

103 How Many Hats Are Too Many?

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William A. Barnett is vice president, general counsel, corporate risk manager, head of human resources, and secretary/treasurer for State Industrial Products Corporation in Cleveland. State Industrial Products manufactures and sells a full line of industrial maintenance products. Mr. Barnett is responsible for providing legal advice to the corporation and all of its business subsidiaries as well as representing the corporation in all legal matters. Since January 1995, the corporate legal practice has included a significant emphasis on alternative dispute resolution. Mr. Barnett actively practices in a broad-based general corporate law environment that includes litigation. Over the past 15 years, he has focused on employment law, product liability issues including proactive programs, and litigation.

Prior to Mr. Barnett's 15 years with State Industrial Products, he was an associate with the Cleveland law firm of McCarthy, Lebit, Crystal & Haiman, Co. LPA.

In addition, Mr. Barnett is a board member of ACCA's Northeastern Ohio Chapter, and is a member of the Northern Ohio Regional Commercial Advisory Committee of the American Arbitration Association.

Mr. Barnett received his BS from Northwestern University and his JD from Case Western Reserve University (JD).

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John B. Ross is vice president, general counsel, and secretary for Williams Scotsman, Inc. and its affiliated companies, which sell and lease mobile offices, storage trailers, and storage containers throughout the United States and Canada. In addition to his legal duties as general counsel in the legal department, Mr. Ross also has management responsibilities for the real estate portfolio as well as for the risk management and licensing departments.

Prior to joining Williams Scotsman, Mr. Ross was special assets counsel for MNC Financial, Inc. and corporate counsel for MNC Credit Corp. In addition, he has engaged in the private practice of law in Maryland and North Carolina, where he was partner in the Raleigh, NC law firm of Hatch, Little and Bunn.

Mr. Ross is currently a member of ACCA's Small Law Department Committee. He is also a member of the Business Section of the Maryland State Bar Association, and he is an officer of the Georgetown Club of Maryland.

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Mr. Veys has been an inside attorney for over 15 years. Before joining A.T. Kearney, he was general counsel and the sole in-house attorney for XL/Datacomp, Inc., a Chicago-based subsidiary of Storage Technology Corporation. Prior to that, he was senior attorney for NCR Corporation, where he handled commercial litigation and commercial transactions.

Mr. Veys has been active in ACCA's Chicago Chapter for several years, serving as a director, treasurer, and most recently as president. As immediate past president, he currently chairs the Chapter's Board of Directors. He is also acting as cochair of Chicago's "Model Partnership Project", a pilot pro bono initiative led by CorporateProBono.Org and ACCA.

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Adding Value to the Corporation and... You

In-house counsel today are in a position where they can and often do wear many hats, some voluntary, some not. What can you expect from the challenges, risks and opportunities associated with the process of wearing these hats? This discussion will review the historical role of in-house counsel, the perspective of an in-house attorney and, discuss multiple hats as an opportunity to expand the horizon of the in-house attorney. Let's face it, as small law department practitioners, we often do our own typing, research, closing deals, negotiations, depositions and court appearances. Do we need or want more responsibility? Yes.

Historical Role of In-House Counsel

The role of in-house counsel is very different from what it was 10 years ago. Corporations have become more aggressive in challenging the norms of the past, such as whether to check with outside counsel before proceeding with mergers, acquisitions, IPO's, strategic alliances, employment actions, etc. Corporate executives are sometimes impatient with the sometimes over-cautionary approach of outside counsel, who often advise corporate clients that their plan of action is fraught with danger. Instead, corporate executives ask, "what does it take to get the job done now?" Consequently, the role of in-house counsel has become increasingly one of "can do." This has created the need for a breed of in-house counsel who are similarly aligned to their companies in this "can do" approach, while keeping a sharp eye out for pitfalls.

Before exploring this scenario further, a brief review of the past will establish a sense of perspective. In Carl Liggio's article, "The Changing Role of Corporate Counsel" (Emory Law Journal Summer, 1997), he presents a brief history of the role of in-house counsel. Beginning in the 1920's the in-house attorney was one of the key figures in the corporation, highly paid and groomed to take on the top corporate jobs. Later, during the 1940's-1970's, as the business schools became the proving grounds for corporate leadership, corporate counsel became less important except as a tying link to outside counsel. According to Liggio, various factors have contributed to the return of importance of in-house counsel including litigation, regulation, cost and expense factors. He postulates that the new role of importance will only be maintained if counsel is innovative and creative in the provision of legal services. Also, corporate counsel must not only demonstrate skills as a legal advisor and professional but also as an administrator and manager.

This historical perspective leads directly to today's "can do" role of in-house counsel. In some respects, this will translate into taking on functions (multiple hats) that may be quasi-legal but establish the in-house attorney as an indispensable, "go to" person. In other respects, it will be the addition of responsibilities that may not be legal at all. Finally, in order to be perceived as a value-added member of the organization, in-house counsel must walk a fine line that lies between giving the "legal perspective" (or, why this may not be a good idea) and the "business perspective" (how do we get it done on time, and on budget).

The traditional role of in-house counsel is to give legal advice on matters of consequence to the corporation, drafting documents, negotiations, etc. The quasi-legal role is less well defined and the subject of much debate as to whether in-house attorneys should handle such tasks. These may include: conducting investigations, processing paperwork on an employee transfer (closing

documents, promissory notes, contracts, etc.), instituting collection actions representing the CEO or their wife, child, sister, etc. as well as a host of similar activities.

Why is it we take on the quasi-legal roles? As corporate counsel, there are numerous constituent clients (managers and officers of divisions, subsidiaries, etc.) who need attention. Being responsive to the needs of such clients may cross over the line of traditional legal duties, however, attorneys are often in the best position to get fast action from letters, phone calls, and meetings that will show the constituent party how efficient (and value-added) in-house legal counsel really is.

