Chapter 17

Law Department Management

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§ 17:1 Scope note

This Chapter discusses the challenges and elements of operating a law department. In covering these topics, the Chapter touches on a number of subjects that are discussed in much greater detail elsewhere in this publication.

Successful law department management is dependent on several factors: the nature of the relationship between the department and the client—the corporation,[1] the structure of the department,[2] adopting the right approaches to managing the department,[3] and close cooperation with outside counsel.[4] The law department must use all the modern management techniques and tools available, such as the development of strategic plans,[5] sound budgeting,[6] cost allocation procedures,[7] benchmarking and evaluation processes,[8] and modern technology.[9] While achieving favorable outcomes for the business is paramount, the law department must properly balance two main expense drivers—internal staffing and external support spend. These and other topics are covered in more detail in this and other Chapters of this publication. More specifically, numerous other chapters of this treatise provide comprehensive coverage of the details of the various processes in which inside and outside counsel interact while this chapter focuses primarily on consideration of how these processes can be used as management tools to facilitate and improve the overall management of the law department.

§ 17:2 Preliminary considerations

The size of the corporate law department will vary depending on the company size, activities and risk profile, the industry, the regulatory framework and other factors. Size will have a significant effect on the department's organization and management, as will geographic scope and diversity of business operations and product lines. This Chapter focuses on the management of larger law departments, not relatively small departments consisting of only a few at-

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[Section 17:1]

[1] *See* § 17:2.

[2] *See* § 17:5; *see generally* Chapter 16 "The Relationship Between the Legal Department and the Corporation" (§§ 16:1 et seq.).

[3] *See* § 17:7.

[4] *See* § 17:8.

[5] *See generally* Chapter 10 "The Planning Process" (§§ 10:1 et seq.).

[6] *See generally* Chapter 11 "Budgeting and Controlling Costs" (§§ 11:1 et seq.).

[7] *See* § 17:6.

[8] *See generally* Chapter 30 "Benchmarking" (§§ 30:1 et seq.).

[9] *See generally* Chapter 28 "Technology" (§§ 28:1 et seq.) and Chapter 28A "Artificial Intelligence" (§§ 28A:1 et seq.).

torneys and staff.[1] There is no single structure for the legal department[2] that is universally the "best." Rather, a corporation needs to undertake a comprehensive inventory of its own structure and business, and identify where it is in its life cycle and where it is heading, before it can begin to prescribe an appropriate organizational structure for its law department. In determining the optimum structure of a legal department, managers of the department must be intimately familiar with the corporation's overall executive management structure and senior management's attitude towards the law department as a whole.[3] As a first order of business, law department managers may need to tackle a negative or obstructive attitude toward the role of lawyers in the corporation. Accomplishing this important task may depend on how the department is organized. Only after this analysis and groundwork can managers determine what structure and size best serves the client.

The ultimate goal of the law department should be to achieve favorable outcomes at a cost and quality level that meets the reasonable expectations of management. The law department's structure should provide the framework that enables the company's in-house legal staff, working cooperatively with outside legal advisors, to provide counsel that optimizes business results in a manner that enables management to best manage the risks inherent in its business operations.

§ 17:3 Understanding and defining culture

The role and effectiveness of the law department depends in no small part on the culture of the company that it services. Understanding that culture and working to encourage changes necessary for the department to add maximum

[Section 17:2]

[1] *See generally* Chapter 40 "Operating a Small Law Department" (§§ 40:1 et seq.).

[2] *See* § 17:30 for discussion of the organization structure of the law department.

