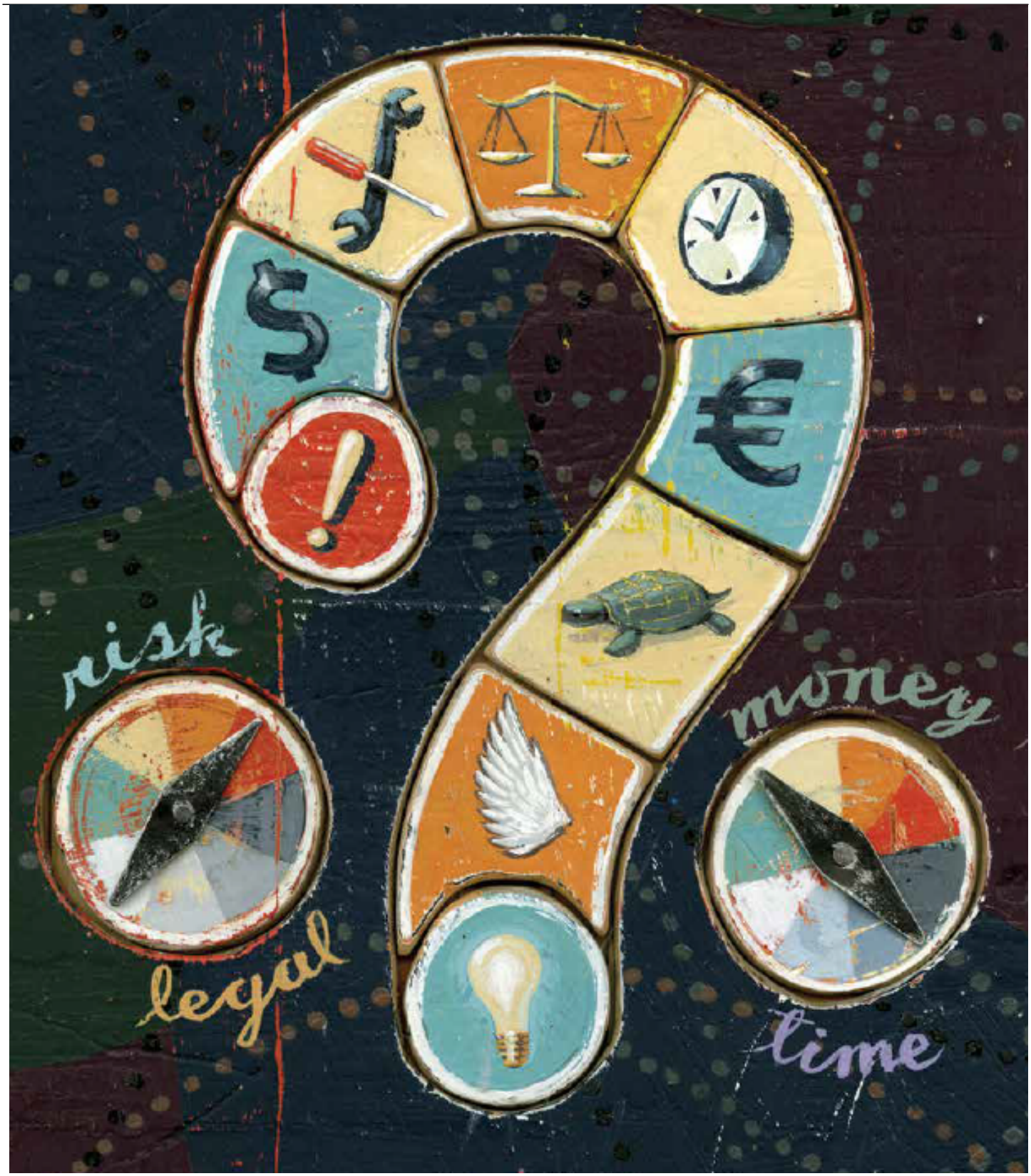


Understanding the Business Means Knowing How Your Company Makes Money

Law Department Management



CHEAT SHEET

- ***The bottom line.*** Understanding the business has become a rallying cry for legal departments — encouraging counsel to learn more about the products and industry of their business and how it makes a profit.
- ***Prioritize.*** Assess the monetary value of a legal matter to determine its level of priority on your to-do list.
- ***Fast track.*** If a request can be solved in fewer than 30 minutes, address it immediately, otherwise rank it by priority.
- ***Needed expertise.*** Ensure tasks are being handled by the appropriate counsel – if someone is over - or underqualified for an issue, it is a waste of resources.

