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ESTABLISHING THE STRATEGIC VALUE OF THE IN-HOUSE LEGAL DEPARTMENT

by

Evan A. Peterson *

Managers often marginalize the significance of the in-house legal department to the generation of corporate strategic value.¹ This outlook reveals a gross misreading of the emerging challenges that developments in the legal environment will place upon organizations over the next few years. Intellectual property law protections will become increasingly important to the generation of organizational value.² Cybersecurity and data protection issues represent chief concerns in the areas of compliance, risk management, and business litigation.³ The conceivable damage to innovation, global trade, and economic growth posed by cybercrime will force legal counsel, corporate executives, and technology experts to work collaboratively on creating proactive approaches to cyber security risk-management practices.⁴ As managers will regularly perform an increasing amount of business decisions in the years ahead that will require an appreciation of the value derived from corporate legal strategy,⁵ companies will face an ever-increasing need to reexamine and adjust unrecpetive managerial attitudes toward the strategic value of the in-house legal department.

In-house counsel will occupy a critical role in supporting techniques for altering unrecpetive managerial attitudes toward the strategic value of the in-house legal department. The greater demands and expectations placed upon in-house counsel will drive efforts toward promoting an understanding of the need for,

and value of, effective corporate legal strategy across the organization.⁶ General counsel serve an important strategic role in acting as boundary spanners between the lawyer mentality and the business perspective.⁷ Bridging the gulf between lawyers' and managers' respective mental models will represent a decisive factor in creating innovative organizational processes by combining legal tactics with managerial insight.⁸ General counsel, through their dual responsibilities as legal counsel and business value creators, are now denoted as "strategic partners" within organizations.⁹ There is a lack of consensus, however, among in-house general counsel with respect to techniques that will alter unreceptive managerial viewpoints toward the strategic value of the legal department in the corporate setting. The purpose of this article is to develop such a consensus by outlining the recommendations of in-house general counsel from a 3-round Delphi study generated in response to following open-ended question: What types of practices will help in-house lawyers demonstrate how the legal department brings strategic value to the company?

STUDY BACKGROUND

A 3-round Delphi study was conducted to address the general problem concerning the severe limitations placed on the organizational ability to derive strategic value from the law due to the lack of integration between legal strategy and business strategy in the corporate setting. The specific problem that addressed in this study is that managers hold unreceptive viewpoints toward the strategic value of law within the corporate setting.¹⁰ Although in-house general counsel working across business industries in the United States stand in a position to develop techniques for altering unreceptive managerial viewpoints toward the law, a lack of consensus exists among them with regard to techniques that will alter unreceptive managerial viewpoints toward the strategic value of law within

the corporate setting. The purpose of the study was to build this consensus.

During the first round, a study panel comprised of in-house general counsel working across business industries in the United States responded to an electronic questionnaire containing 6 broad, open-ended questions. The second-round questionnaire consisted of theme statements derived from panelists' responses to the first round questionnaire. Panelists rated each statement on the second round questionnaire against 2 separate 5-point Likert scales: desirability and feasibility. Any statement where the collective frequency of panelists' top 2 responses (rating of 4 or 5) was 70% or higher on both the desirability and feasibility scale passed to the third round. The third-round questionnaire consisted solely of theme statements carried over from Round 2. In Round 3, panelists rated each remaining statement against 2 other scales: importance and confidence. The statements where the collective frequency of panelists' top 2 responses (rating of 4 or 5) was 70% or higher on both the importance and confidence scales formed a consensus on techniques that will alter unreceptive managerial viewpoints toward the law within the corporate setting.

The final list of 25 theme statements generated by the study panel in Round 3 encompassed the following categories: (a) managerial attitudes toward lawyers and the law; (b) relationships between lawyers and non-lawyer managers; (c) leadership in the legal profession; (d) in-house general counsel and the strategic value of the in-house legal department; and (e) law, legal strategy, and competitive advantage. The discussion in the present article will focus on the fourth major category: in-house general counsel and the strategic value of the in-house legal department. An understanding of the roles and functions of in-house general counsel will set the stage for examining the value of the in-house legal department.