[3] *See* Chapter 16 "The Relationship Between the Legal Department and the Corporation" (§§ 16:1 et seq.).

value is a key role of the General Counsel.[1] The interest and willingness of senior management and the ranks immediately below to solicit legal counsel when it is needed varies significantly by company. Even within a company, reliance on the law department can be substantially different by division and certainly by geography. A legal department that is functioning optimally across all lines of business and geographies ideally obtains support from the CEO, providing the necessary "tone at the top," setting the stage for the business to involve the legal team as a matter of standard procedure in making business decisions or assessing any business related risk. Some might argue that involving lawyers so intimately in the business will only slow down decision-making and will make any decision overly cautious, thereby missing out on key opportunities. If the law department functions as a "business impediment department," those concerns are valid. But just as the General Counsel must work with the CEO to create a positive culture for the solicitation and provision of legal services, likewise, the General Counsel must ensure that the in-house department is rendering counsel that enables the business to achieve its goals. Recognizing the culture of the corporation, and the degree of receptivity of senior business executives to integration of the law department into the business, will better enable lawyers to deploy tactical approaches that overcome any obstacles and ensure that the specific requirements of the business are met.

§ 17:4 Understanding the client relationship

The ultimate client of attorneys working in a corporate law department is the corporation or its shareholders as a whole, not the board of directors or members of senior management. This is not always realized or understood on the business side. The law department's primary mission is to assist management in optimizing business results in a manner that is in the corporation's best interests. This requires the department to maintain a certain independence from the management team, even as the legal team works to

[Section 17:3]

[1] *See* Chapter 16 "The Relationship Between the Legal Department and the Corporation" (§§ 16:1 et seq.).

be a part of and support that management team's mission and business goals. The tension that is sometimes created is difficult to balance, especially when some in management do not understand the role of in-house counsel. As a practical matter, representing the amorphous "corporation" can sometimes be derailed by the demands of the moment, as when corporate counsel are participants in key decision-making strategy meetings[1] in which momentum develops for moving forward with a business plan strongly advocated by senior management but which has, in the mind of the in-house lawyer, unrecognized, or deliberately ignored, risk to the corporation.

Corporate counsel, serving its proper function, should review a business proposal and identify legal risks that might prove material, or even catastrophic. The moment sometimes arrives when corporate counsel faces a dilemma: which voice should be followed, the voice of management authority or that inner voice of professional responsibility? As a matter of professional ethics, the choice to be taken by in-house counsel is clear,[2] but the practicalities can blur ethical lines considerably. The best course of action is to ensure that all material legal risks are identified in any business proposal before it reaches the decision-making level. If the risks are not fully taken into account, they must be communicated to the decision maker, along with proposals as to how to mitigate them in a manner that enables business goals to be achieved. Insisting on material issue identification early on can result in some difficult moments, but the long-term benefits are clear.

It is also advisable to involve outside counsel early on. Knowledgeable outside counsel can provide substantive value and assist in the sometimes difficult job of explaining to management why a particular course of action is too risky from a legal standpoint. However, it is critical that outside counsel understand that the General Counsel is in charge so that management maintains utmost confidence in her.

Issues presented by the need for the law department to

[Section 17:4]

[1] *See* § 17:6 for discussion of lawyers on business management committees.

[2] *See* Chapter 31 "Ethics" (§§ 31:1 et seq.).

understand the client relationship are discussed in §§ 17:5 to 17:10 of this chapter.

§ 17:5 Understanding the client relationship—General Counsel on the board of directors

It is now rare for the General Counsel to be a member of a public company board of directors. There is good reason for this. It is very difficult for one person to provide independent, objective legal advice when she is part of the management that is the recipient of that advice. There are also practical considerations. To the extent the directors are engaged in debate over important topics, having the General Counsel as a director can compromise the ability of the corporation and its directors to receive privileged legal advice because discussions among the other directors with the General Counsel may not be treated as an attorney-client communication under the applicable jurisdiction's law of attorney-client privilege.[1] Also, the General Counsel's role as a director may limit his or her persuasiveness when articulating legal issues surrounding the decision. If the General Counsel does sit on the board of directors, it is essential that the General Counsel clearly identify when legal advice is being provided, and the minutes of the board meeting must be precise in noting these instances.

