

# Evolving Role of In-House Counsel: Adding Value to the Business

In our twenty years of experience working with hundreds of law departments inside and outside the U.S., we have had the opportunity to help define the evolving role of inside lawyers and best practices in legal function management. Some of these best practices are long standing and have become intrinsic and permanent features of the legal function. Other roles and critical success factors have evolved over the years in response to a range of forces. The dynamic elements of the inside lawyer's role have been driven by new models and approaches to corporate management, evolving client expectations regarding legal services, and trends in the external legal marketplace and legislative/regulatory environment. Combined, these static and dynamic elements represent the characteristics of a value-added inside counsel role.

## Evolving Expectations of In-House Lawyers

There is little question that expectations of general counsel and law departments have evolved over the past two decades. The expansion of in-house law departments in the late 1970s and 1980s was largely driven by cost reduction - substituting much cheaper inside legal resources for increasingly expensive outside legal services. For much of this period, legal teams were focused on building effective organizations and internal legal service delivery capabilities.

It was not unusual during this period for the legal function to be exempt from company-wide management initiatives. In some clients we heard references to the law department as an impenetrable "black box" relative to the rest of the company.

Beyond sheer growth, companies also recognized the need to upgrade the quality of their legal staff. They wanted to attract higher-quality legal talent. To accomplish this objective, they had to offer commensurate compensation, competitive with major law firms. Thus, law departments grew in cost as well as staff size. Simultaneously, the demand for outside legal services continued to expand to handle ever-increasing litigation and transactional demands.

The economic downturn of the early 1990s, combined with escalating internal and external legal costs, led to a major change in expectations surrounding corporate legal functions. The "exemption" from corporate-wide management initiatives gradually disappeared. More and more law departments came into the mainstream of management thinking, techniques and, indeed, fads that characterized that decade.

The internal legal function is now evaluated like other parts of the company. General counsel are held accountable for costs and effective management as well as the provision of quality legal services. Each inside lawyer is expected to add value to the company. The remainder of this article examines these points as they relate to the law

department as a whole as well as to lawyers at an individual level. References are made to the implications of the new business environment, which is characterized by a greatly increased emphasis on corporate governance, ethics and compliance, best symbolized by the passage of the Sarbanes-Oxley Act in 2002.

## **Law Departments - Providing and Conveying Value**

### **Defining the Legal Function Mission**

A traditional description of the law department would emphasize providing cost-effective, quality legal services. Many law departments have developed carefully worded mission statements that define the purpose and objectives of the law department and frame their culture, perspective, and approach to providing legal support in their companies.

These mission statements are widely publicized and regularly reinforced in various forums to both law department staff and clients. Many general counsel say that clarity of the legal team's role is critical not only in focusing and prioritizing the activities of the department staff, but also in helping to convey and reinforce to clients the value-added contribution of the legal function.

The more progressive mission statements focus on clients. They stress the importance of facilitating the achievement of client business goals and profitability by having lawyers work as proactive, valued members of the client team. In many cases, law department mission statements expand on more general corporate values or themes - most of which highlight client satisfaction.

In light of the current emphasis on corporate governance, ethical behavior, and meaningful compliance programs and performance, we anticipate that law departments will continue to refine and expand their mission statements and strategic/operating plans to reflect this emphasis. The importance of a preventive law role by inside counsel has been understood for decades. But the new environment will require general counsel to allocate greater attention and resources to proactive and more effective legal risk management programs and activities.

### **Integrating With Clients**

The concept that lawyers should be integrated with their clients has long been a core precept of law department organization. After all, clients are the *raison d'être* of lawyers. Reflecting this fact, many law departments that are widely perceived to be among the "best in class" performers periodically review and refine how they organize to serve clients.

Despite major differences among our clients in industry, size, geographic location, culture and business objectives, this central organizing principle runs through most best-in-class law departments. General counsel emphasize the importance of developing a working environment where lawyers are integrated with their clients and are members of the business team - in perception and reality. When business people perceive their lawyers can provide creative legal solutions with a business perspective, the lawyers are drawn more deeply into business teams as high value-

added contributors and trusted advisors.

Over the years, the principle of lawyer-client integration occasionally has been challenged by economic or management forces. For example, law departments have not been immune from the outsourcing craze, and more than a few companies have undergone rigorous analyses of the need for an inside law department. The shared services movement of the mid-1990s had greater impact than outsourcing in disrupting the provision of high-quality, efficient legal services in some companies. Most general counsel were able to fend off attempts to lump the legal function together with commodity-oriented processing organizations (e.g. payroll, benefits, accounting). But in some major companies, all or parts of the legal function were subsumed under a non-lawyer "shared service manager," thus undermining its stature and access to top corporate management.

