The Business Side of Legal Advice

Law Department Management

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CHEAT SHEET

- ***Set the tone.*** Elevate the profile of the legal department by setting the right tone — establishing who the GC reports to and what the job description consists of are crucial first steps.
- ***Structure the legal department.*** Structure legal to mirror the rest of the management level structure to position senior lawyers on parity with their business counterparts.
- ***Expose legal to business groups.*** Force lawyers out of their comfort zones by giving them exposure to multidisciplinary meetings.
- ***Use outside counsel intelligently.*** While there are merits to driving competition and spreading legal work around, there is also something to be said for consolidating legal work amongst three or four law firms and identifying a relationship manager in each firm.

Articles have been written on the advantages and perils of in-house counsel stepping outside of a technical legal role. That debate is not the focus of this article. The advantages of an integrated legal and commercial approach are incomparable for any organization. Certain favorable conditions need to be in place to realize these advantages. Unless in-house counsel take a thoughtful, proactive approach, these conditions may be elusive.

This article recommends some approaches and tools including the best way to gain the confidence of business colleagues. It also provides methods for getting the most out of a legal department and working with business counterparts effectively.

The context

Although external law firms will always have a valued place, the insights of an internal lawyer who works in the day-to-day business are hard to replicate. Anyone who doubts this should speak to a new general counsel who heavily supported his or her now employer from an external law firm prior to taking on an in-house position. Although that client was a major client with whom counsel had extensive and regular contact, many novice GCs will admit that the learning curve is both humbling and steep.

Most lawyers considering an in-house position are drawn to the prospect of a soup-to-nuts involvement in new transactions or initiatives. Goodbye and good riddance to the time when a client delivered a signed letter of intent to the lawyer’s inbox with curt instructions to paper the deal. Even if the terms of the letter of intent are truly non-binding, it has been structured without a lawyer’s advice. This is frustrating to the lawyer. From the organization’s perspective it is much easier to reflect the best advice in the terms of the initial document — and very difficult to take things off the table that have been at least notionally settled by the business people.

There is a good possibility that this no-win situation can be avoided if the internal business client better understands the value-add of involving the in-house lawyers in early planning and discussions.

Better yet, a client's appreciation of the lawyer's legal and commercial strengths paves the way to the best results for the organization.

Gaining the confidence of business colleagues sometimes involves overcoming institutional or individual biases. Stereotypes abound including the accusation that lawyers are often "naysayers." Even the most insightful, beneficial internal legal commercial advice does not benefit the organization if it falls on deaf ears.

The risks in ring fencing legal counsel

The General Motors (GM) faulty ignition switch situation highlights the risks of not integrating lawyers into key functions and divisions. Although various GM engineering groups and committees had attempted to resolve a faulty ignition switch problem, investigations failed to make the connection between ignition problems and the non-deployment of airbags leading to deaths and injuries. During a 10-year period there were at least related 54 crashes, resulting in the deaths of 13 people.

GM commissioned an independent investigative report ("The Valukas Report") to understand what went wrong. The report contained several important findings on the role of GM's in-house counsel in the switch recall. GM's general counsel was only aware of the defect after a GM committee ordered the recall. Because settlements of less than $5 million did not require the general counsel's approval, he did not know about several similar claims settled for less than $5 million. If he had, he would have seen a worrisome pattern.

Among the recommendations of the GM Valukas Report was to encourage information sharing across groups and formalize the process by holding regular meetings between different groups such as engineering, vehicle safety and legal. Taking it one step further than the Valukas Report, legal can often play an effective integrator role — breaking down silos between business functions and units that interfere with information sharing and identification of worrisome trends. With highly developed project management skills learned on transactional experiences, lawyers can be effective at identifying and troubleshooting problems and following through on action items to resolve these problems before they affect corporate reputation and operations.

Setting the tone

To elevate the profile of the legal department it is important to establish and maintain the right tone. This may start with the general counsel's role (or other senior counsel where there is no general counsel). Three questions are important:

- Is the general counsel a member of the executive management team?
- Who does the general counsel report to?
- What is the general counsel's job description?

It really matters. If the general counsel is not seen as a trusted advisor and participating colleague at the executive management table it could be difficult to position the rest of the legal team in a manner which optimizes the wide range of commercial and legal skills each has to offer.

The position description and performance plan for the GC role should go beyond a technical legal role and identify and support the key organization strategies. A good job description is at least as much about commercial strategy and reputation as it is about law. The following is a sample

description of an overarching goal in a general counsel's annual performance plan:

To build and develop a strong, committed legal team which, through effective legal contracts, strategic negotiations, proactive issue identification and skilled legal and commercial advice: (a) protects and enhances [organization] and its operating divisions' reputation and commercial interests, and (b) thereby contributes to a positioning of [the organization] as the preeminent [include benchmark to industry including competition].