The View From In-House

Consider the perspective of the in-house counsel of today and, where we came from. Many in-house practitioners have a law firm background. Some may view outside attorneys as experiencing a narrow career track and a lack of opportunity to influence the totality of matters worked on. Take for example a product liability claim. As an in-house lawyer there are opportunities to influence matters literally from product inception to conclusion of any legal issues. An outside lawyer most often receives a file only when a problem arises. As an added benefit, working in a corporation is, for many, a welcome respite from the known, single track of the law firm to the unknown, expanded legal career and a chance to make a radical shift from purely legal to a mix of legal and business duties.

Adapting to the In-House Environment

What is it like in-house? The first shocking change for many in-house lawyers is the atmosphere. Instead of being in an environment where the main purpose is to support the legal professionals, in the corporate arena, the focus is on the product or service. It may come as no surprise that the lawyer is not considered the most important person in the organization. A casual

dress code and often no requirement for keeping time sheets belies the fact that in-house attorneys work long hours often under time pressures from clients who are nearby or, down the hall sending endless streams of e-mails and voicemails, as well as a constant flow of scheduled meetings. In Bruce D. Becker's ACCA Docket feature ("The In-House Counselor--Perspectives from the Executive Suite," ACCA Docket, Winter, 1993) he quotes that "it is very important, if not imperative, for the lawyer to know the business...(he/she is in)." Also, "you have to respond promptly to questions even though you may not be able to get an answer until late in the day." This is one of the key wake up calls to the in-house attorney; the realization that the persons to whom they report want a "yes or no" conclusion and the alternatives. Unlike the outside counsel, who advise their clients to steer clear of trouble, the absolute "0" risk syndrome is a well-intentioned approach but not conducive to problem solving (Becker p.2). More often than not these responses and duties involve matters that are not purely legal. This could involve proceeding with a business deal or real estate transaction in the face of known risks or hazards.

The key function of the in-house lawyer is to interact and to show the value-added aspects of having an attorney present. There are many ways in which lawyers can add value to business discussions and interactions by virtue of a different set of disciplines and experiences. There are many approaches to such an interactive role, however, it is wholly inappropriate for lawyers to take a detached approach to matters. Kathleen Knight spoke about it as adopting a "can do" attitude, in connection with in-house lawyers going from minor management figure to one of prestigious consiglie (Challenges and Risks of the Lawyer/Businessperson is it Worth it?, ACCA annual meeting 1999) (page 1). Yet, as the role of trusted advisor is consuming, it is also a balancing act. It is the responsibility of the in-house attorney to become increasingly involved in wearing multiple hats but according to Kathleen Knight one must not lose track of their

primary responsibility, to provide effective, responsive legal services to the organization and protect the corporation from liability. In fact, in discussing the challenges faced by in-house attorneys, there is the risk of losing objectivity if one is too involved in the particular business decisions or functions.

It is a voluntary choice to go in-house but various factors present conflict for the traditional, practicing attorney, both in how to give well-reasoned advice and avoiding the pitfalls of ethical and professional uncertainty.

What happens when in-house counsel takes on multiple responsibilities tends to vary as duties are acquired. Initially, pure legal duties would not cause much conflict as the in-house attorney is acting in a capacity that does not require wearing the business "hat". However, as the in-house counsel takes on hats that could be characterized as "more business related" over time, the potential for conflict increases. For example, when the in-house attorney would be directing a business unit and decisions are made whether corporate policy should be closely followed in order to close a transaction, there would be an obvious conflict for the in-house counsel should litigation arise over the details of that transaction. It is possible to balance the legal and business duties, however when the in-house lawyer is mainly handling business matters, as in the case of the lawyer-CEO, or head of a business unit, the potential conflicts would make it extremely difficult to maintain proper objectivity in both the legal and business areas.

There are many ways to define the issue of conflict and ethics with respect to wearing multiple hats. As a practical matter, the concern is loss of attorney client privilege. This may cover both attorney work product privilege and client communication.

As for communication privilege, it is helpful to keep in mind the criteria set forth in Upjohn Company v. United States, 101 S. Ct. 677 (1981). The communication must have been

made by a corporate employee to a corporate counsel acting as such; the communication must have been made at the direction of the employee's superior so the corporation could secure legal advice from counsel; the employee must have been aware that the communication was to facilitate the corporation obtaining legal advice; the communication concerned matters within the scope of the employee's corporate duties; the information was not available from upper echelon management and was needed to supply a basis for legal advice; the communication was confidential when made and the information was kept confidential thereafter.

Rule 26 of the Federal Rules of Civil Procedure protect the work product of attorneys when the material contains the mental impressions or legal theories of an attorney or, they are prepared in anticipation of litigation or for trial (FRCP 26(b)(3)). It is not difficult to imagine a scenario where the in-house attorney is deeply involved in the business end of a matter and may be unable to claim the protections that would normally fall to a "single hat" lawyer.

Compensation

One component in the decision to go in-house or to pursue business opportunities is to obtain reward in the form of compensation. How does compensation affect the in-house attorney of today? The financial factor can be a very big draw to going in-house. Even if the attorney compensation is not directly tied to company performance (bonus, stock options, etc.), the overall financial well being of the company is a powerful motivating factor for the activities of the in-house lawyer. After all, the in-house attorney is more keenly aware of the potential loss of profits due to a major legal loss especially when their income is dependent on the profitability of the company. Whether this clouds objectivity for the in-house lawyer is not a topic that can be fully discussed here. However, for the attorney seeking the rewards of in-house life, economics becomes one of the driving forces for taking on additional responsibilities and wearing multiple

hats. With increased visibility and performance, there will hopefully come the reward associated with being an upper level corporate manager/executive.

While it may not be apparent when the duties are taken on initially, compensation may develop in various areas as the attorney becomes fully functional wearing new hats.

Hats are a Part of the Team Uniform

Having looked at motivating factors consider day-to-day life in-house. What are some of these hats in-house lawyers are asked to wear? Some of these hats include: business functions, strategic planning, projects, supervisory, financial, human resources, risk management, real estate, operations, purchasing, travel, finance, information services.

