4, at 123.

¹³³ *Id.* at 123 (discussing the "diminution of the trust relationship."); see also DOZ & HAMEL, *supra* note 5, at 15, 162-63 (discussing the "informational gap" and trust).

Secrecy within an organization is also an issue.¹³⁴ While the issue of secrecy may be more readily apparent in a closely-held or family business, it also plays a role in large, publicly-held companies. Because *shalom* emphasizes the covenantal bond and the well-being of all, trust has a place to flourish.

Related to the questions of trust and open communication, manipulation of earnings and profits could occur before and after a strategic alliance is formed.¹³⁵ Before the alliance, numbers may be artificially inflated to attract an alliance partner. After the alliance is formed, it may be tempting to continue falsifying the numbers to show a profit, justifying the alliance to investors. Because *shalom* emphasizes shared prosperity, this practice should be avoided.

Additionally, should either partner desire to terminate the alliance, communication concerning breach of contract is another ethical issue. One party intentionally breaches the contract without informing the other party;¹³⁶ what ethical responsibility does the alliance participant have to its counterpart? *Shalom* would decree honesty and integrity.

Various other ethical considerations include companies being deceptive about their objectives, using deal-breakers as bargaining leverage, and hiring their alliance partner's employees.¹³⁷ *Shalom* would again decree integrity and straightforwardness.

Cross-cultural alliances may raise additional ethical issues. For example, one United States-China alliance broke down when an American partner refused to pay bribes, characterized as "fees."¹³⁸ If an alliance includes multiple parties, who in turn are involved with multiple and sometimes competing alliances, these ethical issues multiply rapidly. Thus *shalom* prosperity requires honesty, integrity and wholeness for all involved.

B. Shalom in Operating a Strategic Alliance

1. Treatment of Employees

The treatment of employees represents another ethical and operational challenge. It is not uncommon for employee maltreatment in the workplace to lead to resentment, estrangement, depersonalization, and physical and psychological distortion among employees.¹³⁹ Moreover,

¹³⁴ SEGIL, *supra* note 4, at 92-93.

¹³⁵ *Id.*

¹³⁶ Telephone Interview with Greg Cirillo, Technology and Intellectual Property Counsel, Williams, Mullen, Christians & Dobbins (Nov. 17, 2000).

¹³⁷ See generally LEWIS, *supra* note 30, at 7.

¹³⁸ SEGIL, *supra* note 4, at 98.

¹³⁹ ALEXANDER J. MATEJKO, A CHRISTIAN APPROACH TO WORK AND INDUSTRY 315-22 (1989). Fortunately, there are exceptions to this prevalent phenomenon. For example, in

the mechanical treatment of workers, which disregards the spiritual needs and aspirations of employees, leads to the employees' passive resistance and lack of internalization of company norms and values.¹⁴⁰ Employees in a strategic alliance are no different. Therefore, if employees are not a major consideration in the alliance, alienation may substantially increase, leading to inefficient planning, losses, and possibly even lawsuits. Alternatively, the recognition of employee input, value, and ingenuity can dramatically increase the success of a strategic alliance. This is *shalom*.

Companies usually enter alliances to gain new products and services. One myth often perpetuated, however, is that these products or services can be achieved apart from the employees who provide them.¹⁴¹ Employees can not be overlooked as a resource. Consideration of the employees of the alliance should start in the planning phase. Often, senior management makes decisions without consulting those who must implement the alliance. At a minimum top managers and operating managers should be consulted.¹⁴² Not surprisingly, purchasing or supplier management departments have a great deal to contribute in the area of alliance implementation and competitive intelligence gathering. Ironically, "such employees are rarely made part of an alliance-planning team, and they seldom get the respect they deserve."¹⁴³ Among

