The Sword Vs. The Shield: How to Transform your In-House Legal Department into a Profit Center

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Introduction:
The Sword vs. the Shield concept, or philosophy, was presented to me in my first year of law school by my contract law professor at Chicago-Kent College of Law, in Illinois. On that particular day, she lectured on the basic principles typically relied upon when drafting contracts. The two foundational principles presented and discussed were:

1. Drafting a contract as a way of attacking the other side or, as we commonly refer to it today, creating a “one-sided contract,” where the terms heavily favor the drafting party. Taking the offensive in this way is really about wielding a “sword”.

2. Drafting a contract with defensive or protectionist clauses as a means of defending one’s position. This is what we refer to as using a “shield” to protect ourselves from risk.

At the time, still a little wet behind the ears as an aspiring attorney, the thought of having to choose between the one drafting technique and the other baffled me. So, I asked, “why can’t you do both?”

Needless to say, my professor was less than pleased with my interruption, but I somehow managed to graduate and have had the benefit of time to rethink the question, reconsider the answers and learn how to apply the implications of both over the years. And, most importantly, I’ve had a chance to use both of the principles learned in that classroom several years ago in multiple ways in my current position as in-house General Counsel. By fully exerting both the “sword” and the “shield”, I’ve been able to transform my department into profit center for my company.

Background:
Like so many in-house attorneys taking on the role of General Counsel for the first time, I was initially concerned with fitting into the overall structure of the business. My current organization is a logistics business. We serve as the intermediary between manufacturers/retail organizations and freight companies to facilitate the rapid and safe transportation of products from warehouses and factories to store shelves. The primary focus is on providing the best possible service (on time pick up, on time delivery, delivering the shipments without claims and losses, etc.) at the most reasonable cost. It is a highly competitive, fast-paced, sales-driven business model in a service industry where the name of the game is profits and margins.

Those two words – profits and margins – are seldom, if ever, uttered in a corporate legal department. At least not the ones I have been privy to. Most legal departments are cost centers, established and funded by the CEO and/or board of directors as a necessary evil to appease the risk concerns of shareholders. In other words, most in-house departments operate primarily according to the “shield” principle. Every day, the General Counsel is
challenged by figuring out ways to reduce costs, keep head count at a minimum and generally justify the existence of an in-house attorney and staff rather than outsource their responsibilities to a firm – or several specialty firms – to avoid payroll, taxes and benefits.

So, how do you change that perception in your organization? Over the years, I have been told by our CEO that the role of the General Counsel can be a very powerful and valuable one. Ideally, the General Counsel can transcend all organizational boundaries, from customer sales and operations to human resources and accounting. Unfortunately, most in-house legal departments and the attorneys that run them don’t recognize this unique situation and, instead, work out of the equivalent of an intellectual silo to control all aspects of the risk management of the company. This paper is intended to offer you practical ways to help you break out of that corporate equivalent of the academic ivory tower. By becoming more involved in the business side of your business and wielding the influence you have, you can transform your in-house legal department into a profit center. As a result, you will add real value to your business and become an active, revenue-generating participant in the business. This requires wielding both the sword and the shield in appropriate ways and at opportune times. It involves:

- Assessing your strengths and weaknesses
- Defining the role of the General Counsel and the office
- Staffing/training your department
- Planning and developing the service offering
- Marketing the service offering

1. Assessing Your Strengths and Weaknesses

While most legal departments share some similarities (including a lead attorney, several administrative support staff, a book shelf full of reference materials that collect dust) and share a common mission – namely, of minimizing risk in every aspect of business operations - there are many variables that can contribute to the success, or failure, of combining the sword vs. shield philosophy. Internal politics, organizational structure, business model, CEO support and company values all play a role in whether the legal department can become a more involved player in the day-to-day operations of the business. The General Counsel’s ability to understand the difference between formal and informal power and the skillset needed to appropriately flex that power also influences the outcome. While I am not advocating doing a full blown S.W.O.T. (Strengths, Weaknesses, Opportunities and Threats) analysis to determine your strengths or weaknesses, I am advising you to observe and understand the opportunities and obstacles that are present in your own work environment before you can transform your department into a profit center.

Let me illustrate through an example from my own business. Every day, our sales staff is challenged to sell our services, which we believe are best in class, while explaining to the prospective customer why the buyer should pay a premium price in return. Even as I was writing this paper, I attended a client meeting with one of our senior sales representatives. The client, one of the world’s best-known and largest confectionary manufacturers, made a point of telling us that our prices are higher than those of our competitors. My role in the meeting was to help explain the value-added services that my company provides and, in particular, the additional unique value that I provide on behalf of our company as General Counsel. Because I understand and can communicate the nuances of the business and explain the value proposition that my team offers in terms that are understood by the client, we tend to win more contracts. (Of course, even though the client may agree that it makes sense for them to pay a premium for the additional services provided through the
legal team, the conversation then often revolves around how much of a premium the client is willing to pay for the added services! The negotiation process that then often ensues is beyond the scope of this paper.