How do we get these hats? Sometimes it is a matter of a person exiting and you are the next one on the bench. Business is fast-paced. Players are being constantly evaluated, tried out and sometimes tossed out, or groomed. The question for many corporate types is how much can you handle? How good are you? Another issue is whether you are taking on additional supporting roles (staff positions) or, venturing into the action world such as sales, marketing, and business acquisitions?

Being a member of a corporate team means you want to play. In order to interact you must be in the game. That means being part of the business decisions and functions that take place day to day. John Ogden presents a good understanding in "Synchronizing Business and Legal Priorities- A Powerful Tool," ACCA Docket October, 2000. He states that in-house attorneys should view themselves and be viewed as business people who specialize in law. The more corporate attorneys can be seen as business people who specialize in the law...the better attorneys and corporate clients can productively interact. Informal socializing with business colleagues can engender this type of understanding.

One of the key reasons for being in-house is to make a difference, to help the corporation avoid the problems that result in outside counsel making a killing on problem solving. What better way than to have a recognized input early in the life of a project as a lawyer/ business participant. In the May 2001 ACCA Docket, a report regarding a survey of CEO's and other senior executives indicates that in-house counsel understand the business better than outside counsel and can better participate in the strategic and business planning of the company. (p. 6-8)

Does Performance Evaluation Equate to Demonstrating Value?

Being a player and being evaluated by corporate superiors are two very different propositions. At the end of the day (review period), it is important to demonstrate continued value both financially and substantively to the corporation. If you were to tell your superior that you have accounted for 2300 hours in the past year, the response you would get ("we care about results not time") would show that there is a lack of synchronization between your expectations and those of the corporation.

In John Ogden's article on "Synchronizing," he states that it is essential to speak the same language as business people in order to integrate the legal function. This includes "aggressively seeking methods of measuring the operation of the legal function in a meaningful way." (p.7) Thus, the legal performance review will look much like that of other corporate reviews: future goals, tasks, job descriptions, percentage completion of last period's goals, skills, accomplishments, responsibilities, etc. It is not easy to equate your legal docket with that of a product line roll out, advertising campaign, sales promotion, new innovation but somehow you must try. In the panel discussion on the "Role of General Counsel," ACCA Docket October, 1995, Walter W. Kurczewski commented on the difficulty in demonstrating that the legal department lawyers added more value this year than they did last year. He stated accurately "the

most productive thing we do is preventive law. How do you measure the lawsuit that does not occur?" (p.13)

The difficulty in measuring value as well as potential reward are factors in taking on multiple hats but, how far does one go? Due to the fact that corporate counsel plays a unique role of stabilizer within the organization and maintainer of confidential information, there is opportunity to take on additional roles. There are the legal tasks distasteful to others like terminations, threats of action, lawsuits, and investigations. In addition, there are other areas that benefit from a blend of legal background such as HR, Risk Management, and Corporate Security. Then again, totally non-related hats, which are not purely support role jobs, can stimulate esprit de corps, team play and consequently career enhancement. In my own case, after being named captain of the corporate tug of war team, I was able to pick up responsibility for Human Resources. Another example would be heading up a safety committee or, corporate policy committee, both of which add valuable corporate face time. There is a lot that is done in the legal department that is similar to what lawyers do all over the US. However, we are part of the corporate culture, and must be a visible part of that culture to have an impact. It is possible to maintain the distance required of the legal function and still be a team player.

A Small Sampling

As a kick-off to my thinking process for the discussion on wearing multiple hats, I conducted a small survey amongst my fellow ACCA Board members. The results fell pretty much in line with my expectations. That is, many in-house attorneys welcome the opportunity to wear multiple hats and experience a wide variety of benefits.

There were seven questions in the survey: 1. Do you wear multiple hats? If so, what are they? 2. Did you ask for additional responsibilities or, were they presented to you? 3. Do you feel such

additional responsibilities are important in your career (enhancement)? Why? 4. Do you sometimes feel a conflict with those other hats vs. traditional in-house counsel functions/roles? 5. Do you see yourself moving to a more business role or, more legal role in the future? 6. Do you believe your compensation opportunities are enhanced by non-legal functions? 7. How are you viewed by upper management after having taken on these additional roles (e.g., team player, less of a lawyer, etc.)?

A summary of the responses showed that the types of "other hats" included: Officer status, Human Resources, Risk Management, Insurance, Real Estate, Executive Management Committee, managing internal auditors. For the most part respondents were presented with opportunities or asked to take them on. Few respondents believed that wearing multiple hats put them in a less advantageous position and most felt that it was good experience, interesting and an enhancement of their careers. In addition, for those coming into the job in the top legal position (i.e., general counsel), wearing multiple hats was realistically the only way to grow professionally. Only a couple of responses indicated a concern of potential conflict between the business and legal hats. One respondent stated that outside counsel would be contacted in the event of a perceived conflict. Almost all respondents preferred to retain the dual role of business and legal functions and most felt that such duality increased their compensation opportunities.

The response on the team player question summarized very well the role of the in-house attorney wearing multiple hats. You will always be a lawyer, however with the expanded duties and experience you gain, your decisions will be more realistic and practical and you will develop a good business sense. Most importantly, upper management will view you as an important/vital part of the leadership team to be included in matters affecting the corporation.

Given this brief survey of the role of in-house counsel and wearing multiple hats, it is fair to summarize by stating that few legal positions offer as much diversity and opportunity as being in-house. In order to grow professionally, one must be attuned to the potential for expanding knowledge and experience through wearing multiple hats.

WHEN IS ONE ADDITIONAL HAT ONE TOO MANY?

