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The Intersection of Law 2.0 and the Lawyer as Trusted Adviser

Blind reliance upon cost-savings solutions conceived by technologists, who may have never practiced law, is fraught with danger.

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I am a champion of the tenets of Law 2.0, which drive greater efficiency, accountability and cost-effectiveness in the practice of law to the benefit of consumers of legal services. In my view, Richard Susskind's book, Tomorrow's Lawyers, should be required reading for all law firm leaders. Law firms that are guided by this inexorable trend will adapt and continue to thrive, while those that cling to the way of doing business from 20 years ago will be casualties of legal Darwinism.

Equally clear in my opinion is that blind reliance upon cost-savings solutions conceived by technologists, who may have never practiced law, is fraught with danger. Years ago when several institutional clients launched task-based billing, I was shocked to learn that there was no code for an office conference; such fraternization was verboten. I have speculated that the impetus for this prohibition may have been a cartoon featuring four or five lawyers clustered about a coffee machine discussing a deal, while billing the client thousands of dollars an hour for doing so.

People Still Need to Speak to One Another

Examples abound why internal meetings among a firm's lawyers are essential, including these two examples from personal experience. On a deal where our firm was representing the seller of a business, we had to update a memorandum analyzing successor liability in several jurisdictions. An associate's research disclosed two recently-decided cases on topic. During a 20-minute meeting, the associate briefed me on the two cases, explaining why they would not affect the advice we had given our client; preparing a memorandum that conveyed the same information, for which a task-based billing code existed, would likely have taken five times as long, with the attendant, incremental cost.

In another transaction, during one of our weekly team meetings, an associate reported that her counterpart—a commercial finance lawyer in the firm representing the entities selling their business to our client as purchaser—was anxious about scheduling a firm closing date, because the secured lender to the sellers had threatened not to extend the forbearance period under the sellers' financing documents. This seemingly inconsequential detail was illuminating, as the sellers' principals were engaging in brinksmanship with our client, threatening to walk away from the deal if our client refused to capitulate to their demands. Understanding the pressure being applied by the sellers' lender and the resulting imperative to consummate the transaction informed our negotiating posture for the balance of the transaction, which eventually closed with the disputed issues being resolved in our client's favor. But for our weekly meetings, this

information, which our client was able to leverage to its advantage, would never have come to light.

The takeaway from these vignettes is that Law 2.0 can be too prescriptive, potentially reducing lawyers to high-priced clerks. That lawyers with different experience levels, skill sets and responsibilities within the context of a deal may have to confer with one another should not come as a surprise and should not be prohibited by a software program. Lawyers should be regarded as trusted advisers and given the latitude to practice law in a manner that brings all of their lawyering skills to bear, toward the end of achieving the best result possible for the client. If the lawyer is not trustworthy, the solution is to remove her from the approved counsel list, not to engage in technological damage control. Moreover, the risks of giving lawyers the runway to practice law as professionals are modest. Clients retain the right to review and slash bills if time charges are excessive. In addition, clients wield the ultimate stick of terminating the representation if a lawyer's costs exceed the value she delivers.

Part of the Solution Rather than the Problem

By nature and training, lawyers are problem solvers. In light of this aptitude, why not enlist their help in providing greater predictability of legal fees? Here, again, an example from personal experience is illustrative. We have represented a Fortune 100 company for two decades in connection with the procurement of corporate travel services. At the start of an airline RFP several years ago, an in-house attorney resigned, forcing the client to outsource to our firm many of the tasks that had been earmarked for the in-house attorney. We stepped into the breach, but much of our work was reactive rather than proactive in nature. That representation is in stark contrast to the role that we played in a subsequent airline RFP for the same client, where our participation was anticipated and budgeted from the start. At the kickoff meeting for the project, we were tasked with developing a plan to save costs. Based upon our experience with this and other clients in corporate travel matters, we advised the client that an outsize percentage of the legal fees has historically been devoted to negotiating data privacy provisions and suggested that the client modify its approach to the issue. We also helped the client analyze whether multi-carrier, alliance agreements, in lieu of a separate corporate incentive agreement for each individual carrier, would result in cost savings. This collaborative approach helped drive savings for the client and, as an added benefit, enhanced the attorney-client relationship, which is typically not a by-product of electronic solutions, such as online, reverse auctions, that achieve savings through the commoditization of lawyers and legal services.

Rightness of Fit

In Tomorrow's Lawyers, Susskind dissects a complex transaction and a complex litigation into two pie charts. He convincingly argues that, among the many sections in each pie, only several require the education, training and subject-matter expertise that are the exclusive domain of lawyers. The tasks represented by the other slices in the pie can be handled proficiently by less costly individuals who are not lawyers, through the deployment of technology, or by off-shore law firms whose concentration is

repetitive, relatively simple areas of the law. The focus of consumers and purveyors of sophisticated legal services should therefore be the few, remaining slices in each pie. How should those slices be divided among the many varieties of law firms vying for that business?

Perhaps the single most important factor in selecting outside legal counsel is rightness of fit. For a multi-billion dollar, time-sensitive transaction involving securities, tax and antitrust laws in several jurisdictions, a client should not opt for a 12-person, suburban law firm with attractive hourly billing rates. The obvious choice in this situation is a top-tier national or international firm that handles deals of this ilk on a regular basis, has the necessary expertise and resources that can be deployed immediately, and charges accordingly for its services. A law firm of this nature is uniquely qualified for such a challenging engagement; the firm is the right fit. It should be apparent that the same law firm would be the wrong choice to handle a lawsuit in which the client faces a maximum exposure of $1.5 million.

However, are chief legal officers of large companies, many of whom honed their skills in AmLaw 100 firms, familiar with quality middle-market law firms who are best suited to handle a $1.5 million dispute? If not, the fallback position may be to engage a larger firm and rely upon technology to limit hourly rates and the tasks for which an attorney may bill, in addition to imposing other constraints. These measures may mitigate the consequences of selecting a law firm that is a bad fit, but they cannot lower the firm's rent, salary scale or other components of overhead, which lead ineluctably to the conclusion that the litigation is not a profitable undertaking for the firm. Consequently, that litigation is likely to be staffed with unseasoned attorneys who will be learning on the client's watch, perhaps to its detriment.

Conclusion

Competitive forces, disruptive technologies and the imperative for budgetary predictability, if not certainty, will continue to shape the way that legal services are rendered and consumed. This tsunami of transformation cannot be turned back and, indeed, should not be resisted. Lawyers who are committed to the profession should embrace the change and help plot its course. Given their knowledge of the legal profession and the business of practicing law, lawyers are uniquely situated to contribute to this movement, client by client, case by case. Clients should enlist the aid of their lawyers in this process and should not instinctually adopt technology-driven solutions that have the effect of reducing a lawyer's efficacy and eviscerating the role of an attorney as trusted advisor.

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