2. Defining Your Role and That of Your Department
The example above also shows that the role of the General Counsel and the function of the in-house legal department do not need to fit so easily inside a pretty little box. After analyzing the strengths and weaknesses of your department, the next step is to define your role as broadly or as narrowly as the business and your company dynamics will permit. The key is to determine what those boundaries are and how to best utilize the skills of those in your group to expound upon them. Once you have figured this out, the next step is to articulate the exact components of your service offering and communicate those internally within your organization and decide who you will market those services to.

3. Staffing and Training Your Department
Your own team needs to be at the forefront of these transformation efforts. Of course, you need to help them understand the technical requirements of the service offering through extensive training. In addition, you will also need to instill a certain entrepreneurial mindset within your team. This can sometimes be difficult, as a shift from a reactionary world view to a proactive stance often requires that individuals change. That can be an uncomfortable process. Someone hired to examine contracts in a back-office capacity may not be suited to a shift that places the legal team front and center to interact directly with customers. That is why you may also need to shift your future thinking about the competencies for which you hire.

4. Planning and Development Stage of the Service Offering
During this stage of transforming your department into a profit center, you should not plan to “reinvent the wheel”, as the expression goes. Instead, focus on what you already do best. You should examine and identify the current functions that your in-house legal department is already performing, most likely in a “shield” or protective aspect, and look for ways to use them as a “sword” to prospect for new clients.

In my company, for instance, one of the greatest areas of risk and potential liability emanates from the selection of the motor carriers (trucking companies) that we engage on behalf of our clients to move their goods from point A to point B. As a non-asset logistics provider (meaning we don’t own the trucks we use) we must be very diligent in our selection process. Third-party liability claims for negligent hiring have been rampant throughout the logistics industry and cause our shipping and retail clients to lose sleep at night. Most of our competitors do the basics:

- Receiving and reviewing a copy of an insurance certificate (which many erroneously believe means the trucking company actually legitimately has active insurance coverage)
- Requiring the motor carrier to sign some type of contract indemnifying the logistics company and their customers for everything under the sun
- Requesting references from the trucking company which may or may not be called, investigated and/or verified

In my view, this scenario provided a unique opportunity to utilize a very talented in-house motor carrier compliance group already trained on the basics. They have fine-tuned their skills and have now elevated the due diligence process to the next level. Under my supervision, this group not only verifies that the motor carrier has active insurance; we go
a step further and actually review the insurance policy to validate each and every exclusion on the policy. This process is somewhat time consuming but has proven to be a very valuable exercise that eliminates carriers whose insurance policies contain so many exclusions that the policy is rendered virtually useless. Our customers appreciate this service and it has proved to be a real differentiator to us in the marketplace. Without delving more deeply into all the details behind our motor carrier compliance process, this is just one example of how we began with a service that we were already providing through resources already in place and simply expounded upon and systematized our service offering.

5. Marketing the Service Offering

The next step is to begin to market your new or enhanced service offering to both internal and external clients. We define internal clients as our employees and external clients as those we sell our services to. We obviously need our employees to be aware of the existence of these new service offerings so they can begin to communicate them to existing or prospective external clients. If you have the luxury of having an in-house marketing department, they can offer invaluable assistance to best communicate the service offerings through your website, marketing materials, and other means so that your sales staff is armed with this new information on their next client visit.

In our situation, in order to really capitalize on our new service offerings, we had to find those clients who were looking for not just the lowest price to move their goods, but seeking reassurance that their freight is going to be moved on safe and reliable motor carriers. Today, we have used this risk management function in our business to penetrate new clients for revenue generation and to distinguish ourselves from our competitors. While the example cited above regarding carrier compliance involved a rather straightforward utilization of existing resources, how can you stretch beyond current capabilities in order to bring a service offering to the forefront that will bring great value to your company?

In order to create a service offering that is outside the scope of your department’s current capabilities, you must take a slightly different approach. At the core of every in-house legal department is the desire to protect the company, to reduce unnecessary risk and to find the balance between the business needs of the organization and your role as the chief risk management officer. Unless you work in an environment that does not appreciate initiative, innovation or creativity, you should be able to apply the core principles to any protectionist service. This was the case when I decided to create a security program at my company.

One of the areas in which we feel we are leaders in our industry is in transporting high value and high risk commodities. The reality is that the higher the value; the greater the risk that these commodities are stolen. Sophisticated criminal networks, armed with the latest technology and incredible intelligence gathering capabilities, target these types of shipments and wreak havoc on both North American and international supply chains. Moving freight from point A to point B is challenging enough, so why would anyone willingly enter into the high value niche market segment when they have knowledge of these nefarious elements? No, we are not gluttons for self-punishment – we are willing and confidently able to take calculated risks and implement internal controls that mitigate much of the potential liability.

