

The Operational GC: Becoming a Process Engineer

Technology, Privacy, and eCommerce




Schlemiel, Schlimazel, & Hasenpfeffer
ATTORNEYS AT LAW
Big Shotz Contract Brewery
Give us a contract, we'll multiply it
Read us any rule we'll restate it
we'll let 1000 contracts bloom!
No variation we won't try
Word processing makes it possible
this time, there's no stopping us!
Make all your deals
come true
the GC and you!
TOU
SOW
MSA
SALES
TOS
LICENSE
PRIVACY
PARTNERSHIP
CONTRACTOR
DISTRIBUTION
PROMISSORY NOTE
BAA
EMPLOYMENT
INDEMNIFICATION
NDA
PIIA
DPA

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Technology has created amazing efficiencies in our life and our workplace. We can work from home and stream movies on the train. We can collaborate on documents across thousands of miles and determine the exact location of our pizza that should have been delivered 17 minutes ago. A result of increasing technology usage is that a larger share of our economy is in the form of trade of intellectual property goods. By its nature, intellectual property is a figment of contractual rights, albeit

sometimes embodied within a physical good.

So how do we represent those contractual rights? Thanks to the rise of the word processor and seemingly unlimited memory and storage space, we are free to continually add new clauses and sections to our contracts whenever it strikes our fancy, or perhaps in response to a new regulation, new circumstances, new partnerships and third-party dependencies, or the rise of a new moon.

By contrast, imagine if you had to retype an agreement on a typewriter, perhaps on mimeograph paper, every time you wanted to amend it. Other than a few folks missing the residual alcohol smell when running the mimeograph machine, we rarely bump into folks longing for greater deployment of the 37-pound IBM Selectric typewriter for use in daily contract drafting.

Before word processing software made it easy to compare document versions to each other and create a redline, a junior associate would spend many hours looking for small word changes with each new draft of an agreement. And, thanks to computer and software searching capabilities along with higher density storage and communications, those of us living near the San Andreas Fault now face less risk of being buried under a pile of West Reporters when the tectonic plates next shift. Instead, we will merely have a laptop landing on our big toe.

Thanks to the efficiencies created by all those wonderful technologies applied to legal processes, one might imagine that lawyers are now carefree and available for long, leisurely lunches away from their desks. This could not be further from the truth. Unless technology is applied in a balanced manner, it can create more work than it saves.

Because it is so easy to continually append and modify contracts, we now have Terms and Conditions agreements for everyday services that exceed Shakespeare's plays in length (and perhaps in profundity). "To download or not to download? That is one of the 632 questions."

In addition to the length of contracts growing exponentially, the sheer number of agreements in our personal and corporate life is skyrocketing. It was not long ago when home entertainment consisted of turning on the television or popping a videocassette tape or DVD into your home entertainment console.

Now we need to sign agreements with HBO for this show, Netflix for that series, and Disney+ to keep our kids quiet during those work calls from home. The use of each one of those services involves a separate contract. And, of course, we first need to sign a contract with our internet service provider to access the services, and perhaps our cellular carrier to utilize them when we are out and about.

The rise of software as a service (SaaS) in the workplace means that tasks once performed by a single colleague now require 23 different subscriptions, each of which may have its own nuances, expiration dates, and restrictions. Yes, this combination of services may add up to a lower cost than a human colleague; however, managing the contractual relationships attendant to those services makes in-house lawyers busier than ever.

eWeek reports that, on average, companies use between 129 and 1,071 SaaS applications. That means that there are now between 100 and 1,000 new contracts for companies to contend with, not to mention amendments, change orders, and statements of work.

In law school, we are taught to think of property as a bundle of sticks. When intellectual property is involved, or technology is deployed to create and facilitate fractional ownership and usage of existing

assets (e.g., Uber, Airbnb, Turo), the result is that each asset is now composed of many more sticks, and each stick may be more complicated in order to differentiate it from the other sticks. And who's in charge of breaking the sticks into smaller and smaller components? The attorneys.