By John B. Ross

I. TAKING ON ADDITIONAL RESPONSIBILITY

Like any new adventure, taking on an additional responsibility at work is an opportunity for growth, but it also comes with elements of risk. For example, in addition to your duties as General Counsel, Secretary and Compliance Officer for your company, you might be offered the additional duty as Vice President of Human Resources (because the current one is retiring). This would be an additional, discrete area of responsibility—a new hat. It is natural to be tantalized by advantages of such a new opportunity (e.g. more challenges, prestige, and compensation); however, the risks are real. To rationally evaluate such an opportunity, it is only realistic to examine the potential risks. The following are some major risks to be considered when evaluating such an opportunity.

II. POTENTIAL RISKS

A. Inadequate Information. Get all the information you can about the new responsibilities. (This is the “look before you leap” advice.) Hopefully, you will be given adequate time to gather all significant information before you accept any substantial new responsibility. If so, then take full advantage of that opportunity. Use every resource at your disposal (e.g. peers, friends, your prospective boss, and people in similar positions) to garner as much information as possible about the scope and depth of the new assignment. For example:

- To whom will you report?
- Who will be working for you?
- What will the budget be?
- Is it adequate?
- What has been the recent history of this unit/function?
- How is the unit/function perceived within the organization?
- What are the goals of the unit/function?
- What are the major challenges of the unit/function?
- What will be your goals and objectives of your new position?
- What will be your biggest challenges?

At the end of this gathering process, you should be comfortable you have unearthed all significant available information about this new assignment.

B. Your Presumptions. Before entering into a new situation, one necessarily makes presumptions about the future based on the way things are or seem currently. In other words, there are things we take for granted. Before taking on a substantial new responsibility, it is extremely important to (1) minimize your presumptions about the

future, and (2) carefully examine those presumptions which cannot be eliminated. For example, if you take over an existing group (like the Human Resources Department), you should try to learn the following:

- Will all the people stay?
- Will the budget remain the same?
- Will the workload remain about the same?
- Are there any problem employees in the group?
- Has the second in command been campaigning for this job?

It is best to minimize your presumptions by gathering good information; the remaining presumptions should be carefully factored into your decision.

C. Your Current Professional Time Commitments. In today's workplace, time is a precious and finite commodity. If you are already spending 40-50 hours a week on your current responsibilities, then you need to understand where the time will come from for a new, substantial responsibility. This should be carefully thought through and, in most cases, discussed with your boss before you accept the additional responsibility. For example, if you accept the additional position as Vice President of Human Resources, how will your other duties be adjusted? Will you be transferring some of your current responsibilities to an associate? Are you hiring a paralegal for some of the more routine work? Are you becoming more efficient by using your new Franklin Planner? A Turbo Palm Pilot? The point is that you need to have some idea of where you will be getting the additional time to do the additional work.

D. Your Desire to Have a Life. Most of us have some life outside of the office. Your time commitments to people and organizations outside of the office will have to be considered as well. For example, if you are the parent of small children, treasurer of your local PTA, a scout troop leader, and president of your community association, you would be wise to think long and hard before taking on the position as Vice President of the Human Resources Department. In short, give full consideration to all your time commitments before deciding to take on a particular additional responsibility.

E. People Management. To manage people effectively, it takes a manager's time, effort, and skill. If you are taking on a department with a substantial number of people, expect to spend significant time with the human issues related to employees (salary issues, family and medical leave, performance evaluations, counseling, etc.). On balance, a department of 10 people takes significantly more time to manage than one of 4 people. This is particularly true if there is a difficult employee who comes along with the new responsibility. This should all be factored into your decision to accept a new responsibility.

F. Avoid Inherently Awkward Situations. There are some functions that are more or less a natural fit for an in-house attorney, others are not. For example, areas within a company that generally are considered a natural fit for an attorney include compliance, human resources, and risk management. These are areas which primarily deal with the

welfare of the company and its employees; they are sometimes referred to as “staff functions”. There are other areas, such as marketing, sales, and production, which primarily focus on the company’s products, its customers and generating revenue. These are sometimes referred to as “line functions”. Do not underestimate the difficulty of simultaneously handling both staff and line functions. Thus, it is wise to proceed very carefully into such a situation (or to avoid it altogether).

G. Your Background, Training and Skills. To be honest, there are some positions for which we, as lawyers, have sufficient training or experience to make a professional fit. However, most attorneys simply don’t have sufficient training, background or skills to easily succeed in other positions (e.g. marketing and systems analysis). Be brutally honest with yourself on this point. If you need significant training or education to do an adequate job, get it early. Make your prospective boss aware of your potential deficiencies. If you believe a training or skill deficiency is minor, then it might be overcome with OJT (on-the-job training). However, at this point it is often a wise career decision to attend a good course or seminar, which strongly relates to your new responsibilities (e.g. a people management seminar if you are taking over a department with more than ten people). This will increase your relevant skills and allow you to focus more on the other challenges of the new position

H. The Depth of Your Resources. Rarely does it happen that someone says: “Hey, I’ve got this department which practically runs itself; will you take it over?” Generally, management changes are made to meet big challenges. You should have a good idea of the real challenges facing a department before you take over responsibility for that department. That is not to say that you should back away from a challenge; rather, you should go in with your eyes open to avoid the unpleasant surprise. You should assume that the actual challenges are greater than what you are aware of at the outset. Indeed, it is best at this point to anticipate that a crisis (e.g. a sudden loss of a key worker or an unfavorable audit or investigation) will occur sometime during your tenure. You should know from where the potential resources will come to address such a crisis. Such a crisis may never happen, but the chances are that it will. Bottom line: Have adequate resources.

I. Real Conflicts of Interest. Beware of professional (and other) conflicts of interest. As long as you are an in-house attorney in the Legal Department, you have the attorney-client obligations of our profession. For example, one of the primary obligations of an attorney is to “exercise independent professional judgment and render candid advice” to the client. As an employee/officer of the company to which you are giving advice, this seldom a pristine situation. However, there are certain situations that should be avoided if you are to substantially fulfill your legal obligation (and maintain credibility both within and outside of your company). These vary greatly from company to company; however, I would suggest that in most cases being both the General Counsel and the Director of Marketing would be such a conflict.

