

Mavericks of the World, Unite!

Creative approaches to legal processes can be a kick in the pants to law departments.

That is, if freethinking attorneys can get past the bureaucrats, the risk-averse, and the traditionalists. **BY REES W. MORRISON**

What's so scary about creativity?

Neither law departments nor the law firms they retain appear to be comfortable with creativity. They talk about the value of doing things differently—and better—but the truth is that creativity is unusual and mistrusted.

Both sides are ambivalent: Law departments favor step-by-step, well-understood services, even as their lawyers claim that they welcome breakthrough thinking; law firms boast of their cutting-edge abilities but find little actual reward in innovation. I want to consider a few ways that law departments can understand and improve their attitudes toward creativity.

I may have quite a challenge. In surveys of what law departments seek in their law firms, at least two surveys have placed creativity in the lowest ranks. Fulbright & Jaworski's second

Management Matters

annual litigation-trends survey asked in-house counsel to identify the "three most distinguishing attributes of your most successful outside counsel." Out of eight

attributes, the one identified least often was "creative." Only six percent of the respondents valued creativity among their top three. Law departments either don't observe any form of creativity in their law firms or don't find the creativity they see particularly valuable.

In a different survey, 45 chief legal officers in Europe answered this question: "What is the single most innovative practice proposed or used by your outside counsel in the last twelve months?" The most common answer was "none." Only 10 even named an innovative practice, and the practices were laughably mundane: "e-learning compliance tool," "document management," and "volume fee reductions."

In short, law departments want their firms to know what they're doing and to follow a well-trodden path. Reliance on precedent and accustomed patterns has long been a hallmark of the law, so divergence and difference often encounter skepticism and opposition.

A creative lawyer accomplishes a task in a new and better way. She creates a new cause of action in a complaint, or suggests a clever trade-off in a negotiation, or organizes the board book in a clearer style. Creativity means improvement, and although not everything done differently is worthwhile, useful creativity increases productivity and effectiveness, and law departments ought to encourage their external firms to be creative.

Why is creativity not more common? You would think that lawyers, who make their living by understanding a complicated legal system and applying even more complicated facts to the law, would cherish creative new ways to practice law. Many billable hours come to someone who can devise a better legal mousetrap. Yet innovation is the exception.

Why are law firms and lawyers not more creative? There are many circumstances that retard creativity in both inside and outside counsel. Our psychological makeup breeds some of these obstacles, and our sociological interactions breed others.

Creativity increases risk. The ultimate conflict is that the creative lawyer runs risks. Risk, to many lawyers, is anathema. Craft a novel tax shelter and you may be sued later by the client who loses to the Internal Revenue Service. Take the position that a zoning ordinance allows a use of some property that others haven't envisioned and your law department might look bad if the local real-estate board bars the use. At the same time, that risk may be worth taking for an entrepreneur if it brings big profits.

In-house counsel wrestle with the same disinclination to do something new. After all, they have to justify the change to their superiors and their clients. Consider that, when a large number of Canadian corporate counsel ranked the importance for in-house counsel of 11 personality traits, just 4 percent of the group ranked "creativity" as the top personality trait, and only 21 percent gave it a 1, 2, or 3 ranking.

Creativity is beyond many of us. Most of us are not smart enough or motivated enough to challenge the status quo. That is to say, even if some lawyers wanted to stretch the envelope and be creative, they lack the ability. Creativity depends on a turn of mind that is rebellious, contrarian, and strong-willed in the face of opposition. It is entrepreneurial.

Creativity presents a criticism to traditionalists. A lawyer who comes up with a new technique implicitly criticizes how lawyers previously practiced. Anything new attacks or at least exposes the old. That psychological penalty—showing up others—inhibits any pioneer’s creativity. If you are the first person to advocate using offshore lawyers to draft nondisclosure agreements, some of your colleagues who do the same work will disagree with the soundness of your strategy.

Newfangled ideas often crater. Coupled with lawyer conservatism is the fact that most new ideas turn out not to be improvements. Naturally, we honor those who do something new that succeeds, but that is partly because of the anonymity that surrounds failures. A realistic obstacle to trying out something new is the likelihood that the new step will stumble. If you assert in bankruptcy court for the first time that an accepted form of transaction was actually a fraudulent conveyance, “I told you so” may ring out.

