

DAILY REPORT

A SMART READ FOR SMART READERS

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Legal Departments Need to Plan for Offense

► COMMENTARY

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IN MY TIME as Michelin's general counsel, we spent considerable time playing defense. The defensive game plan included, among other things, responding to our business clients' needs, defending claims and lawsuits and dealing with tremendous internal pressure to reduce costs. Our defense was solid, and it spent a lot of time on the field.

When we periodically benchmarked other legal department teams, we found the same thing: They had great defenses that played almost the whole game. Like us, they also spent considerable time responding to pressure to reduce the size and cost of the team, even when the business was growing and profitable.

Few, including us, played any offense. Everyone had good,

versatile players, but they always played defense. Why?

One of our legal department management principles was, "Advances are made by answering questions. Discoveries are made by questioning answers."

Applying this principle to our conclusion that most legal departments focus on defense—and coupled quite frankly with some boredom on defense—we started to investigate and question.

Why no offense? Isn't scoring points more fun? Doesn't the quarterback make the most money?

It did not take us long to find someone who actually played offense often—and well. We were fortunate enough to be introduced to DuPont and their legal department corporate recovery program. Thomas Sager, DuPont's GC, was the pioneer

of corporate recovery programs. He thought legal departments owed a duty to shareholders to seek out opportunities to recover lost value.

The concept was simple: The legal department should monitor and mine their contracts, agreements, patents, licenses, franchises, deals, etc., to discover any opportunity to recover monies owed to the company. As we understood it, DuPont defined a corporate recovery as, “Any recoupment in the form of cash, products, services, or other quantifiable rights obtained for the company through the proactive intervention of the legal department.”

And their offense scored a lot of points doing this—millions of them.

The Game Plan

This sounded like a good offense to copy, but DuPont had significant resources, and we had few. But, in a leap of faith, we asked a defensive player to execute a few plays on offense and gave it a shot, nonetheless.

With a single player (could be an inside or outside resource), a game plan can be designed to identify and pursue, systematically, monies which may be owed to the company as a result of actions or omissions by third

parties. Because the recoveries are owed and add revenue to the bottom line, they do serve the interests of shareholders and stakeholders.

In our case, Year One results were OK—think six figures. After Year Two, the results more than doubled. Year Three results were significant and, importantly, well in excess of the cost of our legal department. We even won an internal quality award for the good



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results. Beyond that, by far the most valuable return was that the business clients were more attuned to this issue and proactively identifying the opportunity, rather than vice versa. The organic growth was exponential.

And rest assured that every budget presentation to the CEO started with an overview of the program and our recoveries. It is an entirely different conversation when revenue, which otherwise would be lost, is coming in the door.

As more and more companies follow this path, this is what we see.

Many companies are now proficient at recovering monies owed in the context of class action lawsuits. Pursuing these is relatively simple and can be done internally or outsourced for a small fee.

The opportunity that many miss, though, is to conduct a thorough, systematic sweep of other potential opportunities inside the company. My experience is that these opportunities are abundant and valued well in excess of participating in class action recoveries. The “art” is knowing how and where to look, evaluating whether the investment to pursue outweighs the benefit and, if the matter involves a critical business partner, how to make the recovery and maintain the relationship.

There is, of course, truth to the mantra that defense wins championships. But you still need an offense. We like playing offense. We suspect CEOs and shareholders will as well. ☺