

DEMONSTRATING THE VALUE OF IN-HOUSE COUNSEL

Legalwise Seminar: Meeting the New Challenges Faced by In-House Counsel
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Demonstrating value involves two elements. Firstly, adding value. Secondly, demonstrating how you do it. I will deal with each of these two parts, but I will start with demonstrating: the appearance rather than substance of value, because appearances are very important.

PART I: DEMONSTRATING

Demonstrating the value you add is critical for your success as an in-house lawyer. You cannot take for granted that the contribution you make will be recognised and rewarded.

Be seen

The main message is that you need to be seen in the organisation. If the value is not seen, there is in effect no value. (The reverse is not always true though: the fact that you are recognised and visible in an organisation doesn't necessarily mean that you are making a valuable contribution.)

When costs are being cut, the legal budget is often a tempting target. So it becomes even more important in tough economic times to be able to demonstrate the value you are adding to the company: to justify your existence.

For most in-house lawyers, your client will be a reasonably large organisation. As an in-house lawyer you should be aware of the corporate environment in which you operate. This includes being attuned to the organisational politics, the culture of the company, and its strategic goals.

You also need to get on with your client. They're paying your salary.

Being seen in the organisation is part of building influence, and influence is a necessary part of effectiveness as a lawyer.

Don't be a quiet achiever

Have you ever been described as a quiet achiever? You may think it is a compliment. It is in fact a mild form of rebuke. You are being thanked for the value you add, but you are also being told that you are not doing enough to tell the world about it.

When someone calls you a quiet achiever, treat that as a warning sign that you are not being seen enough.

You don't have to be ostentatious or noisy, getting in everyone's face. But you do have to be noticed.

Brand YOU

When I was at GE, the simple formula for success was described as PIE -- performance, image and exposure. Technical performance is only one of three things that you need to do, according to this formula. The other two are really about appearances: image (how you look and behave) and exposure (being seen).

Marketing theorists talk about the difference between a mere product and brand. A product is just about value. A brand is about an emotional connection. You want to be building your own personal brand in your organisation, and not be just a producer of legal product. That means building emotional connections.

Emotional intelligence

People in professions such as the law tend to overestimate the importance of their technical intelligence and skills as a driver of career success.

Studies have shown that IQ is not predictive of career success in law. In fact there appears to be a negative correlation between IQ and success.¹

Being intelligent and technically capable is only a baseline competence. It's taken as a given that you have the necessary skills to function as a lawyer.

What then makes the difference in your career success? Two factors, I think. One is emotional intelligence. The other is chance.

You can't control chance (although you can exploit opportunities when they unexpectedly arise). But you can certainly learn and improve upon your emotional intelligence.

Emotional intelligence or competence is a vital skill that you need to cultivate to be successful in your career. It is the key to being able to demonstrate the value you bring to your client.

Daniel Goleman is one of the leading writers in the area of emotional intelligence.² He divides emotional competence into two main categories, personal competence and social competence. Within the domain of personal competence, there is self-awareness and self-regulation. Within social competence, there is social awareness and relationship management.

According to Goleman,³ social awareness includes the following competencies:

- **Empathy:** Sensing others' emotions, understanding their perspective, and taking an active interest in their concerns.
- **Organisational awareness:** Reading the currents, decision networks, and politics at the organisational level.
- **Service:** Recognising and meeting follower, client, or customer needs

¹ Cited in Daniel Goleman, *Working with Emotional Intelligence* (Bloomsbury, 1999), in note 2 to chapter 2. There are a number of other studies cited in this work which confirm the same general theme.

² Daniel Goleman, *Working with Emotional Intelligence*; Daniel Goleman, Richard Boyatzis and Annie McKee, *The New Leaders* (Sphere, 2007).

³ Goleman et. al. *The New Leaders*, pp. 47-48.

