



What keeps in-house counsel up at night

Legal department management and cybersecurity topped the list of concerns in *Canadian Lawyer's Annual Corporate Counsel Survey*

By Mallory Hendry

Jean-Francois Denis, a huge baseball fan, says his favourite book — *Moneyball: The Art of Winning an Unfair Game* by Michael Lewis — is not just a book about baseball.

“It’s a business book,” Denis, director of operations, legal affairs with SNC-Lavalin in Montreal, explains, calling relying on statistics and working with economists and lawyers to develop a good baseball team fascinating.

When he saw an article about five years ago called *Moneyball for Law Departments* that promoted the application of that methodology to the management of law departments, it sparked his focus on legal operations.

Still senior legal counsel, commercial transactions at Bombardier at the time, Denis started a personal project researching the area and then persuaded the company’s management to formally launch a legal operations function, which he led as senior legal counsel, legal operations and litigation since its creation in 2014 until coming onboard with SNC-Lavalin in March of this year.

Denis, whose current role consists of managing the department’s strategic plan, budget and outsourcing strategies as well as finding ways to better enable the corporation’s legal counsel through the addition of new technologies and processes improvement, says he’s noticed a lot of legal ops people are not lawyers — large corporations have moved to procurement-background types for the job, which he calls unfortunate.

“If a law department struggles to properly manage its budgets, that’s where they lose credibility.”

“I think lawyers should be managing their departments,” he says. “Maybe lawyers are no longer interested or people in their organization — which would be more alarming — believe they should not be managing their department. That’s obviously a huge concern to me.”

Legal department management and

structure/moving to legal operations was a pretty big concern for the 232 respondents to *Canadian Lawyer's Annual Corporate Counsel Survey* as well — it ranked second overall as a key issue in respondents’ legal departments, coming in just behind cybersecurity.

When asked if the general counsel has the autonomy to select firms with which the company works, a little less than 70 per cent — 67.6 — said yes, which more or less holds steady from the last survey at 68.5 per cent. But Denis points out that means that more than 30 per cent either don’t decide or share the responsibility with other people.

While it may not necessarily be a bad thing that upper management is deciding on firms, Denis thinks it should be the legal department’s prerogative and counts himself lucky that in his working experience legal has strong equity with the rest of the business and, therefore, a good level of autonomy.

But Denis — who is also president of the Association of Corporate Counsel, Quebec chapter and a member of the Quebec bar’s liaison committee with corporate counsel — notes that this is a privilege and not a right.

“We have to show we’re capable and I think that’s where you connect it with budgets. If a law department struggles to properly manage its budgets, that’s where they lose credibility.”

He points to question 9 of the survey, which asked if external spend changed and if so, why? Underlying that question is a

Jean-Francois Denis, SNC-Lavalin

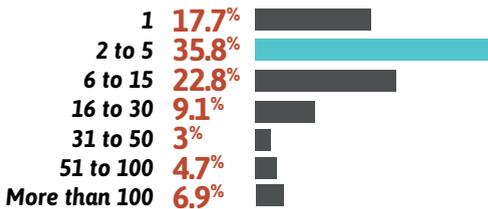
bigger, more important one: Is your budget under control? Can you efficiently forecast? Do you measure it? Denis says lawyers need to be cautious here because businesses — including his own — are going to ask for cost predictability.

For 51 per cent of respondents, external spend went up because an isolated/one-off

What sector is your company/organization in?

- 23.7% **Government** (municipal, regional, provincial, federal, and First Nations – including boards and tribunals)
- 4.7% **Professional services**
- 18.9% **Financial**
- 15.9% **Industry/manufacturing**
- 12.5% **Resource-based**
- 13.8% **Service**
- 4.7% **Technology**
- 5.6% **Non-profit**

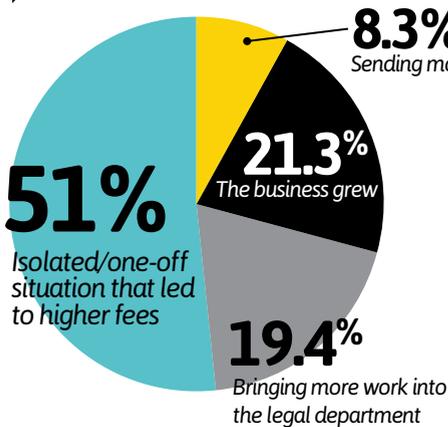
How many lawyers are there in your legal department?



What was the external legal spend for the Canadian legal department in your last fiscal year?



If external spend changed, why?



situation led to higher fees, slightly higher than the 47.8 per cent giving that same reason last year.

Jonathan Cullen, vice president, legal affairs and general counsel at Pfizer Canada

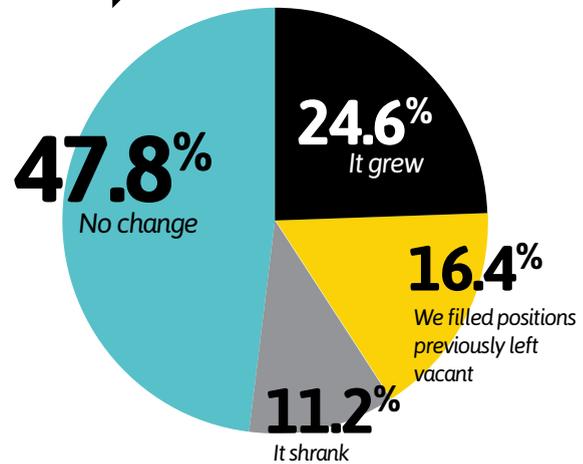
Inc. in Montreal, says the number “seems high to the point where it requires reflection.

“Is there an opportunity here?” he asks. “Maybe there’s a need to be more at the table with management and have an ear to the ground on what’s going on. It’s too much of a cop-out to say, ‘I didn’t anticipate this.’”

Denis agrees, noting the same excuses — “we don’t know how many times we’re going to get sued, it’s out of our hands” — don’t work anymore.

“The business is expecting the same type of reporting, the same type of cost predictability, the same level of strategic

Did the size of your legal department change over the past year?



What are the legal areas you send to outside firms the most?

- 4% **Advertising/marketing**
- 15.1% **Class action**
- 54.3% **Employment/labour**
- 10.1% **Environmental**
- 15.6% **General corporate work (contracts, etc.)**
- 13.6% **Immigration**
- 27.1% **Intellectual property**
- 9.6% **Information Technology (contracts, licensing, etc.)**
- 78.4% **Litigation**
- 28.1% **Mergers & Acquisitions**
- 8.5% **Privacy legislation**
- 24% **Real Estate**
- 26.6% **Regulatory matters**
- 2% **Risk mitigation**
- 20.6% **Securities/corporate finance**
- 26.6% **Tax**
- 8% **U.S.-cross-border**
- 4.5% **Other**

planning from law departments,” he says. “If you show up to the meeting with a legal pad and that’s what you have for your folks in the C-suite, you’re not going to fare very well. You have to speak the language of the business.”

Nick Slonosky, new chairman of the Canadian Corporate Counsel Association and director and legal counsel with Investors Group in Winnipeg, found it unsurprising that cybersecurity ranked first as an issue of concern.

“If that wasn’t top of mind for every in-house counsel in Canada, I don’t know what would be — they wouldn’t be doing their job,” he says.

Cullen says at his organization “it is absolutely in the top identified risks in our enterprise risk management framework.

“It’s a strategic issue that should be on the board’s radar,” he says, adding it’s not hyperbole to say a breach can destroy a company overnight. “If you have a global organization, you don’t want to be the Canadian entity that allows a cyber-event.”

Cullen says he pays very close attention to law firms — they are vendors that “contain a lot of highly confidential informa-

tion that’s very valuable to a bunch of rich clients and can be leveraged in extortions,” and even high-quality protection systems are not infallible.

“Maybe you can be soft on other aspects of the contract, but this is something we have to be tough on.”

In the “other” section of the question, the issue of privacy was mentioned. Wendy Lawrence, program chairwoman at the Association of Corporate Counsel and director of compliance and privacy at The

Hospital for Sick Children, says privacy is a “key consideration” for organizations today, both in terms of compliance with evolved privacy laws such as PIPEDA and PHIPA and data security.

