

LAW DEPARTMENT PRODUCTIVITY

Rees W. Morrison

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SERIES OVERVIEW

Productivity | Outside counsel costs | Talent

These are three of the most important challenges for those who manage in-house counsel and staff and they are the topics of this three-part series.

Each of these reports, which we plan to send out quarterly in the order shown above, reprints five-to-seven recent articles by Rees Morrison, a lawyer and well-known consultant to law departments on management issues. Accompanying some of the articles is a relevant post or two from Morrison's blog, LawDepartmentManagement.typepad.com.

This first collection, on law department productivity, concerns how to get the most from the resources available to a general counsel. As will be seen in the articles, a law department can raise productivity by making access easier to online information, by improving how the department handles contracts, by

reducing the amount of time spent on so-called quasi-legal tasks, by testing and adopting solid practices from other law departments, and by improving any of the nine levers of productivity.

The next quarterly report will cover outside-counsel cost control. The articles explain a variety of methods for reining in the costs of the law firms your department retains.

The third report takes up the topic of talent management. It delves into succession planning, evaluations, engagement and other topics.

We hope you find these reports useful and thought provoking. If you have any questions or comments about them, please call Rees Morrison at 732-369-8076 or e-mail him at rwmorrison@hildebrandt.com.

LAW DEPARTMENT PRODUCTIVITY

Productivity is for law department managers one of the most important, and difficult, challenges. How to get the most work of the highest quality for a given cost – a definition of productivity – tasks the mind of every general counsel and every in-house lawyer.

Productivity is a moving target, of course, because so many variables can change: the lawyers and staff in the

department, the styles and requests of clients, the ebbs and flows of work, the technology available, the organization of responsibilities. Moreover, other than in a few discrete practice areas, no one has figured out how to measure the output of a law department. Benchmark comparisons suggest something about productivity, but not with sufficient clarity. In short, productivity will continue to deserve much thought and attention.

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Management Advice Takes Off

As law departments grow and the corporate legal landscape gets more complicated, in-house counsel will be able to turn to an expanding number of resources to help them do a better job.

BY REES W. MORRISON

The next five years will see a profound deepening and broadening of knowledge about how best to manage law departments. As many law departments could do a better job in management, this leap is important. In fact, I predict that the gap between poorly managed and well-managed departments will close as law department leaders take advantage of the wealth of free management guidance out there.

This profusion of insights will result from a combination of four forces: many more fertile sources of information, the increased availability of the information on the Internet, much-improved search and organization software, and the growth of law departments. Each will contribute new ideas and understanding.

SUPPLY AND DEMAND

Think of those four contributors of management insights as supply. Demand for those insights will also ratchet up. One reason for this is obvious: No one believes that the corporate legal landscape will simplify. More laws, more regulations, more agencies, more court decisions, and more

complexity in business will all contribute to increases in the demand for legal services—and therefore increased calls for better management of legal functions. As law departments get bigger, better management techniques not only will be increasingly sought, but also will be more commonly developed, refined, and extended. Hence, as departments grow, they will be both suppliers of management ideas and consumers of them.

Two other factors will also increase demand. Law departments have long been under pressure to control costs, to be sure, but the next few years will see the vise tighten, which will fuel the need for management information. On the horizon as well is



more insistence on preventive legal work, heightened risk management, and integration with other risk functions such as compliance and internal audits. The additional complexity of such linkages between law departments and allied functions will increase interest in better management tools.

The current generation of general counsel, immersed in management ideas and supported by CEO and CFO expectations that the legal function will be managed well, will increasingly need to be business executives and managers as well as good lawyers.

More sources of management information. New management information is coming from a variety of sources. First, law firms are getting more involved in conducting their own research. The big firms will increasingly invest in research, surveys, and reports about their key markets. Recent examples include Kirkpatrick & Lockhart Nicholson Graham's surveys of law departments, Shearman & Sterling's survey on compliance

functions, Dickstein Shapiro Morin & Oshinsky's survey of CEOs about law departments, and Fulbright & Jaworski's survey on litigation.

With similar goals at each firm—to market their services, to show they are smart and thoughtful, to guide their own practices, and to impress law departments—law firms will set up research centers and will increasingly rely on management data gathered from their primary market, law departments. The chief marketing officers of law firms will become research specialists so that they can understand what services to offer and how to package those services.

In addition, vendors of matter management systems and e-billing systems will follow the lead of Serengeti and Martindale-Hubbell. They will conduct research, even if the findings are somewhat skewed toward the services they provide. These companies will compete on content, methodology, analysis, and research.

Another source of information will be the academic world. As the work force in the developed world moves from manufacturing to services, academics will increasingly study professional service firms. Some of the pioneers in this area are Ashish Nanda of Harvard and Susan Samuelson of Boston University. The development of the science of the services movement is one harbinger of this change. We will see colloquia and workshops. An early sign of this interest is the executive training programs for lawyers that have sprouted recently.

And as always, there will be the steady drumbeat of trade publications, conferences, and groups of in-house lawyers gathering information.

- Conferences with sessions on law department management will increase in number. Webcasts and podcasts will extend their reach.

- Various organizations that bring together law departments, such as the General Counsel Roundtable and the Association of Corporate Counsel, will market themselves by providing management information to law departments.

- Collective organizations among law departments, such as purchasing consortia, benchmark-setting groups, and departments who pool material for their intranet sites, will proliferate. The Internet will make it easier for like-minded lawyers to find each other and keep in contact. Eventually, as well, shared standard metrics will evolve (recall the collective effort to develop the Legal Electronic Data Exchange Standard for electronic bills). Better data will eventually lead to a better understanding of what management actions create the most efficiency.

- Specialized networks for all levels of in-house counsel will sprout. For example, there are various groups for general counsel, the In-House Lawyers Association in the U.K., and the Private Equity Lawyers Forum. Almost all trade groups also have legal committees, such as the Manufacturers Alliance/MAPI and the Pharmaceutical Research and Manufacturers of America.

Internet availability of free management information and practices. The sheer output of information is not enough to revolutionize law department management, but the new information will find its way to the Internet and enjoy widespread availability. On top of that, new tools will help law departments make sense of the trove of information.

A senior environmental lawyer at a law department estimated for me that she spends approximately an hour a day on Google, finding material that helps her in her practice. She searches for proposed regulations, court decisions, regulatory rulings, information about Superfund sites, expert witnesses, and a plethora of other material.

As more law firms and vendors pour material into their Web sites and as government agencies house more regulatory material online, time spent online by in-house lawyers will grow. They will be able to find management practices, techniques, and materials aplenty.