Relationship management is the part of emotional intelligence that's especially relevant to the demonstration part of demonstrating value. Goleman says⁴ that relationship management is about the following competencies:

- **Inspirational leadership:** Guiding and motivating with a compelling vision.
- **Influence:** Wielding a range of tactics for persuasion.
- **Developing others:** Bolstering others' abilities through feedback and guidance.
- **Change catalyst:** Initiating, managing and leading in a new direction.
- **Conflict management:** Resolving disagreements.
- **Building bonds:** Cultivating and maintaining a web of relationships.
- **Teamwork and collaboration:** Cooperation and team building.

Leadership

As you progress in your in-house legal career into more senior roles, you will generally tend to do less purely legal work and assume more management responsibilities: managing your in-house legal department, and being a member of the management team for the business.

As your role expands, it is necessary for you to cultivate skills that are required for your broader role. Skills that go beyond your purely technical skills as a lawyer.

If you want to be considered for such roles, you need to be able to demonstrate the qualities that are needed to meet the requirements of the job. Leadership qualities. Leaders are in this sense self-selected.

There is a lot of 'management' writing about leadership.⁵ What are identified as leadership qualities overlap with the emotional intelligence competencies. By and large they are talking about the same thing.

⁴ Ibid.

⁵ One good example: John C. Maxwell, *The 360 Degree Leader* (Thomas Nelson, 2005).

Influence

Another stream of management writing, often with a marketing or political perspective, talks about influence. Influence is in essence the ability to get other people to do what you want them to do. It is a synonym for power.

To successfully demonstrate your value as an in-house counsel, you must also be able to influence others to believe that you are making a valued contribution.

Again, you will find that the capacity to influence depends on having emotional competencies. Influence is predicated on effective engagement with other people.

The Trusted Advisor

David Maister is a renowned expert on professional service firms. He writes about professional service providers such as lawyers becoming trusted advisors to their clients.⁶ The trusted advisor is one who has moved beyond a purely technical advisor in a narrow domain of expertise, to a trusted confidante who can advise on a broad range of strategic issues. Although Maister writes about professional service firms, the same type of progression can occur in an in-house role as you progress from a legal technician into a more senior and wider leadership role in the organisation.

The foundation of this development as a trusted advisor is the building of trust with the client. And the skills required to build trust are, again, the competencies of emotional intelligence.

Teddy sums it up

Theodore Roosevelt, a former President of the United States, was a remarkable man and someone who was successful in many fields of endeavour.⁷ I think he summed up well the points being made above when he said:

⁶ David H. Maister, Charles H. Green and Robert M. Galford, *The Trusted Advisor* (Free Press, 2004).

⁷ See Edmund Morris, *The Rise of Theodore Roosevelt* (Modern Library, 2001) and *Theodore Rex* (Modern Library, 2002).

“The most important single ingredient in the formula of success is knowing how to get along with people.”

Objections

You may raise objections in your mind to the point I am making. Let me set out the typical objections, and my response to them.

- **I shouldn't have to do this.** This objection is based on the view that the world should be a meritocracy, where the most technically capable succeed. You may want the world to be that way, but it's not, and never will be. You don't have to become an emotionally intelligent person. It is always your choice. But your choice will have consequences. Think about those consequences. Maybe you are only really interested in the technical aspects of your job. If so, that's fine.
- **It's not fair.** This is really a variation of the first objection. Life's not fair.
- **I'm not good at that.** If you are a more introspective type rather than an extrovert, you might feel a little uncomfortable making yourself more visible. You might say that it's not in your nature, and you're just not good and doing that sort of thing. But emotional intelligence can be learned and developed. Your brain is plastic.
- **It's manipulative.** Being visible is about playing the game you need to play to succeed in the corporate world. It is not manipulative or Machiavellian. Nor am I suggesting that you act in any way that is not ethical. Being ethical does not mean being naive.

Being better seen

You can be better seen in many ways. The best approaches will depend on the nature of your position, the structure of the business you work in, your personal preferences, and those of your boss.

Here are some ideas.

- **Walk the floor.** Get out of the office. Talk in the corridors. Chat in the canteen. Attend social functions. Try to come across as approachable.
- **Reporting out.** Have regular scheduled reports to the management team and your boss.