“In my role, I am constantly monitoring privacy incidents in our industry and re-assessing our privacy compliance framework to ensure it continues to be effective at preventing privacy incidents from occurring and keeping the hospital prepared should an incident occur,” Lawrence says.

Today, almost all organizations need to deal with some level of personal information in their operations, she notes, which means privacy protection is essential to doing business.

Cullen says his company works hard to make sure it has proper breach response processes.

“At the end of the day, no organization is immune from these things, but what makes the difference, as with most things at life, is how you respond to it.”

Holding steady from past years, litigation tops the list of work most commonly sent outside. At 78.4 per cent this year, it’s up from last year’s 72.2 per cent, followed by employment/labour (54.3 per cent), mergers and acquisitions (28.1 per cent), intellectual property (27.1 per cent) and tax and regulatory matters (both at 26.6 per cent).

Denis says litigation is typically happening after the fact.

“You’re being sued, you react and defend yourself. If all goes well, you win — nice — but isn’t there anything else the firm can bring?”

One of his biggest challenges is how to leverage the law firm relationship — “pretty much building deeper supplier relationships,” he says.

Denis says some firms are getting good at leveraging AI and analytics to better understand trends legal departments are seeing in terms of lawsuits and having a discussion on how to predict and prevent adverse effects, for example.

“That’s really what keeps me up at night — how do we go beyond just spending and being a cost centre?” he says.

While some respondents were succinct with their reasons for going with certain firms — “I choose lawyers that are reasonable, practical and do not bill me to death



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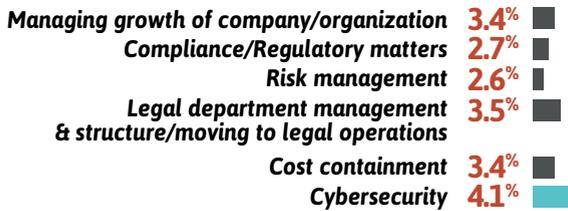
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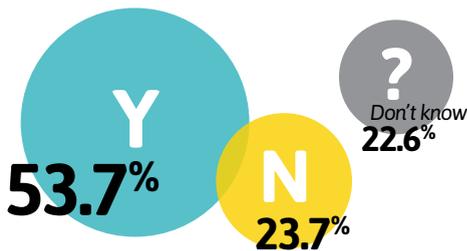
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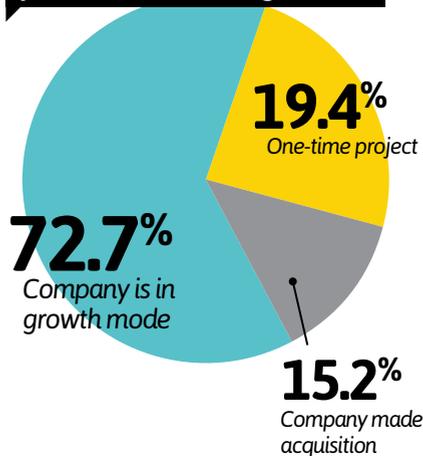
What are the key issues in your legal department? (Weighted average)



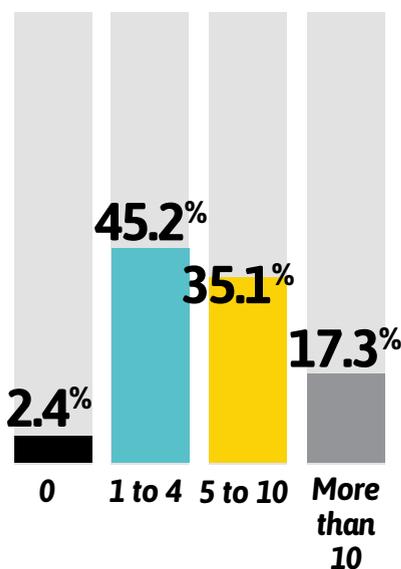
Is the volume of legal work carried out by your department and external counsel combined likely to grow for your company in 2018 from 2017?



If the volume of work is projected to grow, to what do you attribute the growth?



How many law firms are you using?



Are you using Alternative Service Providers?



What type of billing arrangement do you have with your primary law firm/external service provider?



with time/billings,” said one — 68.3 per cent of those who took the survey said they choose firms based on specific lawyers, up by 2.7 per cent over last year.

While Cullen says he’s not surprised in-house counsel choose based on individuals — after all, “you don’t hire a company or a firm, you’re hiring people you work with, human beings” — for him, it’s more about building a long-term relationship with a firm as a whole.

But he notes that if you are a client of sufficient influence, you can ensure a particular partner or associate is getting good work and is involved in strategic discussions.

“I put my own skin in the game to ensure to [the] best of abilities they’re happy with what they’re doing — I continue to provide good opportunities,” Cullen says.

For Denis, too, it’s more about the firm as a whole. He looks for innovation above all else, noting that while all firms might say they’re innovative, he checks things such as if e-discovery is done the old-fashioned way or whether they have the capacity to leverage AI and predictive coding.

“I’d rather focus on a firm’s capacity in terms of efficiency, productivity and innovation — real innovation,” he says.

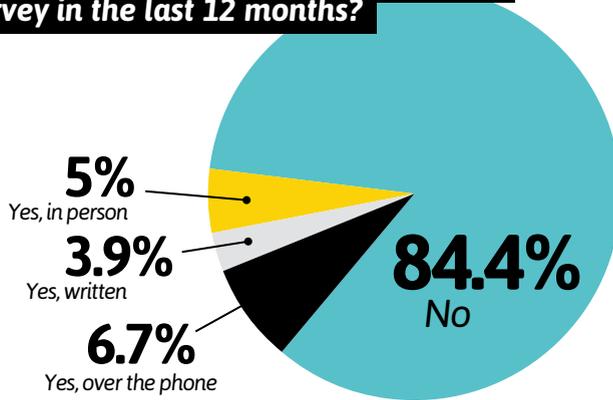
Carrying over from the last few years is a decline in the use of alternative fee arrangements — 3.2 per cent said AFAs were the billing arrangement they had with their primary law firm/external service provider, which was a slight drop from 4.9 per cent last year and a considerable drop from 12.7 per cent in 2015. The billable hour came out on top again, with 50.5 per cent — essentially unchanged from 2016 and up from 46.8 per cent the year before. The combination of billable hours and AFAs was second with 44.7 per cent.

“The discussion is amongst all circles — that conversation is continuing,” says Slonosky, noting that looking for counsel who truly understand business issues is more important than how services are provided.

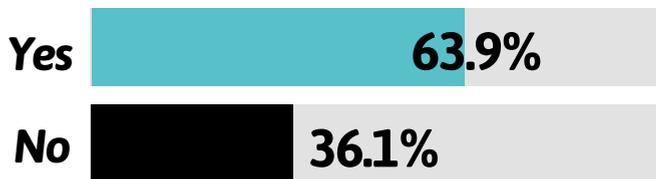
When asked if they were interested in engaging firms in AFAs, 77.4 per cent of respondents said yes. Cullen says the disconnect between the overwhelming desire for AFAs versus those who say they’re actually using them stood out to him.

He says there’s too much of a focus on

Has your top law firm asked your law department to complete a written, over-the-phone or in-person satisfaction survey in the last 12 months?



Our legal department provides feedback to the outside firms that serve us.



fee structures and that “sets you off on a much narrower path than you need to be on.”

The Pfizer Legal Alliance, a group of around 15 law firms globally, makes use of flat-fee structures based on anticipated work for the year, but the main drive is long-term value creation.

“It goes beyond ‘How do we reduce billable hour to X.’ That isn’t rocket science; that’s not the magic,” says Cullen. “The magic is in the relationship.”

Denis says “we sign 15,000 engineering services contracts every year — it’s a given we’re going to be sued” — but they’re similar suits, so he’s trying to isolate tasks that can be grouped together and price them reliably.

“Three years from now, I’d like to say the vast majority is AFAs — we’re being very aggressive about this.”

In question 25, respondents said one of the top things a firm can do to improve working relationships with their company was be more proactive, and in a highly regulated industry such as pharmaceu-

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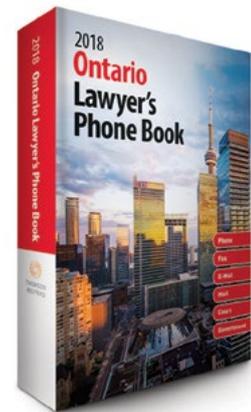
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Rank the most important things that your law firms can do to improve working relationships with your company.

