

FEBRUARY 2019

THE CORPORATE LEGAL DEPARTMENT OF TODAY AND TOMORROW

GARY L. SASSO



**CARLTON
FIELDS**

I. INTRODUCTION

In recent years, corporate legal teams have identified as their top three operational challenges (1) reducing outside legal spending, (2) communicating more effectively with internal stakeholders, and (3) doing more with less. Thompson Reuters, *The Keys to a More Effective Legal Department*, (2016), p. 6. Making significant inroads in each of these areas now, more than ever, requires thinking outside the box.

These are not new issues for legal departments. Over the years, they have tackled them in ways we have come to know well. To reduce outside legal costs, general counsel have focused primarily on tactics to lower hourly billing rates. When thinking about how to communicate most effectively with internal stakeholders – principally business executives – legal departments have understandably prioritized improving their responsiveness to questions asked and the quality of the advice provided. Finally, when required to do more with less, general counsel have naturally responded by assigning more work and responsibilities to the same in-house attorneys.

These strategies can be effective up to a point, but they are fundamentally reactive, not proactive, they can achieve only so much, and they can even backfire. When focusing on lowering outside counsel's billing rates for legal services provided, corporate legal departments too often take for granted the nature, scope, or very existence of the legal problems outside counsel are asked to address in the first place. When striving to respond more quickly and effectively to requests by business executives for legal advice, inside counsel may be waiting passively for such questions to arise without considering what they can do to preempt the need for advice or to select more strategically where they can provide the greatest benefit. Further, they may be missing entirely opportunities to engage with business leaders on more strategic matters that can help the company grow market share or otherwise confer greater shareholder value. Likewise, when loading more work on the same inside attorneys, general counsel may be overlooking measures that can change the priorities, nature, and quantity of work the legal department is handling.

Some general counsel today are taking more effective and proactive approaches to getting substantially more value from outside counsel at the same or lower costs by considering factors that have much more impact than hourly billing rates. They are also changing the paradigm in how they give advice and what kind of advice they give to their internal business clients, finding ways to disengage from performing tasks that should not come to the legal department in the first place, and shifting their time, energy, and talents to helping the company identify unrecognized opportunities to achieve its growth objectives. All of these measures inherently enable inside counsel to do more with less. Especially for smaller legal departments, but with larger ones, too, general counsel may also wish to experiment with retainer agreements with outside counsel to provide a safety valve for work overflow that occurs sporadically and to brainstorm ideas, problems, and opportunities that have not yet gelled, or may never gel, into full-scale engagements.

II. CONTROLLING OUTSIDE LEGAL SPENDING

General counsel tasked with cutting legal spending often embark upon convergence programs to find least-cost providers, demand steeper reductions from standard hourly rates, or both. These measures have achieved significant cost savings for many companies, to be sure. But if misapplied, these approaches may produce a net loss in value, through increased exposure, costly mistakes, and a needless disruption of the business. Getting the most value and best outcomes requires as much focus on qualitative as quantitative considerations.

A. Selection of Outside Counsel

Effective management of outside legal costs must start with careful selection of the right outside counsel for the matters at hand. This may or may not require formal requests for proposals (RFPs) with or without a convergence program. It must first and foremost involve a qualitative assessment of alternatives.

When properly conceived and carried out, RFPs may help the company identify excellent options and obtain important information. They can be a useful and even necessary tool in any convergence program, and many companies probably should reduce the number of firms they use overall to ensure that they are calling upon only their best options. But RFPs can be so detailed and rigorous that they miss the forest for the trees. See, e.g., Bantz, P. and Strom, R., A Simple Request, *The American Lawyer* (January 2019) (“The request-for-proposal process is broken. Both sides want it fixed.”).

Some companies bypass well-grounded and deeply held opinions by even long-serving, highly experienced inside counsel about outside counsel they have used over the years, preferring instead to make ostensibly more “objective” data-driven decisions. Given that data analytics and artificial intelligence (AI) offer profound opportunities in some areas of the law, it is natural to consider their application here and wonder whether a truly “objective” choice of outside counsel can be made. To be sure, historic data may be relevant, and can be supplemented by information gathered in formal RFP processes or convergence programs. But the field of law does not lend itself readily to the development and mining of enterprise data because it is a narrow vertical with a great deal of variability. See <https://www.thelawlabchannel.com/daniel-martin-katz-mlaas-machine-learning-as-a-service>. For all but the most rote engagements, any two law firms and any two substantial engagements can vary markedly.

As experts debate the impact AI will have on the practice of law, most agree that AI is currently best suited to handling matters that involve recurring, rote, identical events. The technology does not exist at this time, and is not likely to exist any time soon, that can replace human value judgments, creativity, and discernment of human reactions and emotions. It is precisely these talents that distinguish great lawyers from journeyman lawyers and certainly from machines. These qualities do not lend themselves to machine-driven evaluation and selection tools or to quantitative analysis. In the final analysis, there can be no substitute for the opinion of managing counsel who have worked in the trenches with outside counsel. At a minimum, this should be given considerable weight in any final determination.

In selecting outside counsel, the company will favor most strongly those law firms that possess the requisite industry and subject matter expertise and, in some cases, regional knowledge and relationships. Increasingly, companies will be seeking out expertise in “micro-niches,” not merely general subject or practice areas. All of this is good and proper.

For many years, corporate counsel have defaulted to hiring the most prestigious Wall Street firms for high-stakes transactions, advice, or litigation. Engaging such firms has been seen as a “safe” option beyond reproach. In some instances, those firms may in fact provide the best alternative. But increasingly, general counsel are questioning whether this should be viewed as the “default” option. The consultancy Advanced Law has gathered together numerous general counsel from top companies across the United States to explore this very issue. They have concluded from their collective experience that firms all across the country outside the *Am Law 20* often outrank those firms in all categories that matter, namely,

quality of representation, favorable results, a solution-based mindset, and responsiveness. See Dattu, F, and Kotok, A., *Largest, Most Pedigreed Firms Underperform on Service Quality Compared to Other Firms* (law.com/American Lawyer, June 12, 2018). The fact is, great talent is now dispersed throughout the country, and top notch lawyers are now found in law firms that charge significantly less than *Am Law 20* firms with no diminution in quality, perhaps even with an improvement in quality, resulting in greater value.

