The Role of Personality in Choosing Outside Counsel

Law Department Management

Career Development

CHEAT SHEET

- ***Personality.*** Lawyers, law firms, and businesses all have specific company cultures or “personalities.” These personalities vary within industries, and even within companies at the department level.
- ***Assessments.*** Two widely used personality assessments and classifications include the Myers-Briggs Type Indicator (MBTI) and OCEAN (also known as, CANOE, Five Factor, or BIG Five analysis).
- ***Research.*** You can determine a lot about a law firm’s personality by how they present themselves on their website, gathering anecdotes from other clients, conducting in-person interviews, and referring to evaluations like MBTI and OCEAN.
- ***Perfect match.*** In-house counsel need to be aware of their company’s personality to best assess which law firm or lawyer personality will be the best match — whether because of similarities or complementary differences.

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The article explores several perspectives including:

1. Personality of businesses, variation between and within industries and companies;
2. Approaches to systematically analyzing personality;
3. Personality of lawyers and law firms;
4. An organization dealing with a single matter and paying for several counsel simultaneously; and
5. When the organization changes its personality.

Individual lawyers, law firms, and businesses have personalities. Usually referred to as “company culture,” we will refer to those characteristics as “personality” for simplicity’s sake, whether discussing an individual or an organization.

Ben Heinemann in Chapter 4 of The Inside Counsel Revolution uses the word culture to discuss the “integrity culture”. This article assumes basic integrity and uses personality (or culture) to mean the characteristics laid out in following text and similar factors.

Consideration of personality harmony between candidate and company for both the hiring of CEOs and other senior executives and hiring by CEOs is increasingly popular. The variety of questions CEOs ask during hiring, as reported in Fortune, tell us a lot about different corporate culture. This approach should similarly apply to retaining counsel.

Model Rule of Professional Conduct 1.16 (a)(3) recognizes the common law rule that as a professional, a lawyer may be discharged by a client at any time for any reason or no reason. The intimate relationship — including sharing confidential material — between a lawyer and his or her client requires personalities capable of working together. It requires mutual trust and confidence. As with our fellow professionals, doctors, whom their patients must trust, personality fit between lawyers and clients is worth spending time and attention on at the start of the relationship.

Organizational personalities

It is no surprise that companies in different industries are likely to have different personalities. Who would expect a startup cannabis business to have the same personality as a regulated public utility? On the risk-taking front, the people in those organizations, and thus the organizations, are likely to have vastly different risk tolerances.

Within a single industry, different organizations may have different personalities. IBM’s organizational personality still bears some influence of its early leaders, the father and son team who shared the name Thomas Watson. (Indeed, the software that won Jeopardy! — Watson — and is being used in other areas, is named for IBM’s early chairs, not for Sherlock Holmes’ sidekick.) Apple still bears the personality stamp of Steve Jobs.

The Watsons of IBM and Jobs of Apple had very different worldviews, and these two companies in the computer industry surely have different personalities. The Watsons were so customer centered they made their salespeople dress like their customers — the uniform dark suit and white shirt of

bankers, their largest customers in the 1950s and 1960s. Jobs, on the other hand, famously relied on a quote attributed to Henry Ford that, if he asked the customers what they wanted, they would say a faster horse. That is, he does not trust customers to come up with innovative ideas.

These attitudinal differences toward customers surely manifest themselves both in negotiating agreements and in resolving the inevitable disputes.

So, too, within a single organization, business units may have different personalities. A given business organization may be a parent to operations in different industries. CBS includes broadcast TV — and within it news, sports, and entertainment — as well as streaming and publishing, such as Simon & Schuster. Would one necessarily expect these diverse businesses to have the same personalities? And after the reunification with Viacom, the diversity of personality types manifested within the corporate umbrella will only multiply or perhaps grow exponentially.

Businesses often distinguish between “front office” (revenue producing) and “back office” (support people). Salespeople and accountants (much less lawyers) in the same company are typically thought of as having different personalities. How often have you heard the legal department described as a cost center?

Legal problems sometimes occur at the organization’s parent company where the personality of the board and C-Suite matter. But sometimes the problems are at the business unit level, involving other personnel. Contracts with vendors to supply goods and services to salespeople and those to supply accountants might both produce documents and disputes. The businesspersons responsible for the matter — salespeople and accountants, respectively — likely have vastly different personalities, and choice of counsel should reflect this.

Personality attributes

One of the earliest widely used personality assessment and classification systems for people is the Myers-Briggs Type Indicator (MBTI), also known as Myers-Briggs. The instrument does not capture all personality traits, but because MBTI was available early and is well known, it has remained popular for 70 years. MBTI has been criticized by newer professionals in the field who often favor OCEANS (explained further below).

Roughly, Myers-Briggs looks at and classifies in its own nomenclature four characteristics:

1. Focused on the world (extroverted) or inner self (introverted);
2. Focused on information taken in (sensing) or interpreting and adding meaning to it (intuitive);
3. Focused on logic and consistency (thinking) or looking at the people and special circumstances (feeling);
4. Focused on deciding and moving on (judging) or preferring to stay open to new information and keeping options open (perceiving).

