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## The ABCs and PPTs of Contracting for Today's Lawyers

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### I. INTRODUCTION

There is a revolution happening in the world of legal operations. The profession is gaining traction and visibility, and is even often being offered a seat at the table with the legal department leadership.<sup>1</sup> Corporate legal departments are creating new positions and allocating resources to various legal operations functions, which may include legal spend management, legal project management, and data analytics among others.<sup>2</sup> But not all legal operations are the same. Different needs and different goals create varying definitions of the job, but one thing is common to all: Legal ops is about changing the way a legal department functions.<sup>3</sup> The change can be focused on one area, such as legal spending management, or it can be a multi-front approach to changing whatever is most impactful. Another thing is certain—you can't change every operation within a department at once.<sup>4</sup> It is a slow, and sometimes painful, Process to change long-standing practices and Processes.<sup>5</sup> Change takes Persuasion, Patience, and Tenacity; but change also requires evaluation and adjustments to People, Process, and Tools (collectively, PPT). Legal departments must address all three in order to have truly impactful and effective change, which can only be done if there is a focused effort and dedicated People who have made changing the status quo their mission.

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1. See Susan Hansen, *The Rise of In-House Legal Operations*, BLOOMBERG L. (Feb. 24, 2015), <https://bol.bna.com/the-rise-of-in-house-legal-ops> [<http://perma.cc/2NE6-GXN6>] (detailing history of legal operations and providing general overview of its rise).

2. See Melissa Maleske, *GC's Embrace of Legal Ops Refocuses In-House Departments*, LAW360 (Jan. 27, 2016), <https://www.law360.com/articles/751500/gcs-embrace-of-legal-ops-refocuses-in-house-departments> [<http://perma.cc/V7HP-52KZ>] (noting increase in legal ops positions across America).

3. See *Rise of the Legal Department Operations Manager*, THOMSON REUTERS (last visited Apr. 13, 2017), <http://legalsolutions.thomsonreuters.com/law-products/news-views/corporate-counsel/2016-in-house-study/rise-of-the-legal-department-operations-manager> [<http://perma.cc/Q4CU-E8V9>] (explaining legal operations bring change and new technology to legal departments).

4. See Dave Galbenski, *Hope Springs Eternal: Legal Operations Effecting Change*, LUMEN LEGAL (Feb. 29, 2016), <http://www.lumenlegal.com/hope-springs-eternal-legal-operations-effecting-change> [<http://perma.cc/9XLV-4JW5>] (reiterating survey results stating top challenge legal operations departments faced “was [d]riving/[i]mplementing change”).

5. See *id.*

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I made it my mission to change the way I ran my commercial transaction legal practice in Microsoft's legal department. I was faced with what seemed like unlimited numbers of contracts appearing on my desk and on the desks of my team. Something had to be done, and over the course of several years, the legal support for the procurement contracting Process was changed forever by redesigning the PPT involved. It need not take years to accomplish if the following approach is taken. Many departments have excelled at some part(s) of the PPT equation, but few have excelled at the combination of all three PPT parts.

## II. PEOPLE (PERSUASION)<sup>6</sup>

Take stock of who is doing the legal work of reviewing, editing, and negotiating contracts. Consider the types of contracts that can be assigned to different levels of professionals. If only attorneys are reviewing contracts, ask whether only attorneys are capable of reviewing those contracts. Are some contracts more critical to be reviewed by an attorney, while others can be passed to another professional for review? Perhaps contract managers can play a role in relieving some work from the attorneys. Certainly, paralegals can do some contract review, and probably do so already. But there are many other roles that can be incorporated into the legal review of contracts. Besides those that do the actual redlining, like paralegals or contract managers, program managers can be brought in to help oversee the Process once it is defined and streamlined. Someone needs to track how many contracts are done and how long they take; lawyers should not be engaging in this work and, frankly, most are not best-equipped to do so. Data analysts can review spend data to learn more about how outside counsel is used for contract review and negotiation, as well as to analyze trends on contract cycles and what impacts turnaround times. The internal resources alone can be reallocated to help free attorney time to other higher priority matters, or to focus exclusively on the highest priority contracts.

Legal departments should next review external assistance. Review the firms used in order to ascertain if the right lawyers are staffed on contract work. Perhaps a partner will be faster at a higher price point than an associate, but there is a long-term investment and future benefit in training a pipeline of junior associates. Perhaps, as is the case in-house, lawyers are not needed for some of these contracts, and external paralegals or off-shore attorneys can be used. Ask, is the law firm the right level of resource, and is the cost justifiable for repeatable work that can be primed for a playbook and outsourcing?

Legal process outsourcers (LPOs) have been around for a few decades and

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6. Note: People and Process can be assessed simultaneously or in either order, but Tools should always be assessed last.