In short, the rise of intellectual property and broader adoption of technology means that in-house counsel have many more contracts and far longer contracts than they have ever dealt with before. Technology has not yet saved us — rather, it has buried us. It's time to make technology work for us as in-house attorneys to balance the scales.

For many years, we have had the technology to draft more and more agreements, route them around, and ask for signatures. Perhaps we have shifted from floppy disks to SharePoint and from email to Slack; however, the problem has never been a lack of agreements that need to be interpreted and carried out by our organization. Rather, what we have lacked are technology and processes to understand and implement this higher volume of longer agreements.

As an in-house counsel in a modern organization, you need to start thinking of your role as being a process engineer, not just a bespoke advisor. Those who cannot change their thinking will be buried or put their organization at significant financial and compliance risk.

So, what is the first step in process and systems thinking? Whenever you see a document, such as a contract, flag the actions that need to be taken across your organization to implement it. Ask your colleagues who will take responsibility for those actions and what systems will be in place to track and measure how we are doing at completing the right actions within the right timeframe. Just as those setting up a physical assembly line would include quality checks, we need to do the same things with implementing our burgeoning quantity of agreements.

Next, we need to understand all the inputs and drivers for our organization. As for contracts, that means understanding all the agreements that we already have in place. Limiting our process focus to new agreements would be like failing to manage all our existing employees and failing to serve all existing clients. Real businesses do not get a do-over where they can jettison their existing employees, contractors, partners, customers, suppliers, and financiers while establishing new relationships with each one from scratch.

Fortunately, certain technologies can help you get caught up, although it is dangerous to rely on them blindly. For example, machine learning systems may be able to help you parse through all your existing agreements and identify key terms that you need to operationalize.

Of course, just like the factory assembly line, the output of these machines needs to be inspected by trained personnel, either provided by the vendor or through augmentation of your legal team with skilled, detail-oriented, and thorough subject matter experts. Think of technology as part of an assembly line, which needs to be validated and then connected to the next operational step in your organization.

Likewise, technology and systems thinking can be applied to litigation. Are there certain types of cases that regularly arise for your organization? Use technology to survey the dispute resolution clauses in your agreements to ensure that they are tailored to resolving those more efficiently.

And consider deploying technology systems like JusticeBid to bid out your legal work, or applying statistical methods like those employed by Value Strategies to better align incentives with those providing outside legal services to you.

Properly deployed, systems thinking combined with the right technology can give you both greater accountability and lower expenses. To be a systems thinker, you should be asking key questions whenever you encounter a new problem:

- Am I likely to see this problem again?
- Before designing a process, am I seeing all the contours of the problem? For example, am I including all the related amendments and statements of work when evaluating the contractual parameters of a relationship?
- What happens next after my input or review as a lawyer? Does the process I designed properly connect to that next step?
- How will I ensure that subject matter experts are verifying processes and technology?
- Am I using technology that others in the value chain in my organization can readily access?
- Are there existing procedural steps for tools in other departments in my organization that I can repurpose for the processes that I need to put into place? If so, then I get leverage out of the presence of other experts in my organization.

When you went to law school, you probably did not imagine working on an assembly line. However, adopting that mindset is the key to identifying technologies and processes that will empower your law department to keep up with the growing complexity and speed of your business.

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Neil Peretz has served as general counsel of multiple companies, particularly in the financial services and technology industries, as well as a corporate CEO, CFO, and COO.

Outside of the corporate sphere, he co-founded the Office of Enforcement of the Consumer Financial Protection Bureau and practiced law with the US Department of Justice and the Securities and Exchange Commission. Peretz holds a JD from the University of California, Los Angeles (UCLA) School of Law, an LLM (master of laws) from Katholieke Universiteit Leuven (where he was a Fulbright Scholar), bachelor's and master's degrees from Tufts University, and has been ABD at the George Mason University School of Public Policy.

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