

CONVERGENCE: IS IT JUST A NUMBERS GAME?*

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I. Introduction

As corporate law departments wrestle with the expectations of corporate management and increasingly significant budgetary restrictions, they must do so while satisfying the responsibilities to provide counseling and other types of legal service to their corporate employers. Those responsibilities have grown and become more complex in recent years, at least in part due to the myriad corporate scandals and the enactment of the Sarbanes-Oxley Act of 2002 and many other initiatives both legislative and regulatory.^{1/} Most, if not all, law departments rely on outside lawyers to provide at least some of that legal service and, in fact, the cost of outside legal service often exceeds the cost of providing legal service by in-house counsel.^{2/} Accordingly, in-house lawyers look at companies' use of outside counsel as a possible area of unrealized efficiency and cost control.

DuPont Legal has earned a great deal of attention for its ten-year-old program called "convergence," which it now refers to as the

DuPont Legal Model (the Model). *See*, for example, "Five Years into the Experiment: An Evaluation of DuPont's Legal Model," 16, no. 4 *ACCA Docket* (1998) 24. The Model represents, for many observers, the most far-ranging approach to the management of legal service on behalf of a corporation by its law department.

Due to the attention it has gained, the Model has served as an approach that other law departments might want to emulate.^{3/} How might another law department do so and be successful?

While DuPont's efforts have achieved considerable renown, some observers may not appreciate all aspects of the program. The reduction by DuPont Legal in the number of law firms with which it works has been the most notable, and the most noticed, element of the Model, even to the point that some may think that the Model consists of no more than that, and by simply reducing the number of firms, a law department will achieve the cost-control goals that DuPont did. For example, in a recent article

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describing a panel discussion among in-house counsel regarding "what general counsel need and want from their law firms," the first of four topics listed by the author as covered in the discussion was "[c]onvergence (concentrating work among fewer law firms)."/4/

That represents a far too narrow view of DuPont Legal's program. The reduction by

Is the Model a question only of cutting down the number of law firms that represent a company? Can a law department simply, by reducing the number of law firms that represent the company, emulate DuPont Legal's success?

If that is not so and the Model is more than just a reduction in the number of law firms with which DuPont works, what does it encompass? What are the characteristics that account for its longevity and success and distinguish DuPont Legal's program from less successful efforts of other law departments to achieve similar goals?

II. The DuPont Legal Model

In order to understand the answers to those questions, you need first to understand the breadth of the Model./7/ The reduction in the number of law firms was only the first, albeit the most publicized, step in the effort, but DuPont Legal identifies five "core elements" of the Model:

DuPont Legal in the number of law firms (and providers of other law-related services) with which it planned to work was but one facet of an integrated program that it labeled "convergence."/5/ The goals of that program are to "appl[y] business principles to DuPont's legal practice and [develop] innovations in legal networking, technology, and work processes."/6/

- (1) strategic partnering;
- (2) early case assessment;
- (3) technology;
- (4) alternative fee arrangements; and
- (5) strategic budgeting./8/

What do those components entail?

Strategic partnering, as DuPont Legal conceptualizes the term, recognizes that legal work is performed better and more effectively through collaboration and teamwork, the value of which has been demonstrated. "[B]y and large, the most interesting ideas come about through interaction. Multidisciplinary teams spark creativity, provide additional insight and points of view, and increase exposure to the big picture."/9/ The strategic partnering paradigm designed by DuPont Legal calls upon outside counsel "to view the legal problem from a broader, less parochial perspective" while the inside attorney "assumes a more constructive role as the lead strategist."/10/

The early case assessment (ECA) represents DuPont Legal's effort "to shift the focus from processing the lawsuit to resolving the business problem" by "redefin[ing] what

constitutes a favorable case resolution.”/11/ The ECA also relies on collaboration and a long-term, effective relationship between DuPont’s outside counsel and its in-house lawyers to serve as the basis for a well-conducted analysis that incorporates an appropriate level of knowing acceptance of risk appropriate for the matter at hand.

Technology serves as a facilitating capability for the Model. It enables quicker, more effective knowledge transfer and communication than is otherwise possible. Simultaneously, the technology tools that comprise critical elements of the Model eliminate some labor-intensive tasks that otherwise might drain legal resources and increase costs.