B. Managing Outside Counsel

Once the client selects outside counsel, how can the company best manage the cost of using outside counsel? Often, corporate counsel believe they have licked this problem through the RFP process itself, by selecting counsel with the lowest hourly rates. This success may be illusory, however. No matter what we buy, what is most important is the all-in cost of the product or service and the value of what we have purchased. We have seen engagements where the lowest rate provider ultimately charged far more for less than what law firms charging higher hourly rates provided. At the same time, we have seen many engagements where the most prestigious firms have charged far more for less than lower rate firms outside the *Am Law 20* provided. Not surprisingly, the right choice might lie somewhere in the middle.

Either way, once the client selects outside counsel, management of the relationship has only begun. The company should not blithely presume that selecting counsel who have quoted a certain percentage reduction from the rates the company has been paying will necessarily reduce the company's outside legal spend by that same percentage. The legal spend might actually increase, outcomes might suffer, and collateral damage may abound. If the company has made a good selection on the merits, however, there are proven strategies for partnering with outside counsel that can help the company achieve the results it seeks.

1. Root Cause Analysis

The most powerful strategy for reducing costs is often overlooked. The Association of Corporate Counsel has conducted a "Value Challenge" for several years, challenging member companies to develop innovative ways to lower their outside legal costs. At the outset, the sponsors anticipated modest, single-digit expense reductions. What occurred, however, was staggering. The most successful contestants achieved huge game-changing, double-digit cost reductions not by forcing down hourly rates, but by addressing and correcting the underlying drivers of costs. One company cut its litigation costs substantially by partnering with outside counsel to study trends giving rise to the cases, and then it intervened with training sessions for employees that substantially reduced complaints and cases filed. See *Meet the Champions!*, ACC's Value Challenge (2017). Changes like this not only reduce the overall costs of defending law suits, but they curtail business disruption, reputational injury, and payouts for the avoided claims. Similar opportunities abound to identify deficiencies in company processes, policies, operations, personnel, contract management, vendor relations, and even corporate organization that may be driving up the legal costs of managing transactions, regulatory compliance, protection of intellectual property, or the resolution of all kinds of disputes.

Is it against the interests of outside counsel to help the client streamline transactions or prevent or curtail disputes? Only the most shortsighted law firms would think in these terms. Any outside counsel worth its salt should take a long view of the relationship, understanding that the best formula for a lasting, mutually beneficial arrangement is helping

the client achieve its overarching business goals. Conversely, treating the relationship as a zero-sum proposition revolving around how much the company pays the law firm by the hour is fraught with peril. It creates all the wrong incentives on both sides of the equation.

2. Budgets and Alternative Fee Agreements

Companies most often manage outside counsel costs through the use of budgets or alternative fee agreements (AFAs). See Thompson Reuters, *supra*, p. 16. Budgets are built around agreed-upon billing rates multiplied against anticipated billable hours, and AFAs may approach the representation differently through fixed fees or fee caps.

a. Scoping

The key to using either approach effectively is to start every engagement with a direct and thoughtful discussion of the scope of the engagement. Too often, this is handled on the fly, with insufficient thought given at the outset to the likely dimensions of the representation. If the matter involves civil litigation, for example, the client and outside counsel will want to consider not only all the ins and outs of understanding, managing, handling, and resolving the civil dispute, but should also consider the various stages that may be involved, e.g., investigation, trial level litigation, post-trial litigation, and appeal(s), as well as collateral matters that may well arise, e.g., parallel governmental inquiries or proceedings, insurance issues, prevention of reputational injury, and more.

All but the most simple, briefest engagements should contemplate a robust early case (deal or matter) assessment. This will be crucial to both devising appropriate strategies for handling the engagement and establishing a credible budget or AFA to price it. Unfortunately, clients often shut this down or preempt it by relying on their own internal early case assessment, in order to hold down outside legal costs. This can be shortsighted and self-defeating.

Why do companies hire outside counsel in the first place? It is either because they do not have the capacity to handle the matter in house or the matter falls outside the expertise of inside counsel. To be sure, inside counsel often work side by side with outside counsel and oversee and support their work. But to get the full advantage of outside counsel's expertise and to ensure that inside counsel and outside counsel are on the same page in matters of strategy, approach, and costs, it is absolutely critical that inside counsel ask outside counsel to engage in an independent early case assessment. This is important for another reason as well: Inside counsel can rarely be either completely objective or independent of influential business leaders in conducting this analysis. They are often too close to the problem and too interdependent with key executives who will likely be involved either in disputed issues or in the decision making.

An early case assessment will generally involve an investigation of the facts and law, including interviewing persons inside the company and perhaps outside the company with special knowledge of the matter or case and the development of alternative strategies for tackling the engagement,

perhaps including a “low case,” “middle case,” and “high case” scenario, each striking a different balance of risk/benefit tradeoffs. Once this is completed, outside counsel will be in a position to lay out the pros and cons of competing strategies and then to arrive at a decision about the optimal course of action with the client. When this is done, the parties will be in a position to develop a reliable, sustainable budget or AFA for the course of the engagement.

b. Budgets

Once inside and outside counsel have settled on a course of action, the parties typically prepare a budget that focuses more on activities than people. But experience shows that staffing can be a critical driver of both pricing and outcomes.

Inside counsel should ensure that outside counsel is using the minimum number of professionals needed to carry out the engagement in the most cost-effective way. Again, the client should not place undue emphasis on the hourly rate of the timekeepers. The pyramid model of throwing an inordinate number of ostensibly “lower cost” associates at any assignment has now largely been discredited. The all-in cost might be considerably lower if outside counsel uses two experienced partners on the file with two associates for support rather than one partner supported by five or six green associates. The focus should be on a lean team comprising the right professionals.