Our security program evolved out of necessity. We were victims of cargo theft in the early stages of our company’s development. Like many of you, I was asked to use my background and training as an analytical thinker to create a solution to the problem. It seemed logical to me at the time that I needed to do a lot of research and devote a
significant amount of time to studying the issue and establishing a network of external experts, including law enforcement officials, who could help me better understand it. Over time and through many more trials and tribulations, I became a subject matter expert on cargo theft (I even wrote an article in this same journal on the topic several years ago). Yet, being able to talk the talk is a lot different than being able to walk the walk, so I needed to put my knowledge to the test and create a viable solution in-house.

The security program launched in a relatively simple manner through enhanced due diligence on the motor carriers that we did business with. Again, we utilized existing resources to create a home-grown proprietary system that eliminated nearly 97% of the motor carriers we relied upon at the time. It then became necessary to create an entirely new group within the legal department to handle other aspects of the security program, including the management of hundreds of covert tracking devices essential for our success in the market place. Securing approval for an increase in head count - not to mention the investment required to purchase the hardware and subscribe to monthly airtime fees - was challenging, to say the least. Fortunately, the business case I outlined was agreed to by our owners and the trust was there to allow me to move forward with the program. Additionally, my shareholders understood what I was trying to accomplish, which was to mitigate our risk while allowing the business to continue to move into this seemingly lucrative and untapped market.

What was once a beta test with borrowed hourly employees from our call center has now turned into a team of five full time employees, a manager and several other supporting roles in other departments throughout the company. Major retail clients that stock their stores with high end merchandise ranging from designer hand bags to plasma televisions now use the security program that we created as the exclusive means of moving those types of commodities to their distribution centers and retailers. There is now a pricing code used strictly to account for the services and fees that this group charges our clients, thus allowing for a very simple and accurate way to calculate the profits and losses generated from this service offering. An additional benefit of this program includes a reduction in insurance premiums, which anyone running an in-house legal department or risk management role would gladly welcome.

Summary

The Sword and the Shield Are Not Mutually Exclusive

In hindsight, my law professor in the manner of most academics was most focused on teaching theories of law and conceptual points. While this is a critical part of any law school curriculum, the application of theory to real-life often gets short shrift. Today, as an adjunct professor at my alma mater, I make it a point to teach practical law to my students so that they can go out in the real world and make an immediate impact in their legal professions. My advice to them is to look beyond the obvious career choice. I tell them that they don’t have to fit into a neat and tidy little box of only doing risk mitigation work or assisting in the consummation of business deals. In the latter scenario, someone else at their company will inevitably be first in line to take credit for the deal in any event!

As the General Counsel or Chief Risk Officer, all of us have immense influence and the skills needed to transform our in-house legal departments into a profit center for our respective business. You don’t have to be a sales person to bring in business for your company. You don’t have to earn commissions or be directly compensated on the business you bring in, which would obviously raise all sorts of ethical issues. You do have to use creativity and the resources you already have to fine-tune and promote the work that your department does really well. And you also need to establish trust and have
a previous history within your company of being able to execute on projects to gain the support needed to launch a service offering outside the scope of your current department’s capabilities.

Once you begin to use your department as a “sword” to differentiate your organization from your closest competitors then you need to market this new service offering to both your internal and external clients. Continue to find new and innovative ways to use the service offering to attract new clients while maintaining your core risk management function. There is no better feeling than to sit in the board room among your peers and know that you possess the unique ability to both protect the business and attack new business opportunities as they present themselves.

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**Jared S. Palmer** leads AFN LLC’s recently combined Client Services and Legal Departments. Serving motor carriers, manufacturers and retailers since 2003, AFN (formerly known as Advantage Freight Network) is an award-winning leader in freight brokerage, third party logistics and transportation management services. AFN is known for its commitment to client service, proactive approach to fighting cargo theft and expertise in retail compliance. In this role, Palmer leads the logistics coordination and legal teams to focus on the strategic implementation of proprietary risk management processes so that shipments reach their intended destinations. During his tenure, he has helped distinguish AFN as an industry leader in theft prevention of high value and high risk commodities. He also developed and launched the AFN Strategic Partnership Summit, a unique annual gathering where shippers and carriers exchange information about industry issues. Palmer is an adjunct professor of transportation law at his alma mater, Chicago-Kent College of Law. Prior to acquiring his JD, he graduated as a Founders Scholar recipient from the Kelley School of Business at Indiana University. Palmer serves as chairman of the Government Affairs Committee for the National Cargo Theft Task Force and is a member of the CargoNet Advisory Committee. He has authored numerous articles on cargo theft, logistics, insurance, and risks affecting the logistics industry and is actively involved in federal lobbying efforts in Washington, D.C.