

DEPARTMENT MANAGEMENT



BY JOHN H. OGDEN

RESOURCE



Creating a Virtual Legal Department

MULTIPLIERS:

Why a Virtual Legal Department?

I often find myself apologizing when conversations take a turn toward the subject of technology. To readers who sighted *virtual* and hoped for a good read on high tech legal departments, I must apologize — again. The value of this general counsel's virtual department lies not in cyber networks but in the linked competencies of human and professional relationships whose quality and flexibility sustain excellence.

The virtual legal department can be defined as corporate resources (inside and out) leveraged for the greatest efficiency, effectiveness, and value. Ours is based on two premises. The first is that a corporation is best served by attorneys well versed in its operations, goals, and culture, allowing for legally sound, proactive, and practical advice and actions. The second premise is that legal departments are not and should not be exempt from corporate America's drive for optimal efficiency. Indeed, given the corporate world's view of the legal department as cost center, some have borne an excessive (and for the corporation, a potentially dangerous) share of the load in "rightsizing" (or other terms *du jour* under the heading of cost-cutting). Since both premises are likely to impact in-house practice for the foreseeable future, legal departments must be adroit at using a changing mix of resources to sustain high quality work product. Hence the need and responsibility to *virtually* expand most legal departments by multiplying resource effectiveness.

For more than a decade I have been my company's only attorney and am therefore responsible for the entire range of legal issues affecting it. (Although, to put this in context, the group of companies to which mine belongs has approximately 50 attorneys, all situated and admitted in Europe.) In addition, like 52 percent of general counsel responding to a recent Altman Weil Pensa survey,¹ I have operational responsibility for several business functions² and serve on or lead several crossfunctional teams and committees. I also litigate, serving as lead counsel or second chair when and as appropriate. Making time available for those as well as ACCA activities and maintaining at least a somewhat healthy quality of life requires time management (which I admit to doing badly) along with managing resources in nontraditional ways. This article will only address activities I have implemented successfully (and one idea which has not yet gained momentum): part-time attorneys, legal research firms, networking, and using retained counsel in new ways. Figure 1 illustrates many other methods to consider.



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Part-time Attorneys

Two attorneys work part-time for my company. Each is a sole practitioner with other clients (one with corporate clients, the other with individual clients). Each bills hourly at a rate substantially below market. They are comfortable doing so because, to a large extent, they use company resources on company property, rather than their own. No particular amount of work is guaranteed, but open discussions take place about how much is expected so that they can plan.

One attorney is a colleague from a previous job, who after corporate and law firm experience maintains a practice of working quasi-in-house for (nonconflicting) corporations. The other attorney, an MBA with a JD, previously practiced at law firms and gradually grew into the position with my company after working per diem, for lifestyle and family reasons, with one of our retained counsel. The arrangement with my company meets those lifestyle and family requirements while providing the satisfaction of ongoing representation of a known client base.

To optimize the value of part-time attorneys, it is extremely useful to decide carefully who will handle which issue(s) and thus minimize working reactively to whatever matters arise, so-called “in-box management.” For example, my company is ISO-9001³ certified. The legal function’s role in maintaining this important certification consists of addressing certain types of matters within a prescribed time. Having flexible additional capacity is a crucial element in fulfilling that obligation. In fact, one or the other part-time attorney has primary responsibility for most ISO-mandated matters. I am involved only if questions arise that they cannot address or if they are unavailable.

Our business is such that most transactions begin with secrecy agreements and progress to relatively complex contracts. These are extremely time consuming and the part-time attorneys have the lead in drafting and frequently negotiating.

Litigation is considerably easier for me with part-time attorneys to assist with interrogatories, depositions, draft pleadings, and so on. Recently I had to participate in a multiparty court-ordered mediation in a remote jurisdiction. One of the part-time attorneys had organized the proofs and generally prepared the matter with a view to briefing me before my appearance at the mediation. Just before mediation a complex matter arose that required extensive travel and time commitments. This prevented me from having full command of the facts needed to participate in the mediation. Because of the part-time attorney’s thorough familiarity with the issues (albeit without the length of experience with the company to attend the mediation alone), we were able to attend the mediation together and bring it to a satisfactory conclusion.

