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Past Trends and Future Prospects . . .

The Development of the Corporate Law Department and Its Consequences

For many years, companies did not have law departments or in-house counsel. If and when the need for legal service arose, they functioned much as did individuals, retaining attorneys in private practice to handle specific matters.

As their needs increased in frequency and sophistication, they began to call upon law firms more and more frequently and for greater and greater amounts of help. In many cases, outside law firms served as their corporate clients' "general counsel" in that they responded to issues that arose on a day-to-day basis, often on call of the senior executive with whom they generally had a longstanding business relationship.

This dynamic is much less frequently the reality now. With the development of the in-house bar, the entire legal profession has changed. Those changes continue and those changes have led to broader changes in the legal profession, though their ultimate impact is yet difficult to discern.

Prologue: Some History

In the 1940s and 1950s, most lawyers were employed by various governmental entities or practiced at law firms but companies did begin to hire lawyers as employees to function as counsel. Nonetheless, private practice in a law firm environment was considered the premier situation for a lawyer.

There was a stereotype of an in-house lawyer at that time that he (female attorneys were much less common than they are now) was not as capable as those in private practice and that an attorney who couldn't cut it in a firm would be "put out to pasture" as in-house general counsel for a client of the firm.

The *quid pro quo* for such a placement (perhaps only implicit) was the general counsel's eternal gratitude to the firm. That gratitude would virtually guarantee a continued flow of the client's work to that law firm.

According to a former general counsel, "[o]ne indicia of th[e] low level of esteem [in which in-house attorneys were held by outside counsel] was that the outside bar frequently and deridingly referred to corporate counsel by the very un-PC term (in today's jargon) as 'kept women.'" C. Liggio, "A Look at the Role of Corporate Counsel: Back to the Future—or is it the past?," 44 *Ariz. L. Rev*. 621, 622 (2002). The practice of in-house attorneys was relegated to less-complex matters so that "[i]nitially, legal functions that needed extensive outside support, such as big ticket litigation, continued to be delegated to the outside law firms." *Id*. at 625-626. As for the prevalence of corporate law departments, Mr. Liggio also recalled data that he had accumulated that showed that during the 1970s and early 1980s, "more than 25% [of companies] did not have in-house legal staffs." *Id*. at 622-623 n.3.

As in-house counsel became more numerous, they became more expert in their companies' daily legal needs than were the outside lawyers. They benefited from their obvious advantage of day-to-day immersion in the affairs of the corporation and greater familiarity with the needs of the business as well as with the expectations and preferences of corporate management. At the same time,

however, in-house attorneys often must be generalists, since the legal needs of a company span such an array of disciplines, and the occurrence of legal issues across that array is very unpredictable from day to day.

As corporations hired multiple attorneys on staff (thereby creating law departments) and those law departments grew, they evolved and matured. That increased maturity has increased the stature of both in-house attorneys and in-house practice. From a single in-house lawyer who had to stay abreast of legal issues across the entire breadth of his or her company's legal affairs, some law departments developed large internal staffs with multiple attorneys, some of whom became specialists.

Today, some law departments have hundreds of in-house lawyers organized into sections, divisions, and other internal groupings. Different internal groups of lawyers might specialize in assisting particular business units or other corporate divisions or in providing very specific expertise such as tax advice.

The ways in which such law departments operate can (indeed must) differ greatly from the way in which a sole in-house attorney functions. These differences have had significance for the legal market in terms of outside legal service to corporate clients.

The maturation of the corporate law department, as a concept and an organizational entity, can be exemplified by the creation in the early 1980s of the Association of Corporate Counsel (ACC). "On March 14, 1982, a group of fifty general counsel formed the American Corporate Counsel Association (ACCA), a group devoted to the professional needs of employed counsel." C. Liggio, "The Changing Role of Corporate Counsel," 46 *Emory L. J.* 1201, 1211 (1997). Several years ago, ACCA changed its name to the Association of Corporate Counsel. Those leaders created ACC to advance "the common professional and business interests of attorneys who work for corporations, associations, and other private-sector organizations through information, education, networking opportunities, and advocacy initiatives" ("Mission Statement" of the Association of Corporate Counsel, which appears at *http://www.acc.com/aboutacc/missionandvision.cfm*).

ACC continues to provide its members a large variety of benefits and resources intended to promote more effective representation by those members of their employing organizations. Moreover, ACC has worked with similar organizations in other countries, including Canada, the European Union, and Australia, to further the interests of in-house attorneys worldwide and within those and other specific jurisdictions.

The relationships between corporate clients and outside law firms have also changed over time, to some degree. Those changes have been greater with respect to corporate clients that have in-house counsel, particularly those that have internal law departments with multiple in-house attorneys.

"As University of Miami Law Professor Robert Eli Rosen has observed, 'the emergence of corporate legal departments may have changed expectations for what communications clients can demand. With knowledgeable inside counsel, outside counsel may have no continuing justification for assuming responsibility for technical and tactical decisions' and should more literally follow the admonition of Rule 1.2 to 'consult with the client as the means … to be pursued.'" Ross, *The Honest Hour: The Ethics of Time-Based Billing by Attorneys* (Carolina Academic Press 1996), p.57.

Corporate clients, represented by in-house law departments have, for the most part, been the instigators of change in the relationship between the corporate client and the law firm. "'[I]t has to be the consumer' [*i.e.*, the corporate client] taking the initiative." Smith, *Inside/Outside: How Businesses Buy Legal Services* (NLP IP Company 2001), p.33. A 2001 survey of ACC members concluded that

"[i]n-house counsel are driving the important changes to the traditional relationships with their law firms, including new terms, fee structures, performance assessments and technologies. They are also bringing objective performance measurements to the selection and retention of outside counsel." *2001 ACCA Partnering With Outside Counsel Survey*, p.8 (American Corporate Counsel Association and Serengeti, Inc. 2001).