Over the past couple of years, the mantra for corporate counsel has been to understand the business. This seems to be a late reaction to the common practice over a decade ago when the legal department was often seen as the “department of no.” In those times, commercial people in a company tried to avoid legal as much as they could, as the project would probably get stranded or considerably slowed down at best. Much has changed since!

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In general, when lawyers state that they need to understand the business, they are referring to the products the company delivers or the sector in which it operates. For lawyers, it can be hard — sometimes nearly impossible — to understand the products their company produces. How could a lawyer ever understand complex industries such as the chemical industry, the pharmaceutical industry, or the electronics industry without years of study?

Of course, the lawyers working in such highly complex sectors do know the common contracting practices, how to protect intellectual property, and so on. But this does not constitute “understanding the business.” Companies don’t have legal issues; they have a business to run. Understanding the business means that lawyers need to better understand how their companies make money. To be seen as business enablers rather than a box that needs to be ticked, lawyers should assess the complexity of each issue, its contribution to profitability, the potential lost opportunity costs, and the level of expertise needed before starting to work on any matter or request.

Moving beyond first in, first out

Today most corporate counsel are assigned to a business line, whether it’s a product or a geographical location. In many instances, a lawyer is part of a “product team.” This ensures short lines and good communication between the lawyer and the business. In addition, many corporate legal departments are under constant pressure to reduce headcount, so it is not unusual that the in-house team is swamped with work. Most corporate counsel are in a certain mode: They provide a service at the needed pace. If a question lands on their desk, then they carry on solving it because that is their job.

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This is because they are adept at at painting a picture of how much is riding on getting this matter dealt with yesterday. Polite requests tend to end up at the bottom. This system, however, doesn't take into account what a legal issue is worth to the business in comparison to all other issues waiting to be handled. This approach also doesn't consider who would be the best person to handle each issue based on workload and expertise.

The following model can help ensure that the issues most contributing to the business can be done first at the right level of competence. This model can also help law departments unlock how to evaluate each issue from the eyes of the business, and at the same time, get the most suited person doing the job, which will potentially release a tremendous amount of value.



Assess the complexity of the issue

When a need for a legal service arises and lands on the desk of a corporate counsel, the first step is to determine if the request can be solved in fewer than 30 minutes. For example, a counsel receiving a phone call from "Dominic" in the sales department should be able to assess whether it is a relatively simple question he can answer in the next half hour. The reason to do it this way, instead of telling Dominic to turn straight to a work allocation center or receive a queue number, is that nobody benefits from turning service into a bureaucratic circus. Service to the business is still the first priority. Achieving a 100 percent efficient resource allocation scheme is not a goal in itself; it will only lead to frustrations. An inflexible system fails because of a growing disconnect and disconnection.

A more complex issue, where it is clear it will take much more than 30 minutes to provide an answer, should be handled differently. For the legal department to truly serve the company in a way that adds the most value, it is crucial to take a look at each matter to first determine the level of priority and the right person to deal with it. Follow these three steps to determine profitability, then the cost of lost opportunity, and, finally, the level of expertise required.

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Step 1: Determine profitability

Issues contributing the most to the bottom line of the company have priority over issues that contribute less. In short, the more profit at stake, the more priority a matter will get. This means a corporate counsel needs to assess the monetary value of a legal matter. This is where understanding the business becomes essential. Understanding the business is usually understood to be about industry sector expertise or knowing what the company produces, how this is priced, and who buys it. However, as stated earlier, understanding the business goes beyond this: It is about understanding business economics, how the company actually makes money, and how any legal issues affect this process.

Companies are more concerned with opportunities, cash-flow, and profit than they are with costs. The direct costs of a legal matter are often not the most relevant economical part of the business. On the simplest level, if an issue arises where a litigation might be in the cards, then the calculation should be made as to how this will bring in money — or prevent a loss — taking into account not only the direct legal costs to the business but also the effect in terms of revenue and cash-flow.