Be more concerned with costs	3%	■
Be more creative/innovative overall	4.3%	■
Be more practical	3.2%	■
Understand our business better	3.6%	■
Be more proactive	4.4%	■
Provide more strategic advice	3.7%	■
Be more concerned with results	4.5%	■
Act on our feedback	4.8%	■

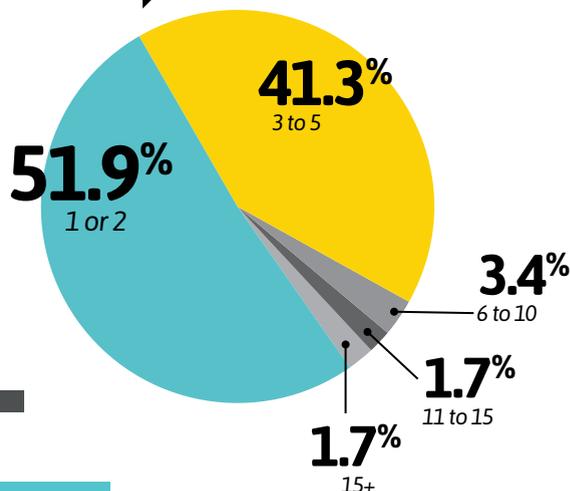
Do you use:

Boutique firms (IP, employment law, tax)	65.4%	■
Regional firms	54.8%	■
National firms	75.9%	■
International firms	36.3%	■
Alternative firms	2.8%	■
LPOs	1.1%	■

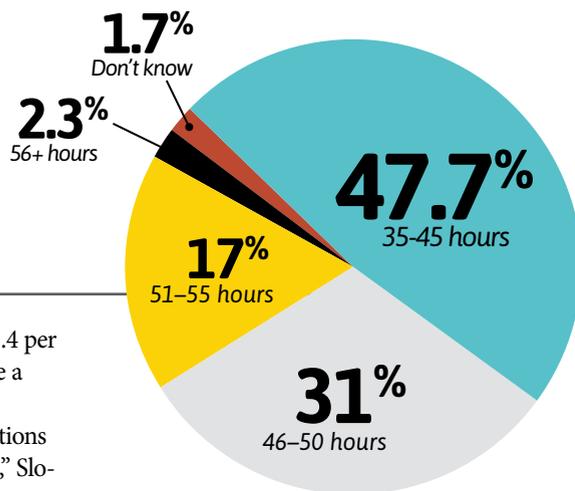
Does the general counsel have the autonomy to select firms?

- 67.6% Yes, the general counsel/legal department makes the selection
- 6.2% No
- 21.2% It is a shared decision with executive management/board
- 5% Handled by procurement department/process

How many firms received the top 80 per cent of your Canadian legal department's legal spend?



What is the average (actual) work week for members of your department?



ticals, Cullen appreciates a heads up to regulatory changes or new legislation that might impact his business.

“Bad is receiving nothing, good is getting periodic updates that are relevant to my industry and company, but all the way at the other end of the spectrum at great is customization for my organization,” Cullen says.

Decisions at Pfizer are complicated, and they're rarely based on dollars alone — it's about people's lives. Cullen says he likes outside counsel to see what they struggle with.

Slonosky identifies diversity as another way firms could improve, saying he'd like to see the results of question 23 — do you ask firms you do business with to provide a diverse roster of lawyers to work with? — reversed.

Less than 20 per cent — 17.8 — ask, and the vast majority — 70 per cent — don't. Another 12.2 per cent of respondents indicated they were thinking about it.

But in the followup question, 71.4 per cent said firms are happy to provide a diverse roster if asked.

“We're not asking the right questions sometimes, that's what that tells me,” Slonosky says.

“Pfizer as a whole is alive to the issue,” Cullen says, adding that companies have leverage with their firms and that's how things change — when customers, clients and users of services demand it. “If I were to categorize, we're further along on the spectrum than most I think. Are we at the point where it's where I'd like it to be? No, but it's definitely a discussion item. I'm a firm believer that in-house legal counsel and GCs in particular need to be at the forefront of this issue — it's a professional obligation.”

More than 80 per cent — 84.4, compared to 87.8 per cent last year — of respondents reported firms don't request feedback. Cullen says that's a missed opportunity, and in-house counsel could say proactively, I'm willing to invest my

time. Last year, Cullen offered to meet with a firm and they flew out from Calgary.

“That spoke volumes,” he says, adding he'll also go to their primary firm and educate young associates about the business and its challenges “so five years from now they can serve us better.”

“That's a competitive advantage that is difficult to replicate. We're creating a system that will better serve us. If competitors aren't doing that, then I win.”

Denis says his company also has very “deep-dive reviews” twice a year with the firms that get most of its volume.

“It's extremely helpful,” Denis says. “There's a lot they can bring us as well — the dialogue goes both ways.” **CL**



CHEAT SHEET

- *Measuring value.* Asking outside counsel to bring value to your organization first requires assessing how the legal department itself drives value.
- *A disconnect in thinking.* Law firms still largely rely on hours and dollars billed to assess value, even if alternative billing methods are coming to the fore.
- *Growing the pyramid.* The core pillars of value are a results-driven culture, basic competence, leadership, and identification as a global team.
- *Assuming a role.* Law firms can drive the education of law departments by developing long-term structured education programs which have a lengthy payoff.

A Perspective of Value:

Forging New Connections Between Law Departments and Law Firms

By Daniel Desjardins Today, more than ever, corporate law departments are focusing on the notion of what constitutes “value” and how to enhance it to support their organizations. Not surprisingly, law firms are also increasingly focused on creating “value” for their clients as well. While both say “value” is their prime objective, the definitions differ.

These ongoing discussions about value have transcended the theoretical — there is now an exciting and mutually beneficial opportunity to forge new connections and partnerships in the law department/law firm relationship.

In defining the notion of value, there can often be a major disconnect between law firms and law departments, primarily based on the way that value is measured.

The law department value pyramid

As we all know, law departments will continue to radically transform. They have expanded in both role and stature within their organizations. Given the regulatory changes over the past 15 years, boards now increasingly rely on the in-house law department to take a lead role in all complex matters. As such, general counsel and their teams are reviewing, revising, and exploring ways to enhance the value we bring to the business units they support.

For us, the key question is: “How can we, as trusted advisors and business savvy lawyers, provide even *more* value to our business?”

To answer this question, the law department at Bombardier set out to map the responsibilities and deliverables that are core to the business units we support, which led to the creation of the pyramid chart. Our vision in taking this approach was to determine where to focus our efforts to have the greatest positive impact on the corporation.

We approached the creation of a pyramid “unique” to our company as a team exercise, with input and feedback from our in-house lawyers and our business colleagues in multiple jurisdictions. Ultimately, our goal is for the entire law department to align as a team and show what we will do, and just as importantly, what we will not do.

To start the discussion, we began by considering how we measure value. Only once we had a clear understanding of our own role and responsibilities within the business units, we broadened the discussion to address the value of our regularly used law firms.

Therefore, if the general counsel and law department are not clear about how we bring value to our organizations, then how can we expect to be clear with external law firms about how they can team with

us? How can we expect law firms to bring better value to our law departments if they do not know our definition of value and only see part of our process?

It’s imperative that we better explain to law firms how we work internally, what our goals are, what makes us tick as an in-house law department, and most importantly, how we bring value to our company.

If we can articulate this with clarity, then our external law firms can understand where they can better add additional value, where there can be a better connection to us, as well as how they can support us better in multiple areas.

So before we can embark on any such discussion with our external law firms, we need to fully explore and then articulate how we as a law department bring value to our corporation. Hence, our pyramid.

Disconnect in measuring value

In defining the notion of value, there can often be a major disconnect between law firms and law departments, primarily based on the way that value is measured.