As corporate law departments have grown in number, size, and sophistication, they have begun to restructure the relationship between corporate clients, on the one hand, and law firms, on the other. So far, those efforts have focused primarily on the nature of the relationship itself.

For example, for some time there has been a movement within corporate law departments to initiate a relationship that is often referred to as "partnering." The precise definition of that term and the criteria that define the relationship vary (A. Fitzsimons & S. Lauer, "Partnering: The 'New' Client-Law Firm Relationship," *Corporate Legal Times*, July 1997 (vol. 7, no. 68), p.29) but the concept has a significant following among general counsel and other in-house attorneys in companies throughout the United States.

Partnering between inside and outside counsel is an evolving concept. The rise of skilled, sophisticated inside counsel, often with greater expertise in areas of particular interest to their sole corporate client, has played a major role in the development of that relationship. At one time, inside counsel were viewed as little more than 'paper pushers' who seldom were seen as actually practicing law. The 'real lawyers' or outside counsel, performed all of the interesting legal work, all of the courtroom representation, and also handled all of the significant transactions. The greatest impact of inside counsel probably was in the review of outside counsel legal invoices.

> However, in the past 15 to 20 years, the role of inside counsel and the degree of sophistication, experience, and the caliber of corporate counsel have changed, in some cases dramatically….
>
> At the same time the roles of inside counsel have been evolving, so has the nature of the relationship between inside and outside counsel been subject to significant changes.

(C. Morgan & D. Chambers, "Introduction," in 1 *Successful Partnering Between Inside and Outside Counsel* (West Group 2000, R. Haig ed.), §1:2, pp.1-4.)

Over time, the relationship evolved from the initial gatekeeper function whereby the in-house lawyer served primarily as a filtering mechanism between the corporate players and the outside counsel expertise as described above. In the current model, outside firms are commonly deployed more in a staff augmentation model to fill narrow subject matter gaps or to allow for the fluid staffing of large matters based on demand. In-house counsel fill a much more strategic role and provide more proactive leadership of the legal team.

Law Departments Begin to Take Charge

Corporate law departments are under enormous pressure from several sources. The first and foremost source of pressure consists of the ranks of senior management and executives of corporate clients. Those groups of individuals now express significantly higher expectations than they once did as to the performance of corporate law departments, particularly in terms of achieving predictable cost control, quantifiable effectiveness, and efficiency.

This trend is reflected in survey after survey. According to the Fifth Annual Report of Corporate Law Departments, reported in *Corporate Legal Times*, 72.2 percent of the respondents agreed with the statement "[t]he legal department is under pressure to

reduce costs." (Stickel, "GCs Are Crunched By the Numbers," *Corporate Legal Times*, vol. 12, no. 126 (May 2002), pp.1, 31.)

Summarizing the results of that survey, the author noted that "'[c]ontinuing to reduce the legal budget as a percentage of revenues,' 'doing more with less money and resources,' 'improving service levels to our clients within budget limits' and 'cost control' were the biggest challenges for four GC respondents." *Id*. at 1.

Such measurements have historically been the focus of corporate functions like Human Resources, Finance, and Information Technology. In many modern organizations, the law department is now viewed as a core operation function. With few exceptions, the modern law department is a cost center with no direct contribution to top-line revenue. As a consequence, the corporate law department must demonstrate its stewardship of corporate assets and interests.

Though expense (both internal and external) is usually the issue that receives the most focus from corporate management, it is not the only one. Law departments are also expected to report to management more frequently and more fully use objectively quantifiable metrics. The in-house lawyers must speak to corporate executives in language that the latter understand and that relates to the business goals of the company.

While corporate executives may not want to manage legal affairs closely, they do want the in-house lawyers to provide more frequent and more comprehensive reports as to the status of individual matters and as to the status of matters across the board. Cost and outcome predictability are expected and measured. Moreover, the executives are more willing and more likely to question those lawyers about the reports after delivery.

Faced with those pressures, corporate law departments are exerting pressure on outside law firms in order that they as in-house lawyers can satisfy those expectations. They are doing so in a variety of ways. In addition to defining a "partnering" relationship so as to reach a more cost-effective means of delivering legal service for their companies, in-house lawyers are exploring budgeting, the use of technology, the application of project management techniques, and other means of reducing and controlling the cost of legal service.

Several areas in which law departments have begun to assert their primacy in their dealings with law firms, as to how the latter will provide legal service to corporate clients, exemplify the impact that an assertive corporate law department can have. Those areas are fees; the disaggregation of the services that law firms have heretofore provided to corporate clients as a package or bundle; and budgeting and billing.

Fees and Value

One much-discussed topic is that of legal fees. The hourly rate, by which we mean any time-based amount used to calculate an overall fee (even so-called "blended rates" and "discounted hourly rates"), has long been the predominant method by which corporate clients compensate their outside law firms. The topic of legal fees is closely related to other subjects that often dominate in surveys of in-house counsel: value and budget pressures. For example, in the survey conducted in 2001 that we cited above, 78.2 percent of the respondents reported that, during the prior year, a median of 80 percent of the total amount of their companies' outside legal work was covered by standard hourly rates. Discounts from standard hourly rates covered a median of 40 percent of their companies' outside legal work for 55.2 percent of the respondents. For no other type of fee structure did more than 25.5% of the respondents respond favorably and no specific alternative fee arrangement covered more than 10 percent of the work (median) of those respondents who used that structure. *2001 ACCA Partnering Survey*, p.158.

For example, "[w]hen asked about their biggest management challenges, [respondent

general counsel] are not shy about mentioning budgets…. 'We're all under relentless cost pressure.'" (*See* Stickel, "GCs Are Crunched By the Numbers," *Corporate Legal Times* (May 2002), p.2.)