If the GC reports to the CEO and is a member of the executive management team, the GC will be in a better position to gain operational understanding and contribute to strategy and business plans. This in turn allows the GC to both promote the legal department and guide the department in a proactive rather than reactive management of the organization's legal needs.

Some general counsel do a legal department annual report as a vehicle to promote the department. This annual report is made available to business colleagues and includes performance metrics such as savings in the external legal spend. To the extent this annual report looks like it is based on the principles of a business plan, it may affect the way others view the legal department. It is harder to discount in-house counsel's expansive role when the department relies on business plans and performance metrics following a similar approach to the method expected from the business divisions.

Structuring the legal department

Legal departments are often quite flat organizations, consisting of the general counsel, possibly an associate general counsel, and then everyone else. A structure that parallels the management level structure used in the rest of the organization sends a strong signal. Specifically, if the legal department structure includes vice presidents, directors and managers, there is an instant connection with others in the organization holding these offices. This is critical and positions lawyers as senior professionals on parity with business counterparts throughout the organization. Once a director level lawyer attends directors' meetings historically attended only by business folk — and contributes to the business discussion — he or she will be seen differently.

This structure has other advantages. When the general counsel's direct reports are reduced, the general counsel is freed up to market the legal department and participate in key strategic and other discussions. In addition, this organization approach motivates the lawyers in the department who see a tangible structure allowing for career progression.

Exposing lawyers to business groups

Specific lawyer performance plans should identify goals that reward participation in cross-discipline committees and teams. All levels of lawyers should attend and participate in multidiscipline meetings and join key internal committees. For example, a lawyer can attend the capital construction division's regular internal meetings. The risk committee is another key internal group where lawyers' participation is helpful. If lawyers are not only prepared to identify the risks but also contribute to work around or mitigation strategy discussions, there will be a parallel growth in both client confidence and the legal department's understanding of business challenges.

Establishing this healthy interdependency sometimes entails forcing lawyers out of their comfort zone. Lawyers need to push themselves to join discussions. To make the most impact, of course,

requires a lawyer's upfront investment in a type of due diligence process. Such due diligence provides a better understanding of the business operation, including history and context for a particular business discussion. Gaining confidence, a lawyer may have the courage to boldly invite himself or herself to key internal meetings — even if not initially included in the attendee list!

Presentations at "lunch and learns," or other internal forums, afford another opportunity to make a connection with business colleagues. Clients can be canvassed for topic requests if the legal department's day-to-day work doesn't readily identify common business challenges and opportunities.

These meetings and initiatives present opportunities to showcase lawyers' broad array of skills and experience. At least as importantly, lawyers are provided with the opportunity to listen, observe and gain a greater understanding of a client's main priorities, concerns and objectives.

Invest in the legal team

Leadership and other development programs, often not aimed specifically at lawyers, can be powerful professional accelerants. For example, professional development focused on effective oral presentation skills can help lawyers better engage their internal clients. Lawyers need to be good communicators. Although lawyers typically have excellent writing skills, verbal communication skills can be weaker. Positive or negative impressions often turn on effective oral and presentation skills. Membership in courses and organizations including Toastmasters help foster this. A communications coach can put together an interactive day program for the entire legal department that introduces all of the elements of strong presentation skills. This has the incidental benefit of being an enjoyable team-building experience.

Stretch assignments are effective at developing all-around skills. Provided the general counsel accepts the need to check his or her ego at the door, placing another lawyer as the lead in a key briefing of a senior management member is incomparable training. Such opportunities can invoke invaluable lawyer loyalty.

Performance plans should include goals related not only to specific file accomplishments but also to soft skills such as empathy, grace under pressure, collegiality and teamwork. Empathy is sometimes overlooked in assessing strong performance. However, the more you understand a colleague's points of view, the more you can provide effective legal advice and the more you influence him or her.

Working effectively with clients

Client opinion survey

A client opinion survey is a useful tool that helps the internal team improve legal services. Both the content of the survey and the identity of the survey recipients are important. Questions should be thought through carefully. The recipients should include employees at different levels of the organization — but only if each recipient has actually had meaningful dealings with the legal department. The survey questions should include a continuum from "strongly agree" to "strongly disagree." To avoid false neutral or average responses a category of "don't know" or "cannot comment" should be included. Most helpfully, the survey should include ample room beneath each question and at the end of the survey to provide specific commentary.

