

The Truth Behind Those ‘Firings’

How many law departments really dump their firms so abruptly? Let's look at the numbers.

BY REES W. MORRISON

Remember all the publicity about law departments “firing” their law firms? It certainly made the headlines and caused a good deal of hand-wringing at anxious law firms. But the truth is not nearly so stark.

In fact, even though it's become conventional wisdom that law departments commonly and increasingly fire their firms, I think that conventional wisdom is off-base.

First, we need to look at what it really means to “fire” a law firm. Firing a law firm ought to mean that an in-house lawyer has taken dramatic action and suddenly severed a relationship. I don't

think it applies to situations involving a competitive bid process in which a law firm, which has been regularly representing a company, is not selected to be preferred counsel. Nor do I think it applies to situations in

which the work assigned to a firm gradually tapers off. These sorts of situations lack the abruptness and deep dissatisfaction implied by the term “to fire.” Let's admit it: Law firms and law departments sometimes grow apart. Sometimes the kind of work available from a client changes, sometimes key partners develop different practices, sometimes in-house lawyers take over the work, and sometimes lawyers relocate.

WHAT BLUNDERS?

Firing a firm is far more dramatic. What serious wrongs might justify a law firm being fired? Fulbright & Jaworski's second annual survey of litigation trends offers seven possibilities, described as the characteristics of “least successful outside counsel.” These were the blunders, listed by in-house counsel at 103 large companies, that can get a firm blackballed. The top three reasons were “high cost” (from 62 percent of law departments), poor communication (44 percent), and incompetence or lack of knowledge (40 percent). Other problems included firms being “non-responsive” (25 percent),



not knowing the company (21 percent), being slow or late (16 percent), and being “unreliable” (13 percent).

Only one of the transgressions rests on not knowing the law well enough; the other six turn on horrible bedside manner and client service. It's simple, really: If you are grossly expensive, silent, or stupid, you can get chopped.

Two more examples of firings come to mind. Accenture stopped using a firm that refused to complete the company's 2005 survey on diversity. And Christopher Littlefield, general counsel of Dial Corp., said he has fired a firm. He explained: “The times we have faced a problem are when we have someone too low a level working on our case. You feel like you're not getting enough bang for your buck, so to speak, and that things aren't moving along quickly enough.”

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In other words, law departments should set a tough standard to justify firing a law firm.

Unfortunately, surveys have done a lousy job obtaining reliable numbers and percentages. One survey of 2004 data conducted by the Association of Corporate Counsel, Practical Law Co., and Altman Weil, asked 45 chief legal officers in Europe, "Have you fired or are you considering firing one of your law firms this year?" Twenty-three of them (54 percent) answered yes.

Although that seems to be a shockingly high percentage, it may not measure anything real. Think of it this way: In the course of a year, what hard-pressed chief legal officer has not had pass through his mind, in a fit of pique, the satisfaction of calling up a partner and bellowing, "You're fired!?" But do they act on that fantasy? If the question had been, "How many law firms did you fire last year?" the survey could have separated the "thought about" looseness from the hard fact of action. Even better, the survey should have defined what it meant to fire a firm.

It also makes a difference how much the fired firms had been paid. Could it be that small fry get fired more often? The Association of Corporate Counsel's 2006 chief legal officer survey, with data from 848 respondents, asked, "Have you fired any of your law firms this year?" The survey found that 32 percent had fired a firm. Those companies stated that they had maintained "a significant relationship" with only 20 percent of the fired firms. It therefore seems plausible that most of the fired firms were either smaller firms, larger firms whose billings were small, or firms that were brought in for a single transaction.

Here's another survey that probably added more confusion than clarity. In a survey that gathered responses from 38 of the Fortune 250 general counsel, *Corporate Counsel*, an ALM publication, reported that 37 percent of them "did not fire a firm in 2005." Companies in that elite bracket may have retained hundreds of firms during the year, so for that many of them to have kept the same herd demonstrates the loyalty of law departments, their lawyers' confidence that they choose and manage firms wisely, and the performance of the firms.

Although this answer also means that 63 percent of the respondents said they had fired a firm, it's more interesting to look more carefully at the reasons they did. First, 34 percent of the respondents (13 general counsel) said they had fired a firm during 2005 "for poor performance." Oddly, about the same percentage said they fired a firm for some other reason, such as technological inability (as one GC said) or diversity (one also). What might be some other reasons? Perhaps the sale of a business ended the flow of certain work, a disabling conflict surfaced, or there was poor chemistry between a new deputy GC and a relationship partner. Maybe a key partner went to another firm, or maybe law firms merged.

