Innovation is Here to Stay: There is no Quick Win for Anybody

In spotlight: Change in the Procurement of Legal Services

By Prof. Dr. Bruno Mascello, LL.M.

In 2018, the legal team of Microsoft contacted their key law firms and asked them to explain what they had done in the previous year to improve and what they were planning to do in the coming years. They were looking for innovation stories that would demonstrably improve the law firms’ legal service delivery to Microsoft. This is a recent example of how outside counsel management is – and will remain – a major concern of legal departments. Expenditure for outside counsel services still constitutes a substantial portion of an annual budget entrusted to a general counsel. And considering that the hourly rate of an outside counsel is approximately three times that of an in-house counsel (Germany), vendor management remains a key issue for each legal department.

The following comments are based on the assumption that a customer does not really care who the legal services are provided by as long as (i) the customer receives correct legal advice, (ii) the service provided is fit for purpose (it does not need to be the best one), (iii) it is delivered at acceptable (not the lowest) prices, and (iv) it reasonably considers all circumstances (not just price and quick wins only, but also long-term interests).

Ménage à trois

Some fifty years ago, it was easy for a customer to buy legal services: he simply went to a law firm. However, since then corporations have started to build up their own internal resources. Today, legal departments absorb up to three quarters of the legal work and have become one of the biggest competitors to law firms. For some years now, the so-called alternative legal service providers (ALSP) have been entering the legal market and offering a third option to customers. These include, for example, the legal arms of the Big Four, legal protection insurance companies and the so-called “new law” and “legal tech” companies. What makes them different is that they master processes and utilize IT in a different way than law firms and legal departments ever did.

Services enriched by products

ALSPs offer not only hourly-based services, but also products which can be downloaded from their websites and which are available at attractive prices, sometimes even free of charge. Customers find quick and transparent solutions, and then informed customers like in-
Procurement will play a bigger role

CEOs are increasingly requesting general counsel to cooperate with the procurement department when they buy outside legal services. The reason can be manifold: it might be a lack of trust that the budget is being spent in the most economical way, be it because general counsel may be biased when they select outside providers or they may not be experienced enough to set up a professional state-of-the-art procurement process. The emergence of the ALSPs has created a further issue. While legal departments have been successfully competing against law firms in the past, they are now being directly challenged by ALSPs. Consequently, if legal departments want to act in the best interests of the company, they must perform a fair assessment in which cases their internal customers are better and faster served by them, by law firms or any of the ALSPs. Since this may go to the core of a legal department, it becomes even more important to ask the procurement department to participate when outside services are being bought. Going forward, general counsel may now only need to explain why they have chosen a more expensive law firm instead of having the job done by the legal department, they may also need to show how ALSP and off-the-shelf products were taken into consideration. The customer does not distinguish and considers all legal service providers to work in the same ecosystems and to share only one goal, to serve the joint customer in the best way.

New requests in RFPs

One of the biggest challenges of legal departments is to work more efficiently. They have to absorb more legal work without receiving more financial resources (budget) or human resources (FTE) – indeed, they sometimes even have to manage with less. In any case, a legal department will pass the pressure on to the outside legal providers, be it law firms or ALSPs. Negotiations will go beyond the usual discussions of hourly rates and (volume) discounts and lead to more demanding requests and challenging questions in RFPs such as:

- How do you ensure that I will receive your best resources? Note: it will be interesting to see how service providers with an eat-what-you-kill model will answer.
- How do you measure the productivity of your employees? Is it only billable hours?
- How do you measure efficiency in a mandate? If it is hourly billing only, how do you ensure you don’t do too much work on a mandate? Do you pass such efficiency gains on to the customer, and if so, how and to which extent?
- When do you apply alternative fee arrangements and where do you see any limits?
- How do you cooperate with other law firms in the best interest of the customer?
- When do you consider ALSPs and what selection criteria do you apply?
- Do you utilize technology and if yes, for which purpose (also for efficiency reasons)? If so, what is the advantage to me and how and to which extent do you pass any efficiency gains on to customers?
- How do you charge the involvement of ALSPs and/or the use of technology tools (e.g., data analytics)?
- Explain the most recent innovations you have implemented to improve your legal services to the customer. How did the customer benefit?

Indeed, these questions will not be easy to answer for providers. And if a
general counsel reading these questions thinks now that these would be a great addition to the next RFP, please bear in mind that you should be able to answer the same questions for your legal department as well. However, it seems that the “spoon-feeding” of general counsel remains a serious topic; in the UK half of them expect law firms to advise them on which technology to use. However, in my view it seems unrealistic to wait for law firms to help, considering how few of them are willing to change their business model and have already turned to technology themselves to increase efficiency and to improve their services to customers. Therefore, it would be better for legal departments to start to work on their own.

Change and uncertainty

Innovation is here to stay. There is no quick win for anybody. All legal service providers are stakeholders in the same legal market and compete for the same customers. Some may have more options and others may have a different USP. But all will have to accept and manage continuous change, will need to invest in innovations, and learn how to live with uncertainty and failures. To quote Microsoft again in their request to their panel law firms: failure is permissible; however, not trying is not acceptable.

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