Further, absent true exigencies, the client should prefer that outside counsel not rotate attorneys in and out of the engagement based on their availability at the moment. This gives rise to duplication of effort, other inefficiencies, or worse – matters slipping through the cracks.

The parties should strive to create realistic budgets, even at the risk of experiencing sticker shock. We have never seen an engagement where either the client or outside counsel were best served by early denial of the eventual true cost of the representation. Surprises almost always result in a lose-lose compromise that leaves both parties feeling cheated. In this regard, the budget should anticipate the twists and turns that always occur in any significant matter. The parties can draw on their own experience to estimate a “plug number” to represent these contingencies. Most experienced counsel can estimate a range, even if they cannot predict with any certainty what may drive these developments. Yes, in some sense they are unforeseeable, but in a very real sense it is eminently foreseeable that what we know today will fail to capture the complexity and true costs of the actual engagement. The parties should discuss this frankly and discuss how to handle this when – not if – it occurs. Sometimes a simple provision for budget adjustments will suffice, but more often than not the client treats even the most conditional estimate as final. So discussing and identifying a likely range that the parties are prepared to treat very seriously is a better approach.

Of course, inside counsel will want to track performance against budget on an ongoing basis. Increasingly, law firms have tech tools that enable clients to do this online during any month. Even when the company is using electronic billing, outside counsel should still provide a narrative each month describing

what was done in the last billing period, where the matter stands at that time, and what will be done in the coming billing period.

c. AFAs

The best option in AFAs is a fixed fee for either the entire matter (or even an entire portfolio of matters) or for no more than a few key stages of a matter. If it becomes too granular, it will be too tempting to treat it like an hourly engagement. The key to a workable fixed fee engagement is for both sides to arrive at what each feels is a fair price at the start and then not to look back. For this reason, it may be unwise to use “collars” or “true ups” that require the parties to monitor and exchange information about the actual hours being expended and their value at some agreed-upon hourly rate. Again, this tends to shift both parties’ mindsets back to hourly rate billing, which can defeat the point of a fixed-fee engagement.

What is the point of a fixed-fee engagement? Ideally, it will better align the interests of inside and outside counsel and provide budget certainty to the client and certainty of payment to outside counsel. The parties should agree on a periodic (typically monthly) installment payment against the agreed-upon fixed fee, with payment provided on the first day of each month, starting with the first month, like a mortgage or car payment. This gives both sides the certainty they want and need.

Viewed properly, a fixed-fee engagement provides an incentive to outside counsel to strive for the greatest efficiencies in handling the matter while also pursuing a successful outcome. Only the most foolish, shortsighted outside counsel would compromise the quality of representation, client service, or outcome for financial gain. If outside counsel handles the matter well in less time than anticipated, that should be seen as a win/win, not as a windfall for outside counsel. Conversely, if the matter takes more time or resources than anticipated, that is a risk outside counsel assumed in return for an engagement and fee outside counsel was pleased to receive, and is thus also a win/win.

Like any budget, a fixed fee should incorporate a component for the unforeseeable, but inevitable, contingencies that arise in any engagement. The size of that cushion will be the subject of negotiation between the parties, of course, but both sides should perceive that it is in their best interests to treat the other fairly.

A risk averse client might prefer a fee cap, giving the client the benefit of any efficiencies that actually occur (e.g., an early, less costly resolution of the matter), while protecting the client against cost overruns. This tends to shift the client’s risk to outside counsel, however. So it will be in outside counsel’s interest to negotiate a larger cushion to protect against currently unforeseen contingencies. This should be done openly rather than by embedding this artificially in actual, budgeted tasks. This kind of arrangement will also require the parties to agree upon an hourly rate and to track actual hours incurred in

the engagement, arguably focusing attention on the wrong things, replicating an hourly rate engagement in essence.

General counsel might consider crafting AFAs that provide a contingency payment to outside counsel as an added incentive to achieve successful outcomes. This must begin with reaching consensus with outside counsel on what “success” looks like. For transactions, this might be the closing of a deal. For plaintiff’s litigation, this might include recovery of damages or equitable relief. For defensive litigation, this might be dismissal of adverse claims, summary judgment, a defense verdict, winning an appeal, or securing a settlement or final adjudication under a certain dollar limit. The fee agreement might then provide for a “success fee” when and if outside counsel achieves this result, or possibly a hold back of a portion of the fee, which is forfeited for a less-than-successful outcome and multiplied by some factor for a successful result.

3. Post-Matter Briefings

The company should follow up on every significant engagement (or group of matters) with a post-matter debrief with outside counsel. This should be a thoughtful, open-ended review of the business considerations that gave rise to the engagement in the first place, whether they can be improved, the relationship between inside counsel in the course of the engagement and whether that can be improved, and the efforts of outside counsel and whether and how that might be improved. The parties should also take the opportunity to discuss any follow up needed on the matter just concluded and anticipated work on ensuing, similar or related matters.

4. Bundling Like Matters

Whether the company chooses to use hourly rates with budgets or AFAs, assigning entire portfolios of like matters to the same counsel can enable better pricing and economies of scale. Outside counsel can build a dedicated team, reduce redundancy and inefficiencies, and develop repeatable processes much more readily when handling a volume of like matters. The client gains not only greater efficiencies and reduced costs, but is able to minimize the risk of inconsistent approaches and results and can reduce disruption of business units. Key inside personnel and departments will be able to interface with fewer points of contact at one outside law firm.

Large companies are increasingly assembling numerous firms into “virtual” law firms to handle portfolios of litigation or transactions or even single, highly significant matters. If the matter calls for expertise not possessed by any one firm, this can make sense. Too often, however, it does not. The client may think it is assembling a dream team, but this can lead to duplication, inefficiencies, mistakes, a lack of cohesiveness in approach, and jockeying for position among the firms that can add up to higher costs and diminished quality.