A more recent and more serious threat to the lawyer-client relationship has been posed by recent developments in the regulatory environment. Under the Sarbanes-Oxley Act that was passed in 2002 in response to the wave of corporate financial and ethical scandals, the U.S. Securities and Exchange Commission proposed a requirement that would compel an attorney under certain circumstances to inform the SEC about a corporate client's misconduct. This unleashed a firestorm of protest from inside and outside counsel alike. The American Corporate Counsel Association's comments on the proposed rule pointed out that in-house lawyers "... are concerned that these rules take an unprecedented and unnecessary step toward changing the role of a corporate lawyer from one of a trusted legal counselor to one of a whistle-blowing policeman."

As of this writing, the SEC has deferred action on this so-called "noisy withdrawal" requirement and identified several alternative forms of the requirement for public comment.

### **Determining the Proper Mix of Inside and Outside Resources**

Virtually all larger companies rely on a mix of inside and outside lawyers to meet their legal needs. Thus, a holistic approach to managing legal resources requires an examination of both components of legal service delivery

The relative mix of inside and outside legal resources has changed over the years. In the U.S., based on 18 years of data from the PricewaterhouseCoopers Law Department Spending Survey, we know that the mix of internal/external legal resources (based on fully-loaded costs) has shifted from roughly a 55% /45% in-house counsel - outside counsel split in the 1980s, to a 50% /50% split in the first half of the 1990s, to a 40% / 60% split that has held relatively steady since the mid-1990s. This is not surprising, considering the continuing cost and headcount pressures on inside counsel and the excess supply of outside legal talent.

Still, the existence of a growing body of aggressive and competitive outside lawyers has presented a continuing challenge to inside counsel. Specific incidents of total or partial outsourcing of the legal function (beyond "normal" outside counsel usage) have been few and far between. But the existence of this option has been a factor in compelling inside lawyers to demonstrate their worth and differentiate themselves from outside law firms that stand ready to replace them.

Many larger law departments try to handle as much sophisticated, business-critical legal work in-house as possible. In-house lawyers typically perform the majority of their company's legal work, with the most notable exceptions being litigation, investigations, customer-paid transactional work, or international work where the law department lacks local presence and/or knowledge. There are a number of specific circumstances where cutting-edge legal knowledge and broader market perspective make outside counsel the more appropriate choice. However, inside lawyers are preferred, especially when they are perceived as being more knowledgeable about the industry, business operations, strategy and new product opportunities than outside counsel.

In today's cost-competitive legal marketplace, some companies indicate that they are considering additional outsourcing, especially certain types of routine legal work. The cost and value differentials between inside and outside counsel are most effectively managed through outsourcing packages for routine repetitive legal services that do not require deep knowledge of company operations, culture and policy.

### **Obtaining Client Feedback**

We assist many law departments in conducting client surveys to gauge overall levels of client satisfaction. The surveys range from relatively brief to fairly extensive in length, and may be distributed to a small core group of executives or to a wide range of clients at multiple levels. Most companies that conduct annual client surveys report that these provide consistent and uniform evaluation criteria and general results for the law department as a whole. Best practice law departments develop concrete, follow-up activities to demonstrate that the time spent by clients in completing the survey will result in improvement initiatives.

For example, one company followed up on client survey results by creating cross-functional focus groups to analyze the findings and develop action plans for issue areas. Another department presented client survey results at individual practice group meetings for clients, as well as at a full department staff meeting with a panel discussion for clients. Yet another department supplements its written client survey with extensive interviewing of clients to gain broader and more specific perspective than numerical evaluation scores.

An additional client feedback mechanism is one that focuses on individual attorneys in addition to aggregate law department survey results. A handful of departments reported examples of client input to individual performance evaluations. In one company, every officer (including lawyers) is subject to a "team review," which involves written evaluations prepared by five clients approved by law department management. Another department uses special transaction surveys twice a year to get client and lawyer-specific feedback on a deal or project basis. In summary, client surveys are a key tool for law departments to calibrate their understanding of client expectations and to monitor their performance against those expectations.

### **Communicating Value**

Savvy general counsel have learned that effectively communicating about the services and contributions of the legal

function is almost as important as actually providing high-quality services. At the most formal and highest level, some general counsel prepare an annual written report on the overall performance of the legal function and present it to the company's management/executive committee and/or board of directors.

Some general counsel actively promote the use of sales and marketing concepts within the legal function. All inside lawyers should be sensitive to the need to convey the value of their work, communicate tangible results, and attempt to measure results in quantitative terms. Lawyers need to communicate in the language and methods employed by their clients, recognizing the substantive and stylistic differences that exist among financial, engineering, marketing, operational and other disciplines.

One of the management tools employed - fully or in part - to help accomplish this objective is the adoption of a "balanced scorecard" performance indicator and reporting framework. This consists of a diverse set of measures to define, monitor and improve the performance of companies.