The other part-time attorney, in addition to handling ISO-mandated issues, specializes in monitoring and supervising insured cases. This attorney also handles various construction matters because of expertise in such matters as a former practicing engineer and as an attorney.



As unwise as it would be to add a full-time attorney to staff without formal training and familiarization, it might be less damaging than doing the same with a part-time attorney, who would have fewer opportunities to pick up the requisite knowledge on the job.

The division of labor is a combination of finding suitable attorneys for specialties and making the best use of their other skills.

Except for billing arrangements, I view the part-time attorneys as staff. Even more importantly, I expect the clients and others with whom they deal to also view them as in-house attorneys. By this I do not mean their status is misrepresented but that I want their knowledge about company goals, objectives, and culture to be viewed on a par with staff attorneys' knowledge of these matters.

To make the most effective use of part-time attorneys, an investment in time (and therefore money) is required. Before any part-time attorneys take on assignments, they are thoroughly briefed on the legal issues facing the company and its position on those issues. Instructions are given as to negotiation fallback positions and when to seek guidance. Introductions are made to appropriate personnel at every level. In short, part-time attorneys are trained in much the same manner as a full-time staff attorney. In fact, as unwise as it would be to add a full-time attorney to staff without formal training and familiarization, it might be less damaging than doing the same with a part-time attorney, who would have fewer opportunities to pick up the requisite knowledge on the job.

There are many options for incorporating the work of part-time attorneys. Setting regular hours for them to be on company premises, however, has met with limited success. Naturally the predictability of this approach helps in managing the situation, but unfortunately issues do not always arise when part-timers are available. It is important to recognize the need for flexibility in this regard. In my situation both attorneys have other clients and family situations that prevent them from being available at a moment's notice. It is therefore important to maintain files in such a manner that staff can cover for one another as required. Excellent administrative assistance is also invaluable in integrating efforts and work product.

Interestingly enough, several technological steps that were expected to aid considerably in integrating the work product appear not to have made a significant difference. One of the part-time attorneys has voice mail and an email address in the company system. Access to company communications technology was expected to improve communication with me and others in the company, since both systems are used extensively. Thus far, though, they have not been much better than using the voice mail and fax systems these attorneys use in their own practices. The only improvement is the ability to transfer lengthy voice mail messages in their entirety without risking losing something in the translation. I am certain different methods will be tried in the future, because I know others in similar situations have increased efficiency through technology.



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Legal Research Companies

I don't have much to say about legal research companies other than to recommend trying them. Although I have not even attempted to impart the legal "intangibles," such as corporate culture, goals, and so on, to legal research companies and suspect it would be unrealistic to do so, they are an excellent extension of available resources.

With good research companies particular issues can be framed quite precisely and senior-partner-level work product can be had at associate rates. Work can also be done on a lump-sum basis pursuant to an agreed-upon schedule. This certainly describes a process closer to what one would expect from an employed attorney than from retained counsel. Work can even be completed in stages, just as you would do it yourself or have it done by a staff attorney. By this I mean you can speak with a company representative, typically a very experienced attorney, and ask that a preliminary review be done through a short written or spoken report. You may then decide yourself or in consultation with the research company if and how the research should proceed and the extent required. The result can range from an overview to a detailed memorandum or even a brief ready for submission to the court.

Because the legal research company is not practicing law, but merely assisting you in your practice, costs are lower (you avoid paying for a partner to review the work of an associate plus firm overhead). While completely legitimate, these added costs are also totally unnecessary if all you need is some research that could be done in the department if you or your staff had the time. In addition, since research is the only business of these companies — and in my experience they treat it in a most businesslike fashion — I expect you will find this aspect of your work among the most efficient from the perspectives of time and cost.

Retained Counsel (A Somewhat Unorthodox Approach)

In two key practice areas, employment law and environmental law, I have retained trusted outside counsel who serve as *de facto* assistant general counsel, who were selected after a formal search of law firms and attorneys.

The training and familiarization process for these retained counsel was similar to what the part-time attorneys received. The designated attorney and an alternate periodically attend company meetings with me to familiarize them with company operations. Equally important is that they know key company employees and the employees know them. I also provide introductions to other professionals retained by the company, such as occupational physicians, industrial hygienists, environmental engineers, and so on. The goal is for a legal team to be in place to respond when I am not available.⁴ Additionally, familiarity with the company's operations allows retained counsel to provide more proactive advice than a less involved, more sporadic engagement.



