In US corporate law circles there are no firms better known than the New York powerhouses Wachtell Lipton Rosen & Katz and Skadden Arps Slate Meagher & Flom. The two firms are often the first port of call for CEOs contemplating the biggest of big transactions, or kept awake at night by the most serious of company issues. When the chips are down, these guys are usually up.

Though today almost diametrically opposed in every measure (size, practice emphasis and geographic spread), the development, success and reputation of both firms are strongly linked. At the heart of each sit Marty Lipton and Jo Flom, two lawyers whose reputations were born of the high profile takeover battles of the 1970s and 80s when they regularly faced each other across the boardrooms of America. The two lawyers have managed to instill within their distinct organisations a quality mark and ethic that remain palpable today, fashioning along the way two of the most highly profitable and successful law firms in the world.

Hothouse flowers
Jo Flom and his firm have come an extraordinarily long way since his 1948 meeting with Marshall Skadden, Les Arps and John Slate, three lawyers who had just gingerly taken the decision to leave what was to become Dewey Ballantine. “Someone had told me they were starting a firm and were good guys, so we had lunch,” he explains. “They spent the whole time telling me about the risks involved, and that they didn’t have a client. But the more they talked, the more I thought they were people I’d like to be with.” So
had moved from a full-service practice. So almost from the outset, he says, the firm encouraged clients to put it on a retainer, “our clients got bigger, the world got smaller, so you begin to talk to each other on a lot of different stages.”

Second, a prescient understanding of the expanding role and demands of in-house counsel. “It used to be that the in-house counsel was a minor functionary, but all of a sudden it grew and is now a very significant office in a company. So the question we had to decide about 30 years ago was where was the in-house counsel going to go for advice? We decided they would go out for massive litigation, or a function that was out of the routine, where there was a need for a sudden influx of people, or involved special expertise. So our model was basically to be big enough to put troops in, and fill the key needs in the major disciplines.”

Lipton pauses before describing his firm’s emphasis: “We do what we do. Basically I’d describe us as a firm that solves difficult problems, whatever they happen to be: hostile takeovers, proxy fights, difficult litigation, very complicated transactions. We handle difficult problems.” The theme throughout he suggests is the kind of problem that grabs the attention of the CEO and the Board of Directors, “the kind they follow on a day-to-day basis. Not all of them are life or death but are the kind that the key people can’t get out of their minds.”

Expanding horizons
Flom says that in the late 1970s the firm was written off by some as already overgrown, before it even reached 250 lawyers. But throughout the firm’s evolution, he says, he has been mindful of the maxim ‘growth is the enemy of quality’. It is the reason why the firm has never merged, choosing instead to grow organically, and take in only small groups of lateral partners. One example is Chicago where “five people wanted to leave Mayer Brown, and approached me. They were the kind of people we wanted, just superstars in our mind, so we changed our policy and opened in Chicago.” The group remains the largest single lateral partner intake the firm has made to date.

Initially, says Flom, the firm was also set against geographic spread. “We were so busy that even until the mid-60s we had no real interest in expanding. The whole growth experience he describes as “serendipity plus a little bit of taking advantage of opportunities.” Outside New York, the firm’s first office was in Boston, “there was a partner we wanted to attract, but he would only go to a Boston office, so we opened one.” Next came Washington, opened to attract lawyers who had worked in government but wouldn’t move. Subsequently the firm’s decision to open elsewhere has been in line with a broader strategic need, coupled with sufficient market space to establish a stand-alone practice.

Asked whether Wachtell Lipton has ever felt the need to expand dramatically, or grow beyond New York, Lipton answers with an emphatic “no,” on both counts. “The kind of work we do doesn’t really depend on having legions of people to do the work,” he says. “It is all essentially done by the partners, with the help of associates. It’s not commodity type work where you have an army of associates reporting to a partner. We have just the opposite, we may have five partners working with one associate on a matter.” Even when it comes to due diligence he explains, “the dog work is generally done by the partners around here.”
But just because the firm hasn’t expanded beyond Manhattan does not mean that the partners have not debated the issue. Lipton confirms that the firm seriously contemplated opening a Silicon Valley office a few years ago. “We’ve looked at doing different things from time to time, and every time we’ve decided that that doesn’t really fit with what we do or how we operate. But we’re not adverse to looking at things.”