To illustrate this, imagine the real estate lawyers in the in-house legal department of a company. Two issues land at the same time: The business is asking for an analysis of the risk allocation for a new parking garage and a review of a contract for maintenance of all elevators that will be outsourced to a new maintenance company. If you don't have the resources to deal with both issues at the same time, which one do you do first? In order to decide, you first must dig a bit deeper. Say that you discover that the parking garage will be a paid parking garage. This means there is an opportunity for the business. The sooner a money-maker is ready, the better. Of course, there are knock-on effects of every legal issue, but if there is no danger to life or immediate and sizeable penalties for not quickly having the contract for maintenance of elevators in place, then the parking garage issue should get priority.

Determining the dollar value and priority of a legal issue is not what lawyers are usually trained to do. Lawyers typically do not think about their work in monetary terms; they aim to deliver a watertight legal solution. But practice makes perfect. Over time, after enough practice, it should be a knee-jerk reaction to see the monetary component of any legal issue. Learning how to quantify it, and applying it routinely, helps add value to the business. The same thing goes for risks. In many cases, quantifying the risks and translating that value into dollars isn't especially challenging.

> Time might often be the most crucial contributor to the bottom line of a company.

Step 2: Determine cost of lost opportunity

If you are evaluating the contribution to the bottom line of a legal issue, then this will result in an understanding of how much it is worth to the business. This doesn't mean, however, that the issue is necessarily a priority. To determine if an issue should be dealt with before other issues so that we can have our corporate counsel working on the right matters in the right order, we need to consider another factor: time.

A matter is often perceived as urgent when there is a deadline looming or when colleagues are hindered in their work until the issue is solved. But urgency from the perspective of the business most often comes down to the simple adage "time is money."

Time might often be the most crucial contributor to the bottom line of a company. If your company has made investments in a project or a new product, which is halted, then every day means lost turnover while still carrying the cost of finance. If the delay continues, the chances that a competitor catches up might mean that not only all potential future income tied to the project is lost but also the entire investment. Understanding the monetary impact of time is important. What opportunity will be lost for the business by not dealing with a matter straight away? For a company, the speed to market of a product, service, or endeavor that is set to generate income is often as important — and in digital businesses more important — than perfection or precision.

Legal work connected to the creation of an autonomous car might not seem that urgent since the car will hardly be here tomorrow. But if the time to market is three years, then issues should be resolved now or the product launch will remain three years away until a competitor has taken the envious position of being the first to enter a market. A decreased speed to market can hurt tremendously in terms of lost opportunity. A legal issue can play a part in delaying the business, and corporate counsel should know the cost of the delay.

Let's take another example: You are a lawyer in the fashion retail business, and this week you are faced with dealing with a dispute with a supplier because a significant order had been delivered late. At the same time, the business wants you to look at the acquisition of an exclusive licensing agreement to use an entertainment character on your brand's clothing. It would be tempting to deal with the dispute because lawyers tend to find contentious issues the most pressing. However, the delivery has already been made, and apart from delivering damages or a discount, the dispute will not generate one cent more in turnover. The licensing agreement, on the other hand, does not only present the opportunity to generate revenue, it is also very time sensitive. The market is a fickle thing and being there first can make or break a new endeavor.

Not being able to do something is usually the most common impactor on the bottom line. However, lawyers tend to focus on quantifying the impact of continuing to do something that might have adverse consequences. But even here, the risks are seldom quantified. The penalty for noncompliance is usually well advertised by the law, authorities, or courts. Lawyers view their primary task as avoiding noncompliance. When the General Data Protection Regulation (GDPR) was announced in the European Union, corporate lawyers created task groups and freed up resources to cover the widespread relevance that GDPR could potentially have in all lines of business. For most companies at that time, the consequences of not being 100 percent compliant with privacy policies or websites was in fact clear and easy to quantify. The potential fine, if discovered and if enforced (and those were two big ifs in the first year following the implementation of GDPR), is clearly stated in the directive. The cost to the business of the issues that were not assigned the same resources or priority might have been far greater.

Step 3: Determine expertise level required

The third step is about "horses for courses," a British proverb that means different people are suited to different things. Like outside counsel, in-house counsel have an hourly cost structure. If we appreciate the hourly costs with every action taken, and how we should apply our time to the right tasks, each corporate counsel will drive more value for the organization. But this is not only about the cost of resources, it is also about the cost to the business when issues end up on the wrong desk, either because the counsel is overqualified or because she is not experienced enough. The work typically ends up on the desk where the request is first received.