With the proper training and management, the part-time or retained counsel can be resource multipliers that allow a general counsel to virtually grow the legal department by adding quasi-assistant general counsel in basic areas to a small department or by adding highly specialized capabilities to a large one.

My company is large enough to have significant problems in these areas but not large enough to have full-time dedicated legal staff. As general counsel, I keep informed about employment and environmental law, but there is no real substitute for true day-in, day-out specialization. The relatively small investment of time necessary to get retained counsel up to speed on company activities and keep them there will effectively ensure first-rate knowledge about these legal areas *and* the company.

At my company counsel in these areas often deal directly with the client, and I am kept informed just as if an assistant general counsel were dealing with business colleagues. I exercise control over the process, not every individual matter. I do not become directly involved unless counsel or the client deems it necessary. To ensure that this approach yields the optimal level of legal services at a cost commensurate with the seriousness of the matter, I have consciously taught my business colleagues in those areas to be sophisticated legal consumers. With the proper training and management, the part-time or retained counsel can be resource multipliers that allow a general counsel to virtually grow the legal department by adding quasi-assistant general counsel in basic areas to a small department or by adding highly specialized capabilities to a large one.

Another approach for employment or environmental issues is for me to provide advice that I believe to be very nearly complete or accurate and refer the client to specialist counsel for confirmation of the advice *in toto* or a specific aspect. Of course, I may also contact specialist counsel myself or may involve him or her directly with the client.

Several other approaches I use with retained counsel also expand the effectiveness of the legal resources available to my company. For intellectual property (primarily patent) matters, I have gone through a selection process which, while not as extensive as those for environmental and employment counsel, has yielded counsel who are experts concerning my company's technology if not its business principles. Patent counsel frequently interact directly with technical personnel, and while the situation has not lent itself to developing a relationship where they might proactively participate in decisions about what to patent, they are in a position to respond quickly and consistently to questions of potential infringement. The relationship seems not unlike many companies whose intellectual property practice is a unique entity within the corporation.

Law Firm Litigation Support

My litigation practice does not warrant keeping a skilled litigation paralegal on staff, but my company is able to be a more effective litigant by using paralegals