One wave in this trend is wikis, collective Web sites to which many people can contribute. These sites may distinguish the next decade of collective law department efforts to obtain and disseminate management information. Cornell Law School is showing the way with its group-edited online repository of law-related information. Other wikis will cater to management material.

When a critical mass of in-house lawyers who handle bankruptcies, for instance, starts a no-cost shared online repository of experiences, documents, guidance, Q&A, lobbying information, and evaluations of outside counsel, the collective expertise available in the easy-to-use wiki will attract more users.

Another fast-expanding trend is the growth of legal blogs, or web logs, which typically offer the unedited, opinionated voice of a single author, along with comments on his posts. Marvel at the fact that there are at least 25 law blogs—"blawgs"—in Massachusetts alone, according to blogger Robert Ambogi. Groups of related blogs, such as the Law.com Blog Network, will be assembled.

Better ways to find, organize, and apply online information. Some doubters will complain that information overload will overwhelm managers. To some extent, especially for those not skilled in online research, there may be too many ideas, metrics, checklists, and guidance on practices to make sense of. Consultants, therefore, will not go extinct. But for many general counsel and other in-house managers, it is meaningless to complain about having too much management available. The river might be deep, wide, and fast, but you can dip your bucket in whenever and wherever you want.

To help sort out the profusion of information, better search engines and more sophisticated filters, concept organizers, and proximity tools will spread. There will be more blog- and other information-organizing tools, such as aggregators, RSS (really simple syndication), and tagging services.

- Aggregators such as PinHawk roam the Internet and assemble information that pertains to a topic. By blogger Erik J. Heels' estimate, more than 1,500 law-related blogs have been created since 2002. Software and services that cull through them will become prized.

- RSS lets users who find a blog they like get the latest postings from that blog without having to log on. Readers will tag items they like with key words that let others find related items more quickly (this is the key idea behind Yahoo's Flickr, where online users put key words on photos). Another useful resource will be the availability of sites similar to del.icio.us, where users bookmark favorite sites and others can follow their trail. Sites like Technorati permit tagging of blogs. We will see software

that says, "If you liked that site, try this one," much as Amazon.com does with books.

Larger law departments that direct better resources. Large law departments experiment with management initiatives more than smaller law departments do. Although bigger law departments need more management help, they also have the resources to try new things. With 30 more lawyers, a department can invest time, people, and funds in coming up with new forms of evaluation or other programs.

Consolidation among even large companies within industries will create larger law departments than it does nowadays. The larger the law department, the more management demands press on its leaders and the more resources it has to respond to those demands. Size matters for innovation and management sophistication.

Larger companies mean enough lawsuits of a particular kind so that the department can look at discovery management, national coordinating counsel (firms that oversee cases for a company), or task-based billing (in which a firm offers billing that can be sorted by the task completed). The size of a law department correlates to the size of the company, which means more infrastructure—for example, strategic-planning groups and

corporate universities. Those managerial ideas can penetrate to the law department. The steady growth of law departments will not only increase the appetite for management brains but also help sate that hunger.

For all these reasons, managers of in-house counsel can look forward to a surge in management data and direction. The groundwork has been laid and forces will come together to meet the demand for a new level of law department management.

Law firms will continue to be pressured to become efficient; correspondingly, they will have more opportunities to show their managerial prowess. Law departments will become closer to their business clients because their management orientation and techniques will draw them closer together.

Promotion in a law department will increasingly depend on managerial skill, and law departments will hire additional experts on different management practices. We will take long strides toward understanding what works best in law departments.

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BLOG CONTENT
From LawDepartmentManagement.typepad.com

PRODUCTIVITY

Rees W. Morrison

For any given management initiative, a four-part description
(April 23, 2007)

Hard as it may be to identify in a consistent and collectively-agreed-upon way the meaning of "management initiatives" (See my post of March 11, 2007, on management initiatives compared to processes.) there is at least some hope that within any particular initiative set, one can describe the variations on a four-part scale: none, some, a fair amount, and progressive. Let's take knowledge-management to see how the scale might play out.

A department that does nothing in any formal organized way to collect and disseminate knowledge could be described as a "one." A department might be described as a "two" that has tried a few aspects of knowledge management, such as to install a document management system and push people to use it. Moving up from such a basic level, an intermediate law department warrants a

"three," perhaps because it has studied knowledge management, put in place several programs such as to collect work product from outside counsel and generally values the collection and distribution of legal knowledge.

A sophisticated law department that has invested significantly in an intranet site, appointed a lawyer in charge of knowledge management, enlisted law firms, and taken other progressive steps would earn the highest number on the initiative scale: a "four."

All this is to say that for any management program in law departments there is a spectrum from laissez faire, to basic, intermediate, and advanced.

In the coming years there will be an accepted taxonomy for law departments to place themselves on, perhaps on a scale something like this four-part one, and eventually law departments will be able to benchmark themselves on management undertakings. Even more promising is the prospect of correlating staff and spending metrics to management efforts.

The Blogosphere Revealed

Law-related Web logs, dubbed blawgs, offer in-house lawyers a wealth of details on life, law, and what their company might be doing wrong.

BY REES W. MORRISON

For in-house counsel, benefiting from online Web logs is as easy as, well, falling off a blog. Law-oriented online Web logs (known to us in the legal world as blawgs) quickly announce and discuss changes in the law and its practice; bring together lawyers with like interests, even if arcane; give insights into the legal minds out there; and provide free material for training and intranet sites.

Various observers believe that to date, several million blogs have been started. In fact, some say that as many as 40,000 brand-new blogs appear on the Web each month. There are now probably more than 200 blawgs.

So, in the larger picture, blawgs are just a blip. Yet blawgs are hot, probably because they seem to be a natural fit for the law profession. Lawyers have no problem marketing their services through blogs; they are comfortable writing; and they understand that blogs serve a purpose in a profession that changes daily, is so information-intensive, and which is becoming increasingly more specialized.

The Law.com Blog Network, for instance, offers 14 blawgs; 90 more are listed on MayItPleasetheCourt.com. Another lengthy list of law blogs is maintained by Ernest Svenson at <http://radio.weblogs.com/0104634>. Most of these blawgs were created by lawyers who wanted outlets to talk about their ideas and experiences. They update readers on new opinions and developments in the law. But unlike, say, standard Web sites created by companies or law firms, blawgs also inject personality into the professional decorum and gravitas that grays out legal marketing.

