

Legal standard setters

Jochen Deister

DMZ Legal

Carsten Reimann

Xenion Legal

1. Introduction

This chapter highlights the challenges faced by general counsel when trying to deliver high-quality service and work products against increasing time and budgetary constraints. In order to succeed, it is key to categorise work strategically according to priority and importance, and then apply consistent standards for the actual product.

A real-life case from Germany is employed to describe how using an approach in line with an International Organization for Standardization (ISO)-based process can help general counsel to fulfil their tasks more effectively and efficiently.

2. Challenges and pain points

The need for increased effectiveness and efficiency is a challenge that general counsel progressively face. Keeping on top of (more or less) routine work and still retaining time for truly crucial tasks seems to be an increasingly insurmountable endeavour.

This was the situation at one of Germany's DAX 30 corporations.¹ The legal department at headquarters level has been around for many years; the lawyers are experienced and know their company and their law. Yet sometimes they find it hard to answer seemingly simple questions such as: Who exactly is doing what in the team and why exactly do we need this many people? Another ever-increasing challenge is the struggle to justify internal spend. For this company this was triggered by an internal audit request to reveal everything about external legal spend – for example:

- Why do you have such high costs in certain countries?
- Would it be better to do more work in-house?
- Would it be better to give some tasks away?

The general counsel was searching for solutions. She tried to monitor closely the hours billed by external law firms with a strong view to reducing them. She even hired an external service provider to support this hour/cost-cutting exercise. However, the law firms were not amused and she received numerous calls from senior partners wanting to discuss business rather than provide business advice. The provider also did not really ease tensions as originally promised. Vibes went from bad to worse – and the whole operation quickly turned political and proved once again that not all legal areas are created equal.

She considered which other options were available. Metrics and benchmarking

1 The following is based on a real-life case.

came to mind; however, on closer inspection, the general counsel discovered that rankings and recommendation handbooks are usually compiled by journalists and young researchers. These resources could not help her to match price with performance in daily business matters. They are mostly about top lawyers acting in crisis situations. Finally, she started reading surveys reporting what the 'average company' does: how many lawyers compared to what turnover; and what ratio of in-house and external counsel work etc. Some studies are more detailed and give results broken down by region and industry sector. At the end of her reading, she found little consolation in telling her internal audit team that some competitor firms also pay high legal bills in some countries. Obviously 'the average' is not much better off either. Still, she did not want to be average; 'average' is just another term for 'gone tomorrow'. She wanted a solid base for her own legal function; a starting point from which she can improve through what her team experiences and learns every day.

Finally, she found her own approach going forward: legal quality management.

3. Key driver for sustainable growth

A modern in-house team wears two main hats. On the one hand, it is a service provider to the management as well as to the sales, purchasing and other departments. From this angle, its role is to support the growth of the company. On the other hand, the legal team is the 'clear conscience' of a company, ensuring that the legal framework of business actions is known and adhered to.² This perspective adds sustainability to the balanced mix: if the company grows but breaks all laws in the process, it will not be around for long. However, if the company focuses only on protection, there will hardly be any progress because every opportunity comes with a risk. In essence, the general counsel of the 21st century is a key driver for sustainable growth. General counsel who lean too much on either side of opportunity or risk will not achieve their full success potential.

4. Quality – but fast and efficient

Clients demand quality work from the legal department. Even though the legal field is extremely nuanced, clients want their lawyers to give them clear advice that is spot on and correct. Thus, 'quality' is defined by the clients of the law department as being right and as leveraging the legal framework to support growth in a sustainable manner. Negotiating a favourable deal or developing a contract template that reduces risk while still being acceptable to a customer or supplier to allow for a quick turnaround can achieve this. Lengthy meetings and discussions about legal topics are things of the past. However, this tactical focus on 'getting ink on the paper' is accompanied by the more discreet task of ensuring that there will still be a company tomorrow. The management or the board of directors can best assess this piece of work and this level of quality. However, all clients want their lawyers to respond quickly – and not to spend the war chest on outside counsel advice.

² It is up to each individual company to decide how far it will take this requirement. While the authors have a clear opinion, for instance, on how a compliance department should be organised, this chapter focuses on the broader picture and so generally assumes the legality function to be a subset of the overall legal function in a company.