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are still evolving. Originally, they focused on discovery and document review. As automation begins to nip at the heels of that work, LPOs are wisely moving up the value and risk chain and doing more substantive work, such as legal research, compliance projects, and, of course, contract review. LPOs, once a perceived threat to law firms, now enable law firms to deliver a broader suite of services at a better price. LPOs also teach the legal industry what can be done with data and how to operate more efficiently. LPOs and firms can form a unique relationship to deliver value to in-house departments that in-house lawyers don't even know to ask for yet.

Why is People paired with Persuasion? When changing People's jobs, which is exactly what happens when resources are realigned more strategically, a simple academic exercise becomes threatening and scary. People need to be persuaded up and down the management chain that the proposed changes are good and will benefit the company. The changes will also benefit many of the People whose jobs were impacted, and they too need to be convinced about the brighter future and greater possibilities for their career development.

Still, there will be those who cannot rise to the occasion. They will not want to learn new skills to adapt to new ways of working, or in some rare cases, they will not be capable of delivering on the demands. Attempts to retrain employees may simply fail, and that is a reality that needs a plan and a great deal of support from management. Be prepared for difficult conversations and painful decisions, which are inevitable when innovating and evolving long-standing procedures.

### III. PROCESS (PATIENCE)

Everything is a Process. It can be a simple Process, like scanning e-mail every morning and flagging the matters that need immediate attention—this would be a prioritization Process—or it can be a complex, multi-step Process involving several People, departments, technology solutions and decisions. The sooner legal departments accept that the lawyering done in-house is, in fact, a Process, the easier it will be to map the work and challenge it.

Mapping a Process is not easy, and I recommend engaging someone who is an expert in Process mapping (which brings us back to People). Don't expect attorneys to gather in a room and come out three hours later with a flow chart of their "Processes"; it is not a good use of their time to try, and it is likely not anywhere in their skill set. So, bring in someone who can help. Consider other professionals in your company that have experience with Process optimization, Six Sigma,<sup>7</sup> or other business operations, who can help guide the legal team through the exercise. It is an exercise. Mapping a legal Process is exhausting

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7. See *What Is Six Sigma?*, ISIXSIGMA.COM, <https://www.isixsigma.com/new-to-six-sigma/getting-started/what-six-sigma> (last visited Apr. 13, 2017) [<http://perma.cc/8BS4-HM4M>].

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and trying on the participants, which means it is critical that participants buy in on the concept (again, People and Persuasion) and provide their undivided attention. A precise methodology will be used to walk attorneys through this exercise, but there is no one methodology that is right or wrong. The expert you engage to facilitate the exercise will choose the methodology.

In my experience, we spent five full business days with two Six Sigma professionals who guided us through an exercise that resulted in identifying hundreds of steps, dozens of which were wasteful, dozens of decision points, and varying opinions on the best Process for what would otherwise be categorized as one uniform Process.

How can five paralegals who all perform the same function of reviewing contracts be doing it in five very different ways? One searches the repository first, then searches the backup location for files. Another goes straight to the backup location because her experience has led her to great success with finding documents there. A third paralegal performs searches at the very end just to validate some information. And so on. In summary, what may be considered one “Process” of searching for a contract, yielded many variations. We were both genuinely shocked and completely intrigued. We became obsessed with identifying “waste” in our Processes, and removing unnecessary or invaluable steps. There is no way to describe the feeling of optimizing a Process after years of doing it one way and discovering a much faster way. Admittedly, one has to love this stuff to appreciate that feeling.

On a regular frequency, stop and ask, “Why is it done this way?” This question may sometimes be perceived as offensive, but it should not be. Lay out the rules of the Process-mapping exercise in advance. The rules can be as simple as: Listen to each other, assume no ill intent, expect curiosity from others, and be curious. There is no such thing as a career-limiting suggestion. Add whatever other rules make sense in your departmental culture. One guarantee, whether you set such rules or not, is that the exercise will not work without transparency and honest discussion. There will be some outcome, but it will be clouded with bias, mistrust, and cynicism. It will not be useful in evolving the practice, and will leave People with a bad taste for Process. What makes this unfortunate is that the exercise itself did not fail, but the lack of genuine engagement caused the failure. Therefore, be prepared to answer questions about your practices, to be called out on Processes that don’t make sense, and to uncover obvious inefficiencies that have not been obvious to you for many years, until this very point when it basically slaps you in the face.

Policy is another “P” that is critical to the success of any contracting Process. Every company needs to be clear about what sort of transactions need contracts and which ones do not. Similarly, it should be made clear which contracts can be handled by the business owner, and which require involvement from the legal team.