Examples of questions to include in a client survey include:

- I can easily and readily reach legal counsel when required.
- Legal counsel is proactive in identifying and communicating general legal developments that are of interest to my work.
- Legal counsel keeps me informed about any issues and/or changes that affect me and/or my team on specific projects or initiatives.
- I am generally satisfied with the number and content of seminars given by the legal department, which seminars discuss legal issues relating to my business unit's work.
- The legal department consistently facilitates my ability to complete work by responding to my requests for services (providing forms, agreements, advice, etc.) in a timely manner, given my needs and priorities.
- The legal department consistently facilitates my ability to complete work by providing viable alternatives in those circumstances where it advises that substantive issues prevent/prohibit transactions that my business unit proposes.
- Legal counsel works collaboratively with project coordinators and contributes to the overall project.
- Legal counsel shows initiative in implementing a plan focused on achieving my business unit's objectives.
- Legal counsel takes action to minimize unanticipated costs and/or eliminate possible losses through risk mitigation.
- The legal department's choice, and ongoing oversight, of external legal counsel has been generally satisfactory to me.
- Legal counsel consistently identifies key or underlying issues in complex situations in order to assist my business unit in making decisions.
- Legal counsel understands the political and/or business environment I am working in.
- The legal department has sufficient skill sets and expertise in diverse areas of law to properly handle the organization's legal issues.
- I am satisfied with the legal department's and corporate secretary's input on board reports.
- I understand what is expected by the corporate secretary during the board cycle and why it is expected.

Once the surveys have been completed, the survey results should be collated and discussed. Specific action items arising out of the survey should be listed and circulated to business colleagues. Ideally legal department meetings regularly track progress against these action items. If the general counsel prepares a legal department annual report, it might include the survey results, action items and milestone reporting.

Client instruction form

A user friendly client instruction form can help both clients and lawyers. Too often a long email chain is forwarded to a lawyer with instructions to provide legal support. Sometimes information in the bottom half of the chain is no longer even relevant. Developing a client instruction sheet including items such as: description of legal services required, client contact person(s), contract value, timelines, lawyers who have previously worked on this or similar matters, and "additional considerations" saves time and leads to a better result. On occasion it reveals whether a so-called urgent matter has been sitting on someone's desk for several days or weeks. If there is a pattern of unrealistic and unfair turnaround expectations, a candid discussion with the business unit can nip that problem in the bud.

Board reports

Legal departments often perform the corporate secretary role. Here too there is an opportunity to guide board report authors in the structure and wording of an effective board, or board committee, report. Since there is a big information gap between management and independent board members, there is an art and a science to preparing board reports. Upfront, cogent executive summaries — including the decision management is seeking from the board — should frame the report analysis. The report should include the historical context including a summary of when the matter, or a similar matter, has previously been before the board.

Depending on the nature of the project or initiative the content of a board report will vary. It typically includes a risk analysis and budget considerations at a minimum. Since the wording of resolutions is not intuitive for most non-lawyers, written guidelines including sample resolutions are usually appreciated.

Rather than taking the role of a stern schoolteacher marking a student's essay, the lawyers can work closely with business counterparts to anticipate board questions and concerns in the written report. In other words, if handled with sensitivity, lawyers can bring clients along to the compelling proposition that lawyers are helping them succeed and look good in front of the board.

Lead lawyers

In organizations with two or more divisions or operating subsidiaries, assigning a lead lawyer to oversee that group's legal needs is highly effective. If possible, that lawyer should attend the operating divisions regular management meetings. In addition to the obvious benefit of this integration, it reduces multiple client group legal contact points and the occasional problem of client opinion shopping.

Lawyers at intermediate levels and beyond can also lead legal centers of excellence in which he or she is the lead subject matter "go to" person, forming legal working groups, monitoring developments in the area, and directing the preparation of relevant precedents. The centers of excellence will vary from organization to organization but examples include technology law, construction law and commercial leasing.

Intelligent use of external law firms

There are compelling reasons for retaining a significant amount of legal work in-house that go beyond financial advantages. Internal lawyers are involved in day-to-day business and know the operations to an extent outside counsel cannot replicate. Also, in order to attract and retain good lawyers involvement in the more interesting files is a must. Good work is a good motivator.

Nevertheless, external lawyers will always have an important place. Not only do they provide resources when the volume of work cannot be handled internally, but they have a depth of expertise in areas not often covered by the internal team.

Like any outsourcing work, external legal resources require careful direction and management. It is important that the management of external legal services is led by the legal department. Although the general counsel and other lawyers may work with their client in instructing and working with external counsel, lawyers are best able to assess whether the firm is delivering value for money.

To make sure that lawyers are retaining outside firms, all external law firm budgets should come under the general counsel's budget. If the legal department does not control the budgets clients can go directly to law firms without the legal department's involvement. Not only does this lead to potential duplication and other inefficiencies, the end product may suffer. If legal services are not centralized in this manner, the legal department will not know of worrisome trends and developments. This in turn impairs the general counsel's ability to operate on the no surprises basis which CEO's and boards expect and need.