Here's an example from the blawg Law Tech Guru in reference to the practice of benchmarking, or measuring outcomes: "Yes, benchmarking is a useful tool, but it quickly becomes a hindrance as a knee-jerk reaction to replace critical, original

entrepreneurial thinking. The problem with looking left and right all the time is that one becomes accustomed to not looking forward on one's own."

When you are host of your blog, you can splash out your style, tickle readers with humor, indulge in sarcasm and irony, and play with metaphors and zingers. For instance, Bruce MacEwen from Adam Smith, Esq. (bmacewen.com) writes: "At the risk of forfeiting my hard-earned membership-in-good-standing in the blawgosphere, I will venture that blogs will turn out to be no better or worse, no more compelling or lame, than conventional law firm marketing efforts." Matched against law review treatises and the arid precision of decisions, there's nothing blah about blawgs.

Blawgs are low-cost Internet sites that anyone can set up for free on Blogger.com or pay around \$100 a year for more capabilities on sites, such as Typepad.com, which allow their authors—called hosts—to easily create and add content (called posts).

IT'S LIBERATING

Blog readers, who pay nothing to access the sites, can comment on the posts. There's something liberating about readers being able to add comments to a blog. A few of the more popular blawgs, such as those hosted by Lawrence Lessig and Glenn Reynolds, attract thousands of visitors; celebrated blogs have the circulation figures of major newsletters, with tens of thousands of hits every day.

Blog material, therefore, has personality and immediacy, because it is a moment's work to create a posting or a comment. Earlier this year, for example, the Labor Blog stepped into the fray of politics and law:

True to form, the Bush administration is making sure that its corporate friends are not too inconvenienced on those rare occasions when they are found to be breaking federal laws, especially if it only involves child labor issues.

Wal-Mart, the world's largest retailer, agreed to pay \$135,540 to settle federal charges that it violated child labor laws in Connecticut, Arkansas and New Hampshire. As part of the agreement, revealed yesterday after it was secretly signed in January, the Labor Department agreed "to give Wal-Mart 15 days' notice before the Labor Department investigates any other 'wage and hour' accusations, like failure to pay minimum wage or overtime."

NO MORE WAITING

In-house lawyers can take advantage of blawgs. The primary benefit is that they can learn quickly about recent developments in an area of law. No more waiting for law review articles, or even for updates from law firms. Instead, instant insights! Lawyers may want to take these insights with a grain of salt, of course, as they are one person's opinion and interpretation.

It is likely that for any substantive legal area, one or more blawgs specialize in it. Their authors will promptly post discussions about new decisions, amicus briefs, proposed regulations, and practice tips. For example, here is some late-breaking news from the Renewable Energy Law Blog:

(April 1, 2005) Clean Air Act Settlement to Require Renewable Energy Investments as Mitigation Measure: The FirstEnergy Corporation, and its subsidiary Ohio Edison, reached a settlement with the U.S. Department of Justice in March to resolve a 1999 lawsuit. The lawsuit alleged that the company's modification of a power plant in Ohio violated the Clean Air Act's New Source Review (NSR) provisions.

There are blawgs on health care (Health Care Law Blog), environmental law, intellectual property (I/P Updates), and immigration law. Some blawgs limit themselves to very specific subsets of the law—for example, California Labor and Employment Law, Connecticut Law Blog, DUI Blog, and Internet Cases.com.

Other blawgs specialize in management issues and topics unrelated to substantive law areas. For example, from Dennis Kennedy.com: "I have long suggested that IT directors of clients talk with IT directors of their law firms on a regular basis to address these types of issues (extranets, for example) and share best practices." I host a blog on how to manage law departments more effectively, called Law Department Management, which currently has more than 130 postings. Others include The [non]Billable Hour and The Wired GC. For technology insights, go to PrismLegal. You can even get the dirt on judges handling your cases, at Underneath Their Robes.

Another benefit of the blogosphere is the potential for networking. No matter how arcane your legal vocation or avocation, you will find kindred spirits. No longer do you need to join an American Bar Association or Association of Corporate Counsel sub-subcommittee that meets irregularly on an esoteric topic. If you're keen on trademarks, try Martin Schwimmer's Trademark Blog. If bits and bytes are your bag, check out TechnoLawyer Blog. If you are trying to organize responses to proposed legislation or a lobbying effort, blogs put you in touch with fellow travelers. Just love the statutory interpretation doctrine of *contra proferentum*? Try Gary O'Connor's Statutory Construction Zone.

If you ask a question in a comment, you can get specific answers in a way that you were never able to before. All blog authors yearn for comments and e-mails from people who share

their passion. You do not have to comment publicly; you can e-mail the author with your questions or thoughts.

The hosts of most legal blogs are practicing lawyers in firms. A lawyer who has a niche specialty is the most likely kind to start a blawg, thus allowing a law department to find him or her. Corporate counsel, therefore, can take advantage of blawgs to find a lawyer who could potentially represent the company, as well as reach conclusions about his style and knowledge through his blog postings. This additional benefit of blawgs—their view into a lawyer's mind—can help a law department locate a specialist or find examples of legal problems. Similarly, by searching blogs, a law department can dig out information about opposing counsel.

It's not just the postings and comments that give blogs their value. Most blogs also refer to other blogs that address related topics. These lists are known as blogrolls. Many blawgs also cite articles, books, and conferences that touch on their particular obsession.

EARLY WARNING DEVICES

Blogs can also be beneficial if your company gets publicity and is the subject of blog commentary. Criticisms of one of your products or services may surface first on a blog. It may be that a trademark infringement, for example, becomes apparent through a blog. In other words, blogs can serve as early warning devices for preventive lawyering.

Blawgs might also contain or link to material that a law department could add to its intranet site. This method would be cheap and easy to access. It can also significantly enrich the content on an intranet. For example, a site might list the five key steps to take if an employee is served with a summons and complaint. A law department could take that material, modify it (and reference the source), then use it on the department's intranet site.

Any search engine—such as Google, MSN, or Yahoo—can troll through the profusion of blawgs. If you find a handful you want to follow, you can enter into your browser, under Favorites, those blogs that you would like to check periodically. It is also relatively straightforward to set up RSS (Really Simple Syndication). An RSS feed, as it is called, allows you to obtain the latest postings from blogs without actually having to go to the site. A law department might want to make use of news aggregators or RSS feeds to find references to pending cases or current topics. For example, if you want to find out whether a lawsuit is reaching the public eye, blogs could be the quickest source.