C. Taking Work In-House

Of course, a company can moot much of this by taking more work in house, and companies have been doing this with alacrity since the advent of the Great Recession in

2008. This can present other offsetting costs discussed more fully below, in diverting inside counsel from engaging with and serving internal business clients more creatively and effectively, but there is no question that this strategy must be part of the legal department's arsenal in reducing outside legal spending.

It is not always possible, practicable, or cost-effective, of course, to take legal work in house. Two-thirds of all legal departments have only one to five attorneys. Thompson Reuters, *supra*, p. 5. So it should not be surprising that inside counsel do use, and even must use, outside counsel regularly on many engagements, with inside counsel most comfortably handling contracts and drafting work, while collaborating with and overseeing outside counsel's handling of litigation, M&A, and IP. *Id.*, p. 7. But larger public companies now have legal departments the size of large law firms, and they can and do handle an increasing amount of the company's legal work themselves. For clients that have this option, the driving considerations for sourcing legal work to outside counsel include the need for their industry and subject-matter expertise, bench strength, and regional knowledge and relationships. When the decision is driven principally by cost, the company must compare the all-in financial cost of maintaining an in-house legal team sufficient to handle the given volume of work at issue versus the all-in cost of outsourcing the work, comparing also the quality of results, business disruption, and need for independence.

D. Alternative Service Providers

Especially on matters involving rote, lower-risk activities, companies are turning more and more to outsourcing work to low-cost offshore legal teams or alternative non-lawyer service providers, like accounting firms or tech firms. These choices always involve trade-offs, but general counsel often quite reasonably opt for the lower cost alternative. In some instances, the company may get both reduced costs and improved quality when sourcing work to vendors who do nothing else and who get quite good at the niche they have carved out.

Experts do not expect technology to displace what lawyers do in any substantial way, but artificial intelligence is very well suited for repetitive tasks susceptible to standardization. This is especially so in document management, retention, and production in the context of e-discovery, where tech is most often used by inside and outside counsel. See Thompson Reuters, *supra*, p. 21 (ranking in-house use of technology from high to low, in document management, electronic signatures, legal hold systems, matter management, e-billing, contract automation, knowledge management, e-discovery, and predictive analytics); HBR Consulting, Law Department AI Survey Report (2018).

III. COMMUNICATING BETTER WITH INTERNAL STAKEHOLDERS

A. The Problem or the Solution?

Too often, business leaders view the legal department as naysayers – as a “necessary evil” or “cost of doing business.” They view the legal team as the source of problems, not solutions. Even viewed most charitably, corporate legal departments have historically added costs to their company's budgets and have spent most of their time and efforts working to prevent losses by ensuring that transactions are handled safely, laws are followed, and litigation is defended. It is hard for top management to get excited about that. When the legal

department wins a tough case, the business division involved says, “Of course! We did nothing wrong.” If the case is settled or lost, the reaction is “Why did we have to pay all that money? We did nothing wrong.”

General counsel of top companies are intensely focused today on how to change this perception and reality. Specifically, they are trying to identify ways to position the legal department to support the company’s growth goals – to contribute to the production of revenues and business opportunities – while also continuing to manage legal risk. See, e.g., Deloitte, *The Legal Department of the Future, How Disruptive Trends are Creating a New Business Model for In-House Counsel* (2017). To achieve this transformation, general counsel must develop a wholly different mindset about how to do their jobs.

Most legal departments are organized to support the various business units, geographic locations, or skillsets required by the diverse business divisions of the company. This is good and necessary, but it is fundamentally reactive. If general counsel want to bring genuinely new value to the table, they must dedicate a portion of their own time and priorities to identifying and executing on such initiatives, and they must develop an infrastructure and culture in the legal department to support this.

The avenues for helping augment and develop revenue streams and business opportunities for any company abound. Here are some examples:

1. Engage directly with the board and top management in strategic discussions. The general counsel of many top companies participate as part of the executive management team in regular meetings and decisions about business strategy. If any general counsel is not participating in these activities, this bears further thought and discussion with the company’s top management. (Of course, thought must be given to the application of the attorney-client privilege to any inside – and outside – discussions with legal counsel, a topic beyond the scope of this article). Savvy business leaders generally understand that the training, skills, and perspectives of general counsel can be invaluable in analyzing and addressing the most pressing matters the company is facing.
2. Help design the right governance and management structures to support transformational projects.
3. Identify opportunities to curtail or recover losses resulting from fraud, theft, or inadvertence, thus boosting both gross and net revenues.
4. Consider seeking damages for violations of the company’s legal rights, perhaps by participating in or opting out of class action litigation.
5. Investigate little-known state tax deductions, subsidies, rebates, or regulatory opportunities.
6. Identify occasions to license and market intellectual property.
7. Anticipate regulatory changes and help the company get compliant products to market ahead of competitors.

8. Suggest the development of new business models based on legislative or regulatory change, identifying opportunities to acquire or shed companies or business divisions.
9. Help devise compensation strategies, including change of control protection, to attract and retain senior talent and to remove impediments to growth or enhancement of shareholder value.
10. Facilitate progressive changes in corporate culture that help operationalize compliance, encouraging employees to “walk the talk.”
11. Look for opportunities to reduce or moot consumer complaints or even class actions while boosting sales and customer loyalty by improving customer service policies and procedures.
12. Identify and investigate business opportunities (and perils) associated with the varying legal regimes of foreign markets.

B. Reallocating Priorities

To achieve these ends, corporate counsel are now considering how to free up time and talent in the legal department from responsibilities that needlessly consume the department’s resources, enabling inside counsel to devote their energies to supporting the company’s growth initiatives. They are approaching this by (1) conducting essentially time and motion studies of inside counsel to understand with considerable granularity how they are spending their days, (2) analyzing where legal resources are needed the most and sorting more purposefully the allocation of responsibilities between legal and business employees, (3) devising means to embed legal advice and direction, where needed, in protocols that can be followed by business employees without personal intervention by inside counsel, and (4) improving project management by members of the legal department. See, e.g., *Lawyers on Demand (LOD), Measure Your Impact, 8 KPIs for In-House Legal Teams (2018)*; Gartner, *The Anatomy of a World-Class Legal Department, 20 Activities to Accelerate the Legal Function (2016)*. We will address these in turn.