5. **Critical thinkers – and more?**

Lawyers are trained to think – and to think critically. While this criterion is a key component of any definition of an external attorney, in particular it is the successful in-house counsel who prides himself on having this attribute. As the old German saying goes, “*lever dot as slav*” (“rather dead than be a slave”), and lawyers alike should noisily withdraw rather than toe an undue corporate line – despite being an integral part of the corporate value creation chain. However, the downside of this heroic self-perception is that earthen principles such as the cost-benefit concept are hard to convey to lawyers – whether internal or external. In light of ever-increasing cost pressures in normal operation mode, in-house counsel display a respectful willingness to adopt change. This is highlighted first and foremost by the advent of discussions on what the value proposition of the lawyer actually is. Quality management is the answer.

6. **Legal quality management**

In addition to seeing themselves as members of a free profession, lawyers are analysts. They are trained and able to deal with form and content. The study of law provides for heightened awareness and thinking in formal and material categories. This in turn forms a perfect base for handling procedures and processes, their documentation and improvement. Suddenly we are at the primary core of quality management. However, lawyers have not really understood this proximity and often utter a flawed and ill-informed reluctance (“I’m only about quality – don’t bother me with quantity measures”).

However, this is only half of the way. A well-functioning legal department must not only define processes and implement them. In addition, an essential ingredient of success (and part of a quality system) is to measure effectiveness (does the process achieve its goal?) and efficiency (can we achieve the desired result easier, faster or cheaper in another way?). The resulting data must then be analysed and used in the continual improvement of the quality management system.

Thus, the main objective of a quality system for a legal department is to produce the right products, which ultimately translates into customer satisfaction.

7. **The three ‘states’ of work of a legal department**

When sifting through the many operational processes and exceptions, there are three main scenarios at work in any legal department: normal operation (known as ‘steady state’), larger transactions and crises.

7.1 **Steady state**

First, examples of the steady state are legal support of the procurement or sales team (eg, by drafting and negotiating contracts). In addition, a critical shareholders’ meeting or a product recall would fall into this category. In essence, the steady state is characterised by repeatable (smaller) projects.

7.2 **Large transactions**

Secondly, a major transaction would extend the scope of the project and require additional resources, as well as a closer legal risk analysis. Primary examples are

acquisitions and divestitures. A major litigation (eg, for a key patent) would meet these criteria. These large transactions have in common with the steady state the fact that repeatable processes are applied, but the scope is much larger and thus more often justifies a deviation from an otherwise standard process to suit the particular deal at hand.

7.3 Crisis

Thirdly, a crisis is a 'live or die' situation for the company. While a product recall should usually be part of the steady state, if it concerns the core or only product of the enterprise, it falls into the crisis category. Thus, the differentiator is the impact: if failure would be lethal, then the company is in crisis mode. Another example would be a substantial antitrust claim because of the potentially high fines (up to 10% of the global group revenue under EU laws). In the future, privacy law infringements might also fall into this subgroup. Not only is the negative PR an increasing factor, but a draft EU regulation exists that will adopt a regime of fines derived from the antitrust practice.

8. Developing processes for each state

Developing a clearer understanding of the tasks of a legal department is, however, only the first step. After establishing the task categories, it is necessary to allow for processes and work packages below this level. A quality management standard would primarily look at the normal operation and larger transactions.

8.1 The suitability of crises for legal quality management

Dealing with a crisis requires the highest degree of tailor-made response. There are processes for crises – for example, whom to inform and who takes the lead (eg, the chief financial officer for the threat of bankruptcy or the general counsel for a major patent litigation). However, due to the varying external factors (eg, government investigations, judicial attacks from competitors and hostile takeovers), such emergencies are exceptions.

8.2 Processes for the steady state

It is much more productive to look at the first two states and develop processes for those. If looking at the steady state, the normal operation (ie, the principle of 'good is good enough') would be the guiding principle. A quality management system can be efficiently and successfully established on this basis. In particular, building a continual improvement loop will ensure that lessons are not only learned but also reflected in an improved process. Understood in this way, legal quality management is closely related to the build-measure-learn loop of the Lean Startup movement initiated by Eric Ries and Steve Blank.³ Popular in modern and fast-paced industries such as high-tech, this loop is a variation of the plan-do-check-act cycle developed by W Edwards Deming with respect to automotive manufacturing in the United States and Japan.⁴

3 While we consider this concept also to be excellently suited for the legal profession, the time for a minimum viable product in terms of a legal document has probably not yet come.

8.3 Processes for large transactions

Despite their often very individual scope, even larger transactions can also be structured into process steps. This area possesses the greatest potential for including external suppliers (ie, law firms) into the processes to ensure the right balance across quality, time and cost.