When asked to rank the top five pressing issues that they face, 81.96 percent of respondents to a survey listed "[r]educing outside legal costs." The weighted average score for that response was 2.55, which was the lowest weighted average score of any of the responses to that question. *2001 ACCA Partnering Survey*, p.197. More recent surveys reveal similar views. (The lower the score, the higher that response ranked in terms of its pressing nature.)

More recently, the goal of law departments may have changed slightly. In-house lawyers now aim to assure that their companies receive sufficient value for their investment in law-related resources. In that context, ACC prominently launched its "Value Challenge" in 2008.

This shift is consistent with the findings of a survey by a European consulting firm of general and senior in-house counsel for companies based or operating in Belgium. According to the findings, "'efficiency' has become at least as important as 'quality' or 'excellence' in defining the core values" that law departments expect law firms to satisfy. ("*General Counsel Survey 2009*" (FrahanBlondé), p.9. *See http://www.frahanblonde.com/index.php*.) In essence, law departments are looking to more directly calibrate the benefits that their companies realize from their investment in legal resources (both internal and external).

The focus on "value" as a function of "efficiency, quality, and excellence" introduces a definitional problem. Notions of value certainly vary from organization to organization, with different companies ascribing varying levels of priority or significance to the more discrete or subsidiary elements of value. At the same time, a clear trend exists to incorporate the concept of predictability into the equation.

As corporate law practices become more closely associated with other traditional operational roles in organizations, the balancing of cost versus outcome becomes more commonplace. The "win at all costs" mindset is increasingly incompatible with the expense-management pressures on in-house law departments. An outcome that the client views as favorable may not require winning in the courtroom or driving a transaction through to completion irrespective of the cost. Rather, the best measure of value may be the degree to which outcomes map to the parties' initial business goals and objectives, including cost. The "quality" of legal service must include a cost-benefit component.

How the cost of outside legal service compares to the value that in-house counsel, on behalf of their companies, place on that service has been a concern for some time. In 1997, in-house counsel graded their outside counsel at 3.4 (out of a highest possible score of 5), while the outside counsel gave themselves a grade of 4.3. In 1998, in-house counsel responding to the same survey gave outside counsel a C, while outside counsel awarded themselves a B+ that same year. (*See* Lauer, "Maybe Humpty Dumpty Was A Lawyer," *Law Department Management Adviser*, Issue no. 213 (December 1, 2001), pp.5-6.) The gap between the scores awarded to outside counsel by in-house counsel and those that outside counsel awarded themselves persisted in annual surveys by that same organization.

The idea of using fee structures to create incentives for outside counsel to provide more cost effective legal service has been explored in the literature for quite some time. An alternative fee arrangement (AFA) should incorporate incentives that support achieving the client's business goals in accord with the client's wishes. Actual use of AFAs, however, has been much less common than one might expect from the extent of its treatment by consultants and others. *See* R. Rawson, L. Cutliff, W. Alderman & R. Donovan, "Fee Arrangements," appearing as Chapter 8 of Haig, *Successful Partnering*, vol. 1, § 8.2, pp.8-3 to 8-5.

Despite the interest of in-house counsel, the hourly rate therefore persists. A review of the history of the hourly rate and the interest in AFAs will illuminate the changing role of the corporate law department and how that change may further affect the ways in which corporate clients identify, select, retain, and work with outside law firms.

The hourly rate was virtually unknown, in respect of how law firms billed their clients for legal work, until approximately the middle of the twentieth century. Revealingly, it arose soon after "[s]tarting as early as the 1940s, management experts concluded from various studies that lawyers who kept time records earned more than attorneys who did not." Ross, *The Honest Hour*, p.16. Nonetheless, until at least the late 1950s, clients' bills did not reflect itemized time records, though the firms were beginning to keep records of how their attorneys spent their time. *Id.* at 17. Gradually, management consultants promoted time-keeping to law firms. They even proposed that firms adopt time-based billing in order to increase their revenue. By the 1970s, bills increasingly reflected the amount of time spent on clients' matters and the fees were calculated on that basis alone. *Id.* at 19. The Chief Justice of Western Australia, in a speech launching Law Week 2010, noted that the first consultant who recommended that outside attorneys keep track of their time "did not recommend time costing as a method of billing. Rather, he recommended time recording as a method of accounting—that is, so the firms could assess the cost of the service provided, not the price." Hon. Wayne Martin, "Billable Hours—past their use-by date." (May 17, 2010), pp.7-8.)

Law firms were not imposing the hourly rate on totally unsuspecting, naïve clients. As corporate law departments began to appear more frequently up to and during the 1950s, in-house lawyers—facing expectations on the part of their companies' management that they manage the legal work—began asking law firms for data to justify the legal fees reflected in invoices that, up to that time, contained no detail but merely charged a single amount "for professional services rendered." Rawson, *et al.*, in Haig, *Successful Partnering*, vol. 1, § 8.2, p.8-3.

The hourly rate thus served the interests of both law firms and corporate law departments. For law firms, it led to a "cost plus" arrangement for billing purposes that removed all outcome-related risk from their shoulders. It enabled law firms to price their services in such a way that they felt little pressure to control their own costs in the form of associate salaries or in what often became annual increases in their rates. (*See* T. Sager & S. Lauer, "The Pernicious Effect of the Hourly Rate on Client/Counsel Relations," *Corporate Counsel's Quarterly*, vol. 20, no. 2 (Apr. 30, 2004), p.27.)

Meanwhile, hourly rates provided corporate law departments a convenient proxy for an accurate measure of whether the clients received value commensurate with what they paid for the work. It fit well into an accounting-based approach to managing legal service and was therefore well-accepted in the 1950s and 1960s.