**Internationalisation**

“At a given point in time there was a choice,” says Lipton, “Skadden Arps could have remained exactly as it was, just as we are today basically, but they decided they wanted to go the way they did. And they have been enormously successful in doing it, probably the most successful in the world in creating a true global firm. I have no doubt that it was the right strategy for them, the firms that are true general practices, and want to represent the global companies, have to be global.”

But such a direction is not one Lipton’s firm has any desire, or need, to emulate. “In large measure all the ‘global firms’ are all corporate and financially focused, so they found that the only way they could be competitive was to pursue the same global strategies.” A result of which, he laughs, is that a number of the firms that have emigrated from elsewhere in the US, or abroad, now have New York offices that are as much as two or three times the size of his own.

Though Wachtell Lipton may not have any international offices, it undoubtedly has a sound international strategy. Lipton shies away from such labels as ‘best friends’ but does state “we have a pretty good idea who is the best firm to consult in most of the major areas of the world. And it may not be the same firm. Frequently there are conflicts, so you have to have relationships with two or three. I’d say that in the major cities of the world, including within the US, we have two or three firms that we’ve had experience with, particular people who we think are very good, and those are the people we turn to.” He gives as examples England and Germany, “there we do turn to Slaughter and May, or Hengeler [Mueller], but they’re not the only ones.”

Flom admits that his firm was a relative latecomer to the idea of internationalisation, being somewhat preoccupied with its domestic growth. “We didn’t move abroad because we felt we already had a pretty full plate, and then at some time it became perfectly obvious where the world was going so we started with London and built that up, now we are all over the place.” He points out, however, that a firm does not have to have foreign offices to be international: “Marty doesn’t have them.”

The selection of international office locations, Flom explains, is primarily done to complement a broader strategic plan, but he highlights the
The business of law

Jo Flom and Marty Lipton have turned their firms into multi-million dollar operations. Last year the 1,700 lawyer Skadden Arps posted revenues of $1.1 billion, while the 180 lawyer Wachtell Lipton, which operates a partner to associate ratio of 1:1, posted an estimated profit per partner of $3.2 million (AmLaw Global 100).

In order to maintain such extraordinary levels, Wachtell Lipton has a specific modus operandi. Yet among the most striking comments in a memo Lipton circulated to staff when he stepped down as Chairman is the assertion that, “the firm is not a business. It is an old-fashioned professional partnership. There is no partnership agreement – only a handshake among friends.”

Perhaps what stands out most about the firm is its reputation for quality, something born of the firm’s strict practice emphasis and limited size. The firm’s focus is purely corporate, litigation, and creditors’ rights. “Everything else we do is derivative from those three areas,” says Lipton. He questions the perception of the firm as having a ‘hard’ reputation. “I think it’s just the reputation about what we do.” He also makes much of the fact that the firm will not serve on corporate boards, does not take retainers, and is promoted as a destination practice rather than one that cross-sells. As the memo states, “the firm does not use its takeover practice to expand other relationships.” Further stating, “the firm does not seek to maintain a specific market share or expand its practice into areas that do not fit with the firm’s basic culture and strategy.”

One New York lawyer half-scathingly describes the firm as “a brilliant self-publicist, to the right people.” But Lipton laughs at the suggestion that the firm has anything approaching a marketing strategy. “Our strategy from the time we started was that if you did a good job people would take notice of it and seek you out.” Likewise he is blunt as to the effort put in to explaining the firm to prospective clients. “There’s none. We don’t call on investment bankers and explain ourselves. We don’t call on anybody and explain ourselves to them.” Moreover, he cannot see a day when they will have to.

Lipton admits that the firm has more business than it can reasonably handle, “we turn down a lot,” he says. And few potential clients walk away once aware of its working practices or billing methods – it takes a contingency fee on many matters. “It’s the rare, rare, company that doesn’t know us. So basically who would want to be a lawyer,” he says. 25 years before many firms made the same decision, Flom describes how in the early 1970s he realised that the firm’s continued independence: “The notion of a meritocracy through a committee.”

Key to the firm’s success is its size; all associates are hired with an expectation of becoming partner. “We only hire people who we think are able to do it” says Lipton. The firm, however, is renowned for the punishing work schedule expected of both partners and associates. Selection says Lipton is largely self-policing. “If you don’t have it then you’re not happy here and you’re probably going to want to leave. This is a very stressful, intensive, difficult practice and if you don’t have the skills and the drive to use them then it’s just not a happy place.”