A number of companies—including Blogdex, Daypop, Slashdot, and Technorati—rate and rank the popularity and influence of blogs. In the near future, the more informative blawgs will be recognized outside the online community. The better blawgs will gain recognition, and more tools will develop for finding information quickly, sorting it by relevance, and linking it to other material.

Blawgs, an already popular technology, offer law departments a new and inexpensive way to keep up-to-date, find talent and resources, and pick up early signals. Blawgs are windows to the wealth of the Internet, and in-house counsel should take a peak into them from time to time.

Rees W. Morrison has been a consultant to law departments for almost 18 years; a blogger for one year, as host of LawDepartmentManagement.typepad.com; and co-head of Hildebrandt International's law department consulting group.

Drowning in Contracts?

Here are 30 ways lawyers can get their heads above the flood of contract details flowing into the legal department.

By REES W. MORRISON

What activity consumes the largest amount of law department time? Contract review and preparation. Contracts—a term I am using here to cover agreements and all other forms of legal commitments by companies with both other companies and individuals—flow incessantly into and out of the law department.

Roughly half the lawyers in a typical law department support a business unit, and much of their work involves contracts. They vet them, revise them, negotiate and draft them, interpret and enforce them. How effectively they and their colleagues—paralegals, specialists, secretaries, and others—process contracts determines in a major way their clients' satisfaction with the department and the department's managerial prowess.

Listed below are 30 ideas for actions that can help you expedite your treatment of contracts. Each day for 30 days, consider one of these techniques and, if you decide to make one or more of them happen, your department can cure even a serious bout of contractitis.

To give the actions some framework, I have clustered them according to their relative ease of implementation. Based on eight years of consulting with law departments, these are the fruits of my learning.

EASY TO IMPLEMENT

1. Understand the number and kinds of contracts coming to the law department. One way to do this is to keep a log for a few months, which is what a leading office products **IN-HOUSE COUNSEL** law department does. Another method is to ask clients, who track their agreements, for a summary of activity over the past year. Your matter management system may provide additional information.

2. Beyond volume and type, track additional information about incoming contracts, such as client source, date received, person assigned, and approximate time needed to handle it. You need to do this to be able to calculate turnaround time. You might even let clients see online the status of their contracts.

3. Give clients term sheets that ask them to provide the basic facts

for a new contract, the desired turnaround time, and the ultimate approver. State in writing the level of the person in the company who can sign a contract, and be sure the lawyers know that ladder of authority. If you can get clients to complete the term sheet online, so much the better.

4. Commit to clients to meet relatively quick turnaround times, such as within a three-day period for typical review of the other side's contracts. Set the expectations of your clients, and push yourselves, by stating when a contract will be returned.

5. Remove the responsibility from lawyers for shepherding the agreement through other groups that have to sign off. This is quasi-legal work which is more properly the responsibility of the business unit that wants to enter into the contract.

6. Create online form contracts. For commonly used contracts, have a form available on the company's intranet for clients to use. So long as they simply fill in the form, they can use it without the law department's blessing.

TAKES MORE EFFORT

7. Streamline the response your lawyers send to clients after they review a contract, for instance, by creating a check-off sheet. Even better, have that response form online so lawyers and paralegals can complete and e-mail it in one motion.

8. Establish a contracts practice group (sometimes called a "community of practice," another term for lawyers who share a common legal interest). A large manufacturer, which has several business units, links together its dispersed lawyers who handle contracts. They share forms, come to consensus on how to handle issues, educate each other, and generally share contract knowledge.

9. Designate a "contract coordinator" for each business unit or staff group that pours out a stream of contracts. That person should be trained to handle process impediments, to be the liaison with the law department, and even to serve as something akin to a paralegal.

10. Create a repository of former contracts. If the law department has a shared drive, secretaries can make sure that every completed

contract is stored on it. It is important to designate whether a contract has been negotiated or whether it is the version first sent out by the department. To create a useful repository, you need to create naming conventions and sub-directories so that future generations of lawyers, paralegals, and secretaries have a hope of finding a useful precedent.

11. Conduct client training and annual certification. If you subscribe to a model of empowering clients, you need to train them to understand the legal issues of contracting and how best to team with the law department. For example, if a client who is negotiating a contract understands indemnification and limitations on it or the legal notion of “materiality,” that client will be more effective, and relieve lawyers of some effort.

12. Arrange so that lawyers review contracts when they are ripe for review, not before intermediate or senior executives have signed off.

13. Balance legal review and business acumen. When lawyers point out legal risks in a contract, they should push themselves to rank the risks from most important (the likelihood of the adverse event happening and the severity of the consequences) to least important. Even further, they should attach some kind of percentage likelihood to help clients understand. For example, “The risk of default is on the order of 10 percent, while the risk of a meteor annihilating the planet is less than 1 percent.”

14. Map the flow of contracts end to end. Process maps, which show each step of a contract’s journey along with how long the typical stages take and who has a hand in them, can help your department figure out where to streamline. The vogue term for this analysis is “business process review.”

15. Define categories of contracts to deal with them differently. For example, contracts involving less than \$25,000 should not come to the law department at all.

SIGNIFICANT WORK BUT LARGER RETURNS

16. Develop a sense of how efficient your various lawyers are in handling contracts. Workload imbalances, out-of-sync priorities, lack of skills, or poor work-flow discipline often cause backlogs that tar the entire law department. Law department managers can make this assessment from client feedback, data about contract turnaround and complexity, discussions with the contract lawyers, and reviewing a sample of contracts.

17. Agree on the best form to use for the common contracts handled by the law department. If several lawyers are involved, this seemingly simple task can bog down. A more fruitful approach is to designate certain provisions as mandatory and certain provisions as good practice, along with some variations.

18. Distribute guidelines for clients about contracts. If you cannot teach clients in person, at least prepare answers to frequently asked questions.

19. Annotate form contracts. A law department goes beyond storing executed contracts online when it builds a library of contracts that show variant language for parts of the contracts that are often negotiated. But progressive departments go further than just showing alternative acceptable language. They annotate the alternative provisions to explain the pluses and minuses of the different language. By doing that, departments help clients and lawyers find the best-choice provision.

20. Define *de minimis* exceptions (such as copier service agreements) that do not need law department review. Lop off the low end of contracts, and you can devote more time to higher-level issues.

One company moved to use purchase orders more than contracts, because the method of attaching addenda allowed commerce to flow without legal review.

21. Arrange before a crush of contracts to have temporary lawyers or paralegals step in (or a secondee from a law firm). One law department turns to a former lawyer who knows the field well but has retired.