As corporate law departments became even more sophisticated, though, they increasingly recognized the negative effects of the hourly rate. Even though in-house attorneys became accustomed to reviewing invoices based on detailed time records, they began to question whether the hourly rate might create incentives for outside counsel that were contrary to their corporate clients' interest in terms of cost-effective legal service.

They began to search for a fee arrangement that would more closely align the interests of the law firm with those of the client, at least as to cost effectiveness. In that earlier-cited 2001 survey, when asked to rank the five most important things that outside counsel could do to improve the working relationship between inside and outside counsel, 80.37 percent of the respondents listed "[b]e more concerned with costs," the weighted average score for which was 2.10. *2001 ACCA Partnering Survey*, p.195.

The interest in AFAs exhibited by corporate law departments will continue. Those departments that use or have used requests for proposals for legal service ("RFPs") have often tried to negotiate AFAs during that process. The success of these RFP models necessarily depends on the ability of in-house counsel to define and scope the desired outcome.

Lawyers who consider or explore the use of AFAs should recognize, of course, that the value of an AFA must be determined in each instance. An AFA, though intended to yield greater value to the client, might result in the delivery of a lower-value service if its dynamics do not lead to the hoped-for benefits due to other circumstances or because the AFA option is poorly designed. Even a fixed fee might result in a lower-value service if its internal dynamics and incentives undermine achievement of the client's goals.

Unbundling

Law department leaders have recognized that not all of the tasks and activities that law firms have traditionally provided as part of a complete legal service package represent the strategic strengths of those firms. If a law department can purchase one or more of those tasks or activities directly from other parties, it might realize greater value, either by saving money or securing other benefits important to the client, such as consistency across the range of their work. (See, for example, the description and discussion of Raytheon Company's establishing an in-house discovery-management center, at least in significant part due to concern over the security of its data, consistency of its document productions, and other benefits besides cost, in Lauer, *The Value-Able Law Department* (Ark Group 2010), pp.45-47.)

Some law firms have contracted out certain functions to third parties in order to lower their costs, but they might not always have passed the savings along to their clients directly. The clients, in some cases, have taken it upon themselves to achieve lower costs by following a similar approach while disaggregating the functions law firms have performed.

One example of such so-called "unbundling" is legal research. Law departments can secure research from companies that perform the service directly or have research completed by third-party researchers on their own terms. (One example of such a company is Legal Research Center. *See http://www.lrci.com/*.)

Other services that corporate law departments have tried to "unbundle" from the core of a law firm's professional role include the use of on-demand personnel, document or information management services, and court reporting. Some law departments have taken the first steps toward literally re-engineering the law firms with which they work by mandating that those law firms incorporate the services of various third-party service providers when providing legal service to those corporate clients.

DuPont Legal, which is considered a law department that manages legal service for the company more assiduously than most, has created a network of law firms and service providers for much if not all its litigation-related legal work. The service providers deliver the following services in partnership with DuPont's law firms: court reporting, document conversion, electronic discovery and document repository service, litigation and financial consulting in the context of litigation, temporary legal professionals, complex litigation document management, dispute analysis, and investigation and legal research. *See http://www.dupontlegalmodel.com/default.asp?p=62&v=2*.

While some law departments have asked their law firms to work together on matters, others have gone even further. In order to match talent and need as specifically as possible, they have begun to create *ad hoc* teams by identifying individuals within disparate firms as team members.

Budgeting and Billing

Billing and budgeting is another area in which law departments are taking the initiative and imposing new expectations and performance measures on outside law firms. More and more law departments are demanding that law firms submit their invoices in a format that is more meaningful to the in-house lawyers. While this move toward what is called "task-based billing" has not been as rapid as some had predicted, it does constitute a definite trend.

Moreover, as technology has enabled the development of third-party services that incorporate task-based billing and budgeting (*see, for example, http://www.datacert.com/*), law departments have found that the data they receive are more useful from a strategic perspective. DuPont Legal has used task-based billing and budgeting for strategic purposes. (*See* J. Michalowicz, "E-Billing, Performance Metrics And Marketing: Misfits Or Formula For Success?," *The Metropolitan Corporate Counsel* (May 2002), p.26.)

As law departments gain experience with budgeting as a management tool, they are likely to become more insistent that law firms participate by submitting their invoices in a format compatible with the budgeting approach of the client. The availability of technology that incorporates the task-based format, and provides law departments with the types of reports that are useful to in-house counsel, will lead to greater use of that tool.

Law departments that continue to focus on time and task-based value exchanges will likely get more and more granular in tracking supporting data. Interestingly, outcome-focused AFAs actually drive the opposite behavior. When firm compensation is limited by flat fees or tied to the delivery of expected outcomes, the client's need for detailed billing invoices declines. To draw an analogy, a customer in a restaurant is unconcerned with the price of individual ingredients for the meal or the relative cost of labor. That does not mean, however, that time data holds no value for law firms.

A recent survey provided evidence of what many in-house lawyers have long known: proactive management of outside legal service providers is necessary for a company to assure itself that its costs do not escalate unnecessarily. According to the summary published in September 2010, "in-house lawyers who spent more at a particular law firm were not getting any discounts" and "[t]he location of the biller and the size of the biller's firm—not the biller's experience—are the variables that most influence how much a client will pay." (*See* Todd, "Survey: Firms Charge Different Rates for Same Work," *The American Lawyer* (Sept. 8, 2010), posted at *http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202471713543&Survey_Firms_Charge_Different_Rates_for_Same_Work=&src=EMC-Email&et=editorial&bu=Corporate%20Counsel&pt=Corporate%20Counsel%20Daily%20Alerts&cn=cc20100907&kw=All%20About%20Inconsistency%3A%20Firms%20Charging%20Different%20Rates%20%E2%80%94%20for%20the%20Same%20Work%21*.) Efforts to monitor not only the work by outside lawyers but also the basis on which they bill, especially when hourly rates serve as the basis for the fee, should appear in every law department's standard procedures.