Flom agrees that Wachtell Lipton is an exceptional firm, though different to his. But overall the governing principle of both is the same. “The primary interest in all these things is not to be spreading your wings and taking the kind of business that is marginal or commodity, you want the ability to give somebody the choice of an exceptional operation.”
Reign on

Despite no longer being involved in the day to day running of their firms, and now both into their 70s, neither Lipton or Flom expresses any desire to give up or retire. Lipton jokes that like the British Queen he too has little desire to abdicate, “I hope to continue my reign as long as I can,” he smiles. Likewise the prospect is not something Flom relishes. “What would I do all day?” he asks.

Though they may no longer be doing the punishing schedules expected of their younger partners, both still maintain a practice and still experience the same thrill when a deal comes off. Flom says he is working harder now than at any time in the last five months. “I’m doing a few deals that get me up at 6 every morning,” he says. “But one of the benefits I see of having 1,700 lawyers is that I no longer have to do the all-nighters. I’m still there though if they have a problem that requires a few grey hairs, which I hope ties in with wisdom and institutional memory.”

As regards his legacy and the perception that his firm remains synonymous with hostile M&A, Flom says, “That was a long time ago. A good general is made by his colonels, and a good field marshall by his generals. I guess I got to the field marshall stage in the 1970s. I basically never wanted to make a huge amount of money up front and wonder what to do with myself if there was a downturn,” he says, “so we decided to build the kind of firm we did.” Likewise Lipton expresses the opinion that to describe his firm as merely an M&A boutique misses the point and besides would be “about 12 years out of date.”

The warrant dividend plan aka “Poison pill”

Perhaps one of Marty Lipton’s most significant legacies is the ‘Poison pill’ defence. “I invented it,” he states proudly, though admitting that the catchy name is not his own.

A concept he first worked on in 1980, he says it took him two years to get it down. Hostile takeovers he felt were damaging to both target companies and the economy, so the defence was developed to counter those who would “hang a permanent ‘For Sale’ sign on all public companies,” Lipton’s intention was to allow the board of a target company the ability to preserve the company’s destiny and “on a properly informed basis conclude that the corporation remain independent.”

Prior to the 1960s there was little judicial or legislative guidance in the US as to the rules applicable to boards of companies experiencing a takeover situation. So by the end of the 1970s when such corporate behaviour was endemic this lacuna was all the more apparent.

In 1979 Lipton published his early thoughts in a paper entitled ‘Takeover Bids in the Target’s Boardroom’, based on his experiences in proxy fights throughout the 1960s and 70s. In it he stated that directors should be governed by the business judgment rule, and that in doing so they should take into account all the interests of their company’s share and stakeholders. At the time it was criticised by those who argued against an active board role in such circumstances, favouring instead a ‘rule of passivity’ with directors merely passive advisors to the shareholding constituency.

In September 1982 Lipton sent out a description of his finalised concept, the ‘Warrant Dividend Plan’ (WDP), in a memo to his firm’s clients; before the end of the year it was employed by the El Paso Corp in a successful defence against a hostile bid by Burlington Northern.

But it was through its use by the Lennox China Co against a hostile bid by the Brown Foreman Corp in 1983 that the method acquired its now familiar name. Lipton explains, “in that transaction the banker who was representing Lennox was asked by the Wall Street Journal what he called the WDP, he called it the ‘Poison Pill’. The next day a story appeared in the paper with a skull and crossbones alongside and the name stuck.

One of the most significant uses of the ‘pill’, however, and the one that established it as a legitimate means of defence was by Household Corporation in the summer of 1984. Its employ resulted in heated litigation that the following year went to the Supreme Court in Delaware, where its legality was upheld.

Today the poison pill has gone through a number of revisions, including the ‘flip over’ and the ‘inversion flip’, and is just one means of defence in a company’s arsenal. “I think the pill has become so well known and so pervasive that I can’t conceive of a company that might make use of it that doesn’t already know about it,” says Lipton. “It was clear to me right after the legality was sustained that almost all the major US companies would put it in place, as it was the only way to level the field in a hostile situation.”