

The Quest for the Best

Law departments can use philosophy, economics, psychology, and sociology to take a fresh look at the usual practices.

BY REES W. MORRISON

Every law department manager asks, “What are the best practices among law departments for managing costs, investing in technology, or designing the organization structure for in-house lawyers?” They hope that some law departments have found the proverbial four-leaf clover that shows how best to assign paralegals, satisfy clients, prove the value of the department, or build diversity. If they have to make a management decision, surely there is, so to speak, a controlling precedent.

Law department managers crave best practices—otherwise known as the accepted optimal management strategies—because they yearn for guidance, they need reassurance in the crowd, they want to legitimize their decisions, they have limited time and inclination to explore options, and they find comfort in conformity. A best practice codifies an initiative.

Sadly, the cravings go unmet. No best practices exist. Beyond platitudes like “get the most from your lawyers,” “optimize the value of your department,” and “use law firms only when you need to,” law department management is too complicated for any particular practice, removed from its complicated history and context, to stand above the rest.

To see why, let’s turn to four disciplines: philosophy, economics, psychology, and sociology. Each discipline offers reasons why general counsel won’t find the ideal management practices. Instead, the lesson from all the disciplines is that general counsel should learn about as many management practices as possible and choose the best.

PHILOSOPHY

Induction can’t prove that a practice is best. A philosopher would reject the idea that best practices, which begin as inductive conclusions, have any rational basis. We reach inductive conclusions when we see a pattern in several examples and generalize that pattern into a truth. But no one can prove that two or more instances of a successful practice can be generalized to a truth for all departments. Just because a handful of law departments suc-

ceed, for example, in linking their document management system to their matter management system, no one can reach the logically irrefutable conclusion that the practice is best.

We can’t pin down cause and effect. We commonly say that event A caused event B. But philosophers deny that we can rely on explanations based on cause and effect. A law department that hires only graduates of Ivy League law schools—an event A that causes event B, good quality legal work—wouldn’t pass the philosopher’s scrutiny. Cause and effect from the philosopher’s perspective can only really be strong correlation. As a matter of logic, we cannot prove, for example, that a law department, when it changed its ratio of lawyers to secretaries, caused the department to become more effective.

Another reason is that consequences are over-determined—more factors chip in and can affect the outcome. In addition, there is the law of unintended consequences, which holds that we can’t foresee all the changes that a given action—such as insisting on budgets from law firms—will bring about. If a law department decides there are advantages to having its lawyers record their time and charging that time back to clients, it cannot logically convince a philosopher that the benefits will outweigh possible disadvantages.

“Best” can’t be agreed upon. Despite thousands of years of effort by some of the wisest humans, mankind has come no closer to a shared definition of what is “good” or “best.” If we cannot reach consensus on what we mean by leading a good life, we should not pretend to be able to label any practice as best.

One reason why we cannot be sure of what is best is that productivity of lawyers is notoriously hard to measure. We can count some aspects of legal input (ads reviewed, contracts negotiated) and output (motions filed, patent applications prepared) but none of the processing between input and output. If we cannot pin down productivity, how can we go far in support of practices? Another reason for suspecting that there is no iron-clad best practice arises from our inability to measure the degree to which lawyers contribute to the success or profitability of their clients. Similarly, we cannot tally the costs of legal risks avoided. Certainly we believe that capable lawyers keep us

out of harm's way, but if the harm never comes to pass, what dollar value can we ascribe to it?

ECONOMICS

All practices exact trade-offs. Every management decision presents trade-offs. A law department can decide to double the ratio of paralegals to lawyers, but then might not be able to hire more lawyers. You can't have it both ways because there are always opportunity costs. If you elect a practice—let's say putting frequently asked questions on an intranet site—you can't also spend the time it took to do so preparing document assembly applications.

I also suspect that practices work like pressing balloons—push in somewhere and the balloon bulges somewhere else. If you institute the practice of insisting on budgets from outside counsel for every matter, do inside lawyers spend less time reviewing bills? In my experience, law departments can really only handle one initiative at a time, so there are trade-offs when any practice is pursued.

The marketplace erodes advantages. If there were a clear best practice, law departments would adopt it and the best practice would become the standard. Even standard practices don't stand still; law departments tinker with practices, so even a best practice would continue to evolve. Charging back the costs of outside counsel may have been a breakthrough at one time, but now it is commonplace. The shelf life of a best practice is limited.

