

# SHIPS PASSING IN THE NIGHT: ISSUES BETWEEN LAWYERS AND CLIENTS

by Joel F. Henning

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I am often stunned by the dissonance between what lawyers think they're selling and what clients want to buy. Nor is the problem limited to law firms dealing with relatively new clients. The most highly institutionalized relationships between law firms and very large companies are often best characterized as ships passing in the night. As the general counsel of a Fortune 50 company recently said to me about the partners of one of that company's oldest law firm service providers, "They just don't get it."

I have encouraged that particular general counsel and other chief legal officers to elaborate on just what it is that the lawyers who serve them don't "get." Let me share with you what I have learned.

## Ad Hocism

Clients perceive that law firms are disorganized. Why do they care? Because they believe that their cases and transactions are not well managed. They may have great confidence in the lawyering skills of their relationship partners, but these relationship partners too often are seen as unwilling or incapable of project management—organizing a team of lawyers and paralegals, all of whom understand what needs to be done and what their respective roles should be. Instead, clients perceive that their matters languish in the inboxes of their relationship partners until just before (or worse, after) the deadline. Then the bulk of the work is done inefficiently by the senior partner alone or delegated by the infamous "dump and run" method on junior lawyers who know nothing about the client and may not even know enough about the legal issues involved.

## Generationalism

Long-standing institutional relationships between a law firm and a company often lead to anomalies between the age of the company's chief legal officer and that of the relationship partner. For example, I am familiar with one situation in which a company recently hired an extraordinarily energetic, entrepreneurial gen-

eral counsel in his mid-40s. The relationship partner of one of its principal outside firms has held his position for 25 years, since he, too, was in his mid-40s. Unfortunately all around, he is now approximately 65. The general counsel and the relationship partner have little in common. The former is looking for new approaches, alternative fee arrangements, and the same level of energy he possesses. Needless to say, he's not getting it from the relationship partner.

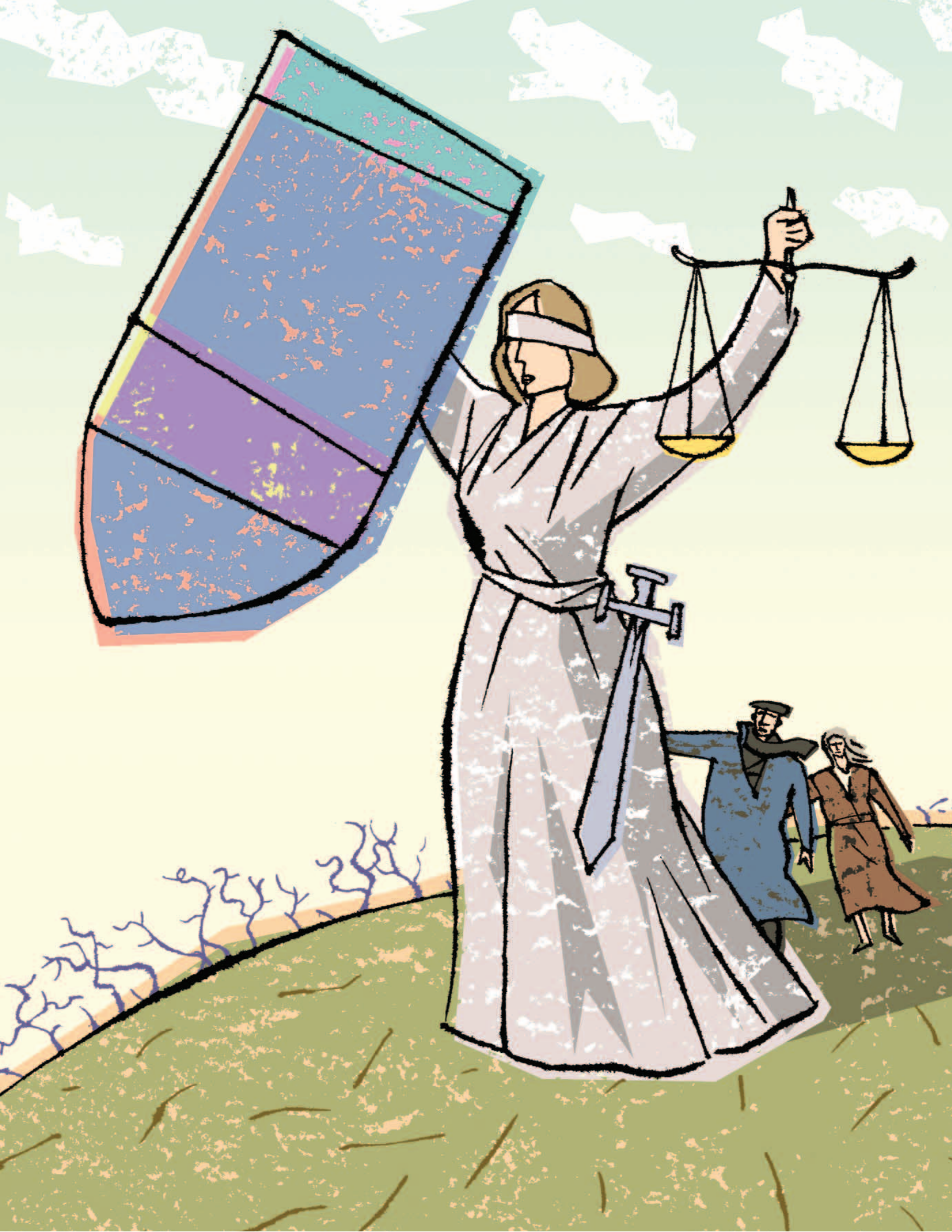
The problem isn't confined to institutional client relationships. I often see law firms failing to attract the information technology, dot-com startup clients so highly prized these days because the leading partners in corporate finance and other related areas are decades older than, and cultural light-years separated from, the high-tech startup client leadership. The same is often true in older industries. Law firms that send older lawyers into financial institutions to do securitization or even loan documentation often are working alongside corporate officers a generation younger than they are.