LITERATURE REVIEW

The Delphi Method

The Delphi method encompasses an iterative process for developing consensus among a panel of experts through the dissemination of questionnaires and feedback.¹¹ Delphi is geared toward the formation of consensus in instances where a deficiency of scholarship exists on a given research topic.¹² Delphi studies occur through a series of iterations (rounds), beginning commonly with the distribution of a broad, open-ended questionnaire in the first round and concluding with the development of consensus in the last round.¹³ The technique was forged by the RAND Corporation in the 1950s as a means to generate forecasts in connection with military technological innovations.¹⁴ Scholars have applied the Delphi method to problems in multiple areas, including environmental and social studies, medicine, government, and industrial/business research.

The Delphi design consists of four principal characteristics: (a) participant selection is based on predefined qualifications; (b) participants communicate exclusively with the study facilitator and are anonymous to other participants; (c) information is gathered and redistributed to study participants by the study facilitator through a series of iterations, and (d) the responses of individual participants are combined by the study coordinator into a collective group response.¹⁵ Numerous benefits accompany the Delphi method, including the minimization of biases stemming from face-to-face interaction, the gathering of varied experts from isolated geographical locations, the abolition of prolonged face-to-face meetings, and the facilitation of greater inclusion from groups of individuals who are habitually omitted from participation in academic research.¹⁶ Rigor is central to the Delphi method, wherein researchers commonly use rating scales to evaluate panelists'

responses along four key dimensions: desirability, feasibility, importance, and confidence. These four dimensions represent the amount of information required for the adequate assessment of an issue under the Delphi method.¹⁷

Role and Functions of In-House General Counsel

This section will contain an overview of recent scholarship on the growth of general counsel in the corporate environment, the ways through which general counsel create organizational value, the tensions inherent in the roles and responsibilities that characterize the general counsel position, and the growing importance of general counsel to business strategy. The literature in this section underlines the critical role that general counsel play in facilitating organizational legal strategy.

Evolution of General Counsel in the Corporate Environment:

Occupational statistics centered on the positions of in-house general counsel reveal a demographic shift within the legal profession over the last few years. Some lawyers within the legal community have by tradition regarded engagement in private practice legal practice as superior to employment as in-house counsel in the business setting.¹⁸ There is some evidence to suggest that this perspective is changing as in-house counsel continue to gain greater recognition and wield greater power in the corporate sector.¹⁹ Approximately 15% of all practicing attorneys worked as in-house counsel in 2014.²⁰ According to the Association of Corporate Counsel, the number of available in-house lawyer positions rose by approximately 10% in 2015.²¹ The results of an analysis conducted by Russell Reynolds Associates of all general counsel appointments within Fortune 500 companies between 2011 and 2012 revealed a 25% increase in the practice of hiring general counsel with prior experience

working as general counsel.²² Comparable developments are apparent in the increasing number of lawyers serving on the board of directors or in the position of chief executive officer.²³ The American Bar Association, as well as many state bar associations, now offer sections and committee memberships geared toward the niche practice of in-house legal practice in the corporate setting.²⁴ Redeployments of company resources are increasingly accompanying demographic shifts associated with the increasing reallocation of attorneys to in-house counsel positions. The results from a 2015 Global General Data Counsel Survey of general counsel from Fortune 1000 companies suggest that corporate legal departments are beginning to see increased human resource and financial support from their respective organizations.²⁵ Scholars have attributed the growth of general counsel positions to a variety of factors, including (a) rapid advancement of information technology innovations; (b) changing business models within the legal services industry, and (c) mandates for legal cost reductions from business clients.²⁶ The rise of in-house legal counsel may reflect an increased understanding of the need for, and value of, effective corporate legal strategy.²⁷

Value Creation and the Role of General Counsel:

Several scholars have studied the connection between the presence of general counsel and the creation of organizational value. Ham and Koharki examined whether the decision by a company to appoint corporate general counsel to senior management affected the firm's credit risk assessment.²⁸ Litov et al. concluded that placing a lawyer on the board of directors led to a 9.5% increase in company value.²⁹ Kwak et al. concluded that if a company has a general counsel on its senior management team, then the company is more likely to issue more frequent and more accurate earnings forecasts than a company without a general counsel in senior management.³⁰