III. ONGOING RISKS

After you have decided to accept a new responsibility, be aware of the significant risks that will continue during the first year of the job. The following are some helpful hints to minimize those risks:

A. Solidify the Goals, Objectives and Expectations. From the outset it is important to firmly establish the goals and objectives for this new area of responsibility. Obviously, it is vital to do this with your boss, as you should both agree on them and agree that they are attainable. Not so obvious is that it is also very important to have a discussion with your peers to ask them what their expectations are of you in the new position, and to tell them some of your expectations as well. This will help avoid unintended conflicts and may even turn potential rivals into allies. For example, if your company's 401(k) program's provider has been a disappointment, the goal of improving the program (or getting another provider) should be thoroughly discussed with your new boss (who probably has some strong ideas on the subject). In addition, it is often helpful to discuss this goal with some of your peers (e.g. the Chief Financial Officer) who may have some helpful insights as well.

B. Maintain Continuous Communication with Your Boss. It is absolutely critical to keep open and continuous communication with your boss when you are in a new position. Whenever you take on a new responsibility, you will be accepting new risks, gaining new insights, and meeting new challenges. These should be shared with your boss, who should understand and appreciate the situation. Any competent manager appreciates being appropriately informed. Often the boss will provide help or guidance, which will make your challenges easier to overcome. Also, it is imperative to avoid giving your boss a negative surprise, and continuous communication will help greatly toward that end.

C. Be Sensitive to Your Changing Environment. Over time, everyone's business environment changes. In some cases, the changes are slow and manageable; in others, the changes are rapid (e.g. if your company has a major acquisition). In many cases, the changes are incremental in the short run, but substantial in the longer run. This "change creep", if it goes unnoticed and unaddressed, can be very detrimental to your resources, your management technique and other methods of operation. This is potentially dangerous for you (and your career) if you don't make the necessary adjustments to your work environment to keep up with creeping change.

D. Realize When You Are Beating a Dead Horse. After you have been in the position for six months to a year and the results you had hoped for (or which others have expected) have not materialized, then you need to honestly re-evaluate the situation. A sign of your lack of success may be that you are not excited about the job anymore and are not getting the positive feedback from your boss or your peers that you anticipated. When this occurs, you should identify the reasons for the shortfall in performance and job satisfaction. Determine if there is something in you, your approach, or the job itself that is preventing your goals from being achieved. After you analyze the situation, propose a

solution. Take it to your boss (or some other person who could help) and give your honest assessment. Be prepared to listen for feedback. The feedback will be difficult – painful in many cases—to hear, but it is absolutely necessary that you get it. It is best to face these situations squarely and timely. Unlike a good red wine, mistakes and problems don't usually get better with age. If a change is going to be necessary, it is typically less painful to do it sooner rather than later.

IV. **TRANSFERRING OUT OF A RESPONSIBILITY (a/k/a Taking a Hat Off)**

In a perfect world, your boss should be able to determine when you are struggling with all of your responsibilities and make the appropriate adjustments. This is not a perfect world. You generally have to figure these out on your own. For example, if you have taken on the additional responsibility of Vice President of the Human Resources Department, but are experiencing extreme difficulties in other areas (e.g. the relationship with your primary outside law firm has deteriorated, your law department's customer satisfaction surveys have trended in a negative direction, or your compliance safety net is showing holes), then you have clear evidence that a change might be warranted. Other indications might be your own personal sense of struggle (i.e. your efforts are not producing the results you are used to), a high or persistent level of complaints about the performance of your areas, or the feeling that your areas are being avoided by your co-workers.

If these problem signs appear and persist, then you should seriously consider reducing those responsibilities that are edging things out of balance. Admittedly, this is not an easy thing to do; yet, in the long run, it will better for you and for your company. It is to everyone's advantage to address a difficult situation in a manageable time frame rather than to let it ripen into a major problem (i.e. the proverbial "train wreck") at some inconvenient time in the future.

If you feel that it might be best for you to reduce some area of your current responsibilities, consider the following approach:

A. **Objectively Analyze the Situation.** As a starting point it is essential that you analyze the situation as thoroughly and dispassionately as possible. In this process you should determine:

1. What have the problems been?
2. What are the reasons for these problems”?
3. How does the reality of the situation differ from your expectations?
4. How are you spending your time?
5. What would be best for the company?
6. What would be the “highest and best use” of your time for the company?
7. How could a better situation be achieved?

In doing this analysis, it is helpful (if not essential) to actually write out the answers to the above questions (and similar questions you believe are important). In my experience, this writing process intensifies the focus on the problem and makes the responses more precise and accurate. In some cases, it would be helpful to put your answers in the form of a short report, which you can later choose to show (or not show) to someone.

As the result of this analysis you should come to an honest conclusion. The primary thrust of your conclusion should focus on the answer to the question: "What is best for the company?" Your conclusion should also include your working at your optimal level within your company.

B. Present Your Analysis—Very Tactfully. If you have concluded that it is best for you and the company that you should be divested of some of your responsibilities, then you should very tactfully present this to someone in a position of authority who can help in addressing the situation. It is generally not a good idea to share this with friends or peers at this point. The conversation wherein you proffer your proposal might go something like the following:

"Boss, I've been giving my situation a lot of thought lately. As you know, I've been attempting to juggle the responsibilities of the X, Y and Z departments, but frankly the results have been less than I thought or hoped they would be. I've analyzed the situation, and it appears to me... [Give your analysis here]."

"Of course, the most important here is to do what is best for the company. It seems to me that... [Give your conclusion and recommendations here]."

After you give your perspective on the situation, you should anticipate a lot of questions. Be prepared to answer them.