1. Time Mapping

The best legal departments, of course, emphasize great client service. When business leaders call, inside counsel jump. This can be a two-edged sword. If business leaders and employees are calling the legal department into matters where they are not needed, this can be a costly misallocation of resources. Use of outside counsel has a natural governor: actual charges for time spent. This is seldom true with inside counsel. (Some companies do “charge” business units for the time of inside counsel, creating the same effect, which is worth close consideration. But it can impair relationships with internal business clients.) Ironically, in the name of providing great client service, inside counsel might be forced to forego spending time and energy bringing added value to the table.

There is only one way to be sure whether the time of inside counsel is being well spent – find out how their time is actually being spent. There are different ways to tackle this issue, of course, but one straightforward approach is to ask all inside counsel to keep detailed time records – recording their time in 1/10 of an hour

increments, with detailed descriptions of services rendered – much like outside counsel must record billable (and often non-billable) hours. This will have to be done over a sufficiently long period of time, probably at least 90 days, to be sure that the time and activities mapped during this time is fairly representative of time spent throughout the year. This will not capture all periodic or seasonal events. So ask inside counsel to create a separate list of discrete services and activities they know will take place outside the window they have recorded in detail. See, e.g., LOD, *supra*, p. 10.

2. Reallocation of Responsibilities

With this information in hand, the legal team should study these data and discuss collectively which activities they all agree lawyers must provide versus those that are superfluous or better left to other professionals (e.g., IT, accounting, compliance), business leaders, or operational employees.

Be sure not to throw the baby out with the bathwater. It is important to keep in mind that building great relationships between the legal department and the business units is crucial to effective legal representation. So having inside counsel present during certain kinds of meetings or activities may serve a vital purpose, even if not essential to protecting the company's legal interests, *per se*. Also, business employees may not be able to spot legal issues in advance of a meeting even when they are embedded in the activity or discussion at issue. So it may not be practical to count on them always to communicate to the legal department a specific need for legal input. Thus, the legal department will have to be careful not to overlook the need to have inside counsel present to spot legal issues where there is a good chance they may be implicated.

Subject to these caveats, general counsel should be able to make much better decisions with data in hand about how inside counsel should be spending their time. Implementing change may be harder than it seems because the company's business leaders may have become accustomed to leaning on the legal department for responsibilities that should be borne by other departments or employees. This will take diplomacy, education, patience, culture change, and maybe even a directive from the top. There will also have to be some trial and error and a willingness to make mid-course corrections.

3. Embedding Legal Protocols

To get to the next level of optimizing the delivery or incorporation of legal advice in all aspects of corporate operations, the legal department will have to dig deeper than merely ascertaining how inside counsel have been spending their time. The legal department should first conduct a broad overview of all aspects of corporate operations to determine where business leaders and operational employees should be taking and following legal direction and operating in compliance with same. (This inherently overlaps with the compliance function, of course, which may or may not be housed within the legal department.) This can be approached abstractly and analytically by scrutinizing and analyzing the industry, company, organizational structure, overlay of laws and regulations that apply, and the nature of all transactions and commercial activities taking place to identify where the legal team could and should be providing guidance. Or this may be approached more pragmatically by

examining how the legal department actually has been advising the company in recent years. Probably some combination of both would provide the best results.

To prioritize where change can be the most impactful, the legal department should identify those areas where legal resources have been used most extensively, especially if there is reason to believe that this time is being misspent. Next, analyze the legal risk associated with each function, creating a scorecard that classifies risk into three categories: high risk, moderate risk, and low risk. See, e.g., LOD, *supra*, p. 5. For high-risk activities, the legal department may establish a presumption that inside counsel should interface with the business side in person at some stage. For mid-level risk activities, some discussion between legal and the business side might take place where a decision might be made about further intervention either way. For low-risk activities, the company should focus instead on creating checklists, procedures, templates, training, or other protocols where legal advice is embedded and that business employees can follow with minimal and acceptable legal risk to the company. See, e.g., LOD, *supra*, p. 7; Gartner, *supra*, Nos. 5, 10.

4. Legal Project Management

Finally, the legal department can free up time for inside counsel to support the growth goals of the company, and reduce costs (staffing), improve client service, and get better outcomes in the process, by adopting and implementing a robust program of internal legal project management (LPM). Facing severe cost pressures, outside counsel have been led to adopt LPM programs to achieve greater efficiencies to comply with client pressures to reduce rates and all-in costs while still generating sufficient profit to attract and retain the kind of talent needed to meet or exceed client expectations around client service and great outcomes.

Different companies have approached this issue in different ways. Some are applying Lean Six Sigma principles, which involves process mapping of all significant functions in which the legal department plays a significant role and then scrutinizing these processes (1) to eliminate or reduce needless expenditures of time and (2) to disaggregate the tasks involved to ensure they are sourced to the right service provider, e.g., inside counsel, outside counsel, operational employees, outside vendors, offshore consultancies, or tech solutions. See, e.g., Neota Logic, *Tackling the “More for Less” Challenge at Wesfarmers (2018)* (discussing the automation of a high volume of non-disclosure agreements). Other companies are developing software-supported dashboards for each significant project assigned to inside counsel, monitoring when work is started and how efficiently it is progressing, to speed the delivery of work product to internal clients, to benchmark inside attorneys against each other, to identify bottlenecks, and to assess where greater efficiencies need to be achieved.

General counsel should also give attention to the legal department’s staffing models. In the main, general counsel should avoid appointing “co” leaders of any function. This frustrates accountability and fosters confusion, duplication of effort, and other inefficiencies. Each function should be led by only one inside attorney. Also general counsel should be mindful of each manager’s “wing span,” taking care that he or she is not expected to manage more employees than can be reasonably overseen.