The inefficiencies of the hourly rate have been apparent to lawyers for quite some time./12/ DuPont Legal intended the Model to incorporate a significant shift to “value-based” billing because, “like other clients, [DuPont] does not want to buy time; it wants to buy results.”/13/

Strategic budgeting, the fifth core element of the Model, both supports and relies upon the other elements of the Model. It requires that the company’s lawyers take into account, when planning the company’s litigation strategy, the value of the matter to DuPont. Development of a litigation plan is another important component of the strategic budgeting process./14/

III. The Model’s Success

Even a summary of those components of the Model, however, does not necessarily account for the success that DuPont Legal has enjoyed through its deployment of the Model. DuPont Legal says that it has realized the following benefits by implementing the Model: cost savings, reduced cycle time, better forecasting of staffing needs, leveraged purchasing power, more diverse representation, better distribution of work, better utilization of legal assistants, the establishment of more effective partnering

relationships, improved quality of the legal service, and a more strategic role for in-house counsel. Can the components of the Model lead one to such gains by themselves? Not likely. To understand that success, we must analyze more fully some of the components, particularly the reduction in the number of firms, the use of technology and alternative fee arrangements, and recognize that the Model’s success ultimately hinges on other factors.

Let’s start our analysis by examining DuPont Legal’s recognition of the value of communication between the in-house and outside attorneys and paralegals and, in fact, among all the professionals who are involved in representing the company whether in-house or outside. The facts of current legal practice make such communication an afterthought in many situations./15/ so DuPont Legal devoted effort to institutionalizing and facilitating communication in several ways.

The department undertook to use technology to allow those professionals, whether in one of its law firms or in the department, to share information and knowledge and to better collaborate among themselves./16/ While the specific technology applications have evolved, DuPont Legal recognized very early that the success of its efforts would depend on the abilities of its lawyers and its paralegals to work closely with outside counsel, which, in turn, would depend on the quality of the communication and information sharing that it could institutionalize as part of the program.

DuPont Legal also realized that its ability to manage the legal work might be adversely affected by having too many law firms and other firms working with the company on its litigation. The more the company’s outside legal work is broken up, the more difficult would be the law department’s management task. As a first step, then, the law department decided to reduce dramatically the number of law firms to which it would assign work, at least on a routine basis.

Ultimately, DuPont Legal selected approximately thirty-nine firms to be its "primary law firms" (PLFs) for litigation.¹⁷ DuPont Legal also selected nine service providers and several consultants to be members of the network (Network).¹⁸

The reduction in the number of firms and suppliers¹⁹ enabled DuPont Legal to reduce the administrative burden associated with managing relationships with a multiplicity of firms. That reduction also allowed the law department to plan for regular meetings of the Network.²⁰ Those meetings facilitate much communication between DuPont Legal and the PLFs and preferred service providers (PSPs), and among the PLFs and PSPs, though less formal communication takes place between meetings.

What sorts of benefits can DuPont Legal derive from using fewer firms? How did that reduction enable it to reduce its own administrative burden?

With fewer firms handling the company's litigation, the average amount of work available for each firm increases. With a higher average workload, the firms can afford to identify teams of their professionals who will work on DuPont matters more consistently, thereby acquiring greater institutional knowledge of the company's business and legal matters. In addition, the larger workloads enable the firms (working with DuPont Legal) to identify efficiencies in how they work for DuPont that might not be possible or as evident at lower work levels.²¹ Finally, by having the latitude to assign greater amounts of work to each of the fewer PLFs in the Network, DuPont Legal assumes a position from which it might better negotiate alternative fee

arrangements, thereby aligning its interests and those of the PLFs more directly than it can if it pays them solely on the basis of the billed hour.

The smaller number of firms also serves DuPont Legal's interest in developing new approaches to managing the legal affairs of the company. DuPont Legal personnel were better able to enlist outside lawyers from the PLFs to participate in its efforts to develop the ECA, for example. The higher average workload of the PLFs, compared to what the firms might have reasonably expected prior to the reduction in the number of firms, means that each firm can afford more readily to invest in DuPont Legal's initiatives that transcend individual cases.

DuPont Legal's success seems to transcend the Model itself. I believe that the success is more closely tied to how DuPont Legal implemented the Model than to the Model's elements. That implementation sets DuPont Legal apart from most corporate law departments.

First, the Model was initially deployed in the early 1990s; DuPont Legal celebrated the Model's tenth anniversary last year.²² Most law departments do not have patience to persist with one approach for such a long time. More typically, when a company's general counsel changes, many management approaches of that law department change also.²³

A second success factor for the Model is that DuPont Legal continually searches for additional improvements in how it, the PLFs, and the PSPs together deliver legal service to protect the company's interests.²⁴ In doing so, DuPont Legal applies Six Sigma methodology to identify potential improvements and to gauge their actual

effect./25/ With that methodology, DuPont Legal creates metrics by which to monitor the Model's impact, as well as the performance of the PLFs. The metrics provide the basis for year-to-year comparisons of achievements as well as enable DuPont Legal to benchmark the PLFs against each other./26/