9. Principles of legal quality management

Each organisation pursues an adequate purpose, taking into consideration the requirements and expectations of customers and other interested parties (eg, employees, suppliers, owners and shareholders). Based on these strategic requirements, each organisation strives to gain a competitive advantage in the most effective and efficient manner to achieve, maintain and improve the overall organisational performance and capability.

Quality management standards such as ISO 9000:2005 and 9004:2009 join quality management principles to the achievement of those objectives – and the same is true for legal quality management. The application of these principles not only provides direct benefits to increase the quality capability, but also makes an important contribution to cost and risk management. Benefit, cost and risk trade-offs are decisive for the organisation's success.

Thus, the principles set out next should govern every legal department and its individual approach towards legal quality management.

9.1 Customer orientation

Organisations depend on their customers and therefore should understand the current and future interests of customers in order to meet their needs and strive to exceed their expectations. The legal department is primarily focused on the internal customer (eg, the management, procurement or sales department). This often leads to a cluster of diverse customers with competing interests. Impartiality, backbone and communication skills are required to create a balance.

Legal quality management can serve to identify and prioritise the divergent needs according to objective criteria. The key criterion is whether an activity adds to driving sustainable growth. Many internal activities are just that – activities that keep people busy but have little to no impact on the outside.

Thus, the legal department's view should expand beyond the internal customer. External customers are of key relevance – not just for the company, but also for the primary mission of the legal team to support sustainable growth. The role of a modern in-house lawyer is not simply to find the right legal solution (ie, a 'given' or 'hygiene factor' in the proper economic terms); in addition to purely legal considerations, the corporate lawyer must take into consideration aspects such as

4 This cycle is based on the notion of continual improvement. We believe that legal functions – at least in steady-state mode – should be seen as part of the legal services supply chain which can be improved from the customer's perspective. Consequently, this asks for quality management to encompass techniques of supply chain management and modular sourcing. While these principles seem to be further implemented in the Anglo-American legal world, in continental Europe traditional lawyers are often still used to 100% production depth in legal services. We think that this is now changing with the next generation of MBA-trained general counsel moving in.

customer satisfaction and the general reputation of the company.

Try this simple exercise the next time the legal team gathers: leave two seats free at the table, one for an internal customer of your choice (eg, finance, management or sales) and one for an external customer of the company. Then ask yourself before and after each agenda topic whether it was relevant and beneficial for them. If the answer is that the customer has fallen asleep or died of boredom, then you might reconsider the prioritisation of that topic. Also, avoid the common mistake of perceiving that everything needs to be done for the customer. That is the mantra of inexperienced sales people and is far too short-sighted. If you do something to satisfy customer A, then you have no resources left for customer B. Or, if you give your product away for free (the ultimate customer benefit), you will have no money left to produce or improve it, to support the customer etc. Justice in an individual case is often injustice for the other cases.

9.2 Leadership

Leaders establish unity of purpose and the organisation's direction. A leader should create and maintain an internal environment in which people can become fully involved to achieve the organisation's goals.

Leadership of the legal function often means backbone. It is important to stand up against a wrong decision, even if it means being the sole voice. The mission of the legal team also to take care of the sustainable side of growth ultimately mandates this behaviour. After voicing concern, the legal team needs to find the right balance between when to commit to the majority business decision and when to further escalate. This part of leadership is again supported by the right priorities that are defined in legal quality management.

9.3 Involvement of team members

Employees at all levels form the organisation. Their full integration into its mission and goals allows their skills to be used for the organisation's benefit.

Legal quality management also provides for processes that not only enable involvement of the right people in the right projects at the right time, but also grant employees processes to develop professionally and personally. Once again, a learning organisation in the spirit of the build-measure-learn loop is quintessential.

9.4 Process-driven approach

Any desired result is achieved more efficiently when activities and corresponding resources are managed as a process flow.

This is usually a hard principle to embrace for legal teams, as lawyers seem to have an inherent tendency to see their work as art rather than mundane deliverables. While a good legal work product essentially requires creativity and grand vision, this does not mean that only chaotic work practices lead to superb results. Quite the contrary: a process-driven approach ensures that ample time for creativity is available because all other non-essential pieces are developed faster and with less effort. If, on the other hand, every work package was treated as equal, time would quickly run out and ultimately nothing would be achieved.