Beyond value creation through mere presence, general counsel also drive value creation through their day-to-day functions. The vision that lawyers serve as gatekeepers may lend partial support to the proposition that in-house lawyers must work constantly to protect the organization from both internal and external legal threats.³¹

The value creation attributed to general counsel echoes the variety of roles that they occupy within organizations. Three general spheres comprise the tasks of senior in-house counsel: corporate governance monitoring, regulatory compliance, and business development.³² A range of functions and responsibilities emerge from these spheres, including arbitrator, legal advisor and educator, negotiator, strategic planner, and crisis manager.³³ General counsel also have oversight responsibilities focused on preserving firm compliance with applicable laws and regulations as well as requests stemming from governmental investigations.³⁴ Other scholars have noted that the roles and responsibilities of general counsel also encompass managing prospective litigation, maintaining responsible corporate practices, and projecting the effect of regulatory changes on firm operations and performance.³⁵

General counsel positions, as a result of the increased range of responsibilities falling to their positions and departments, continue to grow in prestige and recognition. Due to the growing reduction in boundaries between law and business, general counsel continue to gain acknowledgment as critical members of senior/executive level management.³⁶ The growing burdens levied by an increasingly colossal and convoluted hodgepodge of local, state, and federal regulations in the business environment are driving this expansion.³⁷ Mounting acknowledgment that law is also a potential source of value creation within the organization, in turn, drives further expansions to the roles and responsibilities assigned to the

general counsel's office.³⁸ Scholars have emphasized that the attendance of well-rounded, business-oriented counsel at the strategic planning table will constitute a core requirement for long-term success in the years to come.³⁹ General counsel, due to their dual responsibilities as both legal counsel and business value creators, are now denoted as "strategic partners" within organizations.⁴⁰

The Growing Importance of General Counsel to Business Strategy:

General counsel possess a broad array of non-legal skills in addition to legal knowledge and acumen. According to the results of a survey of chief legal officers, 76% have played an increasing role in corporate strategy development in recent years.⁴¹ To thrive in such a role, general counsel have needed to further develop an array of non-legal skills, including developed understandings of human resources, business management, project management, financial management, budgeting, procurement, sales, information technology, asset management, and marketing.⁴² In addition to increased participation in business strategy discussions, general counsel have also championed high-level legal strategies and encouraged managerial employees to assume more participatory, hands-on roles in legal affairs affecting their organizations.⁴³ The role of general counsel will require an understanding of the roles played by diverse parties throughout the firm and the skills necessary to act as a buffer between lawyers and managers.⁴⁴ Chief legal strategists will require an array of qualities to drive legal strategies in such an interdisciplinary context, including:⁴⁵

- Strong business fluency, financial literacy, and operational experience
- Effective communication skills
- Business leadership experience

- Creative problem-solving capabilities
- Change-agent mentality
- Ability to act as team-players and team-builders
- Strategy execution capabilities

The legal skills and business expertise of general counsel have noteworthy effects outside of business strategy discussions. General counsel serve an important strategic role in acting as boundary spanners between the lawyer mentality and the business perspective.⁴⁶ Bridging the gulf between lawyers' and managers' respective mental models denotes a decisive factor to combining legal tactics with managerial insight in an effort to assimilate collective knowledge into innovative processes.⁴⁷ General counsel occupy unique positions within organizations that permit them to subvert legal groupthink stemming from close ties between managers and directors.⁴⁸ To identify how the legal department can play a leading role in achieving the company vision, general counsel must consider their connections and interactions with other organizational departments.⁴⁹ General counsel stand in a strong position to positively alter managerial views of the law and of the legal department's role in the organization.⁵⁰

RESEARCH DESIGN AND METHODOLOGY

Panelist Selection

Participant selection is a critical component of the Delphi design. Delphi researchers select participants based on participants' expertise with the issue(s) involved in the study, rather than selecting participants using representative random samples.⁵¹ Researchers have used a variety of criteria to identify

suitable Delphi panelists, including years of work experience, education, professional qualifications, licensures, and professional publications.⁵² Participants in this Delphi study satisfied the following eligibility requirements: (a) juris doctor degree from an ABA-accredited law school; (b) license to practice law in at least 1 state; (c) 5 years of business industry experience, and (d) currently serve as in-house general counsel for an organization headquartered in the United States. Nineteen in-house general counsel participated in the study.