The work will get done as quickly and as well as possible without considering if someone else is more

suited, has more time, or if other tasks have higher priority. If a senior corporate counsel is busy with matters far below her competence level, just because the issue happened to have landed on her desk, then it is a waste of resources. If a senior in-house counsel is stuck working on issues that can be done by a junior lawyer simply because the request landed there first, then this is preventing the same counsel from taking on the tasks that few others can do. Maybe those tasks are even being sent needlessly to an outside counsel.

This all sounds pretty obvious, but in reality, many legal departments will find it hard to implement some form of ticketing system or other centralized work allocation in order to ensure skills are used at the right level and that some are not experiencing work overload while others have little to do. This is because corporate counsel, like partners in law firms, value autonomy. The idea that someone else would have a say in how their daily work is structured would meet resistance in the initial phase. But ensuring that skills are being used in the right place by implementing some form of procedure is the only way forward in an increasingly busy department with resource constraints.

In-house teams have valuable resources, but they are not always used in the right way and are not always made to feel appreciated. An optimal workflow is key when time is precious. Therefore, the required level of expertise must be a part of any assessment that a corporate counsel or legal department should make regarding every legal issue.

Unlocking value

To simplify this three-step model, we can compare the legal department to a train station and a legal department's work to an oncoming freight train. The carriages need offloading and the goods further handling. The way work is being handled in many legal departments today is that they start with carriage number one and proceed to carriage number two when ready, and so on. But this makes absolutely no sense if we do not know what is in each carriage and are able to determine the value of it. Having a business-focused guideline when establishing the level of priority among work and the right person to deal with it is not only important from a value creation point of view, it also makes for a happier work environment for today's hard-pressed corporate counsel.

The corporate counsel's client is the business. Understanding the business is not about knowing your company's market but how your business makes money. Appreciating the business economics will lead to a more efficient and better utilized legal department that has a more egalitarian workload with people who feel challenged at the proper level. This, in turn, will make the legal department and each corporate counsel more appreciated by the business where it really counts

ACC EXTRAS ON… Understanding the business

ACC Docket

Earn Your Seat at the Table by Maximizing Business Relationships (May 2019).

In-house Counsel: The Face of the Company (Jan. 2018).

A Seat at the Table: From Lawyer to CEO? (July 2017).

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James A. Merklinger oversees the institute In-house Counsel Certification Program and its Data Steward Program, assessing law firm data security practices. Having served ACC for over 20 years in a variety of key roles, Merklinger was named to the position of president of the ACC Credentialing Institute in 2017. In this role,

he is responsible for establishing standards and advancing ACC's ability to establish an in-house counsel credentialing program. Merklinger is also responsible for leading the ACC Data Steward Program to evaluate the security profile of law firms.

Previous to his role as the Institute's president, Merklinger served as ACC's vice president and chief legal officer. He represented ACC on all legal issues affecting the association, including mergers with the Australian Corporate Lawyers Association , the Hong Kong In-house Counsel Association and the Corporate Counsel Middle East. Merklinger advised the organization on meeting the needs of the in-house counsel community. He had also served as ACC deputy general counsel and vice president - legal resources, overseeing the development of ACC's array of resources to help in-house counsel do their jobs. In this position, he worked with 18 volunteer leadership committees, organized by practice areas, which contribute to the strategic development of the association's resources and education programs. Merklinger spearheaded ACC's regular benchmarking studies to provide members and the legal industry at large with key trends related to the in-house counsel practice and outside counsel management.

In addition to his non-profit legal experience, Merklinger served on the board of directors for the Tourette's Syndrome Association of Greater Washington, DC, the board of directors of the ACC Foundation, and President of the Washington Irish. Prior to joining ACC, he served as in-house counsel for DIAD, Inc. in Reston, Virginia. While at DIAD, he provided counsel in a variety of substantive areas, including commercial law, software licensing, disability law and issues affecting entrepreneurial development. Merklinger has served as faculty for CLE programs throughout the United States, Canada , Europe and the Middle East on a variety of in-house topics. Merklinger graduated from Wofford College and the University of South Carolina School of Law.