The beauty of legal quality management is to identify those categories of use cases where a process-driven approach is most likely to lead to results – and where another approach is more suitable. The three states of a legal department illustrate this point excellently: routine work (steady state) is much more receptive to processes than the non-repetitive individual crisis scenario (which is not to say that a crisis occurs only once in a company's lifetime; however, it will dramatically change its appearance and individual challenges).

9.5 Systems approach to management

Interrelated processes must be identified, understood, directed and controlled from a systems perspective to contribute to the effectiveness and efficiency of the organisation.

The essence of this complex model is that processes have an impact on other processes and systems (ie, the world inside an organisation is complex). When managing the legal function, these interrelated consequences have to be borne in mind.

9.6 Continual improvement

The continual improvement of the organisation's overall performance constitutes a permanent objective of the organisation.

Life without learning is death. Any organisation – large or small – must commit to constant improvement and constant learning in order to adapt to current and future challenges. A process in legal quality management in particular is not static. It will initially be developed, but then must be continually open to changes. Those changes can be in the environment (eg, the company shifts from business to consumer to business to business, or a new regulation is promulgated); external (eg, the customer requires a different output, such as short email instead of long memo); or internal (eg, a key expert takes up a new role).

Continual improvement and thus adaptability is the key benefit of legal quality management. Quality management is often misunderstood as a one-off effort. On the contrary, the initial setup only provides the groundwork for further enhancement and change.

9.7 Principle-based approach to decision taking

Effective decisions are based on the analysis of data and information.

A current disadvantage for the argumentative position of a legal team is the lack of factual evidence and research. By pursuing a view of 'quality matters most', legal teams have driven themselves into a corner where they cannot add significant data to a decision. Simple questions – such as what the cost or even price of a particular legal service is – are often met with blank stares. When asked to assess the 'legal risk' of a contract, many lawyers do not have an adequate answer.⁵

At least, legal quality management puts in-house counsel in a position to gather fundamental data (eg, process times). This does not mean that these aspects are key performance indicators and that once legal quality management is in place the

5 As a side note, we do not believe there is such a thing as 'legal risk'. Rather, we think that all risks are ultimately business risks and that some require a closer legal evaluation than others.

general counsel can slap a price on every task or detail his team's added value. Nevertheless, it is the first step towards fostering a more data-driven culture that will ultimately benefit the legal team, not only to the outside but also to the inside in terms of a better prioritisation guideline or identification of improvement opportunities.

9.8 Supplier relationships for mutual benefit

An organisation and its suppliers are dependent on each other. Relationships for mutual benefit increase the ability of both sides to add value.

External law firms are clearly key suppliers for in-house teams. However, advanced legal teams pursue a more diversified approach to a make-or-buy decision. They leverage the whole spectrum of external supplier relationships (eg, by working with interim legal solution providers⁶ or seconded associates from firms). Professor Richard Susskind has proposed a much more diversified model of legal work.⁷ A legal team will have to consider which services it considers core and which are commodities. These are the exact questions that would require answering in the assessment of the work packages that make up a category such as steady state or large transaction.

10. A legal quality management roadmap

What is required for legal quality management? First, documenting the processes and the thinking behind them is relevant. Secondly, the definition of processes and work packages is at the core of a legal quality management programme.

10.1 Documentation is everything – almost

Not only does documentation ensure that the great work in assessing and defining processes and procedures is captured, it also serves as a basis for sustainability: new colleagues have an easy reference for how tasks are to be performed – and why. Also, and importantly, future improvements have a baseline to start from. The version history will allow for quick guidance if ideas have already been tried in the past. This ensures that continual improvement is really only improvement – and not the repeating of the same mistake twice. Thus, the importance of documentation cannot be underestimated.

The scope of the documentation should be appropriate for the size and risk profile of the organisation, its complexity of products and processes, and the competence of its employees. As a minimum, the following set of documents must be created:

- a description of the quality policy and quality objectives (including scope of the quality management system and justification for any exclusions of requirements); and
- a quality management manual containing:

6 Greenstone Miller, Jody and Miller, Matt, 'The Rise of the Supertemp', *Harvard Business Review* 2012, available at <https://hbr.org/2012/05/the-rise-of-the-supertemp>. In the interests of transparency, Carsten Reimann owns and operates such a flexible legal solutions company so we are fully convinced that this model reflects (part of) the future of legal services.

7 Susskind, Richard, *Tomorrow's Lawyers*, Oxford University Press, 2013.

- a description of processes, including:
 - control of documents;
 - control of quality records;
 - control of non-conforming products;
 - corrective action; and
 - prevention; and
- meta-processes, including:
 - internal audits; and
 - a description of the documentation process, in particular the versioning and approval procedure.