22. Do not burden your lawyers with responsibility for contract administration. Each business unit legal group should have (or can draw on) one or more contract administrators, whose primary tasks are preparing routine agreements and using databases that track key dates under agreements, such as renewals, changes in charges, and required notices.

ADVANCED TECHNIQUES

23. Invest in a document management system. With disciplined use, such a system can help your lawyers find examples of similar contracts prepared in the past.

24. Encourage paralegal review and involvement. For many routine contracts, consider having a paralegal review them first, and having a lawyer review only those that present unusual issues or risks.

25. Designate other groups to review certain contracts, at least for the first round. An example of this could be severance agreements for lower-level employees, agreements that someone with experience in human resources could review. Those deputized reviewers would always be able to get additional advice from a lawyer.

26. Charge time for review of certain agreements. A law department might say to its clients, “We will review contracts that do not reach a certain defined threshold of importance, but we will charge you our fully-loaded internal hourly rate.” At least this imposes a degree of discipline.

27. Negotiate fixed fees with outside counsel to review contracts. If the flow of contracts has enough predictability and volume, the law department might choose a law firm to become its outsource partner for that work.

28. Use document-assembly software or macros in Word or WordPerfect. One beverage company has used HotDocs to create a template for agreements having to do with sponsoring events. It takes some time to create a robust expert system, but if the volume justifies it, there are many benefits. Users can answer questions and the software then puts together the appropriate provisions, renumbers the paragraphs, fills in dates and amounts, and does as much as it has been programmed to do.

29. Prepare guidelines for lawyers as to key provisions. If the lawyers who review agreements of a certain kind step back, they can pick out the major issues and better draft revisions to frequently negotiated paragraphs. As a consultant, for example, I often deal with paragraphs on proprietary information, so I have stored some examples.

30. Create contract management systems. For very sophisticated companies with major needs for tracking the contract process, software can assist with many aspects.

In this orchard of ideas, several should help your law department prune its contract flow and harvest more fruitfully.

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How to Jump-Start Productivity

Getting the most out of your lawyers requires a manager to balance experience, knowledge, brains, and personality.

Just saying 'work smarter, not harder' won't impress anyone.

By REES W. MORRISON

Productivity—we know it when we see it, or so say law-department managers. But I'm not sure we all can agree on what causes an in-house lawyer to be productive or how we can boost productivity. Because improving in-house productivity may be the toughest management challenge we face, and yield the greatest return, let's consider what productivity is and what can be done to increase it.

Managers in law departments can jump-start productivity. Not with platitudes, which do nothing when it comes to improving the productivity of a corporate lawyer. Saying "work smarter, not harder" is like advising someone to think. Sure, but how? "Do the right things more than doing things right" raises the obvious questions: What's valued and how should we be more productive doing it?

First, however, note that the term "productivity" only works if we assume that **value** results from the task. Productivity also assumes some level of, at minimum, good **quality**. And it assumes that the productive person is using his abilities **efficiently** for his level. Finally, implicit in productivity are **metrics** or some other form of measurement. Thus most law-department managers define productivity as the quantifiable amount of worthwhile services done well by the right level of lawyer in a given unit of time.

Now let's consider nine factors that determine an in-house lawyer's productivity. Each can slow down productivity if overdone or misdirected; each can be improved if the department and its managers make the right decisions.

EXPERIENCE

Experience, obviously, speeds up a worker. If you have previ-

ously filed 20 proofs of claim in bankruptcies, you will knock another one off faster than your colleague who only knows Chapter 11 from novels. Experience can, however, be a drag on productivity if it locks a veteran into patterns of work that no longer serve the purpose. If you always have filled out proofs of claim by hand, now you may resist software that helps speed up the process.

Specialization quickly builds experience, as does hiring veterans. In addition, instructive performance evaluations can help shape anyone's experience.

KNOWLEDGE

Even with little firsthand experience, if a lawyer has a framework for understanding what to do, productivity will improve. If you have read how to prep a client for a deposition, you can close some of the gap between experience and knowledge. The downside of knowledge can be nit-picking and sophistry. "Paralysis by analysis" is another way to describe a lawyer who knows too much to accomplish a simple task quickly.

There are many ways to increase a lawyer's knowledge, including law school courses, CLE, professional reading, and listening to others.

INTELLIGENCE

With professionals, brains do make a difference. The productivity laurels usually go to the lawyer who thinks more subtly, quickly, or creatively than another. A smart lawyer figures out how to structure a deal efficiently; a less intelligent lawyer takes longer, and might not come to as good a solution. Productivity suffers if intelligent lawyers retreat into ivory-tower thinking or alienate the fools that surround them.

There's not much a manager can do about a lawyer's IQ except to hire smart lawyers. Creative thinking, however, is something that can be developed and practiced, to the benefit of productivity. According to Al Peters, assistant chief counsel of the Pennsylvania Turnpike Commission, "Creativity is an important but often underrated aspect of a lawyer's produc-

tivity tools.” Books, courses, and tapes can all sharpen a lawyer’s creativity.

PERSONALITY

Productivity also depends on the personality of a lawyer. Is she a perfectionist; is he the type who can grind through debentures? Is she cautious; is he organized? “A confident lawyer,” says Leo Knowles, senior vice president and chief litigation counsel at ConAgra Foods, “gets more done because he or she makes decisions and moves on.”

Personality degrades productivity if a strong personality offends others or if there is a “halo effect,” which happens when someone gets an undeserved high rating because of a sparkling personality.

Personality-assessment systems can help lawyers manage others and understand themselves better. For example, methodical people accomplish some tasks better than people who like to have many tasks going on at once, and a personality test can identify both types. These assessment instruments are also keys to creating collegial teams and matching lawyers to clients. Sometimes people with the same style work well together; sometimes they need to complement one another’s styles. And although motivation also plays a role in pushing productivity, it’s unclear whether compensation accelerates productivity.

In other words, what makes one lawyer more productive than another lawyer depends on experience, knowledge, brains, and personality. Other factors that influence productivity depend on the law department and the client.

ORGANIZATION OF WORK

Other things being equal, a lawyer will be more productive if the law department makes it possible to delegate and team up well. If lawyers work together and skillfully execute a document-discovery plan, they will locate more responsive documents in the same period of time than others who are less disciplined. A lawyer is more productive if he is in a position that suits his capabilities.

The downside of organization for productivity is a bureaucratic insistence on procedure at the expense of progress. If it takes a team of people in lengthy meetings over months and months to study anything and recommend changes, productivity will suffer because progress will be slow.