While there are merits to driving competition and spreading legal work around, there is also something to be said for consolidating legal work amongst three or four law firms and identifying a relationship manager in each firm. This drives efficiencies by ensuring that the chosen list of key firms understands your organization thoroughly. It also incentivizes firms receiving significant amounts of work to provide value added approaches including alternative billing arrangements, project budgets and discounts for high value or volume work. Particularly helpful are quality, tailored, in-house presentations on legal developments of interest to the legal department and their business counterparts alike.

Conclusion

An in-house team that wants to get meaningfully involved in general commercial discussions and decisions may need to take control of its own destiny. It is helpful to take steps similar to steps outlined in this article to market the legal department and to earn the trust of business colleagues.

Being useful to business colleagues by showing them how to look good in front of senior management and the board of directors earns loyalty and respect. The more this happens the less likely that legal will be isolated and left outside of critical discussions. In today's increasing complex legal and commercial environment a more balkanized, siloed approach presents both needless and avoidable risks.

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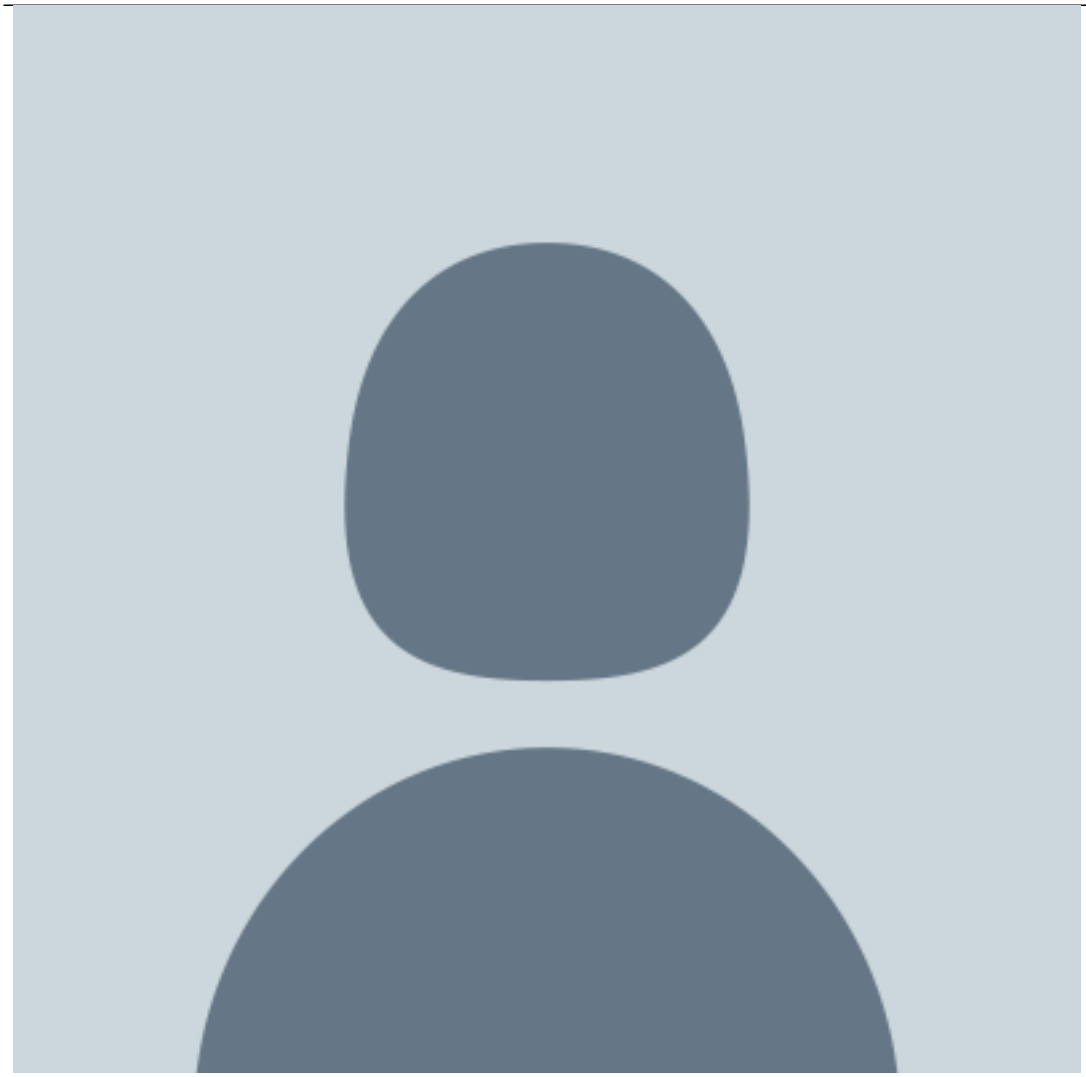

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