Data Collection and Data Analysis

To address the theme of law, legal strategy, and competitive advantage, the first question on the Round 1 questionnaire solicited panelists' recommendations in response to the following open-ended question: What types of practices will help in-house lawyers demonstrate how the legal department brings strategic value to the company? The instructions asked panelists to provide a minimum of 3 – 5 recommendations in response to the question, along with a short description for each recommendation. The study panelists generated 84 recommendations in response to the question. By means of thematic content analysis, I generated 10 theme statements from the panel's first round recommendations. Table 1 contains an overview of the relevant Round 1 results.

Table 1

First Round Coding Results

| | | |
|--|------|---|
| <u>Demonstration of strategic value</u> | 40 | |
| Involvement/participation | 401 | |
| Presence in all stages of business process | 4011 | 1 |
| | | 3 |
| Collaborative efforts to balance risk/reward | 4012 | 6 |

| | | |
|--|------|---|
| Training/education | 403 | |
| Legal consequences using examples/cases/demonstrations | 4031 | 7 |
| Costs/revenue | 404 | |
| Cost effective options to address legal issues | 4041 | 1 |
| | | 2 |
| Legal department as source of revenue | 4042 | 2 |
| Results | 405 | |
| Success in managing legal matters | 4051 | 6 |
| Utilization of appropriate performance metrics | 4052 | 4 |
| Accountability and integrity | 406 | 2 |
| Communication | 407 | 4 |
| Proactivity | 408 | |
| Proactively address legal issues/trends/risks by taking active role | 4081 | 2 |
| | | 8 |

The second-round questionnaire included the 10 theme statements derived from panelists' responses to the first round questionnaire. Panelists rated each statement on the second round questionnaire against using separate 5-point Likert scales for desirability and feasibility. The scale measuring desirability ranged from (1) highly undesirable to (5) highly desirable, whereas the scale measuring feasibility ranged from (1) definitely infeasible to (5) definitely feasible. The second round questionnaire included a list of references and definitions to provide panelists with clarity as to the meaning of each item on the desirability and feasibility scales respectively. Any statement where the collective frequency of panelists' top 2 responses (rating of 4 or 5) was 70% or higher on both the desirability and feasibility scale would carry over to the third round questionnaire. As indicated in Table 2, 8 of the 10 statements satisfied the 70% threshold and carried over to Round 3. The panelists in Round 2 also provided an array of optional comments and explanations in support of their reasoning.

Table 2

Round 2 Ratings

| Statement | Desirability % | Feasibility % |
|---|----------------|---------------|
| Accepting responsibility for the department's decisions. | 83% | 96% |
| Providing timely, effective legal advice and updates on legal matters affecting the organization. | 100% | 100% |
| Participating in business processes. | 91% | 74% |
| Collaborating w/managers to balance the risks/rewards associated w/business decisions. | 100% | 74% |
| Providing training on the legal consequences of management decisions using real world examples, cases, or demonstrations. | 100% | 91% |
| Finding cost effective ways to address legal issues. | 91% | 70% |
| Finding innovative ways for the legal department to generate revenue. | 57% | 17% |
| Successfully managing litigation and other legal matters. | 96% | 87% |
| Adopting and meeting appropriate performance metrics. | 70% | 30% |
| Understanding the business and proactively addressing legal issues, trends and risks that impact the company. | 100% | 96% |

The third-round questionnaire included the 8 statements that carried over from Round 2. The panelists applied further ratings for importance and confidence to each statement using

two additional 5-point Likert scales. The scale measuring importance ranged from (1) most unimportant to (5) very important, whereas the scale measuring confidence ranged from (1) unreliable to (5) certain.⁵³ As indicated in Table 3, only 4 of the 8 statements satisfied the 70% threshold for both importance and confidence. Similar to Round 2, the panelists in Round 3 provided an array of optional comments and explanations in support of their reasoning.