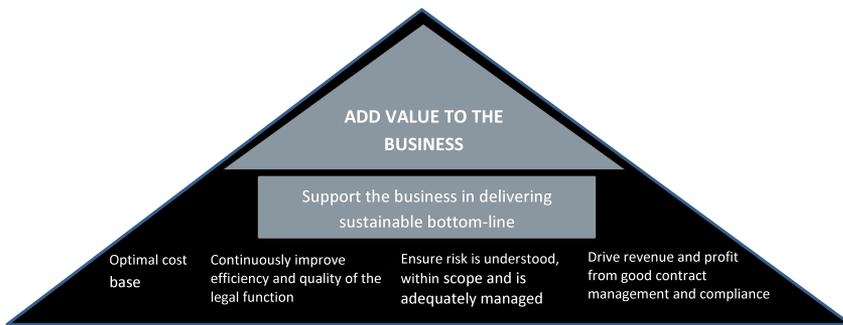
At Bombardier, for example, as we went through our pyramid exercise, we measured the quality of the services we provide and where we bring value to our corporation. In our case, the key indicators in assessing value are based on metrics tied to the nature of our businesses and responsibilities to our internal business units.

But how do law firms measure the value they bring to the client relationship from their side?

In contrast to law departments, law firms usually rely on a very



Daniel Desjardins is senior vice president, general counsel, and corporate secretary of Bombardier Inc. daniield@bombardier.com



different set of metrics, primarily based on hours and dollars billed. The underlying management assumption within a law firm is that if the hours billed and fees are high, a lot of value must have been created for the client. To be fair, a number of law firms are open to alternative billing methods. Still, the key value indicators for most law firms remains the number of hours billed.

As a measurement of the law firm's commercial success, these metrics have a lot of merit. Yet a measure of value created for the client, this tool has the potential to be systemically faulty: Billings do not automatically mean value. As seen from the perspective of the law department, value may or may not have been achieved and increased legal costs for a law department never equates to a "good year" from a budget management perspective. Therein lies the disconnect.

Essential "value" pillars

Law departments add value to their corporations through supporting the

business by delivering both a sustainable bottom line, developing creative legal strategies to ensure solid risk management and drive revenue and profit.

Whether a company is business-to-business or business-to-consumer, or a combination, and regardless of whether its scope is international or domestic, the essential concepts that bring sustainable and transactional value to the law department are identical.

To accomplish this, law departments must:

- Ensure an optimal cost base;
- Continuously improve the efficiency and quality of the legal function;
- Ensure risk is understood, within scope, and is adequately managed; and
- Assist the company in driving revenue and profit through the use of good contracts and claims management and compliance.
- Develop creative legal strategies to advance the business or improve its competitive position

The foundations of value

In order to achieve its objectives and meet its key performance indicators, it's critical to equip the legal team with the skills and self-confidence to be regarded as trusted advisors and business savvy lawyers whom the business units wish to consult. The table below shows how culture, competencies, leadership, and identification are brought together through the engagement of law department personnel.

When we built our pyramid at Bombardier, as a team we decided the core pillars for us are:

- Culture of a results-driven team;
- Competency and skills;
- Leadership; and
- Identification as a global team.

As general counsel, if we want a team that is engaged and shows leadership, the team obviously must be skilled. Yet to "drive" skill we must foster a culture of continuous development and learning that takes into account all aspects that are integral to the business, its strategies, and risk management. It is not enough to focus solely on legal education.

Further, there must be a process whereby lawyers are clear as to their level of authority, so they can be decisive and enabled as leaders. There must also be a strong performance review process. At Bombardier we meet twice a year to do a formal performance review with objectives, which also includes each lawyer's own continuous development and learning.





Imagine the value a law firm will bring to its key clients through training in relevant compliance matters by way of structured educational programs over the long term. The way we see it, this is an opportunity most law firms do not capture; most often they offer ad hoc training.

Is there a definable role for law firms in driving the education of law departments?

One way in which law firms can connect to us that brings value to our legal team, and allows us to deliver a better performance to our business, is through the continuous legal education and development they can offer.

Law firms are very well equipped to provide continuous learning on a great variety of meaningful topics that can be adapted to the needs of individual law departments.

As an example, consider data privacy. Increasingly, there's a need to share personnel information across borders. Routinely, in this age, employees move between offices for a varied number of reasons. High-potential employees gain or share expertise, either for succession planning or many other reasons. Yet this mobility presents a very real danger of breaching data privacy laws, often due to conflicting regulations around the world. As a law department, we spend significant effort in place processes and controls to make sure that we do all of this in a compliant way.

So imagine the value a law firm will bring to its key clients through

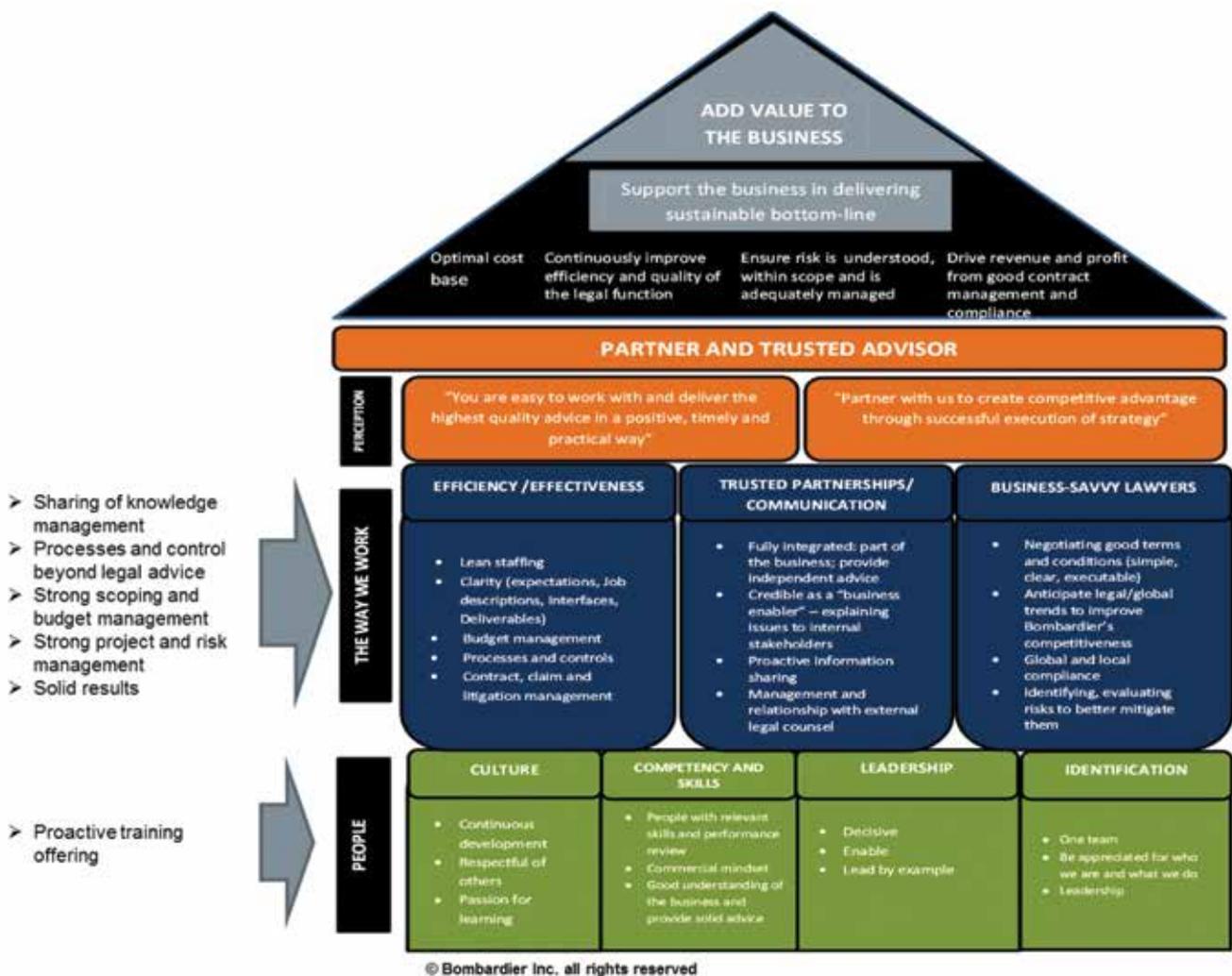
training in relevant compliance matters by way of structured educational programs over the long term. The way we see it, this is an opportunity most law firms do not capture; most often they offer ad hoc training. Yet the law firm that really supports a law department and invests in that relationship creates a bridge that forms the collaboration between both.