Salient Examples

Having established some of the basic contours of a redesigned inside/outside relationship, in-house counsel are now turning to more specific issues. Since the 1990s, some law departments began to experiment with ways to change the dynamic between corporate clients and the law firms that serve them. To a degree, those efforts reflected a view that the then-existing relationship placed too much control in the hands of outside lawyers. Many in-house lawyers wished to revisit that balance. Some law departments have taken steps toward that end.

Some law departments inaugurated the use of RFPs for legal service and other selection tools as a means of recalibrating the inside/outside relationship. While still

not very prevalent, those techniques have set the stage for more changes. The experiences of corporate law departments that have tried somewhat different approaches are instructive.

DuPont

In 1992, the chairman of DuPont challenged that company to reduce expenses by over $1 billion. The law department took up the challenge by initiating an effort that has earned the title "DuPont Legal Model" (which we'll refer to as the "Legal Model").

"Under the direction of senior legal management, the [Legal Department] Team... developed strategies and approaches, based on established business techniques, to accomplish the objectives of the program. The Team concluded that litigation would be the initial focus of the Legal Model and established objectives to reduce costs and increase productivity." (*See The New Reality: Turning Risks into Opportunity through the DuPont Legal Model*, p.3 (S. DeCarli & A. Schaeffer eds.) (E.I. du Pont de Nemours and Company 2009).)

Within the first few years, DuPont Legal identified five "core elements" of the Legal Model that it would apply: (1) strategic partnering, (2) early case assessment, (3) technology, (4) alternative fee arrangements, and (5) strategic budgeting.

Though those core elements have remained constant, the Legal Model has evolved since its inception. The Legal Model now incorporates additional elements, which are devoted to performance metrics, diversity, practice groups, Six Sigma, and preventive law. (*See Leaps and Bounds: Moving Ahead with The DuPont Legal Model*, p.1 (T. Sager & J. Schomper eds.) (E. I. du Pont de Nemours and Company 2001).)

DuPont Legal credits the Legal Model with saving costs, reducing cycle time for its litigated matters, an improved ability to forecast staffing needs, opportunities to leverage its purchasing power more effectively, achievement of a more diverse representation of the company, a more even distribution of work, better utilization of the talents of legal assistants, more effective partnering relationships with its external providers, an improved quality of legal service provided the company, and a more strategic role for its in-house attorneys. DuPont Legal has documented millions of dollars in savings on account of its development and application of the Legal Model. Other law departments have implemented some of the elements of the Legal Model but without such documented success.

DuPont Legal's achievements seem more attributable to how it implemented the Legal Model than on the elements of the Legal Model themselves. In particular, the achievements seem based on: DuPont Legal's willingness and ability to "stay the course" with the Legal Model (now in its nineteenth year); the department's constant search for additional improvements for the Legal Model as well as how the in-house attorneys, the attorneys in its Primary Law Firms (PLFs), and the personnel of its Primary Service Providers (PSPs) collaboratively provide that legal service; and DuPont Legal's recognition through the Legal Model that its success would also depend on the continued success of its outside partners (the PLFs and PSPs). (*See* S. Lauer, "Convergence: Is it Just a Numbers Game?," *The Lawyer's Brief*, vol. 34, no. 8 (Apr. 30, 2004), pp.2, 4-5.)

Prudential

As one of the largest insurers and financial institutions in the country, Prudential Insurance (now named Prudential Financial) had a very large budget for outside legal service, estimated at somewhat more than $100 million a year in the mid 1990s. Managing this enormous amount of legal work had always been a significant challenge, especially since Prudential's legal portfolio was so varied.

Predicting some law-related costs of the company's real estate operations, for example, was relatively simple since real estate transactions tend to occur on a predictable basis within the company's control (to a

degree). Suits against insured entities, however, are not in the control of the company, so forecasting for this kind of work proved much more difficult.

It would therefore be impossible to know what combination of legal skills, experience, and price would be required in any given year, so it made sense for Prudential to retain outside law firms to handle most of its legal work. Even while using that much outside legal resource, however, the company still had several hundred in-house lawyers in its law department.

In March 1996, Prudential embarked on an initiative aimed at rationalizing the process for obtaining the services of, and restructuring its relationship with, outside counsel. It formed a task force, managed by one of the authors who was then a lawyer in the real estate section of the law department. The task force included representatives from all the different sections of the law department, including Real Estate, Private Placement, Tax, Employment Law, Individual Insurance, and Group Health Insurance.

The task force began with a review of all invoices for legal work over the previous several years. It then culled a list of about 1,000 law firms with which Prudential had done business during that time. The task force realized that working with fewer outside counsel would allow the law department to engage the firms with which it works more directly and fully. This concept—strategic partnering—also underlies DuPont's Legal Model. "Strategic partnering, the cornerstone of the Model, emphasizes long-term relationships based on mutual trust, sharing of risks and rewards, working collaboratively toward common objectives to the ultimate benefit of DuPont and a mutual commitment to each other's financial success. It is the driver that makes the Model work." The New Reality: Turning Risks into Opportunity through the DuPont Legal Model, p.2 (S. DeCarli & A. Schaeffer eds.) (E. I. du Pont de Nemours and Company 2009.) Prudential's task force determined that its first job was to reduce the list to a more manageable number of firms.

After some internal discussion, the group whittled the list by almost three quarters to approximately 280 names. The group then turned to the substantive legal work for which the department was responsible. Working with each section of the department, its members tried to estimate, according to business plans and other planning materials, what sorts of legal work Prudential would need and how much and where it would be needed.