Law firms continue to be relatively hierarchical. Junior associates draft a memo, which then is reviewed by a more senior associate, who may add some footnotes and make certain the citations are correct, and finally it gets up to the partner. Legal departments tend to be flatter organizations. In-house lawyers and business managers often want to talk directly to the person doing the work. In this example, it's not clear who will have the deepest understanding of the issues. The law firm hierarchy may get in the way of putting the right lawyer in touch with the right person in the client's organization.

## Cycle Time

The business world moves faster and faster. While clients obviously want to keep legal risks to a minimum, they can't afford to maintain the languid pace needed by outside lawyers to reduce the legal risks in a given transaction to zero. There's a delicate balance between churn-

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ing out documents with insufficient regard for protecting one's client and stewing over tertiary legal issues to the point that the transaction itself is put at risk. As one information technology chief legal officer recently put it, "When you're in the high-tech industry, you're moving fast....Getting it done quickly is better than getting it done perfectly. It takes too long." The days are gone when most clients want to waste either the time or the money negotiating the number of commas in a sentence that goes into that legal opinion.

### **Containing the Legal Function**

The legal function of any business is a cost center, not a profit center. This difference is a key one to which many outside lawyers aren't sensitive. The job of a good chief legal officer is to minimize this cost center. In the abstract, the job of law firm senior partners is to maximize the legal function of each and every client. When a client senses that his outside lawyers are doing unnecessary work on his behalf, he is justifiably unhappy.

These days, enlightened outside counsel meet with their clients on a regular basis to evaluate the work and attempt to determine how to make the workflow more efficient and less costly. The most enlightened even propose how aspects of their current work could be done more efficiently in-house. Some suggest how better planning or variations in the sequencing of outside work could save time and money.

Outside counsel who propose creative means of containing the legal function make themselves very popular. There are various ways to do so. Effective compliance programs and legal audits are only the most obvious. In addition, we often help find activities in the legal function that should more appropriately be done elsewhere in the company or eliminated altogether. For example, in many businesses lawyers are called upon to give advice because they are intelligent or are good writers, but the work itself is not technically law-related. It is well and good to have lawyers serving as wise counselors on general matters, but there are no free lunches. If the company's senior management is willing to pay the extra cost for work done by outside counsel (or inside counsel, for that matter) that could as easily (if not as well) be done by people in marketing, advertising, or sales, that's fine, but once the point is made that the legal function may be bigger and more costly than necessary, most senior management will prefer to see the work done elsewhere.