We helped a task force of senior lawyers and managers from 15 companies develop a balanced scorecard approach for the legal function. This scorecard consists of a combination of elements:

- Financial and operational statistical performance indicators that typically focus on input resources rather than output results.
- Process-specific metrics that are both generic and specifically tailored to an individual law department's unique function, role and services.
- Customer oriented metrics such as client satisfaction results.
- Human resources management elements such as those that promote staff learning and growth.

Developing and implementing this approach requires a healthy amount of common sense and recognition that this is an imperfect and evolving field. These management approaches involve real work, conceptual difficulty and other sources of frustration, and if done poorly can set back a law department's improvement efforts. The ultimate goal is to focus on areas in which the legal function can add the greatest value to the company. Strategies, information, analysis and resource allocation decisions should support that goal.

We anticipate that law departments will continue to develop performance measures, especially those that are results-oriented. They will begin to integrate these measures into other management approaches, including departmental and individual planning, activity and process analysis, performance evaluation and reward programs, and design and implementation of management information systems.

### **Critical Success Factors for Inside Counsel**

What specific guidance can we offer to individual in-house attorneys in defining a value-added role? Figure 1 graphically depicts the key elements of a value-added role and roughly how they have evolved in importance over the past two decades.

The first two of these factors - Quality and Business Orientation - represent fundamental and lasting requirements of inside counsel. The remaining characteristics represent corporate management and client expectations that emerged more specifically over the past 15 years, roughly in chronological order.

### **Quality**

The concept of "quality" itself encompasses many discrete skills and attributes, including such elements as: legal training; technical skills; professionalism; experience; judgment; client service; communication; and negotiation. Interestingly, most clients assume that their inside lawyers possess the requisite legal knowledge, skills and experience and, in any event, often have no basis on which to evaluate the performance of their lawyers in these areas. They therefore typically base their assessment on the other aspects of quality and organizational behavior, such as client service, oral and written communications, personality and teamwork.

### **Business Orientation**

From the beginning, business orientation has gone hand in glove with being an effective corporate counsel. This critical success factor is consistent with the principle of lawyer-client integration. Such integration can be accomplished through a variety of methods, beyond the obvious one of physical co-location. Alternatives approaches include periodic, scheduled visits; "making the rounds" at the client site; regularly participating in key client management team meetings; and leveraging email and other communications technologies to stay aligned with the client.

### **Cost Sensitivity**

As previously noted, it was presumed during the growth spurt of inside law departments that inside legal services are always cheaper than outside legal services. With the growth of benchmarking and other measurement and comparative tools, law department costs came under greater scrutiny. Therefore lawyers invested more time in developing case/matter management and even timekeeping and chargeback systems to track and communicate legal costs to clients. General counsel and inside lawyers are expected to manage inside and outside costs, and to avoid duplication of efforts with outside resources.

### **Efficiency and Productivity**

The 1990s represented a marked evolution in the receptivity of inside lawyers to widely-used management tools and methodologies. General counsel and their staff became masters of their own destiny, initiating improvements and innovations rather than waiting for top executives or outside consultants to be the drivers of change. Many law departments came to embrace cost/activity analysis, process analysis, reengineering and other techniques in an attempt to better understand, streamline and improve their recurring work processes.

Examples of key developments to enable efficiency and productivity gains include:



- Pushing work down to lower and less expensive levels in the law department, such as by making greater use of paralegals and other non-lawyer staffs.
- Pushing work out of the law department to other parts of the company where that work did not require legal skill.
- Flattening the overall legal organization and reducing the number of levels and titles.
- Reducing the amount of lawyer time spent on administrative and supervisory oversight.
- Hiring or arranging for dedicated professional corporate staff support for the financial, human resources and technology management requirements of the legal function.
- Introducing new technologies for document, knowledge and case/matter/project management.

### **Strategic and Proactive Advice**

During the mid-1990s we began to hear more of our clients ask their inside lawyers to play a more strategic and proactive role and to more clearly "add value" to the business. Following are examples of the contributions that inside lawyers can make in the corporate environment:

- Develop a company-wide dispute prevention/resolution strategy and program.
- Promote effective intellectual property strategy, function, process and system to protect and enhance the intellectual assets of the company.
- Integrate document and contract production processes and systems.
- Integrate ethics, compliance and preventive law efforts.
- Establish a comprehensive records (including electronic) management program.
- Integrate legal and public relations.
- Support superior execution of deals and transactions.
- Support creative sales, marketing, and distribution programs.
- Contribute to new product ideas or design.
- Provide client coaching - deal making, negotiation skills, risk evaluation, judgment.
- Influence governmental and regulatory policy.
- Serve as internal early warning system in identifying potential risks to the company.
- Cut through toughest problems facing the company / crisis management.
- Supply leadership talent within the company.