The task force then started considering how it could change the way Prudential purchased legal services and estimate how much service it would need. The task force discussed the many law firms with which Prudential had been working and which firms would be appropriate candidates to handle specific work, ultimately assembling lists of "work packages" and of law firms to which to send those packages. The number of firms asked to submit proposals for each package varied. The largest number of firms asked to bid on a particular package was 13 or 14.

Some firms received only one package of work for which they were asked to submit a proposal. Others got a few. The largest number of packages sent to one firm was also, by coincidence, 13 or 14. The task force created 109 different packages of work, which it sent to 132 law firms in different combinations. (The group estimated that those packages included about $60 million worth of work.)

A team of in-house lawyers that would evaluate the proposals from firms for each package included lawyers who represented those sectors of the company that had work in that package. A work package might be for real estate or private placement work alone, while another package might combine real estate with private placement work and tax work.

Firms to which the department sent multiple packages of work were invited to bid on multiple packages (in any combination)

if they felt they could more efficiently handle those packages in some fashion. Optimizing the process was a challenge. The task force had roughly 10 members. Teams of lawyers (not just members of the task force) reviewed the proposals as they came in; every work package and the responsive submissions were reviewed by a team of at least three lawyers.

After a six-month period reviewing submissions and talking to various firms about their proposals, the law department awarded the 109 packages of work to 80 law firms. Prudential estimated a 20 percent cost savings through this competitive process. *See* R. Meade, "Using Requests for Proposal: A Case Study," *New York Law Journal* (Feb. 9, 1998).

Prudential's law department also organized a "best practices" conference at which five teams of in-house and outside lawyers presented recommendations for improving delivery of legal service to the company's business units. Those recommendations (over fifty in all) were implemented on a practice-specific basis.

Combined with the restructuring of the company's outside legal service by means of the RFPs and a series of meetings with 22 law firms that were awarded the most work under the RFPs, those practice improvements dramatically changed how the department's in-house personnel would collaborate with outside legal service providers to serve the company's needs.

Cisco Systems

The information revolution resulting from the disaggregation of information from single sources to the collective resources available by means of the Internet has created incredible pressure for organizations to critically evaluate both their sources of information as well as the cost of that information.

As the market for this information becomes more and more transparent, it is increasingly difficult for firms to bill multiple clients for what is often essentially the same content. Information technology advances have dramatically reduced the barriers between similarly situated clients. As the number of cases of first impression shrinks, awareness about the resolution of those cases, whether they be litigated or handled by other means, simultaneously increases. The price of information, and legal advice, is being driven toward its marginal cost of production.

With increased breadth and competency among in-house practitioners, one key strategic decision an organization must face is the proper allocation of resources. When an organization has the option and capability to in-source nearly any task, the critical question evolves from "what can the corporation do in-house" to "what should it do in-house."

Cisco's Legal Department approaches these resource allocation decisions by applying a four-quadrant "core vs. context" analysis. The model is defined by four quadrants along two axes. The horizontal axis divides activities as either "core" activities that are necessary for the organization but not tied to competitive advantage, and "context" activities that contribute to Cisco's competitive advantage vis-à-vis its competitors.

The vertical axis is similarly divided according to the "Mission Criticality" of various activities. Mission Critical activities pose an immediate risk if performed poorly. Non-Mission Critical activities present no significant risk to the corporation's business even if performed poorly. The overall approach is pictured in the chart on page 17.

Note that the characterization of any activity as "core" or "context" does not represent a value judgment about the relative importance or necessity of that function. Rather, the construct is used solely to ascertain the proper resource allocation mix.

The classification meriting the most internal focus is Core/Mission Critical activities. For Cisco, that includes protection of intellectual property, mergers and acquisitions, and activities that support the design, building, and selling

	Context (activities that are necessary, but not tied to competitive advantage)	Core (activities that contribute to competitive advantage)
Mission Critical (activities that, if performed poorly, pose an immediate risk)	**Out-Task** • High-stakes litigation • Reputation • Compliance • HR policy	**In-Task** • Design, build, and sell • Business development • Intellectual property rights
Non-Mission Critical (activities that, even if performed poorly, do not pose an immediate risk)	**Outsource** • HR cases • Smaller litigation • Real estate	**Self-Service** • Routine transaction processing

of the product portfolio. Poor performance of any of these activities jeopardizes Cisco's core corporate mission to shape the future of the Internet by creating unprecedented value and opportunity for its customers, employees, investors, and ecosystem partners.

Context/Non-Mission Critical activities fill the other end of the spectrum. A primary example is single-claim Human Resources cases. The appropriate resolution of these matters is clearly important but even flawless execution has no potential to materially impact Cisco's business prospects. Such cases are therefore ripe for outsourcing.

This analysis enables Cisco's legal team to determine whether in-house or outside law-related resources—if any law-related resources at all—should be tasked with the matter in question. It takes into account some factors of the matter itself and, based on the strategic strengths of the law-related resources, leads to an assignment that Cisco believes represents the most effective, highest-value use of the legal talent at its disposal.

Factors related to the work or the assignment that might be considered in such a process include: the level of difficulty or novelty of the legal issues involved; the potential impacts of the matter on the business; the number of parties involved; the geographic scope of the factual situation; and miscellaneous factors such as the potential personal liability of one or more senior corporate officers or the personal investment in a matter by a corporate officer or director (investment here being more a psychic than financial one).

Whether to assign a particular matter to in-house attorneys or to external resources will always depend on a variety of factors, some of which are under the control of the law department but others of which are not. An example of the latter is the availability of the attorney/client privilege to protect discussions between counsel and client from disclosure.

In a recent decision, the European Court of Justice stated that " 'in-house' communications do not merit the protection afforded by legal professional privilege, no matter how often they are made, how highly significant they are or how useful they are" to the company. (Decision posted at *http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-550/07*.)