- **Regular catch-ups.** Meet with your boss and your team on a regular schedule.
- **Legal Department open day.** Hold an annual open day for the Legal Department where you showcase what you do and how you add value to the organisation.
- **Intranet.** Have an intranet site for the Legal Department that is useful and informative.
- **Newsletter updates.** Send out updates on Legal Department activities.

PART II: VALUE

What is value?

Value is in the eye of the beholder. The value you bring to your client is measured by the client, not by you. Understand what your client expects of you, so you can best ensure that you are adding value where it is needed.

That is not always the natural mindset of lawyers. Sometimes the lawyer thinks that what they have to do is what their professional responsibility obligations dictate. You certainly have to meet those obligations, but they do not define the extent of what you bring as a lawyer (particularly when you are an in-house lawyer).

Even if you only consider professional obligations, though, remember you are a fiduciary, and your fiduciary obligations require you to put your client's interests above your own. As a matter of professional responsibility, therefore, you need to know what your client's interests are.

Expectations of in-house counsel

If you understand the expectations of your client, you can not only better meet them, but you can also better manage them.

Managing expectations is an important part of determining the value you bring to your client. If the expectations are unreasonably high, you should seek to influence the organisation to adopt more realistic expectations that you are able to meet. This can be quite a sensitive matter, because you do not want to give the wrong impression that you are not capable, or that you don't want to be helpful. Nonetheless, in some cases it is a good thing to do, because the expectations placed on in-house counsel are increasing, especially in the domain of risk management.

Risk management

The in-house legal function is today usually seen as part of the overall risk management function of the organisation. Risk management is not infallible, as we know. Things happen that we do not anticipate. In-house lawyers are increasingly expected to prevent bad things happening, but that is not always possible.

The expectations to manage risk that are placed on in-house counsel by clients are more onerous than what is expected of outside counsel.

As an external lawyer, each issue tends to come to you as a separate matter, to be dealt with discretely. The external lawyer usually only becomes involved when the issue has already ripened: the interaction between lawyer and client is more transactional than relational.

As an internal lawyer you become (or should become) intimately familiar with the operations of your client, and there is an expectation that you therefore have a more holistic perspective of your client's legal position. Individual issues are assessed in a wider context. You also have the ability to more accurately anticipate potential legal issues and deal with them, because you are closer to what is happening.

An in-house role, at least one with some level of managerial accountability, is therefore likely to have obligations to anticipate and assist the client to prevent adverse events, obligations which go further than the professional responsibilities of an external lawyer.

Being a risk manager presents special challenges for demonstrating value, because if the risks are averted, what you are doing may not be recognised. "I just saved you potentially a million dollars by preventing a misleading advertising campaign going to air."

You can add value in risk management by being involved in the proactive risk management programs in your business.

In a typical risk management process, each (known) risk is identified then rated for (a) its impact and (b) its likelihood of occurrence. The severity rating of a risk is a function of its impact and likelihood. The final piece is the controls in place to manage the risk. These may include business continuity or disaster recovery plans.

The Australian Standard on risk management can give you some useful guidance on the methodology of risk management.⁸

Try to learn the thought process and language of risk management, because it is the mode of thinking and communication that is expected of you as a risk manager.

Remember that risk management is not risk avoidance. All businesses operate in an environment of risk. If they don't take risks, they will ultimately fail. When they take risks, sometimes things happen which are not foreseen (even from things which did not seem risky at the time), and your role as a legal risk manager is to manage the damage.

Once I read an in-house lawyer describing her role as stopping the vase from falling off the table. That may be good a mission statement, but be aware that the vase may fall off, through no fault of your own.

And if you are too risk averse and cautionary as an in-house lawyer, your advice will not be relevant. You must walk the tightrope, making sure that the business is fully informed of the risks, but not trying to prevent risks being taken, unless they are plainly unlawful or stupid. That is how you best add value in the domain of risk management.

Compliance

More lawyers are working in-house. In New South Wales, the percentage of all solicitors in the corporate sector rose from 6.7% in 1988 to 18.3% 2008, almost a threefold increase. Over the same period, the proportion of solicitors working in private firms decreased from 78.1% to 70.3%.⁹ There was a slight increase in the proportion of government solicitors, from 10.3% to 11.4%. Corporate and government solicitors together now represent about a third of the legal profession in New South Wales.