It helps to assign work intelligently (by type, amount, and challenge) and to have paralegals, legal assistants, office administrators, and other support staff let the lawyer focus on the best use of his time. As Phil Crowley, assistant general counsel of Johnson & Johnson, says, “You can improve communication and teamwork in a law department, which helps productivity.”

TECHNOLOGY AND TOOLS

Many tools enable in-house counsel to accomplish more in less time. Think of personal computers, libraries, BlackBerries, dictation equipment, filing cabinets, matter-management systems, fax machines, scanners, and even pencil sharpeners. Productivity suffers, however, if the technology becomes too

complicated or lawyers spend too much time tinkering or sending personal instant messages.

Technology is the easiest investment to make, assuming corporate IT permits it and it can be individualized. The best steps here are to train lawyers, encourage them to share lessons they have learned, and equip people according to their needs and motivation to make use of technology. Technology furthers productivity, experience has shown, when you let lawyers try out what they think they might use, rather than impose the tools.

EMPOWERMENT

Productivity goes hand in hand with the ability of the lawyer to make decisions. If the assistant general counsel can decide on settlements up to \$50,000, the department will resolve lawsuits more quickly. Productivity is hamstrung when others have to weigh in, be consulted, and approve—or, by contrast, if overempowered rogues run amok (ask Barings Bank, which was taken down by one trader who disastrously acted on his own).

Don’t micromanage. Set clear levels of authority that everyone understands. And remember that it’s always important to back people up if something goes wrong.

Finally, there are external forces that also affect productivity.

FLOW OF NEW WORK

The kinds of questions and tasks submitted to a corporate lawyer make a difference in that lawyer’s level of production. Factors such as which contracts come for review, in what condition of completeness, and with what kinds of complexities make one lawyer more or less productive than a peer.

The downside here can be a lack of clarity about the role of the law department and lawyers doing quasi-legal work. No law department can turn around work quickly and effectively if its lawyers are asked to do work that the ethics or compliance departments, or even clients, should do.

Prune out quasi-legal work, and perhaps set up a gatekeeper on the client side. Train clients as much as possible to think of ways lawyers can make the best use of their legal skills—that is, work most productively. Consider even a self-serve, in which the emphasis is on clients doing as much legal work as they responsibly can.

Ironically, to keep productivity at a high level, make sure people take vacations. Burnout scorches productivity. In addition, define the role of the law department and make sure that clients know how best to use their in-house group and unleash their productivity. Service-level agreements help.

CLIENT EXPECTATIONS

No one can outproduce someone else if the standard is too high or constantly changing. Clients need to be consistent and fair and balance their expectations of legal knowledge and business knowledge.

Problems with productivity can occur if a CEO insists on comprehensive surveys of legal risks, replete with full discussion. Then it will be harder and slower for the lawyer to produce that quality of output. Productivity will suffer.

Every task done by a law department lawyer means a trade-off—something else cannot be done. If you spend time here, you can't spend it there. The usual thinking is that the more time and effort the lawyer devotes to something, presumably the better the lawyer can protect the client from legal risk. But if in-house counsel and their clients are willing to take a few more legal risks, they will get more done and boost productivity; if they are risk averse and clamp down on legal risks, turnaround times for documents and guidance will slow, which means less productivity.

The key points here are that productivity translates into quality, furtherance of important ends, the full use of each person's abilities, and metrics. In addition, all of the facets of productivity can be improved by the judicious deployment of various techniques.

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Inefficiency caused by e-mail and crack-Berries

(July 14, 2005)

A study in Britain of 80 workers announced that technological distractions (such as e-mail, instant messaging, and the telephone (!)) make workers temporarily dumber by 10 IQ points – that is, more than two times dumber than if they were smoking pot. Tech. Rev., July 2005, at 18, citing a study Hewlett-Packard commissioned.

Distractions of any kind, but especially the variable reinforcement – and incessant interruption – of Blackberries and e-mail undoubtedly whittle away at the concentration good lawyers need. (But see my posts on April 3, 2005, on tech increasing productivity and July 17, 2005, on lawyers who multitask.)

Natural talent is overrated; IQ can rise with effort

(June 6, 2006)

Law is cerebral, and many people don't question the common assumption that brainier lawyers do better. Whether that is generally true, I at least have always thought that a person's IQ is an invariant figure. Determined by what you are born with and what relatively early experiences you have, IQ thereafter remains fixed.

Then I read in Jeffrey Pfeffer and Robert I. Sutton, *Hard Facts, Dangerous Half-Truths & Total Nonsense: Profiting from Evidence-Based Management* (Harvard Bus. School Press 2006) at 93, that "even allegedly inherited abilities – like IQ and other 'smartness' measures – improve markedly and continuously when people work hard, have good coaching, and believe they will keep getting better" (italics in original).

A lawyer becomes accomplished by dint of disciplined effort over time, with instructors, where the lawyer has faith that his or her cognitive abilities will improve (see my post of Nov. 6, 2006, on effortful study). We can boost our IQs!

"Executive intelligence" as the best predictor of in-house counsel managerial success

(Jan. 1, 2006)

An article in the Harvard Bus. Rev., Nov. 2005, at 100, explains a test for "executive intelligence." The author, Justin Menkes, writes that "studies have shown that [IQ tests] predict work performance at least as well as competency interviews do (the most common assessment tool used today for hiring and promotion) and about 10 times better than personality tests do." (id. at 106) (See my posts in 2005 of July 31 on the predictive accuracy of emotional intelligence (Ei) instruments, July 14 on another set of definitions, Nov. 13 on four attributes – one being Ei, and Dec. 21 on Ei diminishing with rank.)

Even so, Menkes faults IQ tests for being limited to assessing academic abilities that have scant bearing on managerial thinking. His instrument, by contrast, depends on the three skills his research has identified as crucial for thinking critically as a manager: accomplishing tasks, working with and through others, and judging oneself and adapting one's behavior accordingly. It is certainly possible for in-house lawyers to view their work in these categories, but I feel they are too broad.

Each of these three all-encompassing categories have five or six cognitive skills associated with doing them successfully, and taken together how a person fares when employing those cognitive skills makes up the person's executive intelligence. (See my post of today on behavioral interviewing.)

Law departments should consider using tests for executive intelligence. Someday, I predict, there will be an instrument that assesses lawyer intelligence.