This might initially seem like a significant amount of documentation work – and it will be. However, when it is considered that it is going to be the basis for future endeavours, it quickly becomes a worthwhile investment. It is required for the efficient operation of the quality management system and processes. The documentation takes into consideration:

- effectiveness;
- ease of use;
- required resources;
- information management; and
- interfaces with customers, suppliers and other interested parties.

Processes are captured in the quality management handbook, also known as the QM manual. Creating a QM manual shows the organisation and its process landscape with the aim of controlling the nature and activities of the organisation and representing internal and external interests.

10.2 Documentation of processes in a QM manual

The documentation of processes is at the very heart of the legal quality management system. This is where the core ideas, procedures, documents and interfaces are defined. The following serves as a rough overview of what can and should be captured.

First, a meta-description gives insight into how a customer-oriented organisation is going to be built, how documents are created, approved and maintained, and what the key interfaces are.

Secondly, the responsibility of the leadership is key for a working legal quality management system. Leadership refers both to the overall company management and the general counsel or head of legal and his senior team. The task of this group of senior people is to provide for the efficient use of the available resources and for decision-making based on facts, and to ensure that special attention is paid to both customer satisfaction and the needs and expectations of other relevant interested parties. A quality policy, quality management system and quality goals also have to be initiated by the leadership and agreed by the team and key interested parties. The leadership should also establish the role of a legal quality manager who has overall responsibility for the project.

The description of customer orientation comes next. It is essential to evaluate the needs and expectations of customers and interested parties with respect to product characteristics, environmental impact, service, price, life cycle costs and product liability. This evaluation aims to ensure that:

- requirements and expectations are understood;
- key features of the legal products are identified;
- opportunities and competitive advantages are used; and
- weaknesses are reduced.

Interested parties may be customers and end users, people in the organisation, owners and investors, as well as suppliers and partners of the part of the company's operations affected by the legal products.

Responsibility, competencies and communication are an integral part of a legal quality management system. Employees need to be assigned clear responsibilities with the aim of motivating them to participate in the achievement of quality objectives. Communication guidelines also need to be defined.

The quality management system needs to be regularly audited for its effectiveness and efficiency. This section establishes which processes are used (eg, a snapshot of key processes and spot checks of others) and who is responsible for the audit.

A big part of the QM manual is the resources section. Resources not only encompass personnel but also infrastructure, environment, information and external partners. With respect to personnel, first competency levels need to be determined for respective tasks. In this respect, a major portion of the QM manual focuses on continual education, both as an offering and as a process for ensuring effectiveness and efficiency.

However, the key passages of the QM manual concern the legal product development. This section covers the actual work products of a legal team. They can take many shapes and forms, including:

- a contract;
- participation in a negotiation;
- litigation management;
- project management of an acquisition;
- support of a shareholders' meeting; and
- oral or written advice.

This section divides each process into planning; customer orientation (what is the benefit for the customer? why should we do this in the first place?); procurement (external partners, inbound know-how transfer); and product realisation with the sub-phases of direction and controlling, as well as validation.

The QM manual also contains a section on measuring, analysing and improving the processes. In this part, the foundation for further data analysis is being laid. Customer satisfaction is a key indicator in this respect, but it needs to be procured in an objective and repeatable manner. Internal audits and corrective measures form the close of the QM manual.

11. Summary

Establishing a legal quality management system is by no means an easy process. It requires hard work in all phases – from planning, assessing the status quo, categorising the work packages and tasks, developing the standard, and consolidating and approving the document. Furthermore, the QM manual is a live document that has to be reviewed regularly and improved. However, new tasks can be added much more easily if the foundation is laid properly. The overall benefit of a more transparent and data-driven legal management system is tremendous. A solid legal management system is the basis for any benefit assessment. Without a legal quality management system, there is hardly any chance of developing the legal function into what it should be: a value driver for the organisation.

Once you have established a solid legal in-house function that is well organised and can be managed like other well-run business units (rather than by *ad hoc* communication without mid-term planning and transparent performance data), the way is free for adding further improvements beyond your own core people and making your team's life easier. Some ideas: add readily available information technology to support the way you work (rather than buying software which tells you how to work). You have done your homework. You set the standard driving your organisation's effectiveness and efficiency. Expect the same standard of others. In many industries, supplier audits have proved a good exercise for enhancing cooperation and ensuring quality.

BYOS – Bring Your Own Standard!