1996 Aaron Feuerstein, chief executive of Malden Mills Industries made headlines after a fire nearly destroyed his textile company. Instead of closing down the company and walking away with tens of millions of dollars of insurance money, Feuerstein vowed to rebuild the factory and guaranteed his 3,200 workers their jobs. He also paid full wages to those temporarily forced out of work. A deeply religious man, Feuerstein stated he did the ethical thing. As it turns out, he was returning a favor. Before it was forced into bankruptcy in 1982, Malden Mills made its money producing fake fur. Longtime employees of Malden Mills, however, developed a new fabric that is featured in outerwear. This innovation saved their boss, their company, and themselves. Louis Uchitelle, *The Risks of Keeping a Promise: In Becoming an Icon, a Mill Owner Bets His Company*, N.Y. TIMES, July 4, 1996, at D1.

Harbor Sweets is an example of another company where employee trust is nurtured. "Workers are responsible [for upholding] the integrity of the company's product and its system of values." Tracy E. Benson, *In Trust We Manage: This Small East Coast Manufacturer Has Made a Career of Breaking All the Rules*, INDUS. WK., Mar. 4, 1991, at 26. At the same time, they "work in an atmosphere of trust—no time clocks, no credit checks and no secrets." *Id.* When a financial consultant came to present benefits to the company's leader, Ben Strohecker, he suggested the workers be consulted. The financial consultant was shocked. When the workers were consulted, however, they put together a package which was more conservative than what management would have given them. Strohecker remarked, "I think the bottom line of what we've been talking about is that word that no one ever dares use in their business—and that's love. I think love is good business." *Id.*

¹⁴⁰ MATEJKO, *supra* note 139, at 310-11.

¹⁴¹ Seymour, *supra* note 119.

¹⁴² SEGIL, *supra* note 4, at 75.

¹⁴³ *Id.* at 107.

management, humility is a key challenge.¹⁴⁴ *Shalom* requires respecting employees and nurturing their wholeness.

Sometimes, a strategic alliance will lead to cutting salaries and laying off hundreds, if not thousands, of employees.¹⁴⁵ Often companies perceive employees as an expense item that is easy to trim. Some employees are also perceived as resistant to change. This belief is not without some basis. Some employees, for example, are comfortable in their routine and are just biding their time until retirement.¹⁴⁶ It is no wonder with these attitudes at the managerial and line-worker level that the idea of employee expendability becomes a self-fulfilling prophecy. If management senses no employee loyalty, it treats employees as expense items that can be cut, and if employees sense that management believes them to be expendable they in turn will develop little firm loyalty. In contrast, in a sustaining organization, "new ideas are welcomed, rewarded and implemented."¹⁴⁷ This is a *shalom* principle, seeking the benefit of all involved and wholeness within an organization, and providing opportunities for individual advancement.

Downsizings and restructurings often result in long-term net losses.¹⁴⁸ Because some employees may be laid off or displaced, employees are understandably anxious and distracted. Management is often willing to bear some short-term loss in productivity for perceived longer-term gain, and sometimes companies are advised to terminate employees whose jobs will end as the result of an alliance.¹⁴⁹ If the staff is reduced and systemic change is not made, however, remaining employees are overburdened.¹⁵⁰ This tension often produces low morale, causing the best and the brightest employees to leave, taking proprietary information and sometimes going to work for the competition.¹⁵¹

Some companies have learned the value of key employees the hard way. In one strategic alliance, a biotech company was acquired. Its human-resource, accounting, and finance areas were substantially downsized. As a result, many of its biotech scientists left as well. The acquiring firm was left with high debt and limited intellectual assets.¹⁵²

¹⁴⁴ MATEJKO, *supra* note 139, at 317.

¹⁴⁵ SEGIL, *supra* note 4, at 193 (describing a "substantial downsizing in human resources, accounting and finance").

¹⁴⁶ Jim Miller, *Older Employee Resists Change at Work*, ARLINGTON MORNING NEWS, Dec. 21, 1999, at 1C.

¹⁴⁷ SEGIL, *supra* note 4, at 37.