From the law department perspective, being better-trained lawyers with more skills lets us show more leadership within our organizations, and become, or remain, the trusted partners to our business units that all law department lawyers strive to be.

The drive for efficiency

As a law department team, we have to drive our own efficiency. By being efficient, we become fully integrated into the business, proactively managing risks, and aligning our legal advice with the strategies integral for our company's success. The challenge is to be effective without creating a paper-heavy bureaucracy for data information that impedes our ability to serve our organizations well.





One way to achieve this goal is through a solid knowledge management system that features good templates and grids of “do’s and don’ts” or “go/no goes.” In this way, the law department strikes three goals: 1) empowerment, leadership, and enablement within the legal team, 2) effectiveness as less time is spent on drafting new agreements, and 3) an improved risk management process since clear “no goes” based on years of experience are established as a red line not to be crossed.

Again, these goals offer another opportunity for enhancing the law department/law firm relationship. Law firms have strong knowledge

management systems, as these are core to their intellectual capital, as well as an effective tool to improve their efficiency. A law firm willing to share this knowledge with *key* customers would find its database brings these customers much material value.

Understanding that some law firms could think — by granting such an access to their database — they would in the end lose out on fees, is a view that is likely mistaken. As a law department gets stronger, more often than not, it would go about drafting its own agreement and consult the law firm if and when there is need in the drafting, or at a later stage in the transaction.

By early sharing of the database and templates, law firms can help key customers improve the effectiveness and efficiency of the law department, while creating synergies and a strong relationship between them. This sharing is a further extension of the value the law firm can bring through training and education.

Further, in the context of the drive for efficiency, law firms and law departments should spend more time at the outset of any project discussing the mandate. A law firm with good budget management skills (and a lead partner with good leadership skills in budgeting) will have

As a law department, not only do we need to deliver good results, but the business units need to perceive the value we bring to them.

the discipline with the customer to scope the mandate fully: Strategy, timelines, and the team that will work on the project, with the goal of a clear understanding of accountability of deliverables and results. And, by doing so, clear alignment on expectations and better results and a greater value should be delivered at a lower cost.

New competitors to law firms

In a global company such as Bombardier, the law department regularly works with our business units to put processes and procedures in place to ensure compliance with new or amended regulations that regularly occur.

This is another area in which the opportunity exists for law firms to further connect with us.

The new competitors to law firms are accounting firms or other alternative legal providers that, as a result of their particular type of training, have expertise in putting processes and controls in place, thus providing the necessary audit trail.

Law firms have an important role to educate a law department about what a specific law or regulation “means.” However, to build a much stronger connection they need to move to the next level where the

law firm not only says “this is what the law means,” but then continues with, “here’s how we can help you to map out processes and controls for compliance, as well as create an audit trail. Or, “here is how you can proactively use this law to advance your competitive position”. By doing so, value would again be created beyond costs.

Trusted advisor

As a law department, not only do we need to deliver good results, the business units need to perceive the value we bring to them.

Ideally, the business units want to work with the law department. They understand that by involving us early and throughout projects, they increase the chance of delivering the desired results because they are better equipped.

Yet although we are fully integrated into the business, at the same time we must be able to provide independent advice. We are part of the internal gatekeepers who proactively anticipate and identify risk and make sure it is properly allocated to the right function or right people. It gives management the ultimate call to make the proper decision.

Therefore, it is incumbent we make the investment in time and

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Practice Resource

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resources to learn and understand business and the business. If we achieve this, our discussions and work with external firms will create value for our organizations beyond costs. By offering solid quality legal services we are perceived as a “go-to department” that helps solve material issues. How the law department is perceived by our organizations can never be ignored.

Change never happens by sitting on the sidelines

Ultimately, as a law department, if we want to deliver the endgame, which is to provide value and support our organization’s sustainable bottom line, we can only achieve this with a properly trained team that is integrated into our business.

Thereafter, as general counsel, we can then sit down with the managing partner of the law firm and say: “This is what my team is all about. This is how we bring value. Here’s how we measure ourselves on our own performance. This is where we think there’s additional opportunities for you to connect to us and provide more value.”

If we want beneficial change, we’ve got to promote change. This demands leadership by general counsel to create their own law department value pyramid and, in turn, effectively and decisively communicate this value structure to our law firms. **ACC**



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LAWYERS ON THE FRONT LINES:

Identifying Risk and Managing Internal Investigations

By Amber Lee Williams, Matthew Singer, and Lorraine Campos Corporate crises are as old as business itself. However, the focus has never been more intense on the role of in-house counsel to prevent and respond to crises. This widening spotlight on in-house counsel is the result of several coalescing trends. It has been 15 years since the US Congress passed the Sarbanes-Oxley Act, which made it clear that lawyers are “gatekeepers” and play an important role in ensuring a clean corporate marketplace.¹ In the years since Sarbanes-Oxley, government regulators have ratcheted up their compliance-related enforcement and the liabilities for in-house counsel as individuals and as corporate gatekeepers have increased.

CHEAT SHEET

- *Assess and investigate.* In-house counsel are presented with issues on a daily basis that require them to assess whether further inquiry is necessary. In addition to relying on individual judgment, consider conferring with other in-house and/or external counsel to determine how best to proceed.
- *Under privilege.* The three examples of types of matters that are likely best handled as internal privileged investigations are: (1) when an employee flags an issue for concern that could create legal risk for the company, (2) when safety or other regulatory risks are at stake, and (3) when a problem has the potential to escalate quickly.
- *Frame the framework.* At the beginning of any investigation, it is good practice to develop a detailed work plan that outlines the investigative steps to be taken, including a list of witnesses to be interviewed and documents to be gathered.
- *Multiple hats.* As in-house legal teams take on more varied responsibilities, issues of attorney-client privilege are becoming more vague. Government agencies have argued that when in-house counsel hold dual roles, the burden is on the company to prove that the attorney was providing predominantly legal, rather than business, advice.



In 2004, Stephen M. Cutler, then-director of the Securities and Exchange Commission's (SEC) Division of Enforcement, explained the change to the investigations landscape when he said that pursuing gatekeepers is the "most targeted and effective way of using the agency's limited enforcement resources" to ensure good corporate behavior.² Increasingly, individual lawyers are named defendants in enforcement actions along with company leaders and board members. Occasionally, an in-house counsel is the sole defendant in a prosecution for a corporate failure.

While in-house counsel are being pursued as gatekeepers, companies are also simultaneously expanding the scope of responsibilities for in-house counsel. In an ongoing dispute, the traditional ability of in-house counsel to provide legal advice that considers a range of business concerns is being challenged.³ The Federal Trade Commission (FTC) is challenging the boundaries of whether the role of an in-house counsel in a business transaction is subject to the privilege as it relates to an FTC antitrust investigation.⁴ In the matter, a corporate general counsel helped negotiate a business deal. The FTC, as part of its investigation, has argued that such advice and supporting analysis should not be held under the privilege. The corporation, with the support of the US Chamber of Commerce and the Association of Corporate Counsel (ACC), has contended that the FTC's approach would have a devastating impact on privilege and the ability of in-house counsel to, among other things, conduct meaningful internal investigations. As courts have noted, "[r]are is the case that a troubled corporation will initiate an internal investigation solely for legal, rather than business purposes."⁵ Many believe the impact of adopting the FTC's approach would frustrate the

purpose of the privilege and discourage communication of relevant information by company employees to their in-house counsel. This case, and others like it, point to both the ever-expanding role of in-house counsel and the challenges of managing internal investigations.

In the aftermath of the economic recession, most companies are finding creative ways to "do more with less." Many companies now save money by meeting more of their legal needs in-house and hiring fewer outside counsel. Increasingly, corporate in-house counsel are involved in enterprise-scope of strategic business decisions and advise executives on critical matters beyond those that are strictly legal. Job descriptions for in-house counsel continue to evolve; they often wear multiple hats and juggle more expansive workloads. One of the significant consequences of the expanding corporate counsel role is that such expanded responsibilities further stretch the ability of in-house counsel to devote the necessary focus to internal investigations, discern risks, and identify potential crises, thus further increasing the risks that problems may be overlooked or insufficiently addressed.