Technology Trends

Like other professions, the legal profession is subject to the continued progress of technology. One could argue that the legal profession is particularly well suited to avail itself of new technology since it represents, to a greater extent than many other

professions, pure knowledge management. Knowledge management is well-positioned for computerization and implementation through the Internet and similar data-dispersal and data-classification tools.

Particularly in the past twenty or thirty years, the continuing development of computers and associated progress in software (especially the Internet) have provided significant opportunities to restructure business dealings. As a result, "the greatest benefits of [information technology] come from harnessing its power in *changing* business processes (and not simply automating what already goes on)." (*See* Susskind, *The Future of Law* (Clarendon Press 1996), p.50 (emphasis in original).)

To date, however, the legal profession has (with a few notable exceptions) implemented technology in order to accelerate existing processes rather than re-engineer how it approaches its tasks or how lawyers work together.

Developments in computing have readily provided for information dissemination throughout an organization and among organizations by means of various networks. This move to group computing is enabled by developments in personal computers and the implementation of "work-group tools, information and capabilities to directly support all categories of people in the information sector of the economy." (Tapscott & Caston, *Paradigm Shift: The New Promise of Information Technology* (McGraw Hill, In. 1993), p.15.)

This trend has, of course, progressed to "cloud computing." As a result, the legal profession "is on the brink of a shift in legal paradigm, a revolution in law, after which many of the current features of contemporary legal systems which we now take for granted will be displaced by a new set of underlying premises and presuppositions." (*See* Susskind, *The Future of Law*, p.41.)

Corporations are rethinking their business processes in many areas so as to integrate technology into those processes, or to change those processes in order to take advantage of technology's increasing capability. The emergence of the "business process" patent exemplifies how technology has turned business thinking on its head. Whereas the method by which one conducted business was not considered to be a patentable idea a short time ago, it is now a very valuable process worth protecting as intellectual property.

One of the greatest strengths of the Internet is its utility as an information-dispersal medium. To the extent lawyers harness that capability, they will be in position to restructure how they deal with data and information.

The legal profession has yet to undergo that type of review of its own processes. Inevitably it will, however, because the case for doing so is particularly compelling and the expectations on the part of corporate clients that lawyers will do so are so strong.

There are some signs that the legal profession is awakening to how technology might enable it to recast itself. Applications that incorporate the information-distribution capability of the Internet, for example, are proliferating. Those Web-based applications are offered by application service providers and include various types of services for attorneys like electronic billing (*see http://www.cttymetrix.com/*) and depositions (*see http://www.aldersonreporting.com/index.asp*).

Attorneys are using extranets and other communication vehicles to expedite data-sharing among organizations, such as between clients and law firms. Firms are starting to offer some of those services through their own Web sites. Some law departments have implemented their own extranets and require the law firms that work with them to use the resources collected on those Web sites when representing their companies. (See the description and discussion of an extranet developed by the law department of Wyndham Worldwide Corporation in Lauer, *The Value-Able Law Department* (Ark Group 2010), pp.62-64.

Some services specific to corporate clients' outside counsel needs have appeared. For example, a corporate client doesn't have to visit the Web sites of law firms directly, for there are online services that aggregate data from those sites. *See, for example, http://law-periscope.com/*. Sites that offer online RFPs make it easier for corporate clients to seek proposals from law firms to handle legal work anywhere in the world. For an example, *see http://firstlaw.co.uk/.*

The legal profession will realize the greatest gains from technology developments when it integrates information technology into its business strategy. (*See* Tapscott & Caston *Paradigm Shift*, p.191.) That will enable lawyers to truly harness the capabilities of microprocessors, computers, the Internet, and mobile computing in order to "move intelligence out into the enterprise where the action is." *Id*. at 20.

Technology and the Retention of Outside Counsel

The selection of counsel is one of the most important tasks of in-house counsel and is, perhaps, one of the most outcome-determinative decisions that face in-house lawyers. *Report on Selection of Outside Counsel by Corporations*, issued by the Greater New York Chapter of ACC in 1997. *See also* S. Lauer, "What is the Most Important Task of In-House Counsel," *Corporate Counsel's Quarterly*, vol. 19, no. 2 (Apr. 2003), p.73. Some surveys suggest that corporate law departments expect to increase their use of outside counsel, driving further need for improved selection procedures, though other surveys lead to mixed forecasts. *Second Annual Chief Legal Officer Survey: The Opinions of Chief Legal Officers on Issues of Importance* (ACCA and Altman Weil 2001), p.3 (86 percent of respondents plan to increase use of outside counsel).

There is evidence that in-house attorneys are starting to use online tools to improve their counsel-selection efforts. Nearly one half of the respondents in one survey use Internet sites as sources of information about law firms. Smith, *Inside/Outside*, p.10.

Technology permits use of the Internet as more than just an information source. The greater benefits flow from applying new techniques of handling the data that are available via the Internet. *See* Susskind, *Future of Law*, p.55. Not long after Prudential completed its 1996 RFP process described above, companies started to spring up offering to run the RFP process for corporate law departments.

Many of those companies were Internet-based, included organizations specializing in the legal profession, such as eLawForum as well as broad-based online auction firms like FreeMarkets.com. Such services could help in-house attorneys find candidate law firms anywhere in the world as needs arise. The ability to use the Internet to quickly identify such firms in almost any location would represent a considerable advantage to in-house lawyers over traditional sources.

The Internet and related technology tools hold yet greater promise. The Internet allows counsel to find data, distribute data, and, by downloading data into spreadsheets and other data-manipulation software, create searchable indices and metrics-creating libraries of information. That in-house attorneys will turn to the Internet more frequently during the counsel-identification process is virtually certain.

"The Internet is starting to have an impact upon the process of finding new outside counsel, with online directories (17.0%) and searches of law firm websites (11.4%) being designated by substantial numbers of respondents." *2001 ACCA Partnering Survey*, p.12.