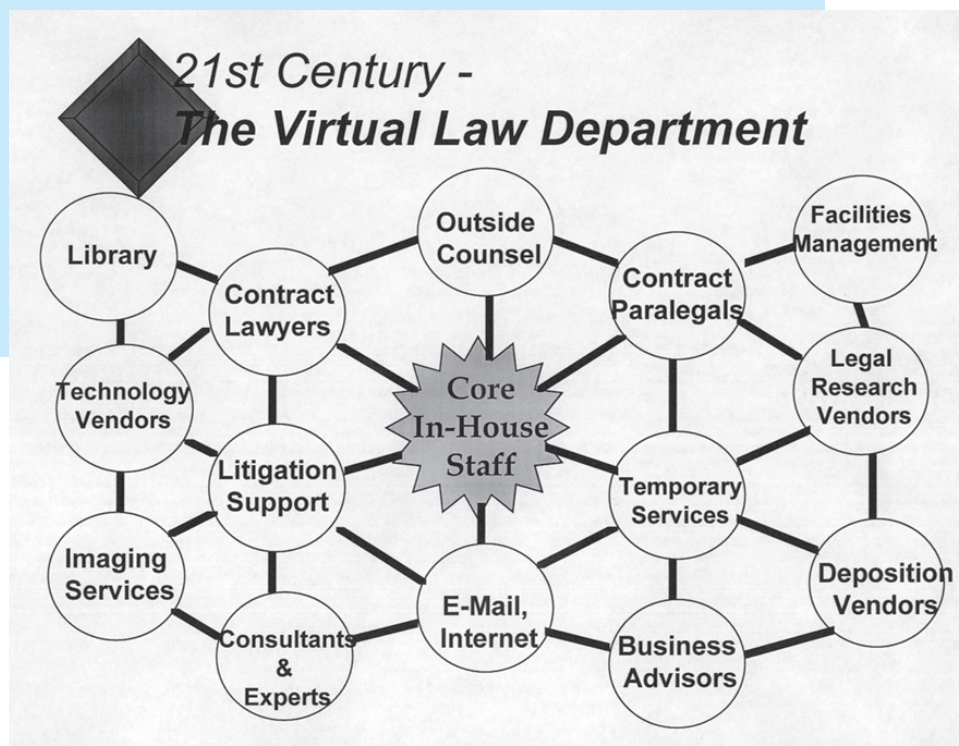
CONTRACT ATTORNEYS

by Thomas Y. Allman, Senior Vice President and General Counsel, BASF Corporation

Attorneys placed by agencies directly into the legal department can be particularly useful resources. Agencies employ or contract for the attorneys, popularly known as contract attorneys, and the legal department has no direct employment relationship with the attorney. In some departments, anywhere from 5-10 percent of the lawyers on staff have that status and are performing work and interacting with clients under the supervision of attorneys employed on a full- or part-time basis. Contract lawyers can handle specific long-term projects or meet needs deemed not important enough to try to challenge an employee headcount restriction. In some cases keeping a percentage of the workforce in contract status provides a built-in hedge against declining workload. The most effective use of contract lawyers is to give them meaningful work and consider them for full-time openings as they occur. Some agencies offer a full range of benefits and a 401(k) plan to their employees. At a minimum, the agency must handle the deduction of payroll taxes and provide other controls to assure that there is no employment relationship created with the legal department. Properly done, with a clear understanding of the ethical and legal implications, the contract lawyer can be a highly effective supplemental resource of great effectiveness.

Figure 1

Note: Presented by Daniel J. Dilucchio Jr., of Altman Weil Pensa (Newtown, PA) at the February 1997 ACCA Board of Directors meeting and originally published in *Metropolitan Corporate Counsel* (Vol. 4, no. 11), 60.



Do you have experience in creating a similar virtual legal department with strategies the author has not tried? Share your approach by accessing memberspeak on ACCA OnlineSM (www.acca.com).



and law clerks from law firms with whom we have a longstanding relationship to assure quality service. Law students appreciate the exposure, the firms value the contact, and in my experience clerks are reliable and hard workers. I have even used a *Referendar* (a candidate for admission to the German bar). The many benefits⁵ that arise from having a corporate generalist litigator would not be possible without a skilled and experienced litigator — in-house if possible — who is also a trusted colleague and familiar with overall company goals and issues to review and comment on work product.

The Sounding Board: An Untested Resource

At the beginning of this article I indicated I would be addressing only approaches I had used successfully with one exception: the sounding board — which I have yet to persuade any law firm to try. Law is, to a large extent, a collaborative profession. In a law firm or large legal department, a practitioner can bounce ideas off respected colleagues. This is not the same as involving the colleague directly or indirectly in the matter (even partially), but asking them to be a sounding board, particularly in the formative stages of a matter or when you are stuck and need to discuss alternatives. Normally this does not take too long. I have proposed to colleagues at law firms I use frequently that a lower rate apply for such services, particularly since the discussions would take place only with partners who to some extent do not have the same pressure with billables that associates do. Sounding board services are different from legal advice with its potential liability and need for comprehensive treatment.

My proposal is as follows: if I call and the partner can spare the time, the firm bills me at a lower rate. If the partner is busy, it would be my choice to accept the usual billing rate or wait until the partner is free. I have never persuaded anyone to try this and, with the increased involvement of part-time attorneys, have given up. If anyone has used this method or intends to, I would be interested in hearing from you.

Networks

Except for association executives, who exhibit a comparable level of cooperation, I have never known a group of professionals as cooperative with one another across organizational lines as in-house attorneys. As an active ACCA member, I have enjoyed this cooperation for many years. For several years I have not retained counsel or agreed to a mediator in a remote jurisdiction without a local in-house counsel's recommendation. As my involvement increased, I found myself able to call someone I knew personally, but I never had a problem with cold calling a Chapter president: they either helped me personally or referred me to someone who could. (As a former Chapter president, I have fielded many such calls myself.)