Diminishing returns dilute practices. An economist would argue that a law department that chooses some practice, perhaps using electronic billing, will find over time that the benefits diminish as the department widens the scope of its adoption. As more law firms bill the department electronically, the time it takes to get them able to do so reduces somewhat, but the dollar value of bills delivered drops more quickly, diminishing the value of the information obtained. At some point, setting up a firm that handles only one matter makes no sense. Or, to give another example, the higher the client satisfaction scores of a law department, the harder it is to improve another increment. It takes increasingly more effort to reach higher ratings, in part because of diminishing returns.

PSYCHOLOGY

Drives push us to make choices. A quartet of basic drives arguably pushes us to most of our actions. Paul Lawrence and Nitin Nohria, two management professors who have written about drives, call them the drives to acquire, bond, learn, and defend. Logical evaluations of practices do not lead us to adopt them—our hard-wired drives do. Genetics and evolution underpin these drives, and we are fooling ourselves to think that law department managers can sidestep their imperatives and decide on best practices based only on rational objectivity.

Our decision making is flawed. A psychologist would question, "How can we rely on presumed best practices when humans make flawed decisions?" It is well-known that people dislike cognitive dissonance, where facts they learn challenge their preconceptions. Most people tend to ignore or reinterpret those dissonant facts. For another example, we see patterns because we need and want to see them. A general counsel decides that smaller firms serve just as well as larger firms, and less expensively. The facts may or may not support that conclusion. Some of that conclusion could be self-fulfilling, while some of it could be selective attention. Another decision flaw is overconfidence in our ability to control the future—and many other decision traps exist.

Personal styles bias our assessments of practices. Psychometric tests and instruments that assess emotional intelligence and group

development all make the same point: Each of us has a characteristic style of perceiving, deciding, thinking, organizing, and reacting. A best practice implies a given way of seeing the world. Is it best to have a deputy general counsel and other lawyers reporting to that deputy? The decision-maker's personal style compels him or her to lean in a direction.

Another way of looking at it borrows from philosophy's fact-value dichotomy. We may think facts are objective and unarguable, but most people who think about it find that they can't separate the value judgment of an observer from a fact observed. Picking out something as a fact implies many fundamental values, most of which are matters of personal style. So a general counsel who claims that it is a fact that certified paralegals accomplish more is probably not aware of the value judgments implicit in that claim: Education makes people better, productivity is the measure of a worker, assignments are given even handedly, and so on.

SOCIOLOGY

Group think quells inquiry into best practices. Business fads and law department best practices share one dynamic: a bandwagon effect. Another aspect results from the tendency of law departments to hire like-minded lawyers. If reducing the number of law firms holds sway for a while, more law departments will give thought to the DuPont phenomenon of limiting the number of preferred firms to a handful or two. Even so, you can be sure the pendulum will swing someday. Meanwhile, everyone spouts the same cant. Without intellectual diversity, group think overrides independent thinking. If all the senior lawyers believe without question that money motivates staff, they won't explore alternative forms of recognition and incentive.

Peer pressure distorts attraction to practices. Group think is like collective mesmerization; peer pressure is the influence of a respected person on an individual. If the general counsel hears from a competitor's CLO that off-shoring legal work to the Philippines cuts costs 50 percent, the desire to keep pace pressures the legal department to explore that practice. That sociological commonplace should cool our ardor for the practice of the day. An aspect of this point derives from the general counsel's overweening influence. Once the general counsel has expressed an opinion about a practice—"Let's hire a third-party bill auditor!"—the expression tends to chill dissent.

Group dynamics twist perceptions of practices. Every society develops its own mores; every law department keeps at a simmer its cauldron of personal agendas, remembered slights, political maneuvering, and individual chemistry. The interpersonal dynamics of a law department make it less likely that the choice of a practice represents the optimal decision—the best practice. If Joe, competing with Jill to be the next associate general counsel, suggests that document assembly could increase productivity, will Jill challenge that idea on its merits or out of competitiveness? Do managers view Jill's proposal to hire a contract manager as a gain for all or another example of her empire-building?

There are arguments in favor of using best practices, but the point here is to challenge a mind-set that believes best practices do exist. Best practices are illusory. Managers of law departments should have the discipline to evaluate practices in law departments in terms of their being contenders—not crowned champions.

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