The above is just an example. The way the message is delivered ultimately depends upon the situation and the personalities involved. However, it is very important that you initiate and control the delivery of the message. At a minimum it will plant a seed and get your boss (or other decision-maker) thinking about the possibility of a change. The packaging of course depends upon the situation. In some cases, it might be preferable to package this information so the recipient believes that the ultimate conclusion is his or her idea. The most important thing is to tactfully communicate that a change is needed, and to suggest a change that is in the best interests of the company.

C. Be (Tactfully) Persistent. In all likelihood, it will not be enough to merely present the idea. You will have to continue to very tactfully sell the idea over a period of time. Ideas for this type of change are often a tough sell, so the selling has to be persistent and tactful. (Remember: Selling, like litigation, is a process.) Use numbers (e.g. cost reductions, man-hours saved, and productivity gains) to show the probable, positive effect of the change. Keep suggesting – again tactfully – to your boss that things would be better for the company if you were able to spend more time in fewer/different areas. If

possible, get a credible ally to help you make your case. Just be prepared to tactfully and persistently sell your idea over a period of time. And don't forget, it is easier for everyone to deal with a slightly painful adjustment in the short run rather than with a "train wreck" farther down the road.

V. *CONCLUSION*

Our careers are extremely important to us, and changes in our work situations will continue to occur. Thus, it is wise when you are offered a new area of responsibility to take adequate time to thoughtfully analyze the situation and its true risks. This will allow you to take on (or reject) a new area of responsibility "with your eyes open." Also, once you've taken on a new responsibility, be sensitive to how you are doing, and keep the vital lines of communication open with your boss and your peers. Lastly, if you find yourself in a situation in which you are not succeeding, carefully evaluate it as well as the reasons for the performance shortfall; then take appropriate actions to improvements, both for yourself and your company. Taking these steps will not guarantee your success; however, they will put you into a better position to evaluate a new or changing situation to maximize your likelihood for a positive experience.

ADDITION BY SUBTRACTION:[©]
Adding value by identifying work you *shouldn't* do

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Introduction

I began thinking about this topic after talking with a number of other law department generalists about the wide variety of things we might do on any given day. Here are some examples of the tasks we described:

- Lawyer A had fielded a call from an office manager with a “quick question” about a problem employee who kept showing up late and wasn’t accurately recording his time. She wanted to know if she could fire the employee. After learning that the employee was in a protected class, Lawyer A wanted more background on the employee’s past behavior, and whether the problems had been raised in earlier performance reviews or counseling efforts. Lawyer A also explored whether other employees had been disciplined or fired for similar behavior. The “quick question” led to a “quick meeting” and, in all, Lawyer A spent about an hour providing this guidance.
- Lawyer B had reviewed a packet of information about a delinquent lease customer that had recently filed for bankruptcy. The account manager needed advice on what to do about the defaulted lease and the leased equipment, and had forwarded his files to the lawyer. Lawyer B, in trying to assess the pre-petition/post-petition situation, had spent about two hours trying to understand and reconcile the invoicing and payment history on the various lease schedules.

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- Lawyer C had spent about 30 minutes working on a non-disclosure agreement he received at four o'clock in the afternoon. A sales rep was scheduled to meet with a prospective customer the next morning, and the customer wanted the agreement signed before the meeting could take place. Lawyer C took 20 minutes to review and edit the document with some revisions, then had a brief conversation with the prospective customer's contract administrator to agree on the changes.
- Lawyer D spent about half the day re-writing one of the company's standard sales forms and developing a set of guidelines for the use of the form.

I suspect that these are pretty typical of the kinds of everyday tasks that are handled by generalists in smaller law departments. But my proposition is that *only* Lawyer D was engaged in the kind of work that he was really hired to do... *value-adding* work! In my view, Lawyers A, B and C were doing tasks that could have been more cost-effectively performed by someone else within (or outside) the organization. By spending time on such tasks, they were losing the opportunity to add value to their companies.

If you want to concentrate on *value-adding* activities for your organization, you must begin "subtracting" from your plate the other kinds of time-consuming activity that will distract you from your goal. I'll come back later to discuss specific strategies for delegating tasks such as these. But to begin, we need to define *value-adding* work. Mindful of our role in a business environment, the concept should be defined in terms that your business clients would understand and appreciate.

“Value-Adding” Work

The applicable business concept that executives and financial managers can relate to is “asset productivity” or “operating asset effectiveness.” They understand the importance of maximizing the productivity – and thereby the value – that can be derived from the operating assets of the business. To maximize the return, assets must be productively utilized for their highest and best use.

In our context, the “asset” is you – the inside lawyer. And your highest and best use is to spend your time on the tasks that you are *uniquely* positioned to perform. These will be tasks that take advantage not only of your areas of legal expertise, but also your knowledge of the enterprise. The specific *value-adding* tasks will not, of course, be the same for every inside lawyer, but there are two common criteria that define these tasks:

- (i) Given the inside lawyer’s knowledge of the enterprise and his or her particular areas of legal expertise, these are tasks that the inside lawyer can perform better and more cost-effectively than they could be performed by more expensive legal resources, i.e. outside counsel; and
- (ii) These are tasks that truly *require* the use of the lawyer’s skills and expertise... the tasks cannot be performed adequately by a *less* costly resource within or outside the organization.

For example, let’s assume that you are not an intellectual property or trademark specialist, and your company needs to register a new product trademark. You would ordinarily decide **not** to do that work yourself. Although you could do a lot of research and find your way to get the job done, your lack of expertise would make you very inefficient at this task. There would also be a heightened risk of doing something wrong.