The modern academic standard in the field of personality classification, now more widely used than MBTI, is variously known interchangeably by the acronym OCEAN (sometimes transposed as CANOE) or Five Factor or BIG Five analysis. The five traits differ in some respects from MBTI, but there is a correlation. They are:

1. Openness to experience
2. Conscientiousness

3. Extraversion-introversion
4. Agreeableness
5. Neuroticism

Companies and law firms can use these tests during the hiring process — or use aspects of them informally during interviews. Some HR professionals are familiar with this; if not, there are also consultants who can help. Companies have personalities that reflect the people in them. Attitudes vary widely depending on the business setting. Approaches to risk (on a scale from avoidance to encouraging), aggressiveness (from competitive to cooperative), and change (from receptive to hostile) vary, among many others. The MBTI and OCEAN tests are not exhaustive.

In the entrepreneurial context, for example, where the consequence of failure may be loss of money, failure may be regarded differently in, for example, the aviation industry, where the consequence of failure may result in the loss of many lives. In the business world and the legal profession, a personality attribute called "grit," usually synonymous with perseverance, is favored, and sometimes regarded as more significant than IQ.

The personality of law firms and lawyers

To illustrate the breadth of law firm personalities, let's look at a few firm (and in one case barristers' chambers) mottos or slogans garnered from their home webpages:

- "Commitment to Client Service. Industry Experience. Collaboration."
- "Creative. Aggressive. Relentless."
- "Our attorneys combine exceptional insight with resourcefulness to help our clients efficiently meet their goals, especially when they face issues of unusual difficulty and complexity."
- "GT [firm initials] Means go-to"
- "Legal excellence. Dedication to clients. Commitment to public service."
- "Advancing Legal Services Through Collaboration, Connectivity and Innovation"
- "We Act on What Matters"
- "A law firm built around people"

Several major firms did not have mottos. Instead, they post on an inside webpage their principles, thoughts, and information on their culture ranging from a paragraph to a page. Several English barristers' chambers listed all the awards they had received instead of mottos.

While self-description is not guaranteed to be accurate, the first two mottos are unlikely to represent the same or even similar cultures. "Collaboration" and "Relentless" probably represent very different cultures (That's been my experience with the two different firms).

Following Marshall McLuhan's insight that "the medium is the message," the firms that avoid short mottos on their home page in favor of fuller descriptions on an inside page may reflect more personality differences than the actual variation among mottos.

Lawyers within a firm are not clones. To the extent that companies select lawyers, not firms, it seems likely that the descriptions represent the median personality, with some distribution above and below. Put another way, even at the "collaborative" first firm above, some lawyers may be more "aggressive" (but perhaps not "relentless"). And at the second firm, some lawyers are likely to be more collaborative than others at that firm. There may even be overlap in personality types among some individuals at each of the two firms.

Law students develop impressions about firm personalities during recruitment, but those impressions are from the perspective of employees, not clients. There seems to be remarkably little published systematic research about firm personality.

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A tale of three counsel

Consider litigation where the organization will need to pay for three senior courtroom counsel. The case involves a suit by a competitor complaining about a team moving to your company from the competitor. This hypothetical occurs in England (where senior barristers are not members of law firms and practice by themselves).

Technically in chambers, where expenses and some governance, but not income, is shared.

One counsel will represent the company and its president. The second will represent a senior officer who led the recruitment and, for a variety of reasons, needs his own counsel. The third will be counsel to the team of employees who moved to your company from the competitor. All defendants will be represented at company expense.

You've decided on the three counsel who will populate your "dream team," but you must decide how to allocate them among the three groups of defendants.

The first lawyer is described by one of the directories as "a fierce courtroom advocate, who will fight tooth and nail for his clients." By reputation and prior experience, you know this advocate is as likely to fight tooth and nail with his clients as well as for them.

The second is an advocate described by the lawyer directories as "having an extremely analytical mind and technical excellence (with) commercial awareness and a client-friendly manner." His personality is characterized as modest.

The third is an advocate described by the directories as "very good to work with, very responsive, and very inspirational; he is incredibly user-friendly and seriously knowledgeable in the area of team moves." He has a paternal, comforting personality. He wrote one of the two leading books on this particular type of litigation.

As the reader may well have deduced in this hypothetical case, the assignment of the first advocate is to the company, the second is to the separately represented executive, and the third is to the relocating team.

Hypothetically, on the morning of the last day of trial, in-house counsel bumps into the leader of the movers and this conversation ensues:

In-house: What did you think of your counsel?

Leader: He's quite nice. The judge treats him much more respectfully than any other lawyer, whether it's ours or theirs. Probably because he wrote the book. But he's not the best questioner;

we even had a little mix-up on direct examination.

In-house: Do you remember how you felt just after the move and when you were sued within days?