§ 17:6 Understanding the client relationship—Lawyers on business management committees

In contrast to the board of directors, business management committees of any significance should have a lawyer as a member or, at a minimum, a lawyer should be regularly present in some other capacity. There are several reasons why membership on management committees is important for the success of the business as well as the legal department itself.

First, the presence of a lawyer will aid in the legal function's understanding of where the business is heading, allowing the lawyers to develop solutions to legal issues in context, using approaches that are consistent with the mis-

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[Section 17:5]

[1] *See generally* Chapter 33 "Attorney-Client Privilege and Attorney Work Product Protection" (§§ 33:1 et seq.).

sion and strategy of the business. Second, a lawyer can identify any legal dimension to the business problems and collaborate seamlessly with the client in real time. When lawyers have direct access to issues as they appear on the radar screen, they can get in front of problems and help devise solutions, eliminating legal impediments to a business initiative in advance of implementation.[1] This is a more favorable scenario than the all-too-common, last-second communication to the law department for sign-off of a plan that has been agreed to by all but the lawyers, but which creates significant potential risks that have not been properly considered. Finally, having lawyers integrally involved with the business and recognized by business colleagues as members (even ex-officio) of substantial business committees, helps to raise the consciousness of all committee members to legal matters and the legal ramifications of business decisions.[2] For the law department, this increased involvement and exposure is crucial to its effectiveness in servicing and protecting the client's interests.

While the benefits of placing in-house lawyers on business management committees are many, there is an underlying risk that requires attention and careful management. Preserving the attorney-client relationship can be tricky when lawyers sit on management teams. The in-house lawyer must be aware of the "dual-hatted" role and take great care to identify, and note, when she is giving legal advice as opposed to general business advice.[3]

§ 17:7 Understanding the client relationship—Conflict identification and resolution process

Understanding the tensions created by serving two

[Section 17:6]

[1] *See* Chapter 2 "Pre-Litigation Management and Avoidance" (§§ 2:1 et seq.).

[2] On the importance of developing solutions to legal issues consistent with the mission and strategy of the business, *see* Michael Volkov, Redefining The Relationship of The General Counsel and Chief Compliance Officer, Association of Corporate Counsel (ACC) Publication, September, 2014 ("CEOs often rely on their General Counsel for more than just 'legal' advice and seek guidance on 'business' issues.").

[3] *See* Chapter 33 "Attorney-Client Privilege and Attorney Work Product Protection" (§§ 33:1 et seq.).

masters—the corporation and senior management—is key to successful and ethical law department management. Conflict can arise between business objectives and legal risk, especially where the business leader is either very aggressive in pursuing management's goals or where the business person possesses personal attributes that make her a "difficult" client (*e.g.*, no respect for lawyers, lack of sophistication, overloaded ego).

One way to minimize such tension is to design the legal department's organizational structure and management philosophy in a manner that provides conflict identification and resolution mechanisms or communications channels to which department attorneys can resort when the occasion arises.[1] When a potential conflict presents itself, it is important that it be considered and addressed at the appropriate level. The law department should establish a conflict identification and resolution process that permits (and expects) a junior attorney to promptly move an issue up to a more senior attorney who can speak credibly on a one-to-one basis with the senior executive (or her supervisor, if necessary). In this way, a more satisfactory review and discussion of the potential conflict will likely result, while maintaining the credibility of the department. Such a mechanism is critical in companies having decentralized, matrix organizations that have legal staff reporting directly to a line manager. The lawyer in such an organization needs to know that she has the ability to gain the support of senior functional leaders, especially where the line managers are known to be aggressive.