How Is It Defined?

The other point to remember is that law department managers may not be using the same definition of "firing" a firm. Some may feel that they're not firing a firm unless they've actually stopped using it in the middle of a matter. Others may say that not using a firm after the matter ends amounts to firing

it. The surveys jumble together all the possibilities yet pronounce alarmist conclusions. It's even possible that under a broad definition of firing, even more firms go up against the wall each year. If every time a law department replaces one firm with another, the former firm is deemed "fired," then the numbers will increase, but the usefulness of what is meant by firing will disappear.

Better for the surveys to ask, "How many firms did you suddenly stop using for reasons of poor performance or deep dissatisfaction?" Better still, they could calculate the number fired as a percentage of all firms paid during the year or the fees paid to the departed firm as a percentage of all fees paid.

Let's consider another survey. In the middle of last year, a survey by *InsideCounsel* magazine announced the responses of 407 law department lawyers who said their department "fired or planned to fire" one of their law firms in 2006. In big print, the magazine proclaimed, "34 percent!"

But there are reasons to be skeptical about those responses. It's odd, first of all, that many in-house counsel "plan to fire" a firm. If the firm's performance is so poor that execution is warranted, why wait? Are transition costs and risks so big that you endure subpar performance? But I have a more fundamental objection: Even if the percentage is true, it might mean just a small number of firms were fired.

Start with the fact that the average department in this survey had 31 lawyers, so at a common benchmark of five lawyers per billion dollars of revenue, assume the average department served a \$6 billion company. A rough rule of thumb based on my consulting experience is that companies of that size in 2006 paid 20 to 40 law firms per billion dollars of revenue, which means that the average department in this survey might have paid between 120 and 240 law firms. Let's pick the midpoint, 180 law firms.

Now, back to the trumpeted finding that one-third of the respondent departments fired or planned to fire a single firm. First, two out of three of these large departments, each likely represented by around 180 law firms, didn't even consider firing one of them. Of those who even contemplated execution—we do not know how many acted on that thought—some number might have fired only one firm.

The alarming headlines over methodologically suspect data become even more dubious if a survey purports to show a trend. In other words, if each survey is full of these kinds of interpretive issues and ambiguities, how can anyone comment on a pattern? One survey analysis did just that, however. Taking 165 responses to a survey conducted in 2006 by Altman Weil and LexisNexis Martindale-Hubbell, the firms made much of the drop in the "fired or considering firing" percentage that year compared with previous years. The latest survey reported that 30 percent of the respondents said they had fired or considered firing a firm and went on to discuss why that figure had dropped significantly from the approximately 50 percent figures of previous years. The analysis attributed the drop mostly to steps outside firms had taken to improve communication, reduce fees, work as partners with law departments, improve staff assignments, and provide free training.

This may all be true, but another set of forces could also explain the shift. Perhaps the convergence of law firms has gone

on so long that many law departments have culled out their underperforming firms. Perhaps with bigger firms serving some departments, there are more ways to resolve dissatisfaction than dismissing every lawyer of the entire firm. Perhaps law departments regard simply not using an unsatisfactory firm as different from “firing” the firm. Perhaps a quite different group of general counsel replied to this year’s survey.

I doubt that U.S. law firms, taken as a whole, have so dramatically improved.

As should be apparent, the surveys that have ventured into the fiery heat of this matter have been burned, badly, by poor questions and methodology. They don’t even define the key term. But even if you accept the general direction of their data, the situation is not as bleak as the headlines proclaim.

It’s no surprise that law departments decide, based on a single dramatic mistake or a series of avoidable missteps, to fire a firm. But despite the gaggle of surveys that have pronounced on this subject, the number of firms that a given law department fires each year is probably a small fraction of all of its law firm relationships. We need better surveys and clearer thinking for us to understand the actual incidence of abrupt terminations of law firms and the performance- or capability-related causes of those firings.

Rees W. Morrison is vice president, law department management consulting, for Hildebrandt International. He hosts the blog www.LawDepartmentManagement.typepad.com and can be reached at rwmorrison@hildebrandt.com.