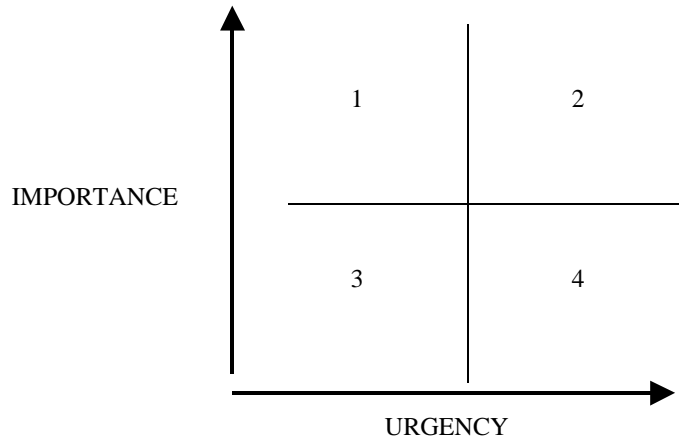
Therefore, while the outside trademark specialist may be a more expensive resource (on an hourly rate basis), the specialist's expertise and efficiency at performing the task probably makes outside counsel the better, more cost-effective choice in this situation. Doing the task yourself would not be *value-adding* work for you, because it doesn't meet criterion (i) above.

At the opposite extreme, you would probably never consider spending your time doing clerical tasks, such as filing or updating the CCH reports with the latest replacement pages. You realize that certain tasks do not require the full range of knowledge and skills that you bring to the table, and those tasks can be adequately performed by a less costly resource, such as an administrative assistant. Under criterion (ii) above, this would not be *value-adding* work for you either.

In short, your *value-adding* work is work that is neither *beyond* nor *beneath* your particular skill set and capabilities. I believe this second criterion is the one that many lawyers often overlook, especially when practicing as generalists in smaller law departments. Because there are fewer (if any) other legal resources to choose from within their organizations, they may believe they have no options for delegating less important jobs that they are asked to do. They may also fail to consider whether some tasks crossing their desks are really "legal" tasks at all. Lawyers are, after all, generally regarded as good problem solvers, and it's not unusual for managers to bring all manner of problems to their inside counsel. It's a compliment, really. But the lawyer who gets caught up performing too many non-legal tasks, or "non-value-adding" legal tasks, can be severely distracted from the goal of adding value to the organization.

The Costs of Doing “Unimportant” Work

Most of us are familiar with the Time Management Matrix, a tool that reminds us to organize and expend our efforts according to the *importance* of given tasks, not just according to their *urgency*.



For inside lawyers, the tasks we identify as *value-adding* work will be the “important” work that populates Quadrants 1 and 2 of the matrix. Since those tasks represent your opportunity to add value, you must concentrate your efforts there.

Most of us have no problem identifying and addressing the tasks that are *both* Important *and* Urgent (Quadrant 2). But the danger lurks in Quadrant 4! These are the ‘squeaky wheel’ tasks that may not be as important as others, but they scream for our attention because of their “urgent” nature. It can be easy to fall into the trap of sacrificing tasks in Quadrant 1 (Important – but not Urgent) to those in Quadrant 4 (Urgent – but not Important).

How often do you fall into that trap and spend time on non-value-adding tasks?

Everyone does to some degree; but bear in mind...

30 minutes in an 8-hour day	=	6 % of your time;
45 minutes	=	almost 10 % of your time;
90 minutes ...	=	nearly 20 % of your time.

It's easy to see how a significant percentage of your time can be consumed by work that is not *value-adding* work.

Do the math. Let's assume you give the company 2000 work hours each year. If you spend as little as 10% of your time on non-value-adding work, you've lost 200 hours of time for more important, *value-adding* work. If the time spent on Quadrant 3 and 4 tasks is more like 20% of your time, you've lost 400 hours!

And what will happen to the "important" tasks waiting to be addressed while you are busy doing less important work? Three options:

1. You will spend a lot of weekends and evenings making up for the lost time. Indeed, to make up for 200 – 400 hours of lost time, you would have to work an additional five to ten hours in *every* work week. Not a very desirable option.
2. The important tasks just won't get done. Also not a very desirable outcome... and certainly not the way to add value.
3. Most likely, you will off-load a little bit more of the important work to outside counsel.

But even with the most likely scenario, there is a serious problem. First, since the off-loaded *value-adding* work is, by definition, work that you are uniquely qualified to perform – work that you can perform better and more efficiently than outside counsel, the

task that might have taken you ten hours may end up taking fifteen or twenty hours for outside counsel to do. (You have the business familiarity... they don't; you have ready access to people and information... they don't; you can focus on real issues and pragmatic solutions, and do not feel compelled to over-research and over-analyze every issue.) Consequently, when you off-load 200 – 400 hours of *your* time to outside counsel, this may translate into 400, 600 or 800 billable hours of law firm time... kind of like the relationship between human years and dog years.

Second, remember that outside counsel is, on average, a more expensive resource than you are. Compare the range of average hourly billing rates in my market, Chicago¹:

	<u>Size of Law Firm</u>	
	<u>Over 100 lawyers</u>	<u>20 – 100 lawyers</u>
Equity Partners	\$ 248 - \$ 500	\$ 226 - \$ 373
Income Partners	\$ 195 - \$ 372	\$ 182 - \$ 290
Associates	\$ 154 - \$ 286	\$ 140 - \$ 225

In short, the average hourly rate for the lowest cost, least experienced associates at small-to-medium sized firms in Chicago is \$140. That's pretty close to what it costs my employer to pay me, in terms of a fully-loaded, average hourly rate... and I have 20 years of experience! For my company to get a comparable level of experience on the outside, it would likely have to pay an hourly rate at least twice as high.