§ 17:8 Understanding the client relationship—The necessity for business skills

Another key element in maintaining a successful client relationship—with both management and the corporation as a whole—is to ensure that the corporation staffs its law department with attorneys who understand the business world and

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[Section 17:7]

[1] *See* Chapter 16 "The Relationship Between the Legal Department and the Corporation" (§§ 16:1 et seq.).

who know how to think like a business person.[1] "It's no longer banging out a contract. It's learning the nuances of a business decision, learning how to handle human interaction, and more importantly, understanding the company's financials."[2] In-house lawyers need to learn the business the way a business person learns it.[3] Most business corporations are operating in competitive markets where survival is not guaranteed. In order to survive, the corporation must be prepared to take risks, including legal risks. Management wants to know what the chances are that a given legal risk will come to fruition—*e.g.*, is the likelihood of an adverse result 10%, 50%, or 80%? These types of statistical and mathematical calculations, of course, do not always come easy to lawyers, who often prefer simply to discuss pros and cons, not probabilities. In conducting legal risk analyses, lawyers will benefit from learning to communicate in the language CEOs and CFOs use and apply to the uncertain circumstances they deal with every day.[4]

Even if the attorney arrives on the job with polished business skills, it is important to provide training for law department attorneys to recognize that taking risks is entirely appropriate, and indeed necessary, and to be able to make reasonable predictions of legal risk. This type of training can be accomplished through formal programs using outside vendors that are skilled in this area, or through mentoring programs using both senior members of the law department, of the business and, where appropriate, outside counsel. It is also important to provide training on the basic business decision-making styles of corporate management to ensure that counsel can communicate with managers in their

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[Section 17:8]

[1] *See* Chapter 16 "The Relationship Between the Legal Department and the Corporation" (§§ 16:1 et seq.).

[2] Quote from Josh Linker, CEO of ePrize, *see* Flahardy, Survey of CEOs, 10 Corp. Legal Times 48 (October 2005).

[3] Quote from Nancy Loeb, General Counsel and corporate secretary of Takeda Pharmaceuticals North America, *see* Julie Miller, Learning the Value of Business, Inside Couns. 61 (July 2006).

[4] *See generally* Chapter 12 "Evaluating Legal Risks and Costs with Decision Tree Analysis" (§§ 12:1 et seq.). *See also* Think like a CEO, *available at* https://www.law.com/corpcounsel/2018/09/04/think-like-a-ceo/?slreturn=20180918112623.

language and command their respect when presenting legal issues for consideration. Only then will corporate counsel be in a position to raise sensitive issues in a manner that will facilitate a favorable outcome for the corporate client and engender trust and confidence in the lawyer. This training requires active mentoring by law department members who are familiar with the various decision-making styles of management.

Another way to provide training of this kind is to gain access to non-legal corporate training sessions for in-house attorneys, such as training courses required for sales representatives that are intended to ensure that the corporation presents a uniform image to its customers. Many companies also provide financial training and project management[5] training for "lay" persons within the company. In these sessions, the attorney will learn how the corporation expects its employees to act in certain situations, enabling the attorney to evaluate whether a given business method implicates broader legal concerns for the corporation. In addition, placing lawyers in the field is a useful training method, providing lawyers with context to better inform their advice.

One way to demonstrate the law department's business acumen is by running the law department itself as a business. Law departments can exercise sound business judgment by, among other things, outside counsel management, including rate management[6] and matter staffing,[7] finding opportunities for alternative fee structures,[8] balancing internal and external resources efficiently, and embracing new technologies that support automated outside counsel data/analytics.[9]

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[5] *See* Chapter 42 "Quality Management, Six Sigma, Re-engineering and Project Management" (§§ 42:1 et seq.).

[6] *See* Chapter 14 "Billing" (§§ 14:1 et seq.).

[7] *See* Chapter 18 "Law Firm Staffing" (§§ 18:1 et seq.).

[8] *See generally* Chapter 8 "Fee Arrangements" (§§ 8:1 et seq.).

[9] *See* § 17:18; *see generally* Chapter 28 "Technology" (§§ 28:1 et seq.); Chapter 28A "Artificial Intelligence" (§§ 28A:1 et seq.).