Larger companies may resort to a matrix form of organization, with leaders assigned to different business units, subject matter areas, and/or geographic territories. Again, general counsel should take care to spell out as clearly as possible the respective responsibilities of these managers so they do not end up tripping over each other's feet or failing to address important matters they assume some other manager is handling. Whatever direction is provided, there must be periodic meetings or discussions among these leaders so they can compare notes, take advantage of their respective lessons learned and best practices, avoid mistakes and redundancy, and identify synergies.

IV. DOING MORE WITH LESS

Finally, legal departments today are facing relentless pressure to do more with less. In the most typical smaller legal departments, general counsel increasingly feel besieged with the responsibilities being heaped upon them, and they do not have the budgets to outsource much of this. Of necessity, they must be generalists, and they must make risk/benefit trade-offs constantly, given their inability to be all things to all people all the time. Even larger law departments have been given directives in recent years to cut costs and then to cut them again at prodigious levels, impacting not only what they have to spend on outside counsel but also staffing levels and responsibilities inside the legal department itself.

This issue overlaps significantly with the other topics we have addressed, in that general counsel will apply the same analyses, methods, and approaches to reduce costs overall as we have reviewed in cutting outside legal spending and reallocating priorities inside the legal department. Beyond these measures, general counsel should consider using retainer agreements with outside counsel, even at modest levels, to forge a different kind of ongoing relationship, creating a safety valve for work overflow of hard-pressed general counsel of smaller legal departments, while enabling the outside law firm to strengthen its relationship with the company. Even larger companies might consider using this approach for areas where the company needs special guidance or expertise delivered more in the form of ad hoc advice now and again, e.g., lobbying, regulatory advice, and dispute avoidance, rather than significant matters each warranting a discrete engagement, e.g., litigation.

General counsel might use retainer agreements as a convenient vehicle to “brainstorm” with outside counsel about a variety of ideas, problems, potential opportunities, or challenges, large or small. This might be the most valuable input inside counsel can obtain from a trusted or respected outside advisor. Inside counsel may otherwise forego this kind of brainstorming with outside counsel due to the complexity, cost, and hassle of starting a new engagement. It is so much easier to rely upon an established retainer arrangement just to pick up the phone, send an email, or schedule a lunch to talk about ideas or concerns that may not have even fully taken shape yet in the mind of inside counsel. (Of course, both sides will have to take care to ensure that outside counsel will have no conflicts in providing input on the issues at hand.) Sometimes inside counsel will want and need an “outside” perspective on an issue where inside counsel or business or operational employees are simply too invested or jaded, or maybe outside counsel has just the right expertise or experience, perhaps across a breadth of clients they represent.

The charm of these retainer arrangements from the company's perspective is that their cost can be nailed down and budgeted at the outset, outside counsel will not run the meter every time the client places a call, general counsel will feel more free to seek outside counsel's input as needed, and

the outside law firm is likely to be more accommodating in pricing these relationships attractively in consideration of the enhanced relationship with the client.

V. KEY TAKEAWAYS

To summarize our observations and recommendations:

1. Corporate law departments today are striving (1) to reduce outside legal spending, (2) to identify and support corporate growth initiatives, and (3) to do more with less.
2. To reduce outside legal spending, legal departments frequently pursue convergence programs, with or without formal requests for proposals (RFPs).
 - a. Although RFPs may be helpful and even necessary, and although the company will want to draw upon and use available and pertinent data in making the selection of outside counsel, the qualitative judgment of inside counsel based on firsthand experience should be weighed very heavily in making these selections.
 - b. Well informed corporate legal departments are increasingly selecting outside counsel based on demonstrated industry or subject matter expertise, regardless where the law firm may be headquartered.
 - c. Managing outside counsel effectively should involve a great deal more than working to push down hourly rates.
 - d. The focus should be on value and all-in cost, not hourly billing rates.
 - e. Inside counsel should partner with outside counsel to conduct robust root cause analyses of the historic drivers of outside legal spending and strive to eliminate, ameliorate, or mitigate those drivers.
 - f. Budgets or AFAs should be realistic and must anticipate and include a factor for the kinds of events that inevitably occur to drive up costs. Although we cannot always foresee exactly what those events might be, we can be certain that some collection of them will occur. And we can estimate and plan for a likely range based on the collective experience and well-informed judgment of inside and outside counsel.
 - g. The first step in any substantial engagement of outside counsel should be a joint effort between inside and outside counsel to scope the engagement – to determine its likely dimensions, including all attendant activities. All but the simplest engagements should contemplate a rigorous early case assessment in order to develop alternative strategies and cost scenarios for handling the representation.
 - h. A major driver of costs is staffing. Inside counsel should expect that outside counsel will involve professionals with the right expertise and no more of them than necessary. This is less a function of hourly billing rates than experience and skillsets. Staffing any matter based on seniority or billing rates alone can achieve false economy. Whenever feasible, outside counsel should not rotate

new players in and out of the engagement to ensure optimal effectiveness and efficiency.

- i. When the parties employ a fixed-fee agreement, the key is to arrive upfront at a price that both sides believe is fair and then not to look back or to provide for a “true up,” which tends to convert the arrangement to an hourly engagement. The point of this is to align both parties in interest in getting to the goal line most efficiently and effectively, where the focus is on success and not on the hourly investment in getting there.
 - j. General counsel should consider incorporating a contingent “success fee” in any AFA arrangement (or more standard engagement, for that matter).
 - k. The company should follow up on every significant engagement with a post-matter briefing to identify and benefit from lessons learned.
 - l. General counsel may achieve even greater efficiencies and outcomes by bundling like matters and assigning the whole portfolio to the same outside counsel.
3. The larger legal departments have been performing more work in house, but two-thirds of all legal departments have only one to five attorneys, placing a natural constraint on this. In all cases, the company must compare the all-in cost of maintaining an in-house legal team sufficient to handle the work at issue versus the all-in cost of using outside counsel as needed.
 4. Legal departments are also sourcing more work to alternative service providers. Given the inherent limits on the use of AI, technology is now used most frequently in document management, electronic signatures, legal hold systems, matter management, e-billing, contract automation, knowledge management, e-discovery, and predictive analytics.
 5. In seeking to communicate better with stakeholders, and to contribute more effectively to the growth objectives of the C-suite, some general counsel are now working hard to reallocate the priorities of inside counsel.
 - a. To accomplish this, it is first important to understand how inside counsel are currently spending their time. This requires a detailed study of what inside counsel are actually doing day to day over a representative period of time.
 - b. General counsel should also develop a scorecard of various business functions to identify those activities that carry a high level, moderate level, and low level of legal risk and then develop appropriate strategies to focus the energies and face time of inside counsel where it is most important, relying on training, checklists, or other safeguards for less risky endeavors.
 - c. With the benefit of more time and a changed focus, inside counsel enjoy numerous opportunities to help the company grow the top line or otherwise to add shareholder value, e.g., engaging more actively and regularly with the board or top management in strategic discussions, helping design the governance or management structures to support transformational projects,