Naturally, in-house counsel are feeling the heat of the spotlight. The recent *ACC Chief Legal Officers 2017 Survey* showed that more than one out of every four respondents reported being targeted by a regulatory agency in the past two years.⁶ In the same survey, 74 percent of respondents rated ethics and compliance as their top challenges.⁷ In addition, the actions of general counsel during recent investigations at major companies have garnered significant media attention.

Though the CEO, chief compliance officers, and other top company leaders are generally considered to be primarily responsible for establishing a company's values, in-house counsel are uniquely positioned to help support the integration of compliant behavior into organizational culture. Benjamin W. Heineman, Jr., author of *The Inside Counsel Revolution*, argues that that general counsel must serve in both a partner and a guardian role.⁸ As a business partner, an in-house counsel works with company leaders to make and help implement major business decisions. As a guardian, an in-house counsel is responsible for bringing an objective perspective to the company, and is uniquely positioned to challenge company practices that are too risky or



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don't comply with the law. Armed with both an inside understanding of the business and an external commitment to the law, in-house counsel — in partnership with compliance departments — are empowered to help advocate for the embedding of processes and protocols that will help the company when crises occur.

In-house counsel play a critical role in helping organizations build and maintain robust cultures of compliance. Organizational culture is a set of shared values that can guide employees on how to respond to various situations. Compliance refers to the protocols companies use to help ensure employees follow the company's risk management guidelines and obey the law. An effective culture of compliance is one that prioritizes honest communication, transparency, and accountability and helps all employees understand that legally compliant behavior is essential to advancing the company's long-term goals and growth strategy.

There are many ways that in-house counsel can support and reinforce an organization's culture of compliance. In the day-to-day work of providing advice and counsel to the organization, in-house counsel should enthusiastically emphasize compliance priorities with company leadership. This is critical because tension sometimes exists between compliance and a company's bottom line. Unfortunately, there are countless examples of companies facing troubling situations with significant legal and financial impact because the company grew quickly without making compliance a priority during the early stages of growth. In-house counsel can help CEOs and other business leaders take the long view, encouraging them to model compliant behavior, and set the tone at the top. There is a compelling need for the business to engage counsel at the inceptive strategic stage to empower them, and inevitably the business, to be proactive on matters of compliance.

Corporate counsel can also support the business by helping develop and regularly evaluate compliance policies and guidelines. To effect long-term, sustainable compliance, companies must put in place accessible reporting platforms that act as early warning systems for nascent problems. In-house counsel are well-positioned to work with company compliance leaders to ensure that all employees are well trained and fluent in compliance policies, and that the organization has effective monitoring controls in place.

All in-house counsel, regardless of role or title, should work with company leaders and rank-and-file employees to ensure ongoing alignment between compliance goals and business goals. At the micro level, this may mean helping the business evaluate whether work assignments, compensation, and other incentives are structured so that employees are motivated to do their work in a legally compliant manner. At a more macro level, in-house counsel should be alert to how the company manages hiring, firing, promotion, and other personnel issues, as well as determine how it assesses procurement and sourcing practices to help ensure they align with best compliance practices. In-house counsel that readily engage with corporate employees in the day-to-day business of the organization are in the best position to identify red flags, elevate issues, and help the business proactively redesign practices, programs, and initiatives that have potential compliance defects.

In order to effectively help the company drive compliance best practices, in-house counsel must build strong channels of communication across the organization, both vertically and horizontally. Companies can run into trouble when their legal teams operate in silos. In the realm of cybersecurity, for example, lawyers need to work closely with technical staff to understand and respond to potential security breaches before they create

Armed with both an inside understanding of the business and an external commitment to the law, in-house counsel — in partnership with compliance departments — are empowered to help advocate for the embedding of processes and protocols that will help the company when crises occur.

larger risk to the company. In-house counsel should insist on unfettered communication channels with all departments, especially a company's leadership team. Likewise, employees in the business should feel comfortable raising concerns to in-house counsel. Michael Held, executive vice president at the Federal Reserve Bank of New York, recently cautioned against organizational cultures that yield "too high a degree of adherence" and a "dangerous lack of questioning."⁹ Leaders in business, compliance, and legal departments can help foster open communication within the organization by encouraging and rewarding employees who have the courage to flag issues, and by strictly enforcing non-retaliation policies.

Sometimes a company creates its own crisis and other times the unexpected occurs despite a company's best efforts. When a corporate crisis strikes, general crisis management protocols and investigation efforts may consume significant resources. Yet, there are some preventive measures that will mitigate the impact of the crisis and any subsequent investigation. In-house legal teams should plan ahead by anticipating that their company may find itself faced with an internal or external allegation of wrongdoing that warrants investigation.

Below are four questions that every in-house counsel should consider as they examine their company's readiness for the unexpected.

1. Do I need to investigate?

Depending on an entity's line of business and the role of the in-house counsel within the organization, many lawyers are confronted with issues on a daily basis that require them to assess whether further inquiry is necessary. For example, an in-house counsel may be working on a transactional matter where, in the course of discussions, it appears there may be a "side deal"

As in-house legal teams take on more varied responsibilities within companies, issues of attorney-client privilege are becoming thornier. This is especially true for in-house counsel who participate in strategic business decisions where they may be providing both legal and business advice.

influencing the parties' negotiation posture. Or in-house counsel may hear through rumors that a company employee is engaging in unethical behavior. Or a third party may formally allege corporate wrongdoing. Although each of these examples represents a vastly different circumstance, each situation requires that in-house counsel assess whether further inquiry is necessary and appropriate.

Many times, the in-house counsel's "assessment" of the situation is rapid and instinctive. At other times, the attorney may need to spend focused time deliberating next steps. Too often, corporations recognize the need for an investigation too late in the process — often after significant internal actions have already taken place. In addition to relying solely on sound, individual judgment, the in-house counsel may need to confer with other in-house and/or external counsel to determine how best to proceed.

2. Do I conduct an internal investigation under privilege?

Once an in-house counsel determines that an internal investigation is warranted, they must be able to promptly plan how to proceed. Not all internal investigations need to be at the direction of in-house counsel; indeed, many internal investigations can be

conducted with limited in-house involvement. In-house counsel should objectively examine the purpose and scope of the investigation while also considering resources and real-time business pressures. Here are three examples of the types of matters that are likely best handled as internal privileged investigations.

- A privileged investigation might be in order when an employee flags an issue for concern that could create legal risk for the company. For example, whistleblowers should be taken seriously, and their complaints appropriately addressed. Even seemingly innocuous issues might be indicative of a larger problem. At the very least, looking into the merits of a complaint sends a signal to employees that their input is valued and helps to create a culture of compliance. It is the job of the in-house counsel to evaluate the seriousness of a complaint and provide advice on the scale and scope of a potential investigation.
- A privileged investigation should also be considered when safety or other regulatory risks are at stake. For companies that are vulnerable to product liability claims where consumers might be hurt as a result of a design or manufacturing failure, in-house counsel should aggressively investigate potential problems and do so quickly. These cases are likely to spiral out of the company's control in the wake of inaction. At the first whiff of a safety concern, in-house counsel should immediately elevate the issue to the stakeholders at the appropriate level within the organization. In one case, a senior lawyer hid the news of a product defect from company leadership. Later, after the product was implicated in causing serious harm to consumers, the company was sued and was found liable for significant compensatory and punitive damages. The post-crisis

investigative report placed much of the blame on the lawyer for hiding the information.

- Too often companies let problems balloon into full blown crises, in-part because the in-house legal team or company leadership have not prioritized investigating the issue. For example, in the event of a cyberattack, it is never ideal for a company to have to admit that preventative security measures have failed, especially if the breach compromises customers' confidential information. Nevertheless, in-house counsel should resist the urge to downplay the seriousness of any problem that has the potential to grow quickly. In one example, a general counsel of a major company resigned after a post-crisis investigation uncovered that the counsel sat on information that would have warranted an

aggressive internal investigation years earlier, before additional and potentially preventable cyberattacks occurred.

3. Have I developed the right investigation framework?

An investigative framework will not be effective without thorough documentation of the investigative process. At the beginning of any investigation, it is good practice to develop a detailed work plan that outlines the investigative steps to be taken, including a list of witnesses to be interviewed and documents to be gathered. The work plan should be a living document that is regularly amended as the investigation progresses. All witness interviews should be memorialized in writing and a report that details investigative findings should be drafted at the conclusion of the investigation. Such documentation may ultimately serve as

evidence of the investigation and may be crucial to proving the matter was appropriately handled.

