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Proving a Law Department's Value

When the name of the game is risk avoidance, it's harder to show a return on investment.

By Rees W. Morrison

As if being a general counsel were not stressful enough—risks from all directions, politics with senior executives, constant changes in the law, and all the compliance mandates—there's still the worry about law department management. Among those management difficulties, five particularly vexing challenges have remained unsolved for many years.

While each problem has proved to be intractable, there are some things law departments can do right now. What's offered below are not solutions, but they may help you cope better in your legal department.

Management Matters

An inability to prove the value of the law department. What in-house counsel do has the often-frustrating quality of not being tangible. You can't connect a lawyer's idea, explanation, or warning directly to the success or failure of many transactions. It's just not possible to isolate something done by a lawyer as the essential ingredient of a business success.

If positive contributions don't have a cause-and-effect relation, value that's added in terms of losses avoided are even more difficult to demonstrate. Everyone acknowledges that most risks avoided cannot be quantified. A lawyer who skillfully drafts a contract provision that avoids a default has done well, but how do you attach a dollar value to what never happened or might never happen?

More subtly, it's difficult to prove a law department's value because no lawyer acts alone; others in the company are inevitably part of the team, so how can the lawyer appropriate all the value or the progress? For instance, to document a deal is mostly to memorialize business terms struck by others, so the essential value is not delivered by a lawyer.

The best that law departments can do to prove their worth is to amass satisfied internal clients. Even better, ask clients to complete a survey so that you have supporting metrics about their satisfaction. If those who rely on in-house counsel feel that the lawyers have in large measure helped them, that stands as the best proof of value. Benchmark comparisons, including information such as "Our total legal spending as a percentage of revenue is lower than our competitors'" also, but less directly, show that value has been delivered.

If clients are charged for internal lawyer time, this suggests that the input—the internal cost per hour charged—is less than the output—the perceived value to the client of whatever legal service they paid for. A final step, but one that most general counsel oppose, is to have lawyers report to business unit heads and have their costs directly hit the unit's cost center. You can be sure that those executives have decided that their lawyers add value.

Difficulty in measuring productivity. While "value delivered" involves the worth to the company of what is done by the legal team, productivity measures how efficiently the team gets done whatever it does. It's entirely possible to produce a lot of low-value work very efficiently. Although output per unit of input measures productivity, for law departments, both input and output are problematic.

As to input, you can count the number of lawyers, paralegals, and other staff, and you can total the spending of the department, but those are very crude measures. They don't touch on skills, experience, creativity, teamwork, and other productivity factors.

What output a company gets for those resources has almost completely eluded analysts. A negotiation tip, a comment during a meeting that sidesteps an antitrust risk, a point made that influences a decision toward or against litigation, a loophole spotted in a regulation—these are outputs of lawyers in a legal department but they defy meaningful quantification in terms of productivity.

It is possible to count some of the production of in-house counsel, such as patents applied for, leases signed, cases resolved, EEOC charges responded to, but much legal output is far slipperier. One clever or creative contribution by an in-house lawyer counts for far more than routine drudgery. Then, too, sheer numbers aren't what's really important—counting the pages of contracts produced per month is silly; output has a qualitative side, too.

The intractable nature of measuring in-house productivity is why it is impossible to assess in a black-and-white way whether a law department is chugging along at full capacity. People can always work smarter, or with different processes or technology.

To demonstrate the productivity of the law department, a general counsel can have inside lawyers track their time. At least to some degree you can then match effort to output. Benchmarks also suggest productivity, because among comparable companies, a law department that has lower spending or fewer staff is more productive. It is also true that if two lawyers of similar experience handle substantially similar work, their productivity can be compared, but that situation rarely happens in law departments.

Over time there will be better productivity metrics for groups of lawyers who handle similar work, such as environmental lawyers, regulatory lawyers, or tax lawyers.

Difficulty in measuring the quality of legal work. Judging the quality of legal work is subjective. No one can proclaim that the contract Chris just negotiated is the best contract that could have been obtained. Nor can anyone prove that the contract is an 8.5 on a scale of 10. A judge might rule in favor of a company, but was that ruling the result of the quality of the brief and oral argument, and to what degree?

One reason it is so hard to judge quality is that often the legal advice is never tested. Sometimes executives override a legal recommendation. Another reason is that many times even a general counsel knows much less about a specialized area of law than does the lawyer whose work quality is being assessed.

What can be done? Peer review of work is volatile; outside counsel asked to grade an inside lawyer's advice may not be objective; results of legal services may have little relationship to the skillfulness of the lawyer; and there is never enough time. The best a general counsel can do to improve quality is to think hard, take some time, ask good questions, and pay attention to results. It's better to hire bright lawyers, engage them professionally, praise them for good work, and keep their skills sharp. Otherwise, feedback about the prowess of a lawyer is usually infrequent, anecdotal, and tinged with personal agendas.

Inappropriateness of seeking to fully satisfy clients. Every general counsel knows that lawyers sometimes have to take a hard line and tell a client that she can't do what she wants to do. "You will run afoul of Regulation 3(b) if you do the promotion that way!" For the good of the corporation, an internal lawyer sometimes has to dissatisfy a particular client. If that client later knocks the department on a satisfaction survey, that's life. Law departments serve as a check and balance in a company, which means some checked clients won't be happy.

On the other hand, an inside lawyer can look the other way, keep quiet, and not challenge a powerful, aggressive, or misbehaving client. Say nothing about financial shenanigans, backdated options, misappropriations of corporate funds—and you will make some clients very, very satisfied. But total client satisfaction may be the result of abdication of professional responsibility to serve the company as a whole.

Law departments are perceived by business executives, for the most part, as a cost center. Executives begrudgingly accept that their company has to pay for legal advice, but in their ideal world there would be no need for the expense. Thus, genuine satisfaction with lawyers may be a chimera.

One reason client satisfaction remains so elusive is that law departments can never really budget outside counsel expenses accurately. What clients decide to do is largely out of their lawyers' control; what wrongs were committed in the past that blow up now are uncontrollable; and what forces in the outside world can overwhelm a budget know no measure—creative plaintiffs, bad weather, political shifts, competitors.

How does one walk the line on client satisfaction? The techniques to choose from are well known in principle but difficult in practice. Keep setting the performance bar for your department higher. Take actions based on the gap between the importance to clients of an attribute, such as timeliness, and the scores they give to it. Educate clients about how best to use the law department and what they should realistically expect from it. Push your lawyers to think in terms of client service. Finally, structure your law department so as many as possible of your lawyers feel a commitment to one or more client groups. In the end, speed, responsiveness, clarity, and decisiveness go a long way to satisfy clients.

An inability to show a return on investment for management initiatives. A general counsel can cherish initiatives like knowledge management, pro bono, technology, diversity, or team work, but those who study the effective management of law departments have not been able to prove empirically what works and what doesn't. We can barely define common practices with standard terminology, let alone collect benchmark data to compare companies on those practices. For example, to what degree does productivity increase when technology is introduced? We do not know.

The best way to demonstrate a return on an investment, assuming that proof is even a goal, is to keep accurate metrics before and after a change. If you want to learn whether your new matter management system saves money, you need to collect spending and other data before and after and then analyze it objectively and honestly.

Value, productivity, and quality elude us because of the intangibility of cerebral work and the unknowability of what doesn't happen. Complete client satisfaction bumps into conflicting values and it's impossible to analyze a return on investment without historical data. The good news here is that every law department struggles with these five challenges. The better news is that in recent years there has been some progress chipping away at them.

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