Finally, a third factor that I believe supports the Model and establishes the means for its success is that DuPont Legal recognized very early that true partnering is a two-way street. While the client is paramount in the attorney/client relationship by virtue of the buyer/provider relationship and, perhaps more importantly, by virtue of professional standards applicable to the representation, DuPont Legal expends resources, including funds, to support the PLFs. It seeks ways that the PLFs themselves can benefit from adopting the approaches inherent in the Model./27/ Strategic partnering, in DuPont Legal's view, includes a "mutual commitment to each other's financial success" and that this commitment is "the driver that makes the Model work."/28/

IV. Summary

The Model is a multifaceted structure for the delivery of litigation-related legal service for a large industrial corporation. The reduction in the number of law firms that handle that litigation is the most publicized aspect of the Model. That reduction, however, represents only a part of the entire package and, perhaps, not the most important part.

The metrics that DuPont Legal developed in the course of implementing the Model/29/ serve as a gauge for the Model. In that regard, they constitute an important aspect of the Model in at least two respects — in addition to enabling DuPont Legal to monitor the continuing utility and value of the Model, they represent a significant change in how the lawyers for DuPont (both inside and outside) think as they represent the company. The metrics also allow for

successful operation of the continuous improvement process that DuPont Legal incorporated into the Model.

How should we answer the question posed in the title of this article? The Model is a question of numbers (to a large degree), but not just numbers and certainly not just the number of law firms. "Convergence" is much more than a concentration of legal work among fewer law firms. Rather, by using numbers to manage and measure the effectiveness of its management and delivery of legal service, DuPont Legal has used numbers much more strategically than do most law departments.

What lessons might another law department draw from DuPont Legal's experience with the Model? First, the benefits that DuPont Legal has enjoyed result from much more than a simplistic reduction in the number of law firms that represent the company; the Model is a multifaceted approach to the delivery of the legal service that the company needs. Second, the return on a law department's investment in a program like the Model may not manifest itself for some time, so a department must adopt a long-term perspective when approaching this subject. Third, the department will be able to measure its progress (if progress results from the effort) only if it designs appropriate metrics into the process.

With all those cautions, however, the benefits that DuPont Legal has realized serve as appropriate challenges to other law departments. By adopting similarly holistic, broad-based approaches to the question of controlling the costs of providing legal service to a company, another law department might achieve similar gains.

The success of an approach based on the Model is not limited to large law departments. While a smaller law department might have fewer resources to apply in managing the legal service for the company, the Model contains many ideas and techniques that such a department can apply

even with fewer resources than DuPont Legal has available. The concept of strategic partnering, the development of metrics, and some of the other modules of the Model can be easily applied by a law department of any size.

Moreover, the enactment of the Sarbanes-Oxley Act along with the heightened scrutiny of corporate activities because of that statute and the various scandals of the past few years will result in greater need on the part of corporate law departments to manage that legal service more effectively and be able to demonstrate that they are doing so. By adapting the Model to their own situations, virtually all law departments would be better situated to make such a showing.

ENDNOTES

/1/ "One year after the Sarbanes-Oxley Act became law — and with today's implementation of controversial rules governing their own conduct, lawyers are still navigating its labyrinthine standards for their clients." L. Henning, "Taking Stock of the Sarbanes-Oxley Act: Lawyers Learn to Live with, and Profit from, the Law," *Legal Times* (Aug. 5, 2003), posted at <www.law.com/jsp/newswire_article.jsp?id=1059980409467>.

/2/ PricewaterhouseCoopers reported in its 2002 Law Department Spending Survey that "inside legal spending was a median of 38.8 percent of total legal spending" among the 207 law departments surveyed. See <[www.pwcglobal.com/Extweb/ncsurvres.nsf/0cc1191c627d157d8525650600609c03/1786cb1ac2de827f85256c53007a502d/\\$FILE/2002%20LDSS%20-%20Executive%20Summary%20-%202002-10-04.pdf](http://www.pwcglobal.com/Extweb/ncsurvres.nsf/0cc1191c627d157d8525650600609c03/1786cb1ac2de827f85256c53007a502d/$FILE/2002%20LDSS%20-%20Executive%20Summary%20-%202002-10-04.pdf)>.

/3/ See, for example, R. Dager, "Model Behavior," *The Recorder*, Nov. 20, 2003, at 1. See also Coscarelli, "At DuPont, a Better Way to Pay for Legal Services," *Star Ledger*, Oct. 21, 2003, at 77.

/4/ See S. Viola, "What Makes General Counsel

Happy," posted at <www-lawmarketing.com/publications/news/pub456.cfm>.