Moreover, a clear document retention policy is a critical component of the in-house counsel's investigative toolbox. Document retention policies that are clear and consistently followed enable organizations to more readily perform internal investigations and respond to requests for production. Even if the investigation reveals corporate wrongdoing, robust and consistently applied recordkeeping policies lend credibility to the investigative process, which may help mitigate liability for the company. Some companies have garnered negative media attention by attempting to change retention periods in the midst of an investigation. Even if a policy change is warranted and is unrelated to the investigation, in-house lawyers should think through the best approach for



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implementing and communicating the change — taking into consideration potential negative inferences.

Another step that in-house lawyers can take to build an effective investigative framework is to actively develop and maintain strong relationships with outside counsel. In-house legal teams are meeting an increasing percentage of most companies' legal needs, but company lawyers simply cannot do it all and often need to rely upon outside resources to respond to complex, high-risk matters. When faced with an allegation of internal wrongdoing which meets a certain threshold, most companies will hire outside counsel to conduct an internal investigation. In the face of crisis, it is extraordinarily helpful and beneficial to be able to call upon trusted outside counsel familiar with the company, the industry, and regulators.

4. Who is my client?

Attorney-client privilege is the oldest common law protection for confidential communications and is designed to encourage a client to be open and honest with his or her attorney. Attorney-client privilege is a key element of a legally led investigation, and it is imperative that corporate counsel understand the technical aspects of how the privilege applies in the in-house context.

As an initial matter, in-house lawyers conducting investigations will

need to promptly clarify their role via an “*Upjohn* warning” so employees understand that they represent the company as opposed to the individual employee.¹⁰

In-house counsel have tripped over this issue when they were not in communication and in agreement with company leaders about whether they were representing the corporate entity or the individuals involved in an investigation. There are numerous cautionary cases where employees of an organization believed the in-house counsel represented them individually. Such confusion is easy to understand as in-house counsel and company employees often develop close relationships. A clear “*Upjohn* warning” dispels such confusion.

As in-house legal teams take on more varied responsibilities within companies, issues of attorney-client privilege are becoming thornier. This is especially true for in-house counsel who participate in strategic business decisions where they may be providing both legal and business advice. In many situations, the role of the in-house counsel is blurred when, for example, they are advising on the business aspects of a deal or corporate strategy. In certain of these situations, government agencies have requested communications related to the deal to determine whether any laws were broken. Companies have generally refused to turn over those types of

documents, asserting attorney-client privilege. Government agencies have responded with strong arguments that when in-house counsel hold dual roles as legal counsel and business advisor, the burden is on the company to prove that the attorney was providing predominantly legal, rather than business, advice.

On June 2, 2017, the US Chamber of Commerce and ACC submitted an amicus brief against this position in a case involving the FTC.¹¹ The brief argues that if in-house counsel are required to prove whether they are providing legal or business guidance when advising their clients, such a stance “will undermine the traditional ability of in-house counsel to provide legal advice that considers the full range of concerns relevant to the company, and will promote a moment-by-moment, communication-by-communication approach to attorney-client privilege that would chill clients’ communications with counsel and undermine the provision of legal advice.”¹² If the court finds in favor of the FTC on this issue, in-house counsel who are engaged in their companies’ business decisions will need to track whether each activity and communication is primarily for business or for legal advice.

Conclusion

The roles and responsibilities of in-house counsel are changing and

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ACC Docket

How to Prevent a Tragedy: Know Your Role During Government Investigations (May 2017). www.accdocket.com/articles/resource.cfm?show=1457679

10 Tips for Conquering Cross-Border Internal Investigations (March 2017). www.accdocket.com/articles/tips-conquer-cross-border-internal-investigation.cfm

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InfoPAK

Management and Defense of Employee Whistleblower Claims (July/Aug. 2015). www.acc.com/legalresources/resource.cfm?show=1405564

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expanding. Consequently, regulators and the general public now have higher expectations of in-house attorneys as corporate guardians. As counselors and advisors, in-house counsel have daily opportunities to positively impact their companies, and they often hold seats at the table where high-level, transformative business decisions are made. Such influence and potential for impact carries with it sobering and significant responsibility. As part of this responsibility, in-house counsel must closely collaborate and partner with their risk and compliance departments that are tasked with the day-to-day responsibility for implementing and maintaining controls that help mitigate the potential adverse impact of corporate threats. Now more than ever, in-house counsel are held accountable for the behavior of other corporate actors. Creating effective working relationships with compliance and risk organizations enable in-house counsel to better assist companies when they respond to unexpected crises or allegations of internal wrongdoing. Using sound judgment, acting proactively, and partnering with corporate risk and compliance departments positions in-house counsel to effectively monitor compliance, flag and escalate issues, and create an effective investigative framework that minimizes liability for themselves and their clients. **ACC**

- 5 In re Gen. Motors LLC Ignition Switch Litig., 80 F. Supp. 3d 521, 530 (S.D.N.Y. 2015).
- 6 *Id.* at 4.
- 7 *Id.*
- 8 Benjamin W. Heineman, Jr., excerpt from *The Inside Counsel Revolution*, (March 29, 2016), <https://corpgov.law.harvard.edu/2016/03/29/the-inside-counsel-revolution/>.
- 9 Michael Held, *Reforming Culture and Conduct in the Financial Services Industry: How Can Lawyers Help* (March 8, 2017), www.newyorkfed.org/newsevents/speeches/2017/hel170308.
- 10 *Upjohn Co. v. United States*, 449 US 383 (1981).
- 11 Brief of Amicus Curiae US Chamber of Commerce and the Assoc. of the Corp. Counsel in Supp. of Boehringer Ingelheim Pharmaceuticals., Inc., *FTC v. Boehringer Ingelheim Pharmaceuticals., Inc.*, No. 16-5356 (D.C. Cir. Jun. 2, 2017).
- 12 *Id.* at 2.