Leader: Yes — quite upset and nervous. I'd never changed jobs or been sued before. I was quite stressed.

In-house: And how did your counsel make you feel?

Leader: He was quite calming. Like my grandfather. I felt much better after meeting him.

In-house: How do you think you would have felt if your counsel at that meeting had been the company's counsel?

Leader: I would have left the meeting and jumped in the Thames.

In-house: Now you know why he was assigned to you. All three were in the courtroom and worked as one team. Our side got the brilliant cross examiner, but you and your movers got the gentle personality who was also the author of the book.

Leader: I see that. Thank goodness.

The times they are a-changin'

Personality is not an immutable characteristic. To survive organizations must grow and learn from their experiences. As we heard in The Godfather:

Hagen: Mike, why am I out?

Michael: You're not a wartime consigliere. Things may get tough with the move we're trying.

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Uber is perhaps the leading recent example of an organization seeming to change its personality. Under its founder, its philosophy seemed to be to ask forgiveness, not permission. After its upheaval, its new CEO and GC seem to have adopted a strategy of trying to work things out with regulators, proving they are responsible players. This seems to result in a lower profile. It would be interesting to learn what percentage of outside counsel survived this organizational personality metamorphosis.

Returning to the CBS example, the very public shift from Les Moonves's leadership to Susan Zirinsky's leadership after Moonves was accused of sexual misconduct almost certainly changed the personality at the top and may have had knock-on effects in other positions.

Law firms can also change personalities. For example, market pressure has changed partner compensation from classic "lock step" to a merit-based or "eat what you kill" system — even at some classic New York white-shoe or London "magic circle" firms. This change in firm compensation seems likely to change firm personality, resulting in a more entrepreneurial atmosphere.

Summary

As earlier noted, in general, salespeople and accountants have different personalities. Likewise, transactional lawyers and litigators generally have distinct personalities. Because each category can contain multitudes, an aggressive transactional lawyer may be more direct than a low-key litigator. Justice Kagan advised incoming law students that what makes lawyers great varies with what kind of lawyer they are and discussed the American style of practicing law as being a “problem solver.”

There is a notion, for example, about using separate counsel to litigate a case on one track and to try to settle it on a parallel track. Even if equally qualified and capable in the subject of the dispute, personality would surely strongly influence the choice of who goes on which track.

What to do

Inside counsel need to be sensitive to these attributes in their company’s personality and in the personality of firms. Moreover, the personality attributes of in-house counsel, who will likely manage the legal matter, should not be ignored.

In choosing outside counsel, personality is entitled to consideration, just like quality, price, and expertise are weighed as factors. The scales above (OCEAN, etc.) provide a checklist of attributes to consider in assessing both outside counsel and the client’s personality.

Researching firm and individual personality by seeing how they present themselves on the web, hearing about the experience of other in-house counsel who have used the firm, and conducting in-person interviews, or using the evaluative instruments described earlier may help. Likewise, involving the senior businesspeople who will be affected by the legal matter in the selection process will help.

From the outside counsel’s perspective, the wise outside counsel will select a lawyer whose pitch will include not only the expertise and experience of the firm, but also how the firm’s personality gels with the client’s temperament.

Matching personality characteristics will often be the best course. But it has been said of marriage that opposites attract. Sometimes a synthesis between the organization’s personality and its law firm antithesis will produce better results. Personality analysis may also apply to arbitrators and mediators.

In any event, making these judgments is part of an in-house counsel’s job. Whether formally using an evaluative instrument, such as the framework of OCEAN or Myers-Briggs, or other factors identified in this article, or that occur to you, a systematic approach should be considered. Whether applying a systematic structured approach or a less formal approach, consideration should be given to the role personality plays in outside counsel selection

The leading published source of insight about structure for analysis of firm personality (albeit somewhat academic) seems to be Sarat, A (Ed)., Special Issue – Law Firms, Legal Culture, and Legal Practice (Studies in Law Politics and Society, Vol. 52, 2010). Two articles have relevant insights. E. Chambliss, Measuring Law Firm Culture includes a discussion of a book about the fall of a well-known lawyer in the context of his firm’s transition “from a bastion of the social elite to an aggressive entrepreneurial enterprise." The article also discusses the personality differences

between litigators and transactional lawyers, and notes differences within each group. It reports on some studies of law firms asking, “what holds this firm together?”. Firms differ in their tolerance for aggressive behavior of rainmakers and this affects culture. In the same Special Issue, R. Rosen, Rejecting the Culture of Independence: Corporate Lawyers as Committed to Their Clients, discusses variation among firms, and over time at the same firms, with respect to transactional lawyers viewing themselves as independent voices, to keep the client within the rules, and viewing themselves as serving those clients.

ACC EXTRAS ON… Partnering with outside counsel

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The Modern Partnership: In-house and Outside Counsel (Aug. 2019).

How to Secure Long-term Relationships with External Counsel as a Small Law Department (April 2019).

Sample Forms, Policies, and Contracts

Outside Counsel Guidelines Template (Nov. 2018).

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