The bottom line? When you allow unimportant, non-value-adding work to absorb your time, and thereby have to push some of your *value-adding* work onto outside counsel, your client will be paying for a resource that could take twice as much time to do the task, at rates that could be twice as high as yours. This is not a value proposition you

can sell to your management. To the contrary, your value proposition should be more in line with the following well-accepted management principle:

*WORK SHOULD BE PERFORMED BY THE LOWEST COST RESOURCE
CAPABLE OF PERFORMING THE TASK ADEQUATELY.*

The following principles then flow from this:

- Lawyers are generally expensive resources... outside lawyers especially so.
- Work that can be performed (adequately or better) by inside counsel should *not* be referred to more expensive outside counsel, if that can be avoided.
- In order to keep as much of this *value-adding* work inside, inside counsel should not spend time on non-legal tasks or on work that doesn't require their expertise.
- Inside lawyers are, after all, still expensive when compared to other resources that may be available within the organization to perform such tasks, such as: full or part-time paralegals; administrative assistants; employee relations specialists; collection specialists; and so on.
- Therefore, work that does not require the expertise of the inside lawyer... work that can be performed adequately by less expensive resources... should be delegated to those resources.

Finding and Using Lower Cost Resources

Let's go back to the original situations and explore how Lawyers A, B and C might have avoided the time lost to these urgent – but **not** *value-adding* – tasks.

¹ Source: "Chicago Lawyer Survey 2001"; *Chicago Lawyer*, June, 2001.

Lawyer A lost an hour of her day counseling an office manager on a garden-variety employee relations matter. I'm not suggesting that such preventive counseling isn't important; it clearly is. The question is: Who should be responsible for such counseling? Front line counseling on employee relations and performance issues is an HR function that can be adequately performed (at less cost) by a qualified employee relations specialist or HR generalist. Lawyer A can be the sounding board for this person and provide periodic training on legal developments in employment law. (This would be the cost-effective and *value-adding* use of Lawyer A's time.) If Lawyer A's company does not have an HR person, Lawyer A may need to make the case to management that such a role is needed. Otherwise, Lawyer A will be *informally*² adopting the additional role of an HR specialist, which is not the highest and best use of her time.

Lawyer B spent a couple of hours doing classic paralegal work... reviewing a file to gather and accurately capture the essential facts necessary to provide legal advice. If Lawyer B does not have a paralegal or an administrative assistant capable of handling this type of work, he should be re-thinking his staffing. I can hardly imagine any in-house legal department, even that of a solo lawyer, that could not profit (benefits exceeding costs) from having capable paralegal/ administrative support, even if only on a part-time basis. Lawyer B also had another option. His company did a lot of equipment leasing and there were undoubtedly people in both Accounts Receivable and Leasing Operations who were quite familiar with how leases were structured, documented and billed. Since the company frequently dealt with lessee defaults and bankruptcies, Lawyer B could provide training to educate these staffers on the essentials of bankruptcy and,

² As my co-panelists have thoughtfully discussed, there are some pro's and con's to wearing such an additional hat. But the key point is to make the choice knowingly and voluntarily, not to have an additional

thereafter, the staffers could properly work up the file, prepare proof of claim forms, etc. before presenting the problem to the lawyer for legal decisions and advice. The time savings in the long run would be well worth the one-time investment in such training.

Lawyer C reviewed and negotiated a contract; a traditional “legal” task. But, in this case, not one that required the expertise of a seasoned lawyer. Note that the other company was using a contract administrator to handle the matter on its end. Many companies use contract administrators or contract specialists to handle routine and repetitive tasks related to the use of everyday contract forms and documentation. I worked for a large, centralized law department in the 1980’s that developed a “Contract Manager” program to provide on-site, front-line contract support for our geographically dispersed business units. Our law department invested the time up front to hire and train these professionals, and the program was enormously successful. The Contract Managers gave the business units great response time, even on the smallest matters; they became closely integrated members of the business units they supported, giving us greater and earlier visibility to developing situations that might benefit from legal support; they cost the company only about half as much as the lawyers; and they freed up the lawyers to focus on the bigger deals and more sensitive matters that required the higher level of legal expertise.

Had Lawyers A, B and C been able to delegate their tasks to such other, less costly resources, the business problems would still have been adequately addressed, but the lawyers would have been able to stay focused on more important matters. They simply failed to ask, “Who else *could* be doing this work? *Should* be doing this work?”

role thrust upon you without recognizing it or agreeing to it.

Inside lawyers may have to be creative in finding the answer to that question. It would be artificial to suggest that you would be saving the company money (only in the legal budget), so long as the company adds an employee relations specialist in HR, a collections specialist in accounting, and a contract manager in sales. The business case may not support the addition of headcount in any of these roles. But consider these approaches:

- Offer to train existing personnel in another department to take on a new role. Sell the other department head and the staffer on the idea by emphasizing that it's a career development opportunity.
- If you cannot justify a full-time paralegal in your department, don't overlook the possibility of creating a part-time position. Or consider creating a hybrid position and "splitting" the cost with another department. For example, find a paralegal with experience in employment law and an interest in the HR field. Create a position that is half-time paralegal and half-time HR generalist, and split the cost with HR.
- Temporary attorneys can be used cost-effectively to handle routine contracts and other miscellaneous legal tasks on a demand basis. In both my previous job and my current one, I have found great value in using a staffing agency to engage a more junior attorney to work on a part-time assignment, with hours varying according to demand. Even with the staffing company's markup, the hourly rate was far less than the rates charged by our outside law firms for a comparably experienced attorney. With a reliable resource that allowed me to push less

sophisticated work *down* to a lower cost resource, I avoided having to push that work (or other work) *out* to more expensive resources.

- If you're really frugal (read "cheap") and have the kind of practice that could regularly use a lawyer-in-training for research or paralegal-type work, some law departments have structured internship arrangements with local law schools. The company pays nothing or a nominal amount, and the student gets course credit for putting in a regular schedule of work.

Alternative, lower cost resources are out there to do the kind of work that is not the highest and best use of your time.

Conclusion

When inside counsel makes a habit of delegating non-legal and less important work to resources that are more appropriately suited to those tasks, he or she makes it possible to stay much more focused and to do a better job on the important problems facing the client. It also allows inside counsel to get more work done inside, thereby reducing the company's reliance on outside counsel and holding down the overall cost of legal services. It becomes easy to see ... and to demonstrate to management ... how the inside lawyer is adding value. And all it takes is a little subtraction.