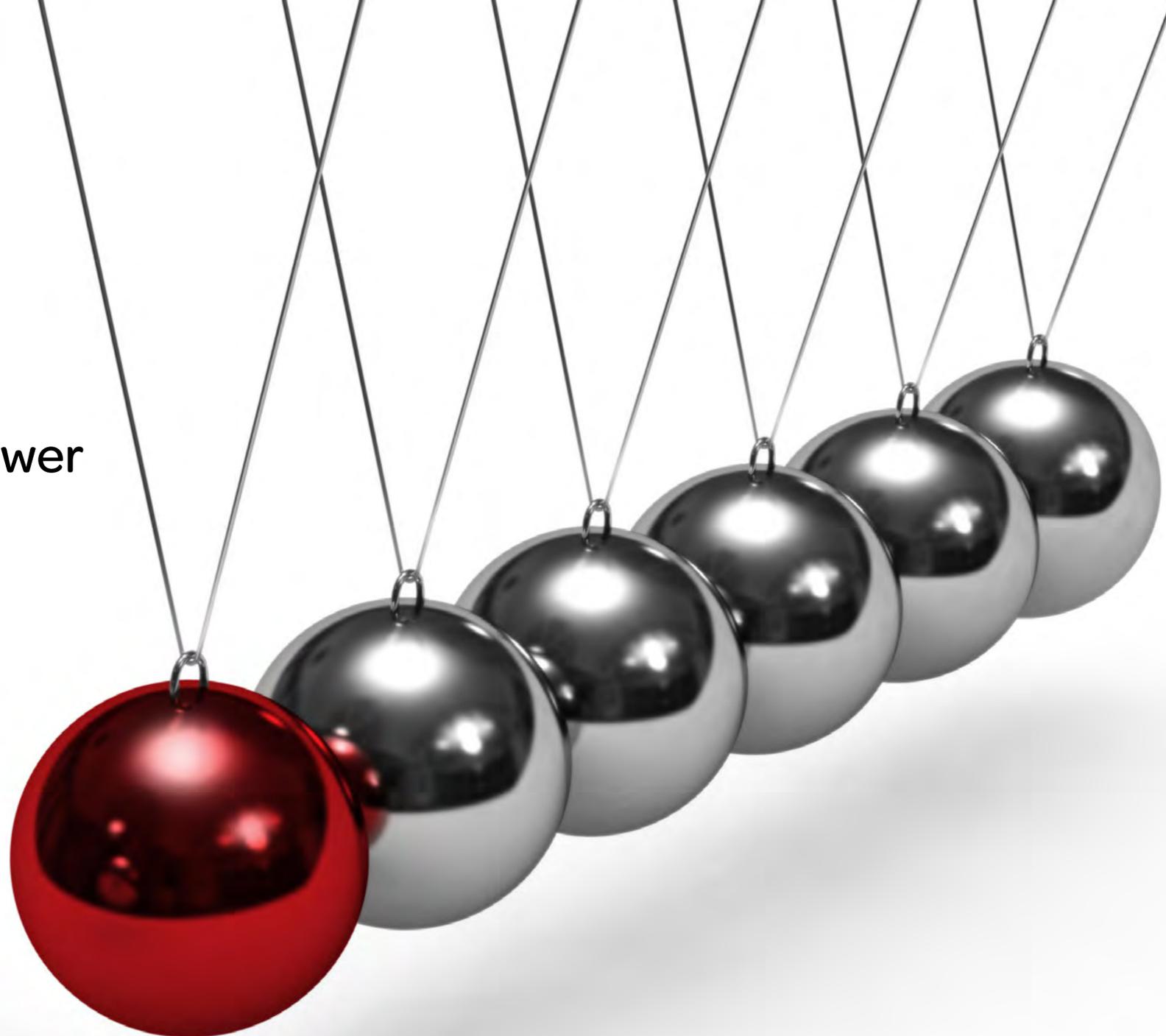
NOTES

- 1 Stephen M. Cutler, “*The Themes of Sarbanes-Oxley as Reflected in the Commission’s Enforcement Program*,” (Sept. 20, 2004), www.sec.gov/news/speech/spch092004smc.htm.
- 2 Assoc. of Corp. Counsel, *ACC Chief Legal Officers 2017 Survey*, www.acc.com/legalresources/research/ (last visited Aug. 9, 2017).
- 3 Brief of Amicus Curiae US Chamber of Commerce and the Assoc. of the Corp. Counsel in Supp. of Boehringer Ingelheim Pharmaceuticals., Inc., *FTC v. Boehringer Ingelheim Pharmaceuticals., Inc.*, No. 16-5356 (D.C. Cir. Jun. 2, 2017).
- 4 *Id.*

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THE BELLWETHER REPORT 2018:

**The Culture Clash –
Solicitor Confidence vs Client Power**



3. A CLIENT-DRIVEN MARKETPLACE

Client-driven pressure on solicitors to behave more like service providers could have an impact on both fee structures and on quality of service. But to what extent?



3. A CLIENT-DRIVEN MARKETPLACE

LAW FIRMS CAN BE SLOW TO RESPOND TO CHANGING CLIENT DEMANDS, PREVENTING THEM FROM RECOGNISING THE SEISMIC CULTURE SHIFTS THAT ARE HAPPENING WITHIN THE INDUSTRY.

“ - SOLICITOR
Thinking in business terms, clients are customers.”



BASE 103

Client power is reverberating throughout the profession.

From price comparison websites and review forums to powerful search tools, clients currently have an unparalleled ability to shop around. Intuitive search tools alongside review websites are changing the way the legal industry does business. Clients have found means of gaining advice on their own terms.

As a direct result, clients are demanding more from their solicitors; namely, that they act more like service providers.

“ Solicitors bang on about how good they are, but it means nothing. Clients don't care about problems you have sorted out for other people, they just want you to sort theirs.”
- SOLICITOR

3. A CLIENT-DRIVEN MARKETPLACE

The value of reputational excellence within the legal industry has decreased, resulting in solicitors being forced to develop other means of persuasion to bring clients through the door. Indeed, when you look at what's going on inside small law firms, as one of our respondents was quick to point out, the pressure on the solicitors themselves has only increased in recent years:

“
- SOLICITOR
When I first qualified, work used to flow through the door, but those days are gone. We are now expected to go out and get the work on top of our normal working days. It is very wearing.

How has your firm responded to the increased pressure to source and retain clients?

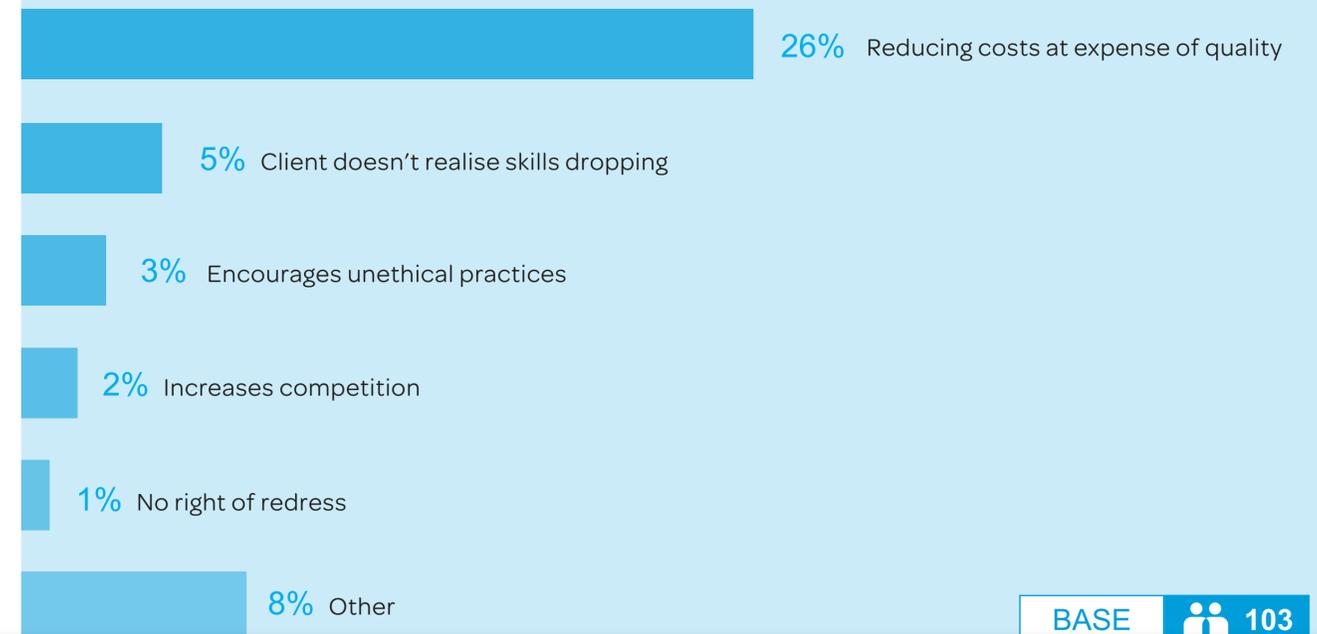
Has this drive impacted you?

One of the other main issues reported by the respondents we spoke with was the potentially negative impact that this emergent client-power culture could have on fee structures. A quarter of those surveyed expressed concern that it would reduce costs at the expense of quality of service. Many respondents expressed concern that driving down costs will ultimately compromise the profession as a whole.

DO YOU THINK THAT TODAY'S PRICE/CUSTOMER DRIVEN CULTURE IS IMPACTING ON LAWYERS BEING ABLE TO UPHOLD THE INTEGRITY OF THE LAW?



WHY DO YOU SAY THIS?



3. A CLIENT-DRIVEN MARKETPLACE

The pressures of deregulation are only adding to these concerns about the quality of legal services solicitors are able to provide.

The SRA has proposed that firms should publish their rate cards in a bid to make the profession more transparent and foster a more commercial marketplace. However, solicitors are dismayed by these changes, with 60% believing that the SRA is acting outside of the interests of solicitors, potentially causing significant risks for the profession moving forward. Many solicitors, for example, believe that access to fee cards would **“degrade the profession’s image”** and **“encourage lower standards”** due to the potential for some legal providers to feel pressured to cut quality for cost.

WHOSE INTEREST DO YOU FEEL THAT THESE ORGANISATIONS HAVE MOST AT HEART?

LAW SOCIETY ■ SRA