### **Flexibility and Versatility; Speed and Agility**

In recent years, with the tremendous expansion of communications and technology - including the adoption of email, remote access, Internet usage, cell phones and mobile and wireless technology - new expectations began to be layered on top of those already identified. The concept of "internet time" emerged, and despite the implosion of the dot.com phenomenon, client demanded faster lawyer response time.

Fortunately, lawyers were not only on the receiving end of these new technologies - they were also able to leverage them back to their clients. The best example is the legal intranet. Many larger law departments have established

legal intranets within their companies which serve to better integrate the legal staffs and resources of the company across location (and also tie in key outside law firms through legal extranets).

Even more valuable, they have enabled law departments to leverage their limited resources and to expand their reach to serve a wider range (number, geographic spread) of clients within company. Specific services range from static information (e.g. directories, policy documentation, frequently asked questions) to more dynamic automated workflow and training modules.

### **The New Imperative: Risk Management and Controls**

Long before the recent changes in the business environment, law departments struggled to find the proper balance between working to support business goals and acting as the "conscience" and control function for the company. Inside lawyers typically possess broad knowledge of the business strategies, issues and policies of the company and often have longer tenures than business managers.

Consequently, in addition to contributing their legal and business policy expertise, inside lawyers can act as the most reliable institutional memory in the company. Further, because the law department has a heightened sensitivity and responsibility to the enterprise as a whole rather than to discrete business units, lawyers may be more conscious of protecting their "ownership interest" in the company.

Balancing these dual responsibilities can cause tension between lawyers and their business executive clients. To minimize these strains, it is important to clarify and manage the role of lawyers to avoid crossing the boundary from adviser to decision-maker. But control often means identifying and elevating issues, not necessarily stopping the company from an activity - unless the activity involves a violation of the law or a breach of delegated authority.

One general counsel describes his strategy as follows: "We have built up so much credibility and confidence with clients that the law department has earned the right to exercise the brakes on the occasions that are necessary."

The law department's responsibility to protect the company from inappropriate risk does not mean that lawyers should be making decisions in lieu of clients on matters of legal risk that do not involve violations of the law or a breach of delegated authority. The consensus view is that lawyers are expected to identify a range of risks, with details about the attendant risk impact and consequences and suggestions for alternative approaches, but to leave it to the client to make the decision. Some general counsel suggest that this policy is somewhat driven by business managers' concern that lawyers may be too conservative if they have ultimate responsibility. They acknowledge that clients who manage a multitude of other business risks should be trusted to manage legal risk, as long as their lawyers have effectively provided advice and counsel.

One general counsel suggests that "the great riddle is how to make lawyers part of the client team without making them part of the client, thereby making decisions." This general counsel coaches lawyers to provide clear advice and assessment of relative merits, but to be purposely non-decisional. In another department, the general counsel is



developing individual attorney performance evaluation criteria to measure and reward the kind of lawyer who searches aggressively for solutions rather than saying "no." This general counsel wants the inside lawyer to recognize that in today's business environment there has to be an acceptance of some level of legal risk.

In contrast, other law departments avoid distinguishing between the legal and business advisory roles of lawyers. For example, one general counsel indicates that the "teaming" orientation of the law department leads lawyers and clients to share responsibility for risk. Lawyers participate in defining risk, advise their clients on taking legal risks, trust their clients to make the "right" decisions that incorporate the lawyer's legal risk planning and strategy, and support (rather than second-guess or abandon) their clients once the decision is made to incur the risk, irrespective of whether the lawyer would have made the same decision.

This general counsel further says that the "two-handed" lawyer ("on the one hand there is this risk and exposure, and on the other hand there is that risk and exposure") who provides facts and strict applications of technical law, but not guidance or business perspective, is less valuable than the lawyer who is willing to participate in decision making and share the risk with clients. Another general counsel agrees, explaining that when lawyers are part of a business team, they provide business advice with a legal twist that isn't full of legalese, so it becomes difficult (but not problematic) to distinguish between business and legal advice and decision making.

If the business risks are high - with respect to dollar amounts, policy considerations and/or legal propriety - then in-house lawyers are expected to identify issues and elevate the matter to a more senior client and/or counsel level to ensure that the matter receives the appropriate business attention. However, as long as there is a reasonable basis for the client's desired action, even if the lawyer doesn't agree with that action, most general counsel believe the decision should be left to the client at the appropriate level. Ultimately, lawyers are expected to meet their responsibility to identify issues, and are appreciated for contributing ideas and possible solutions to address those issues and facilitate business prosperity. Moreover, they are expected to do this without taking over responsibility for making business decisions.

## **Conclusion**

The role of general counsel and law departments and definition of value-added contribution by inside counsel has been dynamic over the past two decades. But in the current climate, their importance has never been greater. It is likely that the definition of best practices and critical success factors will continue to evolve in the coming months and years as companies and their inside lawyers adapt to the new business environment.