

The New Practice of Outsourcing Law



Expanding a leadership position in outsourcing advisory services is complex business. The hardest part is bringing all the right people together and applying the best practices and lessons learned from many fields.

Photo: Principals in the Global Outsourcing Group of Morgan Lewis
Michael Pillion, Akiba Stern, Barbara Melby, Ed Hansen

Here are words that an outsourcing services provider almost never utters to his customer's lawyer: "Without you, this deal would never have happened." Yet members of Morgan Lewis's Global Outsourcing Group hear it. Regularly.

Seemingly overnight, Morgan Lewis, with more than 1,200 lawyers, and one of the global top 10, has established the leadership position of its Global Outsourcing Group, helping the who's who of the *Fortune* 1,000 streamline their HR, IT, finance, accounting and other business processes. With the addition of New York-based Akiba Stern, Ed Hansen, and Rusty Yuson to its internationally ranked outsourcing legal team of Barbara Melby, Michael Pillion, Karen Leisten, Peter Watt-Morse, and Rahul Kapoor in the United States; Richard Barratt in London; Florence Guthfreund-Roland in Paris; and Adi Seffer in Frankfurt; Morgan Lewis has

won outsourcing headlines and clients worldwide.

"We have seen a lot of people do outsourcing deals wrong," Ed Hansen says with characteristic passion. "It's the opportunity to get them right that gets us up in the morning. And when we are done, we leave our clients, and in many cases the outsourcing marketplace, in better shape than we found them."

Hansen uses an example to illustrate the positive impact of thought leadership—a term often used but rarely defined. "For instance," Hansen says, "take the pricing model that Akiba [Stern] implemented for an insurance company client. This was a never-before used innovation that continues to provide significant ongoing operational advantages for both the client and its supplier. This is the type of 'thought leadership' to which we aspire every day."



The “Point Guard” for the Outsourcing Team

When companies build outsourcing relationships, the lawyers are often brought in far too late in the process. The outsourcing contract is simply the end result of a process that, if conducted correctly, will align both parties' expectations and establish the basis of the ongoing outsourcing relationship. As Barbara Melby, one of outsourcing's most experienced and widely-published attorneys noted: "Many law firms can write a contract, but that's not enough. The lawyers must be able to work side by side with the clients and their other advisors, and use their experience to help shape the discussions with the outsourcer so that the client has the best opportunity to create the proper business drivers for their needs." This is best accomplished with an integrated team that includes skilled outsourcing attorneys. Michael Pillion, a 20-year firm veteran of Morgan Lewis and an experienced outsourcing practitioner in his own right, puts it another way: "Our Global Outsourcing Group is focused on driving strong relationships between suppliers and their customers. This results in the best value possible for our clients. And to accomplish this, we like to have input throughout the entire process." Akiba Stern is quick to add, "We round out the team by providing a much-needed skill set that takes into account the endgame and how to get there. We complement the team." Deloitte Consulting's landmark April 2005 report "Calling a Change in the Outsourcing Market" documents several relationships that encountered fatal pitfalls that could have been avoided with more balanced and thoughtful use of experienced legal counsel.

Innovative Vision

One of the challenges often faced by outsourcing and procurement professionals is the supplier selection process. In many business processes, there are only a few providers of a particular outsourced business process. In addition, many

large integrated outsourcing suppliers provide services across many business processes. Good relationships need to be maintained with those suppliers, while at the same time selecting the most appropriate supplier for the particular service being outsourced. Perceived unfairness in supplier selections and/or lack of gratitude for other "investments" made in different parts of the company by the losing bidder can strain relationships for many years. Morgan Lewis has devised a significant innovation that counteracts the challenges presented by this quandary. Morgan Lewis calls it, simply, "inclusion." While inclusion may sound pedestrian, in the world of traditionally adversarial contract talks between suppliers and clients—each represented by opposing counsel—it is nothing short of a breakthrough.

Akiba Stern explains, using HRO as an example. "Outsourcing HR presents the changing of a set of particularly delicate relationships," he explains. "After all, we are dealing with peoples' lives and livelihoods." The secret to success in HRO, he states, is to start the negotiation process by working to keep everyone in—the company's HR professionals, suppliers, consultants, advisors, and other stakeholders. "Keeping everyone in while working through the arrangements is a huge departure from common practice. Typically, procurement is designed and acts to exclude people. By including all the stakeholders, you get an awful lot of learning done, which benefits the client."

If conducted properly, it is also a learning process for the bidders. The selected bidder will begin the relationship with a deeper understanding of its new customer's business, and the bidders who do not stay in the process to the end will understand why they were not able to be selected. This makes it easier for the unsuccessful bidders to continue to interact with the customer in other circumstances and for other services without ill will.

Philip Werner, the Morgan Lewis Management Committee partner responsible for practice development who is the driving force behind the firm's commitment to continue to build and enhance the Global Outsourcing Group, explains further. "There is an unfortunate

dynamic in the outsourcing world," Werner says, "where there is emotional and commercial friction between customers and suppliers. Every party's interest is proprietary." But, Werner explains, Morgan Lewis devised its inclusive, non-adversarial approach in part by working with its giant Wall Street clients, including the largest private equity firms. "We are not scorched-earth guys," he says. "We could not work in that private equity world unless people knew we can work with everyone. These outsourcing contracts are seven or eight or 10 years long. This is no place for throwing grenades in the crowd."

Barbara Melby sums up the significance of this inclusive approach for Morgan Lewis' clients. "Inclusion is a tempering factor against the bullies, whoever they might be," she says. "Also, we help to make people look good when they are stumbling—even when they are on the other side. Expertly playing this enabler role makes everyone want to stay at the table and get the best deal done."