Creative approaches sometimes take longer. If a real estate lawyer proposes a new obligation for a landlord, other parties to the transaction may be suspicious. The landlord’s lawyer will object, say it hasn’t ever been done that way, and point out the disadvantages, and the negotiations will drag on. The creative lawyer has to take the time to explain and defend the new obligation. Yet this is how the law grows and changes.

Creativity withers in a bureaucracy. Law departments are embedded in large corporations, where structural rigidities inhibit creativity. Large law firms have committees and procedures and permissions. For example, a partner who is willing to try some alternative to hourly billing may have to persuade the managing partner and others to let that new idea be included in a proposal. Bureaucracy in all its forms strangles initiative—more people have to be consulted as more levels of approval are necessary; endless meetings take place inside and outside the law department; more memos and e-mails must be sent.

Are there solutions to the dearth of creativity? Here are a few suggestions.

Creativity can be small-scale and process-oriented. Creative doesn’t only mean “never been done by someone before.” It also may mean “we have not done it in our law firm before, but let’s try.” Dramatic creativity is rare, but small and incremental improvements also serve. For example, within a law department, one could say, “Let’s hire an engineer to work with our patent group,” or “Let’s create a trademark-request form that our law firm can give to the client group in marketing.” In truth, most change is “emergent.” Over time, a number of people, in fits and starts, shape and reshape a set of practices that, later on, crystallize into an innovation.

Look at what others have done. Take the example of some recent creative ideas from various law departments. Together they exemplify the psychological and sociological obstacles to creativity that appear in relationships between law departments and their law firms.

One law department in New York City decided in 2005 to replace its accomplished, long-serving administrator with a lawyer from the department. The lawyer would hold that position for two years and then rotate out, replaced by another

lawyer. What’s creative is how this changes the way the law department looks at lawyer development and the importance of sound administrative practices. Kraft’s patent lawyers began a program to educate clients not involved with research and development about the value and importance of process innovations, such as potential business-method patents. The lawyers circulated an explanation of such innovations and an invention-disclosure form, then tracked submitted forms.

Citigroup Global Wealth Management recruits law school graduates as employees, but they start their careers at a top-tier New York law firm. After two years, qualified participants are offered a vice-presidential position with the legal department.

Try some techniques that encourage divergent thinking:

- Challenge defensiveness among your peers and the chorus of “we tried it.”
- Brainstorm; use the technique (known as the Delphi technique) of having experts evaluate and vote on ideas and develop scenarios.
- Encourage contrarian views and maverick thinkers. A study of 240 top executives, conducted by a firm called PsyMax Solutions, “found creativity to be the one trait most common to highly successful executives,” *USA Today* reported.
- Explore creativity enhancers, such as combinations (could a law firm merge its invoice and a mini-satisfaction survey?), what-ifs, and metaphors.
- Expose assumptions and question them. One way to do this is to appoint a devil’s advocate to argue the contrary position.
- Bring in views and experiences of outsiders, such as academics or consultants.
- Read and listen widely across disciplines. Cross-pollinated ideas can make a lawyer look brilliant.
- Use procedures such as Six Sigma, a technique to identify and drive out variations in procedures. International Truck and Engine hired a contract intellectual-property lawyer and trained him in Six Sigma. He creatively improved the company’s patent process. For example, they posted the patent submission form online and offered \$250 for each accurate invention submission form. That step helped reduce the time spent in the law department on preparation of patent filings by 28 percent.

Creativity in outside counsel and among those who pay their bills may be like leadership. Everyone praises it and talks about its importance, but in truth, both turn out to have a limited role or limited visibility. The sadder truth: Law firms don’t rock the boat; they don’t venture into new ways of serving their law-department clients. Sadder still: Law departments do not insist on creativity, reward it, or experiment with it.

Ironic, isn’t it, that for an intensely cerebral profession that lives on complicated concepts and rational argument, the creative idea does not at all enjoy the honor and prominence that might be expected? Both law departments and law firms should nurture and reward creativity.

Rees W. Morrison, co-head of law department consulting for Hildebrandt International, helps general counsel improve their law departments’ effectiveness. He creatively hosts the blog LawDepartmentManagement.typepad.com.