

# BACK STORY

BY AVIVA GORDON, ESQ.

## THE RISE OF THE IN-HOUSE COUNSEL

Business models in our new economy have changed as a result of the Great Recession. Many businesses have been forced to re-evaluate their legal expenses and moved to reign in such expenses by, among other things, insisting on realistic budgets with not-to-exceed caps; demanding blended rates rather than paying the top attorney's hourly rate; and creating internal legal departments.

The rise of the need for in-house counsel is a natural response to the increase of attorneys' hourly rates and overhead costs. A company that has an in-house counsel or legal department is better able to predict the costs associated with legal matters and can develop a more synergistic relationship between its executive team and its legal counsel. A lawyer who has a more holistic understanding of the business, its market and its staff may become an invaluable source for the business' growth and development.

Businesses for which hiring in-house counsel makes sense are those that are:

1. Highly regulated;
2. Have recurring agreements with third-parties;
3. Have significant legal disputes;
4. Have a presence within real estate, intellectual property or brand creation; or
5. Have operations that cross multiple jurisdictions.

If a business is looking to bring counsel in-house, there are a number of factors that should be considered. These factors should be evaluated by the lawyer contemplating a jump to an in-house position. In addition to having sufficient experience within the business sector at issue, both the lawyer and the business need to evaluate the scope of internal services the lawyer will be providing. Will in-house counsel be actively appearing in litigation or managing outside counsel's actions? What (if any) role will in-house counsel play in the overall operations of the business? Will the lawyer play any role in the strategy of management and growth of the business?

As in-house counsel, it may be difficult to define an appropriate methodology of communication. A clear direction should be given, whether the lawyer reports to a board of directors or to a particular officer or executive.

In addition to reporting issues, in-house counsel must aggressively protect the attorney/client privilege s/he has with the business and remain attentive to conflicts of interest. This is particularly true if the lawyer has some role or oversight within the human resources arm of the business.

Additionally, if there is only one in-house lawyer (as opposed to a defined legal team), both business and lawyer need to manage expectations of the areas that the lawyer can and should address. For example, if the lawyer's area of experience and expertise has been within tax law, and the attorney was brought in primarily to address the same, then s/he may want to re-think whether s/he is the best person to be evaluating the business' employee handbook. If the lawyer is more of a generalist in experience and practice, then that lawyer may be able to address a greater spectrum of legal concerns, but should be sure to have additional resources to address issues that exceed his/her knowledge and expertise.

Finally, for both sides of the equation, the economics need to make sense. From the attorney's perspective, is the salary contemplated comparable to what one could earn in private practice? Similarly, for the business, is creating this position truly going to reduce legal expenses? This question is particularly relevant if the business is going to continue to have outside legal expenses even after creating an in-house legal department. Generally, lawyers do not have any meaningful effect on revenue generation; rather, lawyers are an expense. Consequently, it is advised that the business consider the true impact creating such a position will have on the bottom-line before making a transition to include in-house counsel. However, there can be a greater flexibility when it comes to compensation of in-house counsel; traditional hourly billing need not be the rule. Compensation can include equity as a component. That can make the upfront costs more manageable.

The benefits for both lawyer and business can be overwhelming when the two merge. Ultimately, the management of expectations, in terms of both work that can be accomplished and economics, should be the primary focus of a business looking to transition to employing in-house counsel. **NL**

**AVIVA GORDON** serves as principal and attorney for Gordon Law as well as general counsel for Terra West Management Services.