Table 3

Round 3 Ratings

| Statement | Importance % | Confidence % |
|---|--------------|--------------|
| Understanding the business and proactively addressing legal issues, trends and risks that impact the company. | 89% | 89% |
| Collaborating w/managers to balance the risks/rewards associated w/business decisions. | 79% | 63% |
| Participating in business processes. | 84% | 74% |
| Accepting responsibility for the department's decisions. | 84% | 63% |
| Providing training on the legal consequences of management decisions using real world examples, cases, or demonstrations. | 84% | 79% |
| Providing timely, effective legal advice and updates on legal matters affecting the organization. | 84% | 79% |
| Successfully managing litigation and other legal matters. | 79% | 63% |
| Finding cost effective ways to address legal issues. | 74% | 68% |

Exploring the Results

The key findings, depicted by the theme statements contained in Table 3, represent a consensus by the study panel on practices that will help in-house lawyers demonstrate how the legal department adds strategic value to the company. The practices for demonstrating the strategic value of the legal department, in turn, represent a subset of techniques for altering unreceptive managerial viewpoints toward the strategic value of law within the corporate setting. The findings suggest that proactive attention to legal issues, providing legal training, participating in business processes, and the effective delivery of legal advice will help in-house counsel demonstrate the strategic value of the legal department.

Participation in Business Processes

The collective ratings supplied by the panelists in Rounds 2 and 3 indicated high levels of agreement with the desirability, feasibility, importance, and confidence of in-house counsel demonstrating the strategic value of the legal department by participating in business processes. This result is consistent with research by Bird and Orozco, Siedel and Haapio, and Bagley whose works have highlighted the importance of involving legal counsel to a greater degree in company business processes.⁵⁴ Despite such scholarship, however, there remain gaps in the literature with respect to suitable mechanisms and methods for putting these theoretical concepts into actual practice within the organization. Questions related to where, when, and how organizations can involve legal counsel to a greater degree in company business processes remain chiefly unanswered.

In addressing these questions, two considerations are paramount: cost concerns and organizational conflict. Prudence

and business judgment relative to overt and hidden costs must accompany any decision to foster greater involvement by in-house counsel in company business processes. Although organizations across industries have hired additional in-house counsel and allocated additional resources to their legal departments in recent years, available evidence suggests that this growth is reactive, rather than proactive, in nature.⁵⁵ In the face of sentiments that cost minimization represents a primary charge of corporate legal departments, any proposal to increase the participation of in-house counsel in company business processes must include an articulation of the resulting strategic value to the organization. Alongside cost considerations, it is also necessary to consider the organizational conflict that will result from the increased involvement of in-house counsel in company business processes. Conflict between in-house counsel and other members of the organization, largely driven by differences in behavior and decision-making,⁵⁶ often leads to anxiety over attorneys' authority over decisions affecting the employer-employee relationship,⁵⁷ perceptions that in-house counsel are not team players,⁵⁸ and beliefs that law is an impairment to organizational growth.⁵⁹ Failing to recognize and/or address such conflict can lead to disastrous consequences.⁶⁰

Training and Education

The collective ratings supplied by the panelists in Rounds 2 and 3 indicated high levels of agreement with the statement that in-house counsel can the strategic value of the legal department by providing training on the legal consequences of management decisions using real world examples, cases, or demonstrations. This result is wholly consistent with existing literature on workplace training. Alignment between HR training initiatives and the organization's competitive strategy serves as a powerful source of competitive advantage that enhances training effectiveness

and cannot be easily imitated by an organization's competitors.⁶¹ It is important to recognize, however, that diverse internal and external factors may impede or enhance training effectiveness, including how training is delivered (classroom vs. online), whether training is voluntary or required, the manner in which training importance is conveyed to employees, whether training takes place after hours or during the workday, the characteristics of the training facilitator, and employee satisfaction with the instructional experience.⁶²