¹⁴⁸ Mark L. Feldman, *Disaster Prevention Plans After a Merger*, MERGERS & ACQUISITIONS, July/Aug. 1995, at 31.

¹⁴⁹ SEGIL, *supra* note 4, at 136.

¹⁵⁰ Feldman, *supra* note 148.

¹⁵¹ *Id.*

¹⁵² SEGIL, *supra* note 4, at 193.

Both the acquired and acquiring firm failed to communicate to its key employees, the biotech scientists, that they were the reason for the acquisition.

Even worse, maltreatment of employees can also lead to substantial legal liability for a company. Many employees are let go because of their age, which raises the issue of age discrimination.¹⁵³ In a 1988 study by the Rand Corporation, the average cost of defending a lawsuit was \$80,000.¹⁵⁴ The key predictor of whether employees brought a lawsuit was the perceived fairness of the process.¹⁵⁵ Among those who perceived the process to be highly fair, only 1% filed a lawsuit. Among those who perceived it to be highly unfair, the figure was 17%.¹⁵⁶ The factors affecting the employees' perception of fairness were the managers' respectfulness in delivering the news, the employer's honesty, and the completeness of the explanation of why they were losing their jobs.¹⁵⁷

On the other hand, management's correct handling of a restructuring can lead to increased employee trust.¹⁵⁸ In fact, a larger question involves whether management within an alliance partner should be displaced at all. In one negotiation between an American and Australian company, the American company made two offers to acquire the Australian company. Both were turned down. The Australian company was impressed with the amount of money offered, but refused to sell because, if it did, the founder's three sons would have been excluded. After employment agreements for the sons were negotiated, the deal went through.¹⁵⁹

For employees who are asked to staff an alliance, management must communicate not only the strategic benefits to the company, but also the personal benefits to the employees.¹⁶⁰ An alliance should attract the very best among a company's employees if it is to succeed.¹⁶¹ The *shalom* framework would recognize the critical importance employees play in promoting wholeness and prosperity.

¹⁵³ Seymour, *supra* note 119. See *Irwin v. Marquette Med. Sys., Inc.*, 107 F. Supp. 2d 974 (S.D. Ohio 2000).

¹⁵⁴ JAMES N. DERTOZOS ET AL., *THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION* viii (1988).

¹⁵⁵ Joel Brockner, *Survey-Mastering Management*, FIN. TIMES, Oct. 30, 2000, at 6.

¹⁵⁶ DERTOZOS ET AL., *supra* note 154.

¹⁵⁷ Brockner, *supra* note 155.

¹⁵⁸ *Id.*

¹⁵⁹ SEGIL, *supra* note 4, at 99-101.

¹⁶⁰ DOZ & HAMEL, *supra* note 5, at 257.

¹⁶¹ *Id.* at 258.

2. Environmental and Socioeconomic Factors

In addition to the ethical dilemmas concerning alliance partners and employees, a *shalom* framework also requires an analysis of the alliance's ultimate effect on the environment and the widening gap between the rich and the poor. Environmental concerns may go beyond what is legally required or allowed to consider effects of the alliance on global warming, forest destruction, and other ills.¹⁶² Wholeness with the environment requires attentiveness to the rhythm of nature. This rhythm is not endless growth but one of peaking, resting, and renewal.¹⁶³ This is the physical well-being of *shalom*.

Shalom also requires a concern for the poor. It is particularly evil when some prosper at the expense of the poor.¹⁶⁴ Because the *shalom* framework requires justice, exploitation of the poor is venal. In sum, *shalom* prosperity requires wholeness, justice, and benefit for all involved, including strategic alliance partners, employees, and the public at large.

IV. ROLE OF THE ATTORNEY

Counsel to a strategic alliance can greatly facilitate or hinder the alliance. Facilitating the alliance requires great sensitivity to relationship building and trust issues.¹⁶⁵ Many transactional attorneys may not "understand the intricacies of relationship development that far transcend the written word."¹⁶⁶ It has been said that "the most important contract . . . with a partner [is] unwritten and unsigned."¹⁶⁷ Counsel must also be extremely cognizant of the unique management issues facing an alliance involving new technologies and markets.