Disappearing legal work is also a means for outside lawyers to ingratiate themselves with

clients. We worked with a company that found, with the help of outside counsel, that for years lawyers were preparing and filing enormously complex reports with the U.S. Internal Revenue Service that the IRS did not require or even read. Once the discovery was made, the savings were enormous.

There may be a virtual industry waiting for outside counsel to assist in the area of contract management. Traditionally, contracts were assumed to be a part of the legal function, but technology permits companies to distinguish between the great volume of routine contracts it must negotiate and administer and the occasional ones that are either huge or extremely specialized. The latter obviously require legal expertise, but the former do not except in an oversight capacity. Today companies are interested in finding help in developing their contract management capabilities. Most would not instantly think of turning to outside counsel, who are not generally known either for sophisticated management expertise or for an interest in minimizing the legal function, but there is no reason why clients would not be enormously impressed by law firms that developed expertise in contract management.

### **Access**

Hard as it is to believe, many clients can't find outside lawyers when they need them. They continue to complain that they give a transaction to counsel, and it is as if the matter disappears into a black hole. If they don't themselves follow up, they will hear nothing. Phone calls are not promptly returned, briefings as the matter progresses are not offered, and even invoices are frequently delayed. One general counsel of a bustling technology startup recently said, "I need my outside lawyers to have their laptops with them so I can send them e-mails at 11 at night and maybe get a response." This simple statement suggests several fundamental issues that many outside lawyers have yet to confront. The first is technology. The world is now fully wired via the Internet. Communications and data exchange can be accomplished 24 hours a day, seven days a week, but how many law firms insist that all their lawyers not only use laptops, but also understand their potential and exploit it? The next issue is access during unconventional hours. Especially when transactions involve several time zones, there is no such thing as regular business hours. Finally, there's the need not only for access but "response." In earlier eras, lawyers could research and cogitate until they were wholly confident in their position, but no more. If the client is putting the deal together at 11 p.m., the outside lawyer had better be prepared to respond.

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## Relationships

Relationships between outside lawyers and clients mean more than friendship or even service. Today businesspeople expect their lawyers to understand their business and be available to provide strategic legal counsel based on deep understanding of it. Today one of the principal drivers of the movement toward expanding the use of in-house lawyers is the ability to align those lawyers with business units and create transparent relationships between lawyers who fully understand the business issues and the business managers themselves.

How can outside lawyers compete? It requires a different orientation toward clients. If outside lawyers involve themselves with their clients only when they are asked to act in regard to a particular transaction, they are not likely to develop three-dimensional business knowledge. It's only when lawyers are willing to spend non-chargeable time in the client's offices, on the factory floor, and in business meetings that they develop an intimate understanding of the business. One chief legal officer has said that she wants her outside lawyers, associates and partners alike, to be on her company's Web site every day and also to be on the Web sites of her competitors, developing a deep understanding of her business and her industry.

## Pricing

If I were writing this piece five years ago, pricing would have been the first, perhaps the only, issue worth discussing. In this buoyant economy, however, clients continue to look for value, but they are also looking for service. Pricing today is merely a component of service. Alternative pricing arrangements may or may not result in savings to the client. In fact, they may result in more profit for the law firm. What's truly important about alternative pricing is that good pricing proposals require considerable thought about service delivery. They require planning, budgeting, assembling a consistent team, training that team, and constant communications with the client as to how well the arrangement is working.

## Conclusion

So how do law firms begin to "get it" in their dealings with outside counsel? In a nutshell, the answer is to put themselves in the position of the client's chief legal officer, or another businessman if there is no in-house lawyer, and think of the purchase of legal services as not dissimilar to the purchase or manufacture of any goods or services. Companies are always compelled to decide what to "make" and what to "buy." Should an automobile company make its own windshield wipers or buy from



suppliers? The likelihood is that such decisions will be reviewed from time to time and circumstances might change, but these days companies base such decisions on what is in their strategic interests. Outside vendors may have the ability to provide more specialized, more sophisticated, higher quality goods or services in certain areas, but they must understand that whatever they are providing must be high-quality, high-value, and delivered just in time. They must also understand that they are in a joint venture with their customers or clients and that their interests must coincide. Rather than ships passing in the night, they must be part of the same crew on the same vessel, heading toward the same destination. ■

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