/5/ One author used the term "convergence" in a slightly different way in another context, to recognize how "the boundaries between each [of the fields of professional services are] becoming less distinct, and each industry [is] increasingly encroaching on others' territory." Dawson, 35 *Developing Knowledge-Based Client Relationships: The Future of Professional Services* (Butterworth-Heinemann, 2000).

/6/ Sager, "Toward a Common Goal," 15, no. 4 *ACCA Docket* (1997) 13-24.

/7/ See <www.dupontlegalmodel.com>.

/8/ See "Leaps and Bounds: Moving Ahead with the DuPont Legal Model" 1 (DuPont Legal, Sager ed.) (hereinafter "Leaps and Bounds").

/9/ Innovation 39-40 (HarperBusiness, Kanter, *et al.* eds., 1997).

/10/ "Leaps and Bounds," at 11. Think of the in-house attorney as the quarterback of a team the members of which include outside counsel. See Lauer, "In-House Counsel, Executive Must Play Strong Role; To Win in Litigation, All Players Must Take the Field," 2 no. 8 *U.S. Bus. Litig.* (Mar. 1997) 16.

/11/ "Leaps and Bounds," at 25.

/12/ See "Current State of the Profession," which is Part 1 of the "ABA Commission on Billable Hours Report" that appears at <www.abanet.org/buslaw/billable/toolkit/bhcomplete.pdf>; and Ross, *The Honest Hour: The Ethics of Time-Based Billing by Attorneys* (Carolina Academic Press, 1996).

/13/ "Leaps and Bounds," at 31. The shift to value-based billing may be the least-developed aspect of the Model.

/14/ *Id.* at 36-37. See also Lauer, "The Evaluation of Cases Is a Critical Element of Litigation Management," 9 *In-House Practice & Management* (Altman & Weil, Jan. 1999).

/15/ See Lauer, "Maybe Humpty Dumpty Was a Lawyer," *L. Dep't Mgmt. Adviser* 5 (Dec. 2001).

/16/ "Leaps and Bounds," at 17.

/17/ That number has fluctuated over the years as the company has added firms to and deleted firms from the group.

/18/ The members of the Network that are not law

firms are known as PSPs. The PSPs provide various types of services and products in the litigation context, from trial theme development to temporary attorneys and paralegals, to software and technology, as well as other services and products.

/19/ DuPont Legal reduced the number of suppliers of various products and services for its legal work at the same time it reduced the number of law firms that would handle that work. Suppliers included suppliers of temporary professionals, vendors of software and other services, and products. By including within the Network the PSPs, DuPont Legal was applying the concept of “unbundling,” in which “new entrants” to a professional service industry, “rather than competing head-to-head with existing suppliers for the full range of services offered, have selected a single aspect of those services in which to offer specialized competition.” Dawson, *supra*, n.5, at 37. As that author noted, “[t]hese pressures have come just as much from the client side ... with clients seeking more specialized knowledge, greater value, and the ability to compare more directly the pricing and value of the offering’s various elements.” *Id.* Outsourcing clearly represents a recurring theme of the Model.

/20/ The Network now meets regularly.

/21/ The relationship that DuPont Legal works to develop with each PLF and each PSP constitutes the “strategic partnering” to which I referred above. The PLFs and PSPs are all critical to the success of the Model.

/22/ See “DuPont Legal Model: 10th Anniversary,” a special supplement to the June 2003 issue of *Corporate Legal Times*.

/23/ The current general counsel of DuPont, Stacey Mobley, is the third general counsel of the company during the Model’s existence.

/24/ As Mr. Mobley put it, “we do not pretend to have the perfect solution. [The Model] is, in fact, a dynamic process with continual improvements and refinements.” “Leaps and Bounds,” at ii.

/25/ See “DuPont and the Cult of the Six Sigma Samurai,” *Corporate Counsel* (Aug. 2000). See also Lauer, “Measuring the Value of Metrics,” 16, no. 3, *Corporate Counsel’s Q.*, July 2000, at 50.

/26/ See “Leaps and Bounds,” at 47-48.

/27/ DuPont Legal has gone so far as to place full-page advertisements listing the PLFs, and it has created a marketing function for the PLF Network. Finally, DuPont Legal created economic incentives for the PLFs — “challenge awards” — by which it awards up to \$2 million to the PLFs and PSPs annually in the aggregate. “Leaps and Bounds,” at 49.

/28/ *Id.* at 2.

/29/ Dupont Legal introduced its metrics in 1996, several years after it had unveiled the Model. “Leaps and Bounds,” at 37. Those metrics then served as the precursor to and the platform for DuPont Legal’s introduction of Six Sigma principles into the Model in 1999. ■