Taking a few steps back, we need to question why it is that attorneys allow

the business to dictate what our workload looks like. Obviously, we are in-house to support the business, and have to provide legal advice on business matters, but we should not simply do legal work because the clients decide they need legal support. We should define what sort of business transactions need our advice first. If we are clear with the business that there are certain transactions for which they do not need to come to legal, they will rejoice! Contacting legal is not necessarily a step that the business owner looks forward to, and I will be so bold as to say it is one many business owners would like to avoid. If nothing else, it is a delay in achieving business goals. So, we should take the first necessary step of deciding what sort of transactions really require legal support, and which transactions can be handled without any intervention by the legal department. This is a little scary at first, because it requires the legal team to relinquish control and rely on the business. It also naturally requires that some risk must be assumed. The risk is that the business will do a terrible job on contracts if left to their own devices. They may sell the farm, agree to terrible caps on liability, or completely misunderstand indemnification obligations. I am here to tell you that it is okay. It is okay because for every contract the legal team knowingly allows to proceed without legal's involvement, there are at least three other contracts that proceeded unknowingly. That is reality. The sooner you accept it, the easier it will be to let go.

A policy must be conceived and agreed upon that clearly explains, in plain language, which transactions do not require legal review. This means that several other things should happen in order to make this policy useful (and not scary) to the business. You will need to create some templates for the business owners to use, in a place where they can easily locate them, along with some simple guidance. That one sentence alone can take several months to design and implement, but is critical if you want to empower the business and avoid noncritical work from coming to your legal department. In addition, you will want to do some training for your business and have a communication plan. All of this needs to be coordinated and planned in a way that optimizes the resources available, and should not rely solely on attorneys. Can you leverage project managers from another department? Is there someone whose job is to work on communications? Perhaps it is time to give a chance to that person in the business who you have been impressed with as someone very good with contracts who can help design the templates. Be creative and use everyone available to help prepare for this shift in work allocation.

Patience will quickly become the most sought after and rewarded trait, as you go through the painful experiences of mapping Processes and revising/designing policies. I hope that the need for Patience is now obvious without too much explanation.

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#### IV. TECHNOLOGY (TENACITY)

Finally, we get to technology. Not a day goes by without an article on legal technology and, more specifically lately, about artificial intelligence. Nothing is really new here. Technology has always been at the core of any discussion about innovation, but I propose that it should not be. I suggest, before any conversation about technology takes place, there should be an assessment of the current state of People and Processes involved in contracting. Only after a thorough review has taken place, and there is agreement within the organization that the right People are doing the right steps in the best order, should a discussion about technology begin.

Next, consider who should be part of that initial conversation. The worst thing you can do is see a shiny demonstration and decide to start from there. That is not the first step. Reviewing solutions and scheduling demos should come down the road. Start internally with key stakeholders to understand what they need from a technology solution. Understanding these needs is the most important part of any technology implementation. If you are not certain about what People need, you will deliver something that is not used, and therefore, is a waste of money and credibility. There are entire consulting companies whose job it is to help with technology selection and implementation, but you may not need to go that big. If you are careful and engage the right People with the right skills to run a technology assessment, you can accomplish it on your own.

Once you have gathered all of the requirements from your stakeholders, you will need to spend some time prioritizing the requirements. Which requirements are a must-have versus a nice-to-have? Is contract authoring the most important step to automate, or do you just need a great searchable template repository? After prioritizing your needs, you are ready to assess what is available in the market. Spoiler alert—there is no Tool that will match your exact requirements, without significant (costly) customization. Stay away from customization for several reasons: it is costly, it needs to be maintained for the long run, and it may become outdated or irrelevant and render other functionality not useable. Try to select a system that you can use out of the box as much as possible, yet is configurable, which is very different than customizable. Mature systems will be highly configurable so that they can serve legal departments that vary in size and complexity. In order to use something out of the box, you will likely need to revise some of your Processes, which, at this stage, may be okay if you have done all of the homework on your Processes in advance. It is easier to tweak Processes once you have optimized them. Remember: No Tool will match 100 percent out of the box.

You will quickly see the Tenacity with which tech providers will try to get your business, but this is not the Tenacity I want to focus on. The Tenacity that really matters is your team's commitment to sticking firm to your requirements,

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and holding steadfastly that Process comes first. Be the broken record, and repeat it as many times as necessary while everyone around you is ready to buy that magic button that they saw on a flawless demo over the course of fifteen minutes. You have invested months, and have a deep knowledge of the stakeholders' needs. Do not fall victim to that pressure. Be tenacious that Tools come after Process.

#### V. CONCLUSION

Every company has contracts and every legal department struggles with meeting the needs of its business. Volumes are high. Expectations about turnaround times are unreasonable. Resources are limited. Any legal department of any size can take the steps above and benefit from the resulting efficiencies. Benefits will come from just assessing People and Processes, without even the need to invest in technology. People and Process changes can be done with no extra investment (besides time) and, if outsourcing is a possibility, can even result in savings. Next, turn to technology. Start today. Ask questions of your current Processes, and make incremental changes. This does not need to be a big bang project. Small tweaks will result in time savings right away. Small wins will gain traction and provide support for further small changes. Once combined, before you know it, you have made some major changes!