Due to the limited information provided by the panelists, questions remain as to how to properly frame and conduct training on the legal consequences of management decisions. For instance, are there assumptions among general counsel that training sessions using the traditional classroom lecture/Q&A format are most effective? Do general counsel place any value in team-building exercises or personal reflections in connection with the training process? Does the content of such training include only a focus on black letter law, or does training also include materials related to the value of legal strategy and interactions with in-house counsel? Does training encompass only a reactive approach to law, or is training designed to support a preventative/proactive view toward law among managerial employees? Questions also emerge relative to the effectiveness of training conducted by in-house counsel, given the factors that drive organizational conflict between in-house counsel and other members of the organization as noted in the previous section.

Communication

The collective ratings supplied by the panelists in Rounds 2 and 3 indicated high levels of agreement regarding in-house counsel demonstrating how the legal department adds strategic value by providing timely, effective legal advice and

updates on legal matters affecting the organization. This finding is consistent with the work of scholars who have described effective communication as a critical attribute indispensable to modern in-house legal practice.⁶³ Mitigating or preventing the organizational conflict between in-house lawyers and managers described above will oblige both parties to assimilate their respective abilities and spheres of knowledge through using effective communication. During the course of the main study, several panelists commented that the timely delivery of effective legal advice by in-house counsel is a non-negotiable value proposition for every in-house legal department. As discussed more fully below, the ability of a legal department to provide timely, effective legal advice and updates is largely contingent on whether the department takes a reactive posture or a proactive posture to legal matters affecting the organization.

Proactive Approach to Legal Issues

The collective ratings supplied by the panelists in Rounds 2 and 3 indicated high levels of agreement with the statement that in-house counsel can demonstrate the strategic value of the legal department through understanding the business and proactively addressing legal issues, trends and risks that impact the company. The principles of proactive law encompass (a) practices, skills, and knowledge that support identifying future legal problems in time to take preventive action; and (b) the identification of business opportunities in time to exploit conceivable benefits.⁶⁴ Proactive law centers on the future-oriented integration of legal skills and knowledge firmly into corporate culture, strategy, and day-to-day activities.⁶⁵ Proactive law concepts have supported efforts by in-house legal departments to transition from reactive postures to proactive postures.⁶⁶ A law department embracing the reactive posture constantly functions in firefighter mode by responding to critical events only as they arise.⁶⁷ Such an

approach reduces the department's capacity to systematically identify and prioritize future business risks. Law departments that embrace a proactive posture, by contrast, pre-emptively address known risks and the potential legal consequences of developing business trends.⁶⁸

CONCLUSION

This 3-round Delphi study was conducted to address the specific problem concerning unreceptive managerial viewpoints toward the strategic value of law within the corporate setting. While in-house general counsel working across business industries in the United States are poised to develop techniques for altering unreceptive managerial viewpoints toward the law, a lack of consensus exists among them with respect to techniques that will alter unreceptive managerial viewpoints toward the strategic value of law within the corporate setting. To address the theme of in-house general counsel and the strategic value of the in-house legal department, and to develop techniques for altering unreceptive managerial viewpoints toward the strategic value of law within the corporate setting, the Round 1 questionnaire solicited panelists' recommendations in response to the following open-ended statement: What types of practices will help in-house lawyers demonstrate how the legal department brings strategic value to the company? The final list of theme statements generated by the study panel in Round 3 encompassed the following actions: (a) participating in business processes; (b) providing training on the legal consequences of management decisions using real world examples, cases, or demonstrations; (c) providing timely, effective legal advice and updates on legal matters affecting the organization; and (d) understanding the business and proactively addressing legal issues, trends and risks that impact the company. The key findings of this study represent a consensus by the study panel on actions for demonstrating the strategic value of the in-house

legal department. The actions for demonstrating the strategic value of the in-house legal department, in turn, denote a set of techniques for altering unreceptive managerial viewpoints toward the strategic value of law within the corporate setting.

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