Metcalfe's Law—The Morgan Lewis Corollary

Remember Metcalfe's Law? That was Ethernet inventor Robert Metcalfe's revolutionary observation that the usefulness of a computer network improves by the square of the number of users on that network. Now get ready for the Morgan Lewis Corollary to Metcalfe's Law: The value of your outsourcing relationship improves by the square of the quality of your professional representation.

Philip Werner explains the core of the Corollary. "In law and other professional services, quality equals depth and breadth," he says, referring to Morgan Lewis' combined years of attorney experience and its broad industry sector and geographic coverage. "Our premier outsourcing practice is backed up by the market's deepest Labor, Employment and Benefits Law Practices—240 attorneys in a practice that has been at the top of the game for 40 to 50 years."

Michael Pillion explains further. "Many outsourcing deals have a critical human resources component," Pillion notes. "Often, employees are transferred to the new provider or they are let go. We are able to tap into the resources of our large Labor and Employment Law Practice to provide clients with solid advice and creative thinking on those issues."

Quality equals depth. Value improves by the square of your counsel's quality. The Corollary represents a formula that Morgan Lewis has worked a long time to perfect, says Barbara Melby. "When you think about outsourcing contracts, don't forget that many of them have a global component," she says. "Over many years, we have built strong practices in all the world's commerce centers in order to manage relationships that cover a lot of geography simultaneously. We work globally. Our international presence includes offices in the United Kingdom, Paris, Germany and Tokyo."

Manufacturing Leverage

The outsourcing failure scenarios outlined in the April 2005 Deloitte Consulting report "Calling a Change" are most often, according to the Global Outsourcing Group, a result of imbalance caused by a flawed outsourcing process. A legal counsel with deep fluency in outsourcing is able to re-balance the relationship to the benefit of all parties. Ed Hansen explains "Among the worst-case scenarios is when either the customer or the services provider simply imposes its will. The best case is when the customer and services provider meet at the right place on scope, service levels, and pricing." According to Michael Pillion, "A lack of alignment between the service provider and customer goals and objectives leads to post-contract execution problems."

Akiba Stern points out that this re-balancing role harkens back to "principled negotiating" techniques of Harvard Law professor Roger Fisher, the architect of the famous concept, "Getting To Yes." If you are represented by counsel with deep fluency in outsourcing negotiations, Ed Hansen says, a client is more likely to achieve a successful, long-term



relationship with its services provider.

For smaller transactions where the supplier often seems to hold all of the cards and for sole-source procurements, Morgan Lewis introduces an innovative new term: "manufacturing leverage." Ed Hansen explains that Morgan Lewis delivers previously unavailable leverage to its clients by understanding what that client means to its services provider. "In the big deals, the skill is in keeping the data organized," he says. "In the small ones, it is in understanding the business and the leverage points." Akiba Stern puts it another way. "We create surrogates for competition," he says. "By getting involved, we help the client avoid always having to play catch-up with their supplier." Barbara Melby further explains, "We bring to the clients the knowledge and processes that help them minimize the suppliers' advantages and help level the playing field."

Often during the course of finalizing an outsourcing relationship, says Michael Pillion, doing the deal becomes the objective rather than reaching the business objective. In this focus on the close, a client often ignores what its own centers of excellence have learned. As Akiba Stern observes, "A sometimes-unfair reality is that senior executives occasionally pay closer attention to what we say than to the internal experts in their company. So sometimes, part of our job is to learn what the good internal expert opinions are and validate them." In this way, Stern concludes, Morgan Lewis often finds leverage within the customer's own team.

Ogilvy's Law—Build a Company of Giants

Partner Philip Werner remembers when he realized that a larger and broader outsourcing practice was a must-have for his firm. "There was lots of discussion among the partners where the outsourcing market is going," he recalls. "Is it a flash-in-the-pan? Is it a bubble? We concluded it is quite the contrary. We see outsourcing as an ongoing dimension for business—and the processes being utilized by the outsourcing practitioners being applicable to many of the long-term technology-enabled services relationships

that we have been helping our clients negotiate and conclude almost forever. I bought the concept then, and now more than ever I really believe in it."

So how does one make the firm's outsourcing team an industry force? Werner knew only one way. Secure more of the best talent. He understood that legal talent, like legal customers, go where they are wanted and stay where they are well-treated. How Werner approached the practice-building task is reminiscent of Ogilvy's Law, set down by advertising legend David Ogilvy in his book *Ogilvy on Advertising*. When he appointed a new office head, the new manager received a matryoshky—a Russian nesting doll inside each of which was a smaller doll. Inside the smallest doll read a note: "If each of us hires people who are smaller than we are, we shall become a company of dwarfs. But if each of us hires people who are bigger than we are, we shall become a company of giants."

When Werner was able to attract Stern, Hansen, Yuson, and their associates from Shaw Pittman in late 2004, he knew he had added some very tall trees to his already impressive forest. Having highly skilled outsourcing lawyers—as Michael Pillion and Barbara Melby are quick to point out—also represents a client's best insurance of high return on its professional services investment. Efficient delivery of professional services, say Pillion and Melby, is all about having expert attorneys focus on high-value work, while junior associates do most of the documentation work, which ends up being the bulk of a client's legal bill. The expert-level tasks, such as correctly defining the relationships among the client's outsourcing's scope, performance levels and price contributes the most value because it serves to avoid the expense and disruption of re-work and renegotiation.

"On the topic of how to best use an outsourcing counsel," Akiba Stern says, "my message to the chief HR officer, the CFO, and the general counsel is the same: Invest in people who will make the greatest contribution to your outsourcing objectives." Stern then pauses for emphasis. "At Morgan Lewis," Stern says, "we have a singular goal. We contribute value to our clients!"