Rees W. Morrison

PRODUCTIVITY

From LawDepartmentManagement.typepad.com

BLOG CONTENT

Quasi-Legal Time Wasters

*If anyone can do it, does it make sense to give the work to your law department?
Not if the company wants a productive team.*

BY REES W. MORRISON

Quasi-legal work is the cellulite of law departments. These are the tasks in-house counsel can do but shouldn't—if their legal department wants to reach peak effectiveness.

Quasi-legal tasks include peripheral lawyer activities such as drafting and reviewing routine correspondence for executives, managing projects that involve several departments in the company (such as marketing, a business unit, and the patent group), and responding to routine claims that should be dealt with by the business unit. These kinds of tasks are larded throughout the productive work that lean, efficient law departments should concentrate on instead.

Not that quasi-legal work wears a scarlet Q and is always immediately detectable. Rather, it's a question of separating higher-value legal work from lower-value work that a lawyer can do. These are not water-tight definitions. Nor should paralegals fill in and do these tasks. The improper activity falls outside the boundary of the optimal role of a legal department.

Who makes these demands? For the most part, the managers and executives of the company often trigger quasi-legal work. What is the solution? A department with a clear understanding of how it best contributes to the company's success, along with internal clients with the same understanding, will keep quasi lawyering to a minimum.

WHAT'S VALUABLE?

The most valuable work of in-house counsel is giving legal guidance to business executives; interpreting regulations,

statutes, and decisions; reviewing documents and activities for legal risks; and managing outside counsel. Quasi-legal work advances none of these goals.

Instead, quasi-legal work at its rawest has lawyers doing tasks that anyone could do. Tracking the number of company advertisements that need to be reviewed for regulatory compliance, for instance, can and should be done by someone other than a lawyer and, indeed, outside the law department. Preparing run-of-the-mill sublease extensions ought to fall to the real estate group, not to a lawyer.

Although these are a few good examples, it's nearly impossible to catalog the suspect tasks, since many really depend on the particular lawyer and the particular task. The gray area teems with tasks that lawyers might be trained and experienced in, such as writing, fact organization, and analytical thinking, but that do not make the best use of their legal training and experience.

Lower-value work sometimes includes writing documents, when the document is not legal analysis or pleadings; organizing facts, when the facts have more to do with business or administration than law; thinking through a problem, when the problem should be solved by another department; and coordinating a team, when the legal elements of the team's work are small. What the lawyer is asked to do (or takes on) has a legal veneer, but the core of the task should be someone else's responsibility.

I would not be surprised if in most law departments quasi lawyering gobbles up 5 percent to 10 percent or more of lawyers' time. Shed this fat, and your lawyers will be much fitter contributors to the company.

ASK QUESTIONS

Companies benefit when they can prevent their lawyers from being sucked into quasi-legal work. But how can a company determine the boundaries if the edges are unclear? Here are some questions to ask:

- Would the company hire an outside firm to do the work? If the client (the company) wouldn't think of paying outside counsel their rates to accomplish the task, the inside lawyer should probably not do it, either.

- Could a person who did not graduate from law school handle the task just as well?

- What happens in other law departments? For example, if no other law department in your industry requires that a lawyer review every contract, you have stumbled upon a quasi-legal waste.

- Are the legal risks infrequent or small in relation to the amount of time lawyers spend sniffing them out? Reviewing plain-vanilla confidentiality agreements falls into this category.

How does a department rout these time wasters? Simply understanding and articulating the concept can help lawyers spot and sidestep less-essential work masquerading as "the law department's responsibility."

TRACK THE TIME

Another technique adds more precision. For four weeks, have the in-house lawyers track how they spend their time. They should use five to seven categories of tasks, and make sure they indicate for each task whether—compared with all the tasks done during the period—the particular one is a good, medium, or poor use of their legal talent. Gather the lawyers together and have them discuss which of the activities they are asked to do, or choose to do, fall into the suspect category of quasi-legal work. Once they are aware of these drags on their time, they need to talk with their clients about alternative resources or alternative ways of accomplishing the tasks. Thereafter, much like an exercise regimen, law departments need to periodically sweat off their quasi-legal flab.

Besides tracking lawyer time, another option is to charge in-house clients, perhaps only for the most egregious examples of quasi-legal work. Although it's a heavy-handed solution, it will make these clients more sensitive to diverting their lawyers to ancillary tasks. On the other hand, the solution raises the possibility that the company will push back. Some might even consider firing some lawyers, which would ultimately force the survivors to eliminate the lowest-value work. Sometimes that approach works, but most would argue that the cure is worse than the disease.

In my consulting experience, consciousness raising and exhortations do well to tame the problem, but for lawyers to push back when asked to take on quasi-legal tasks, or to drop those tasks they are doing, the general counsel must stand up for them and support them in the face of client discontent.

Ironically, sometimes resistance to stopping quasi-legal tasks comes not from clients but from the lawyers themselves. In one insurance company law department that tried to trim some quasi-legal time, the lawyers resisted the change. In fact, the lawyers argued that it was better if they ingratiated themselves with the clients in-house and gave them the services they wanted. They believed that the more the lawyer does, the happier the executive client. Many companies, for instance, use their

lawyers as notary publics. If there is no cost of lawyer time to clients, clients will be grateful for the services. But in the end, we're still talking about what amounts to corporate waste.

Lawyers also argue that you can't tell when a legal issue will show up in otherwise nonlegal functions. They feel it's worth the effort to spot the "wheat" of a legal risk mixed in with the "chaff" of low-value quasi-legal activity. But, for the most part, although reading through piles of documents and creating summaries make some use of lawyers' competencies, these tasks mainly divert lawyers from putting their skills to the best use.

There's another reason lawyers sometimes like quasi-legal tasks. Although few might admit this publicly, these duties can be a reprieve from more difficult work. There's nothing like a few minutes of proofreading and initialing standard form leases to let the stressed mind recover. It is said that "No good lawyer is idle," but, unfortunately, busyness is no good if it simply involves lower-value tasks. For lawyers of limited ability or energy, the ideal day is filled with peripheral puttering.

How do quasi-legal burdens arise? These problems arise most commonly in decentralized departments, where lawyers report to a business executive. When lawyers are beholden to a non-lawyer executive, they can find themselves slipping down the slope of handling tasks that don't make good use of their core competencies. Running the crisis management program or business interruption program could be examples of activities outside the sweet spot.

The problem also turns up when companies are forced to lay off employees. Then, business managers are tempted to use lawyers for tasks that can no longer be accomplished within the manager's group. Administering contracts is an example. The lawyer should explain to his or her manager that the task is inappropriate. An uncomfortable discussion? Yes. But rooting out quasi-legal time sappers requires making sometimes-difficult decisions.