What this means to my company is that it enjoys some of the benefits of having regional staff counsel in areas where none are employed. My office is in New Jersey but my company's business is far flung. I frequently encounter in-house colleagues who are able to acquaint me with matters in a remote jurisdiction, such as the intricacies of the local bench and bar, as well as corporate clients of the

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local bar. This is extremely useful and while these virtual regional counsel are, of course, not able to act on behalf of my company, such assistance when issues arise is invaluable.

Similarly to ACCA's Chapter networks, the association's National Committees offer some of the benefits of having specialized staff counsel in various substantive areas. (The benefits of both networking groups can be found in Chapters with active local committees.) The committees provide access to similarly situated colleagues with whom you can benchmark or even just shoot the breeze, which often produces excellent ideas. They also present the current and upcoming state of the law locally and at ACCA's Annual Meeting, contribute *ACCA Docket* articles, publish *Counsel* (a periodic newsletter on important developments in the committees' specialized areas of practice), and other resources that can be accessed through ACCA. No matter how large or strong a legal department is, it cannot be the very best in every aspect of its practice. Moreover, the practice of corporate law is so dynamic that staying the best requires constant contact with other practitioners.

Networking even has extraterritorial application. I had to travel to the People's Republic of China to attend crucial negotiations. We were very well represented in New York, Hong Kong, and Beijing by a law firm whose attorneys provided not only excellent legal counsel but also advice on the commercial and even social nuances. What they could not do, however, was provide the "in-house spin" vital to maintaining the good working relationship I had established with our business partners whom I had met several times in the United States. During my trip, I was the only company representative in dealings with our Chinese business partners. This is significant since their view of attorneys is radically different from ours. I remembered a colleague from Wisconsin who was general counsel to a company somewhat similar to my own who had also been heavily involved in China. He returned my call at home on a Sunday evening and described his experiences as an American in-house attorney negotiating in China. Thanks to him, I was able to successfully address the appropriate issues while maintaining a good relationship.

In-house colleagues also assist in navigating the waters of corporate practice. Several years ago I was asked to assume a role in a newly formed affiliate company. The nature of its operations were such that it was not appropriate for me to assume the comprehensive and proactive role I perform in my primary position. Although our group of companies faced those issues worldwide and I was able to talk with in-house colleagues in other countries, the only American attorneys involved were retained counsel who naturally had a different perspective. Thanks to a brief conversation with a respected former ACCA chair, I modified my approach slightly and the arrangement has run successfully since.



A final note on networking. I firmly believe ACCA offers unparalleled and focused networking opportunities for in-house counsel, irrespective of location or practice expertise, but one should also have supplemental sources. For some it is the ABA, state bar, local bar, or a trade association. For me, the European-American and the New Jersey general counsel groups, both of which are somewhat unofficial, are most useful. No matter which networking group(s) you choose to become involved in, be interactive. The more involved you become, the higher the quality of your work.

Conclusion

Although not cutting edge or highly sophisticated, these approaches to leveraging an existing legal department's capability and expanding its efficiency are most effective. The current business climate, which is expected to last for some time, mandates that companies be versatile and intelligent in their use of resources. Legal departments will face the same challenges. Indeed, cost cutting in other areas may very well increase the need for a proactive, highly effective department. Using these resource multipliers will meet that need. □

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Notes

1. *Law Department Functions and Expenditures Report-1997 Survey*, Altman Weil Pensa Publications, Inc.
2. For a discussion of how attorneys can effectively perform several roles, see John H. Ogden, *Legal and Business Functions: Corporate Counsel Juggling Multiple Roles*, ACCA DOCKET, Vol. 10, no. 2 (fall 1992), p. 22.
3. This is a certification by the International Standards Organization in Switzerland indicating that an approved quality management system is in place. ISO certification is useful in many markets and essential in others.
4. I wholeheartedly recommend making yourself unreachable while on vacation. Resource multipliers have made it possible for the first time ever to be incommunicado on vacation. Try it! Tell your clients you'll be better able to represent them after a refreshing vacation.
5. For a discussion of the benefits derived from such a practice, see John H. Ogden, *Litigating the Corporate Generalist, a Necessary Skill*, ACCA DOCKET, Vol. 12, no. 3 (summer 1994), 54.