identifying non-obvious strategies to monetize the company's legal rights, helping the company anticipate regulatory change, getting products or services to market sooner, and a host of other initiatives.

6. All of these steps will help general counsel do more with less, the overarching fiscal goal. Beyond these strategies, however, general counsel may wish to explore entering into retainer relationships with outside counsel, creating added flexibility to supplement the resources of the legal department on a more ad hoc, informal basis, without facing the concern that each new engagement may add significant, unpredictable costs to the legal budget. These retainer arrangements can be used to “brainstorm” the kinds of matters where general counsel may very much wish to have an outside perspective.

VI. CONCLUSION

Law is a conservative profession, but business stands still for no one. The free market can be a beautiful but brutal thing – a Darwinian jungle. The pace of change and disruption is accelerating. We can either fear this or embrace it. General counsel across companies of all sizes and all industries get this, and they are working hard to stay ahead of the curve. The challenge is to stay focused on the big picture and not to get lost in the minutiae of innovation, process, and procedure, which can become an end in and of itself.

BIBLIOGRAPHY

Managing In-House Legal Departments

Association of Corporate Counsel, *ACC Legal Operations' Maturity Model for the Operations of a Legal Department*, <https://www.acc.com/maturity/>.

Association of Corporate Counsel, *Establishing the In-House Law Department: A Guide for an Organization's First General Counsel* (July 2012), https://www.acc.com/_cs_upload/vl/membersonly/InfoPAK/1313060_1.pdf.

Deloitte, *The Legal Department of the Future: How Disruptive Trends Are Creating a New Business Model for In-House Legal* (2017), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/finance/us-advisory-legal-department-of-the-future.pdf>.

Exterro, Inc., *2017 In-House Legal Benchmarking Report: Optimizing Legal & E-Discovery Activities* (2017), https://www.edrm.net/wp-content/uploads/2017/11/In_House_Benchmarking_Report_2017-3.pdf.

HBR Consulting LLC, *Law Department Artificial Intelligence Survey Report* (2018): <http://www.hbrconsulting.com/wp-content/uploads/2018/01/HBR-Law-Dept-AI-Survey-Report-1801.pdf>.

JD Supra Perspectives, *Finding True North: How Corporate Law Departments Are Leading the Legal Industry Forward*, JDSupra (May 3, 2018), <https://www.jdsupra.com/legalnews/finding-true-north-how-corporate-legal-62818/>.

Lat, David, *5 Tips for Running Your In-House Legal Department Like a Business*, Above the Law (October 27, 2016, 2:14 PM), <https://abovethelaw.com/2016/10/5-tips-for-running-your-in-house-legal-department-like-a-business/>.

Mitratech, *10 Ways to Transform Your Legal Department: A Blueprint For Becoming The Best-Run Business Unit In The Organization* (2015), <http://info.mitratech.com/10WaysToTransformYourLegalDepartment.html>.

Mitratech Holdings, Inc., *What is Enterprise Legal Management?*, JDSupra (August 30, 2018), <https://www.jdsupra.com/legalnews/what-is-enterprise-legal-management-24272/>.

Sasso, Gary L., Carlton Fields, *Clients and Lawyers Have Choices*, Carlton Fields: Insights (August 10, 2018), <https://www.carltonfields.com/insights/publications/2018/clients-and-lawyers-have-choices>.

Thomson Reuters, *2016 Legal Department In-Sourcing and Efficiency Report: The Keys to a More Effective Legal Department* (2016), <https://static.legalsolutions.thomsonreuters.com/index/pdf/2016-efficiency-report.pdf>.

Thomson Reuters, *2018 State of Corporate Law Departments: Innovation, Data and Collaboration Drive Optimal Results* (2018), <http://www.legalexecutiveinstitute.com/wp-content/uploads/2018/02/2018-State-of-Corporate-Law-Departments-Report.pdf>.

Using Key Performance Indicators

ALM Legal Intelligence and Corporate Counsel, *Law Department Metrics Benchmarking Survey* (2014 ed.), <http://almlegalintel.com/Resources/2014%20LDMBS%20Executive%20and%20Excerpt%20Summary.pdf>.

Association of Corporate Counsel, *Leading Practices in Law Department Metrics: Company Best Practices* (October 2013), <https://www.acc.com/chapters/wpenn/upload/ACC-Leading-Practices-in-Law-Department-Metrics-Company-Best-Practices.pdf>.

Association of Corporate Counsel, *Stirring the Pot with Metrics*, ACC Docket.com (March 29, 2016), <https://www.accdocket.com/articles/stirring-the-pot-with-metrics.cfm>.

Barr, Clifford, Andeavor, *Legal Ops 101 for Law Departments: Using Key Performance Indicators and Productivity Tools to Create Better Outcomes*, In-House Ops (October 2, 2017), <http://ccbjournal.com/articles/35015/legal-ops-101-law-departments-using-key-performance-indicators-and-productivity-tools>.

Cerrone, Frank, *Acing the In-House Legal Department Performance Review*, ACC Docket (May 2013).

