

RISK AVERSION IN RETAINING EXTERNAL COUNSEL

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This is the forty-sixth in a series of articles about how corporate and government law departments can improve their performance and add measurable value to their organizations.



Over the last four years, I have had the good fortune to participate in a number of reviews leading to the choice of external counsel. Some have been for governments at the local and provincial levels, some for cross-border resource companies, and others for the insurance, pharma, and telecom sectors. A few of the initiatives began with staff in Strategic Sourcing departments, but all required the involvement of senior members of the law department.

Sophisticated purchasers of legal services use the full range of traditional tools to achieve their objectives when retaining outside counsel. Preferred counsel lists, billing guidelines, requests for proposals, and bill auditing firms were the blunt instruments of choice in the 1990's. The very



best firms still received the lion's share of the work and total legal spend and hourly rates have continued to escalate since before the pandemic. In the face of this, law firm partners have re-doubled their efforts to forge stronger working relationships with General Counsel, members of the law department, business units, and the executive suite.

Surveys of corporate counsel continue to show that law departments have introduced few new approaches to retaining external counsel in the last 15 years. Moreover, they have even less time to fundamentally re-think and re-negotiate arrangements with their law firms. In this respect, they are no different than the other parts of a company or governments trying to do more with less time and resources. Corporations are turning to procurement specialists for

help – a smarter, tougher band of professionals with more invasive mandates from the executive office than one saw 10 years ago. Unfortunately, they are resisted if not resented by the law department, especially when the process support they offer calls for multi-year planning, clear selection criteria, financial negotiating skills, and commitments to contract-like terms well into the future. In my opinion, the flexible, independent, cost-ineffective operating practices of law departments in retaining counsel are much less tenable than they were a few years ago.

The first line of defense put up by corporate counsel is to claim that they will not trade quality for price. When asked to define “quality” in a law firm, the answers cover a broad range of valid points: we hire the lawyer not the firm,

they know our company, I have worked with him/her before and we always get good results, and I have negotiated a volume discount. A second line of defense is required to explain why more systematic practices are not being used and why legal expenditures continue to rise. The issues include the failure to converge to fewer firms spanning provincial jurisdictions, the reluctance to have law firms delegate work to more junior individuals within the firm, the assumption that especially complex or specialized work cannot be moved to “ordinary” firms, and the risk of moving legacy files - particularly litigation.

It is difficult to find corporate counsel who are prepared to “put all their eggs in one basket.” But legal / business conflicts with full-service firms are forcing tough choices. The appropriateness and effectiveness of “Chinese walls” created by law firms has generated no end of headaches for managing partners.

Law firms are left with few choices when corporate and institutional law departments fail to make long-term commitments for legal services. Corporate and commercial practices have an insatiable appetite for “deal flow” and regular commercial support. Law departments regularly make the business case for insourcing ongoing commercial work provided they can find and pay the talent. This leaves law firms scrambling to diversify their offerings and national / international reach, and it makes them more inclined to commit to longer-term arrangements with key clients.

The stage is set, and the conditions are right for corporate law departments to better man-

age - read stabilize and reduce - their total legal spend in the face of escalating demand. Yet few are ready to do so. On the one hand, they are told to live within a budget for legal expenditures, including litigation. And on the other hand, business units and the executive suite interfere, too often suggesting which firms or which lawyers should be used for high-profile matters – effectively neutralizing the credibility of partnering agreements that a General Counsel may have put in place for legal services.

Sometimes the organizational obstacles seem insurmountable. National and multi-national companies and all levels of government are particularly susceptible to not making commitments or failing in their execution. Some years ago, Donald N. Sull and Charles Spinosa described six obstacles to getting things done in their article "Promised-Based Management: The Essence of Execution" (*Harvard Business Review*). These include organizational silos that hinder coordination, employees who are disengaged, lack of clear accountability across the organization, an organization that lacks agility, stakeholders that do not trust executives to honor their commitments, and an organization that is trapped in the status quo. Sull and Spinosa point out the root causes and suggest remedies for each obstacle.

Recent experience demonstrates that law firms, even the biggest ones serving the same reference market, will propose prices (rather than rates) that vary by as much as 30 percent. The availability of internal teams and delegation, the experience with case and matter budgeting for complex, even unique work,

and the willingness to commit to longer-term stable teams and prices vary enormously by firm. The problem with many of these workflow and pricing practices is that they are largely unfamiliar to corporate and government law departments. In addition, they may be more available in a competing law firm – one from which the majority of legal services is not sourced today. Corporate counsel translate this lack of familiarity into legal risk, and then do not commit to doing business differently.

It is time for law departments to develop evaluation criteria / practices to better gauge the expertise and service levels of law firms more

objectively and less experientially. Doing that effectively allows a balanced trade-off of lower-priced arrangements while ensuring the quality–risk elements are properly considered.

About the Author

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Renewing the Approach to AI, Innovation, and Law Department Performance

Level Legal and Ari Kaplan Advisors were honored to co-host a dinner for law department leaders at the International Legal Technology Association's 2023 Annual Conference. We discussed the practical application of artificial intelligence, the connection between the economy and innovation in legal, and the role of e-discovery in law department transformation.



Economy-Driven Innovation or Vice Versa?

- ▶ Law departments are identifying tasks to stop doing in today's constrained budget environment with limited staffing.
- ▶ The economy is accelerating innovation, which is no longer a nice-to-have because it saves jobs over the long term.
- ▶ Legal is not simply running like a business, but as one of the most successful and effective departments in the company.

Artificial Intelligence: Now an Outside Job



- ▶ Law departments are developing standards governing how outside lawyers and providers can deploy AI on matters.
- ▶ Creating a unified definition of AI is a challenge for some legal teams.
- ▶ Many in-house teams do not have a choice about whether to develop AI use cases; they are now a business imperative.

“Using AI responsibly can result in a higher quality of work.”



E-Discovery Is a Key Element of Law Department Transformation

- ▶ The current disruption in e-discovery affects priorities in litigation support.
- ▶ Expect a more robust disclosure requirement in the U.S. for the use of generative AI in e-discovery.
- ▶ Don't worry: AI will accelerate the eDiscovery process, enabling law departments to do more with less.