There is a reason for this change, which has to do with the perceived value of in-house counsel: they are seen as being a better value proposition than using outside counsel. Partly this is a matter of cost, which I will discuss later, but it is more than just the cost factor.

⁸ AS/NZS ISO 31000:2009 *Risk Management – Principles and guidelines*.

⁹ 2008 *Profile of the Solicitors of NSW*, January 2009, available online at <http://www.lawsociety.com.au/resources/surveysandstatistics/index.htm>

Having in-house legal capability is more and more important to business because the scope of legal requirements for business is growing. There is an increasing volume of regulation to contend with. In its most recent annual survey of in-house counsel,¹⁰ Deloitte found that in-house counsel rated maintaining regulatory compliance as the greatest legal risk currently facing organisations.

Playing an active role in legal compliance is therefore absolutely essential to adding value as an in-house counsel. However, one of the issues you face as in-house counsel is the extent of your responsibilities in relation to compliance.

Compliance is now a distinct functional specialisation. Most major corporations have the compliance function as separate from legal, although in some organisations, compliance and legal roles are managed by the same person, which has its own difficulties.

Compliance specialists see their function as including legal risk management. So where does the legal function end and the compliance function begin? The lawyer tends to be more of an adviser than an enforcer, and a compliance officer is more of an enforcer than an adviser. Should the internal lawyer also be responsible for enforcement? Does the lawyer become a “gatekeeper”, as some commentators say they should act?¹¹ If you play the role of enforcer, does that constrain your ability to act as a confidential adviser to the client?

These are difficult questions. The American Bar Association made the following comment in a 2003 report on corporate responsibility:

“lawyers for the corporation — whether employed by the corporation or specially retained — are not “gatekeepers” of corporate responsibility in the same fashion as public accounting firms. Accounting firms’ responsibilities require them to express a formal public opinion, based upon an independent audit, that the corporation’s financial statements fairly present the corporation’s financial condition and results of operations in conformity with generally accepted accounting principles. The auditor is subject to standards designed to assure an arm’s length perspective relative to

¹⁰ Deloitte *Forensic in-house counsel survey 2009*.

¹¹ John C. Coffee, Jr., “Understanding Enron: It’s About the Gatekeepers, Stupid” (2002) 57 *Bus. Law* 1403 at 1403-1405.

the firms they audit. In contrast, (...) corporate lawyers are first and foremost counselors to their clients. Except in clearly defined circumstances in which other considerations take precedence, an alternative view of the lawyer as an enforcer of law may tend to create an atmosphere of adversity, or at least arm's length dealing, between the lawyer and the corporate client's senior executive officers that is inimical to the lawyer's essential role as a counselor promoting the corporation's compliance with law.¹²

As a matter of legal professional responsibility, you probably don't have any obligation to ensure that your advice is followed. It's up to the client to decide if they want to follow your advice. But an in-house lawyer may have responsibilities as an employee or a manager of the corporation that go beyond his or her professional obligations as a lawyer. It's very important to understand what the expectations are in relation to compliance and to define your compliance role. It could be that your view of your role is the narrower, traditional legal advisor, but your client is expecting something more.

Governance

Governance is the third member of the holy trinity with risk management and compliance. It's now popular to group them together as GRC. Another three letter acronym to remember.

Here again, in-house lawyers can be of great value, because of their expertise in corporate law and due process.

If you have ambitions to move into senior roles, you must get a handle on corporate governance. It may not matter if you just do specialised legal work like IP or employment/industrial relations law. But if you want to play a bigger role on the stage, you are going to need to be able to advise the senior levels of management and directors about how decisions should be made, and the appropriate governance measures that should be implemented in the organisation. That means understanding corporate governance: not just the technical requirements, but also the nuances of the exercise of power.

¹² American Bar Association, *Report of the American Bar Association Task Force on Corporate Responsibility* (Chicago: American Bar Association, 2003), available online at <http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf>.