The Future

Corporate law departments have experimented with different methods of improving their approach to managing the legal interests

of their companies. Some have focused on improving the relationship between the department and outside law firms. DuPont's approach—the Legal Mode—exemplifies that approach.

Some law departments have focused on other issues, such as the hourly rate and AFAs. The law department of FMC Technologies, for example, uses its Alliance Counsel Engagement System to create incentives for its outside counsel to more fully align their interests with those of the company through AFAs that include incentives and financial penalties (as described in "Dollars and Sense," *Texas Lawyer* (November 7, 2005), posted at *http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1132144710554*.)

As they have done so, however, law departments have witnessed considerable change in the legal profession. One of the accelerated changes of recent years is the continuing growth of law firms. Whereas firms with 500 lawyers were once unusual, many firms now have more than 1,000 each and some exceed 3,000 lawyers in total.

The emergence of global law goliaths has implications for the efforts of law departments to effect operational efficiencies, at least in how they work with outside counsel. Companies such as Cisco, Prudential, and DuPont once represented "plum" clients for any law firm since those clients spent millions of dollars on outside counsel. Such fees represented a considerable percentage of even the largest law firm's total revenues.

However, global mega-firms may have a different perspective on satisfying the service demands of a client such as DuPont, Cisco, or Prudential than in the past. In essence, with the larger scale of law firms now in place, individual corporate clients have seen their clout diminish. A recent survey of general and senior counsel of companies operating or based in Belgium found that "General Counsel are becoming disenchanted with (some) global firms" (*General Counsel Survey 2009* (FrahanBlondé), p.26).

As a result, in-house attorneys seek other "leveling" forces. Some have begun to explore multi-company or multi-department buying consortia. There are many varieties of this strategy. The aggregated economic clout of several corporate law departments might gain the attention of law firms more readily than any of the participating law departments could do on its own.

The pressures that corporate law departments face—whether they remain as strong as they appear at present or abate somewhat—call for maximum value realizable from a company's legal team. "In order to assemble the most effective team for [an] assignment, a law department needs to assess more specifically the qualifications of the members of the team....[A] law department should take steps to determine what talents will be called on over the course of the matter and whether those talents will be available when needed." (Lauer, *The Value-Able Law Department* (Ark Group 2010), pp.103-104.)

The application of some business techniques routinely applied elsewhere in a company can likewise be of considerable assistance to a law department determined to maximize the value of its own efforts and those of outside lawyers. Project management, Six Sigma, total quality management and metrics, all hold great promise if properly applied to the management of legal service. (*See, for example*, Levy, *Legal Project Management: Control Costs, Meet Schedules, Manage Risks, and Maintain Sanity* (DayPack Books 2009).) Though such techniques may not be familiar to in-house attorneys at present, and their application will require some training, the long-term benefits will more than justify that effort.

Some law departments have begun to reconsider the division of work between in-house and outside counsel. Conventional wisdom might once have allocated higher-risk work to outside counsel (*see* Liggio, pp.622-623 n.3, cited in note ii) and more mundane or rote work to in-house attorneys perceived as less capable. Now, more and more law

departments (such as Cisco's) recognize that in-house lawyers have the capability to handle much more complex work and that they can do so cost effectively—in a way that allows the company to realize greater value beyond solely cost.

Cisco's approach described above, for example, results in an allocation of responsibility specifically tailored to achieve the best result most cost-effectively. By bringing such work into the law departments themselves, general counsel can avail themselves of the strategic strengths of their in-house lawyers. S. Lauer, "Strategic Strengths: The Basis for the Efficient Design for a Corporate Law Department," *Corporate Counsel's Guide to Law Department Management (2d)*, chapter 103, p.103.001, *et seq*. (August 1999 Supp.). Taking advantage of those strengths will become more and more important as law departments attempt to realize greater value from their investment in both internal and external resources. T. Sager & S. Lauer, "Establishing and Maximizing Corporate Legal Resources," *Of Counsel*, vol. 29, no. 2 (Feb. 2010).

Law departments will likely become more proactive in managing the law-related matters entrusted to them. They will be more assertive with their external counterparts with respect to fees, budgeting, reporting, and other aspects of the relationship. They will also move more aggressively to assemble the right team of individuals to meet the demands of the matters (at least, the more significant matters) and assert their prerogatives as quarterbacks of those teams.

Technology has begun to change how the legal profession operates. Computers are ubiquitous in lawyers' offices whereas twenty years ago they were novelties there. New technology, including software and hardware, promises greater change is yet to arrive.

The identification and selection of outside counsel is, for in-house lawyers, a responsibility of the highest magnitude. It affects whether a corporate client will achieve its goals and, if it does, the cost of doing so.

To date, however, technology has had little impact on how in-house attorneys locate outside counsel for their companies. The importance of that responsibility, and the enhanced abilities that in-house counsel will enjoy if they use technology in that process, point toward greater reliance on technology. The availability of online services to assist could prove instrumental in how they do so.

Law departments will apply other tools and techniques to their management of legal service. Project management techniques will assume increasing importance in their operations and they will also expect outside legal service providers to apply such techniques as well.

Law departments will become more specific and granular in analyzing the needs of their corporate employers for legal service. Rather than retaining one or more law firms to handle the case in all instances, they will begin to assemble teams from among their outside service providers. Those team members might reside in multiple organizations (and not necessarily law firms). In that way, the law departments will secure the particular and specific expertise and talents necessary to achieve the precise business goals of the client.

The selection of those outside service providers will focus increasingly on whether they deliver more value to their corporate clients, and how much. The definition of value for that purpose will be a central focus of law departments. To a large degree, they will realize higher value based on the ways in which those outside providers service the companies. "Relationship" issues will thus play an ever more prominent role in the identification and retention of outside providers. ■

—Steven A. Lauer and
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