

Report to Legal Management

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The Effective In-House Lawyer Knowing How to Say No to a Client



James Wilber

By James Wilber

My colleague Dan DiLucchio recently published an article in the June 2006 issue of *Corporate Counsel*, an American Lawyer Media publication, about the “go-to” in-house lawyer — a lawyer with whom corporate business executives want to work, to whom they turn with confidence and who stands out from the rest, for a variety of reasons. Perhaps the most important attribute of such lawyers is how well they facilitate the business objectives of the clients they serve.

Lawyers, of course, often have to tell clients, “No, you can’t do that.” Failing to tell clients “no” when that is necessary can obviously lead to major problems, as we saw at Enron and other companies where lawyers felt strong pressure to do what clients wanted and the failure to rein in clients lead to bankruptcy, civil litigation, criminal charges and long prison sentences for some of the executives. Effective in-house lawyers know how to pass along this bad news in such a way that clients understand why the advice is given. That effectiveness, however, is only as good as the lawyer’s ability to find creative alternatives to facilitate the client’s business objectives when the initial suggestion is not legally permissible or does not comport with the amount of risk the company wants to assume. It’s clear that how well lawyers facilitate business objectives is of primary concern to those they serve.

The Nay-Sayer Syndrome

Other than results — and by results we mean whether transactions are consummated or litigation is brought to a successful conclusion — the most important metric bearing on the success of a law department is client satisfaction. Our experience tells us that, overall, clients of law departments are generally pleased with the substantive quality of the legal services they receive, but that they sometimes complain that the law department does not assist them sufficiently in furthering business objectives. A common refrain is that “I would appreciate fewer no’s and more solutions.”

Indeed, it is often the case that a law department’s performance is inconsistent in terms of each individual lawyer’s ability to act effectively as both legal and business advisor. Clients make it clear that some lawyers

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need to put their “business hats” on more often, offer *solutions* to legal issues and provide clear assessments of risk so that business executives can make good, informed decisions. Some in-house lawyers are very creative at finding solutions for the business people they serve, but others are too quick to say, “No, you can’t do that,” and then offer no alternatives.

The issue arises with such regularity in our work with corporations that we have given it a name — the “nay-sayer syndrome.” Nay-sayers are too quick to dismiss client objectives by asserting that what clients want to do cannot be done, and to leave it at that. Clients are frustrated at this kind of negative — and non-constructive — response.

Of course, in some situations, the answer has to be “no,” but understanding how to effectively deliver that negative message is critical to the establishment and maintenance of superior client service. It’s not that a lawyer has to tell a client, “no,” it’s how he or she delivers the advice that is most important.

But knowing how to say no is not enough. Clients want to know that their lawyers have been as diligent as possible in attempting to find other ways in which to accomplish business objectives — a lack of creativity on the lawyer’s part, real or perceived, will always lead clients to believe that their lawyers inappropriately are standing in the way of business goals.

To alleviate the risk that a client’s view of the law department will be jaundiced by perceptions that the company’s lawyers are nay-sayers, the effective in-house counsel is proactive in explaining to clients why a conservative legal position is necessary and appropriate. More than that, it is up to counsel to ensure that they and their clients engage in a collaborative process to determine what legally can and cannot be done. Thus, although sometimes a “no” has

to be the end of the conversation, as much as possible it is the lawyer’s job to find ways to facilitate client goals in a manner consistent with prudent legal advice — in which case the response to the client changes from “no,” to “no, but...” — or to work closely with clients in ensuring that they understand why it might not be possible to pursue the objective.

All lawyers in law departments need to understand that, ultimately, they are competing with outside counsel for the client’s legal work.

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That is, companies can send more work to outside lawyers and even outsource the entire legal function if they are dissatisfied with the services being provided by in-house lawyers. Those who provide the service clients want and expect, whether they be inside or outside, are likely to be given increasing amounts of work. For in-house lawyers, responsiveness, timeliness and creative problem solving are areas in which they can positively differentiate themselves from outside counsel. General counsel should develop training strategies to address the nay-sayer factor, including increased communication with clients and opportunities for

them to provide candid feedback about the issue. For example, general counsel should consider:

- maintaining an ongoing dialogue with the department’s lawyers about the nay-sayer issue to ensure that it is top-of-mind
- determining at the hiring stage what the prospective candidate’s views are about the issue by asking him or her to respond to a hypothetical question about how he or she would handle the situation
- evaluating lawyers in the formal performance appraisal process regarding their facility in striking the right balance when telling clients “no”
- continually seeking feedback from clients about the department’s performance and that of its individual lawyers regarding this important issue.

Law departments need all their lawyers to understand the importance of being facilitators of the company’s operational objectives. That is, they need lawyers who do not automatically say, “No, you can’t do that.” Overcoming too much cautiousness cannot be accomplished without proactive effort, dialogue and training. In these post-Enron days, however, a general counsel obviously has to instill in the department’s lawyers a hyper-sensitivity regarding the need to say “no” when that is the appropriate course of action, and to be able to stick to that advice. The key, of course, is how to say “no” in a manner that clients understand and ultimately agree with. ♦

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