GRC may be a bit of a management fad, but if management of your client think it's important, they will be looking at you through the lens of GRC, so embrace it.

Expertise and cost control

As in-house teams grow, they expand their range of expertise, and members of the team become more individually specialised (just like law firms tend to do as they get bigger). The greater the internal expertise, the less likely it becomes that a particular matter will be referred out to external counsel, because more complex and specialised work can be done in-house.

Companies move work in-house because it is more cost effective. But as the bean counters watch the size of the legal team grow, they will start asking questions about whether the cost of an internal team is the most efficient way to spend their dollars. Some bright spark will come up with the idea of outsourcing more legal work (forgetting why in-house capability was developed in the first place).

Expertise and cost control are linked together. You have to be able to show that internal legal capability is overall more cost effective than external. This requires you to prove (a) that the work has to be done, (b) that you are able to do it in-house, and (c) that doing it that way will be cheaper than using an outside law firm. It is not a zero sum game: it is usually not a question of all or nothing. It is more likely a question of: Do you really need this additional headcount? Or, can we reduce the legal team headcount by 15%? Or, why do you need all these admin staff?

CFO's tend to see only the hard numbers (actual spend) rather than the soft numbers (savings you are making by doing the work in-house). You need to make sure they are seeing the full picture.

Managing external legal spend

With enhanced internal expertise, you can evaluate more critically the work being done by outside counsel, and how much they are charging you for it.

One of the major trends in the legal profession – clearly evident in the United States, but a trend that will also occur in Australia – is for in-house counsel to push law firms into greater

accountability for their costs, and to drive down the cost of external legal spend. In the US, the Association of Corporate Counsel is leading this push, with the ACC Value Challenge.¹³

Corporate clients are realising that they have some serious bargaining muscle, and they are flexing the muscle. Even with big in-house legal teams, corporates will often have significant external legal spend. Law firms want to get and keep their share of that work. Clients are not as loyal as they used to be and they will shop around for the best deal. There is plenty of choice, with a wide range of good firms in the market, including many boutique firms that can offer specialist expertise but with better service and lower cost. Microsoft has a 'virtual law firm', a pool of small firms that are available to do its legal work.¹⁴

Charging by billable hours is under threat. Corporate clients will no longer give an open ended commitment to pay whatever hours are billed. They are demanding a commitment to fixed prices or fee caps, and so they should.

Corporate clients are also looking more closely about how the work is done. Highly leveraged firms are designed to maximise profitability for the partners, not to minimise the cost to the client. Corporate clients are now instructing how their matters should be staffed and managed by outside counsel, to ensure they get value for money.

You can add value as an in-house counsel by using these approaches to get better value from your outside counsel. If you are not already using them, your CFO may be asking questions soon about why you aren't.

The ACC Value Index

In the United States, the Association of Corporate Counsel recently released a simple tool to measure and rate the performance of outside legal counsel. It is called the ACC Value Index.¹⁵

¹³ <http://www.acc.com/valuechallenge/>

¹⁴ "Microsoft's Horatio Gutierrez: A virtual reality", *ALB Legal News*, 12 November 2009, available at <http://asia.legalbusinessonline.com/news/features/38548/details.aspx>

¹⁵ <http://www.acc.com/valuechallenge/valueindex/index.cfm>

The index is a way to rate the performance of outside counsel on 6 key criteria on a scale of 1 to 5 (1 being poor and 5 being excellent). The criteria are:

1. Understands Objectives/Expectations
2. Legal Expertise
3. Efficiency/Process Management
4. Responsiveness/Communication
5. Predictable Cost/Budgeting Skills
6. Results Delivered/Execution

You may want to use this or something like it to rate your external providers. But I suggest you also use it rate yourself, and ask your internal clients to do the same to see how they rate you. It could give you insights into where you might not be adding the value that you seek to bring to the business, and areas for improvement.

Conclusion

If you can add value, and effectively demonstrate how you add value, hopefully it will lead to appropriate reward and recognition for the value you bring to your client.