As early as possible, legal counsel should be involved in the development of the alliance. Counsel should participate in meetings held by their client to discuss alliance strategy and possible partners. This way, counsel becomes familiar with the business issues. They learn to think like their business-minded clients. Legal and ethical issues can then be raised in the context of the business concerns of their clients. This collaboration will greatly bolster the credibility of counsel.

A more sensitive issue is when counsel becomes involved with meetings with the other alliance parties. Here, the presence of lawyers may signal an adversarial situation rather than a trust-building

¹⁶² See generally ULRICH DUCHROW & GERHARD LIEDKE, *SHALOM: BIBLICAL PERSPECTIVES ON CREATION, JUSTICE & PEACE* 16-21 (1989).

¹⁶³ *Id.* at 56-57.

¹⁶⁴ YODER, *supra* note 96, at 17.

¹⁶⁵ SEGIL, *supra* note 4, at 144.

¹⁶⁶ *Id.* at 146.

¹⁶⁷ LEWIS, *supra* note 30, at 16.

session.¹⁶⁸ These attorneys should be ready instead to address win-win solutions. Before final documentation is drafted, a simple memorandum of terms can be written as a foundation for further writings.¹⁶⁹ Then, more complicated legalese can be carefully explained to all parties before being inserted.¹⁷⁰ On the one hand, the attorney must draft the agreements that structure the alliance, but on the other hand, the legal agreements themselves are usually secondary to the economic concerns of the parties involved. In an alliance where good faith is presumed the documentation can be quite simple.¹⁷¹

Counsel to a strategic alliance must be willing to build flexibility and organicity into the documentation. If not anticipated and planned for, the initial documentation and governance structure may strangle the alliance. The documentation may need to be reassessed and rewritten as the alliance progresses.¹⁷²

The attorney is in a position to be a reconciler,¹⁷³ a *shalom*-maker. An attorney can advise his client when there is a breach. An attorney can also speak on behalf of alliance partners who are not speaking to each other.¹⁷⁴ The assistance of legal counsel who is sensitive to the trust issues, who is educated as to the realistic goals and cultures of the parties, and who is trained to look for compromise and conflict resolution rather than confrontation and termination will be very valuable for alliances at every stage of their life cycle. Such people are truly contributing members of the alliance-planning team.¹⁷⁵

V. CONCLUSION

Strategic alliances seek to combine the resources of one business with those of other businesses. Therefore, the legal and ethical challenges facing one business can effectively be multiplied. Legal challenges include structuring the alliance, dealing with control and governance, and numerous other issues affecting *all* businesses, not just alliances. These issues include tax, regulatory, and intellectual property questions. Ethical challenges include dealing honestly and openly with one's alliance partners and employees, and other stakeholders.

The framework of *shalom* asks those planning and implementing a strategic alliance, including attorneys, to address several questions of justice. How does the strategic alliance promote wise stewardship of

¹⁶⁸ SEGIL, *supra* note 4, at 145.

¹⁶⁹ *Id.* at 146.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 21.

¹⁷² DOZ & HAMEL, *supra* note 5, at 15.

¹⁷³ Cirillo, *supra* note 136.

¹⁷⁴ *Id.*

¹⁷⁵ SEGIL, *supra* note 4, at 148.

resources, including employees, technology, and capital? Is the alliance a band-aid solution to poor management? Will laid-off employees have to bear the cost of poor management? If the alliance promotes employee well-being, does it also serve the mutual interests of each of the partners to the alliance? How can the legal structure of the alliance promote these mutual interests among all necessary parties? If positive answers can be found to these queries, then the alliance will not only be profitable, but just. It will achieve *shalom* prosperity. It will be a *berith shalom*, or covenant of peace.