Some quasi lawyering survives as an anachronism. Many years ago, it may have been important for lawyers to handle workers' compensation filings because the law was less settled, but now the task has sunk to administrative levels.

Reporting to non-lawyers, headcount shortages outside the law department, misguided notions of client satisfaction, tradition—all of these encrust quasi-legal tasks in a law department. Most crucial to the buildup of these diversions, it should be stressed, is misunderstanding by clients and law departments about the highest and best use of lawyer talent.

Quasi-legal tasks bloat and encumber most law departments. Productivity and focus on the law department's core competencies drift away when there is an infestation of quasi-legal work. The price of fitness is eternal vigilance, a dose of self-discipline, supportive clients, and the conviction that quasi-legal work hobbles a law department.

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The Quest for the Best

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

BY REES W. MORRISON

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

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

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

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

PHILOSOPHY

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

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

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

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

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

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

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

ECONOMICS

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

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

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

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

PSYCHOLOGY

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

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

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

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

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

SOCIOLOGY

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

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

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

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

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Adoption of “best practices” is a bad practice (meta-post on best practice)

(June 6, 2006)

Let me not be facetly misunderstood. Law departments exhibit many bad practices, nor am I a practices relativist – all practices are equally good. Far from it, I believe there are hundreds of solid practices that many, even most, law departments should take to heart (see my post of April 2, 2005, regarding survivor bias and best practices; July 14, 2005, about the most important practices being the hardest to imitate; Sept. 13, 2005, on how easily we overlook common good practices; and May 30, 2006, on our bias toward novel practices).

Having said that, I commend the reader to the article www.hildebrandt.com/Documents.aspx?Doc_ID=1944 I wrote that unmasts the ship of best practices.

Dueling “best practices” – embed lawyers with clients; require legal approval of contracts (BHP Billiton) (June 7, 2006)

Small wonder that I doubt the miracle drug of “best practices” (See my post of June 6, 2006, regarding an article I wrote and my post of June 6, 2006.). How can one reconcile the two initiatives John Fast, general counsel of BHP Billiton, decreed against the exactly opposite practices that others extol?

BHP's legal function “took the lawyers out of the business units in which they were embedded and placed them together in one department,” according to Legalweek.com, May 25, 2006 (Ed Thornton) . It appears from the article that some of those business unit lawyers reported to a business unit head and that the change relocated many of them to a centralized office location. The exact opposite of this practice – such as at GE where business unit lawyers report to that unit and have offices near those unit's executives – has been touted as a best practice. For example, Honeywell scatters its approximately 100 lawyers at 23 different sites – and each lawyer reports to both their law department superior and the head of the business unit they serve, according to GC Mid-Atlantic, May 2006, at 28.

The second BHP practice “introduced a policy whereby business units had to seek endorsement from the legal department before submitting a contract.” Opposing this practice are those law departments, such as Cisco, who only want to review important contracts and therefore train clients to handle less significant contracts (see my post of Jan. 3, 2006, on ways to expedite contracts.).

A meta-post on law department processes

(Feb. 6, 2007)

This blog has planted a long row of posts on processes (See my posts of April 27, 2006, which defines processes; May 1, 2006, about the breadth of the term; June 28, 2006, on their importance; and Aug. 13, 2006, on components of processes; Oct. 16, 2006, on processes in law departments generally; and Oct. 18, 2006, which compares processes to “tools.”). There is much more to say about processes in law departments.

Why are processes a useful construct for general counsel? Because once you identify and understand processes you can streamline them and teach people to step through them more adroitly (see my posts of Oct. 30, 2005, on guidelines for processes; and Aug. 28, 2005, on process maps).

Every activity in a law department can be subsumed in one or more processes (see my post of). Processes are a fundamental unit of activity, while most of them can be aggregated with others into a larger process. At the most macro aggregation, everything a law department does could be lumped into one process: helping the company avoid legal problems. At the micro end there can be processes for issuing and tracking litigation holds (see my post of Feb. 5, 2007, on software that helps this process).

Processes fit within a more comprehensive organizational framework (See my posts of Aug. 13, 2006, on processes, tools, and productivity; June 28, 2006, and the need for continual vigilance.). As just one consequence of this view, all analysis of errors should be thought of as process analysis (see my post of Nov. 14, 2005, on Six Sigma).

All processes exist as a range of activities that can vary (see my post of Nov. 26, 2006, on spectrum of processes and practices). Six Sigma methodologies dig for process wrinkles and try to iron them out (but see my post of Jan. 20, 2007, on the whether such techniques stifle innovation; and Jan. 16, 2007, regarding Lean Sigma at GE).

Arguments can be made for and against every process (see my post of Dec. 17, 2006, on pros and cons for every process and practice), which means to me, among other things, that there are no best practices. Fortunately, all processes produce metrics, whether or not managers collect them (see my post of Jan. 25, 2007, on this point). Thus there is at least hope that empirical research can lead to improvements in processes.

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Rees W. Morrison is a Vice President of Hildebrandt International, the leading management consulting firm to law departments, and co-head of the firm's Law Department Practice Group. Based near New York City, he consults solely to law departments: operational reviews, technology, benchmarking, cost control, re-engineering, structure and organization assessments, client satisfaction, and other issues. During his 18 years of consulting, Rees has assisted more than 200 law departments including Aetna, Air Products, Alcoa, American Express, Amway, AT&T, BASF, BellSouth, CableVision, CMS Energy, Coca-Cola, Colgate-Palmolive, Compaq, Continental Bank, Deutsche Bank, Diageo, El Paso Energy, Exxon, the Federal Reserve, FDIC, Halliburton, Harris, Ingersoll-Rand, John Hancock, Johnson Controls, Lehman Brothers, Lucent, Marsh McLennan, Merck, MetLife, Mirant, Motorola, Northrop Grumman, Occidental Petroleum, Office Depot, Pfizer, Pharmacia, Philip Morris, Port Authority of NY/NJ, Prudential, PSE&G, Schering-Plough, GlaxoSmithKline, Sun Life, TIAA-CREF, TXU, and Westinghouse (CBS).

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Graduating from Harvard College in 1974, Morrison earned his law degree from Columbia Law School (1978) and an LLM from New York University (1984). He taught at Cardozo Law School and moderated the Lexis Counsel Connect Law Department Management discussion section. He is a Certified Management Consultant, a fellow of the College of Law Practice Management, has been on the Board of

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