Hanna, Todd, *KPIs for the Modern In-House Commercial Legal Department*, Corporate Counsel (October 16, 2018, 12:50 PM), <https://www.law.com/corpcounsel/2018/10/16/kpis-for-the-modern-in-house-commercial-legal-department/>.

Haysley, Mike, *I Don't Know What You Should Be Measuring, But You Do: Best Practices and the Theory of Reporting Relativity*, The Metropolitan Corporate Counsel (September 2014) <http://ccbjournal.com/pdf/2014/September/32.pdf>.

Johnson, Patrick, *Top Ten Metrics That Your Legal Department Should Be Tracking*, Association of Corporate Counsel: Legal Resources (March 4, 2013), <https://www.acc.com/legalresources/publications/topten/ttmtlydsbt.cfm>.

Mabey, Stephen, Applied Strategies, Inc., *Measuring Legal Department Metrics*, Mondaq (August 8, 2014), <http://www.mondaq.com/unitedstates/x/333566/Strategic+Planning/Measuring+Legal+Department+Metrics>.

Mack, Olga V., *5 Steps to Metrics: Stephanie Corey's Guide to Build a Data-Driven Legal Department*, ACC Docket.com (July 26, 2018), <https://abovethelaw.com/2018/06/5-steps-to-metrics-stephanie-coreys-guide-to-building-a-data-driven-legal-department/>.

Miller, Sterling, *Ten Things: Setting Goals for the Legal Department*, Ten Things You Need to Know as In-House Counsel (January 7, 2015), <https://sterlingmiller2014.wordpress.com/2015/01/07/ten-things-setting-goals-for-the-legal-department/>.

Palomaki, Sheri, SeyfarthLean Consulting, *Legal Operations Survival Guide: Key Performance Indicators* (2015), <https://www.acc.com/chapters/wpenn/upload/SeyfarthLean-Consulting-Legal-Ops-Guide-to-KPIs-copy.pdf>.

Satkunas, Kris, *How to Put Mojo in Law Department Metrics*, Lexis Nexis Business of Law Blog (August 12, 2015), <http://businessoflawblog.com/2015/08/law-department-metrics/>.

Sowinski, Bill, *Cutting Through the Maze*, AWolters, Klumers Tymetrix (2014).

Speirs, Alex, *Tracking Change for In-House Legal Departments*, GC Magazine (Autumn 2015), <https://www.legal500.com/assets/pages/gc/autumn-2016/tracking-change-for-in-house-legal-departments#sthash.1U4AUqI0.dpbs>.

Thomson Reuters, *Beyond Legal Spend Metrics: KPIs for the Efficient Legal Department*, Above the Law (June 7, 2016), https://abovethelaw.com/?sponsored_content=beyond-legal-spend-metrics-kpis-for-the-efficient-legal-department.

Wilkins, David B., *The In-House Counsel Movement, Metrics of Change*, Legal Business World (January 20, 2017), <https://www.legalbusinessworld.com/single-post/2017/01/20/The-In-House-Counsel-Movement-Metrics-of-Change>.

ABOUT THE AUTHOR

Gary L. Sasso is the President and Chief Executive Officer of Carlton Fields. He represents business clients in securities fraud and consumer fraud class actions and other complex litigation at the trial and appellate level, in the financial services industry, energy sector, products manufacturing industry, and services sector. Gary has tried cases in the areas of securities fraud, business contracts, products liability, professional malpractice, employment discrimination and termination, eminent domain, bankruptcy, construction, administrative law, and land use in Florida, Maryland, Pennsylvania, and Virginia.



Gary has argued appeals on diverse issues including business fraud, federal and state constitutional claims, products liability, personal injury, insurance coverage, national bank regulation, employment discrimination, federal occupational safety and health regulation, eminent domain, county taxation, and public utilities law.

Before joining the firm in 1987, Gary worked as a law clerk for Justice Byron R. White on the United States Supreme Court; and as a law clerk for Judge Spottswood W. Robinson, III, of the United States Court of Appeals for the District of Columbia.

CARLTON FIELDS serves business clients in key industries across the country and around the globe. Through our core practices, we help our clients grow their businesses and protect their vital interests. The firm serves clients in nine key industries:

Insurance
Health Care
Technology

Consumer Finance & Banking
Construction
Telecommunications

Securities & Investments
Real Estate
Manufacturing and Raw Materials

For more information, visit our website at www.carltonfields.com.

Atlanta

One Atlantic Center
1201 W. Peachtree Street | Suite 3000
Atlanta, Georgia 30309-3455
404.815.3400 | fax 404.815.3415

Hartford

One State Street | Suite 1800
Hartford, Connecticut 06103-3102
860.392.5000 | fax 860.392.5058

Los Angeles

2000 Avenue of the Stars
Suite 530, North Tower
Los Angeles, California 90067-4707
310.843.6300 | fax 310.843.6301

Miami

Miami Tower
100 S.E. Second Street | Suite 4200
Miami, Florida 33131-2113
305.530.0050 | fax 305.530.0055

New Jersey

830 Morris Turnpike | 4th Floor
Short Hills, NJ 07078-2625
973.828.2600 | fax 973.828.2601

New York

Chrysler Building
405 Lexington Avenue | 36th Floor
New York, New York 10174-3699
212.785.2577 | fax 212.785.5203

Orlando

450 S. Orange Avenue | Suite 500
Orlando, Florida 32801-3370
407.849.0300 | fax 407.648.9099

Tallahassee

215 S. Monroe Street | Suite 500
Tallahassee, Florida 32301-1866
850.224.1585 | fax 850.222.0398

Tampa

Corporate Center Three
at International Plaza
4221 W. Boy Scout Boulevard | Suite 1000
Tampa, Florida 33607-5780
813.223.7000 | fax 813.229.4133

Washington, DC

1025 Thomas Jefferson Street, NW
Suite 400 West
Washington, DC 20007-5208
202.965.8100 | fax 202.965.8104

West Palm Beach

CityPlace Tower
525 Okeechobee Boulevard | Suite 1200
West Palm Beach, Florida 33401-6350
561.659.7070 | fax 561.659.7368