

# MERGERS & ACQUISITIONS 2019 EXPERT GUIDE

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## The Evolving Role of Outside Corporate Counsel in M&A

By Andrew J. Sherman

*"It was the best of times;  
it was the worst of times."*

~ Charles Dickens

When Dickens first shared this quote with the world, he was not referring to the current state of the merger and acquisition (M&A) markets, but he might as well have been. Over the past several years, the overall financial markets and the levels of M&A activity have experienced both polar opposites and everything in between. With those changes, it comes as no surprise that the roles of both the in-house and outside corporate counsel in M&A and related transactions have evolved – but it would appear that law firms are lagging behind in-house counsels' expectations.

In M&A transactions, the first step in keeping a deal on track is to have strong communication and leadership by and among all parties and key players to the transaction. As in football, each team (e.g., buyer, seller, outside corporate counsel, etc.) must appoint a quarterback, who will be the point person for communication and coordination. Too many lines of communication, like too many chefs in the kitchen, will create confusion and misunderstanding. The more that the designated quarterbacks coordinate, communicate and anticipate problems with the various members of their team, and promptly discuss critical issues with the quarterbacks of the other teams, the higher the chances that the transaction can and will close.

Over the past few years, some of the critical tasks of the transactional quarterback and each team to keep the transaction on track towards closing have dramatically changed. The resourcing of M&A transactions is going through a fundamental shift with

more radical change on the horizon, driven by in-house counsels' desire to reduce the burden of regulation, ever changing technologies, globalisation, and internal and external cost pressures.

The legal departments of today's M&A and transactional clients are increasingly insourcing – taking on more responsibility in-house thereby altering the role of their outside legal counsel. Large and mid-size companies are continuing to invest in in-house legal experts and as the M&A process becomes more complex, these in-house teams are building essential skills to internally handle many aspects of the transaction from beginning to end. This insourcing trend is expected to continue over time, and as a result, the role outside counsel must evolve as well.

A driving force behind the changes to internal and external roles on transactions is a new approach to M&A risk management. As businesses look for growth in emerging markets, M&A activity is not so straightforward. Compliance, regulatory, and reputational risks have muddied the M&A waters. As one general counsel reported in a study by Bird and Bird and RSG Consulting, "[deals have] gone from 'let's do it' to 'can we do it?'"

In the past, outside corporate counsel could merely focus on reviewing clients' work, providing specialist expertise, negotiating the legal terms of the agreement, and managing the legal process, yet, today, this is not enough. According to the Bird&Bird study, "a [shift] in mindset is required [and] law firms have to change their attitudes, behaviours and skill sets to meet the new demands of general counsel on M&A deals."

Clients want a partner who will not step back after the legal aspects of the deal are closed, but rather someone who will provide



valuable insight and guidance every step of the way. The expectation of outside corporate counsel to act as a partner, rather than merely as an attorney is not surprising. For years, in-house counsel have been frustrated by the perception of outside corporate counsel operating as a "one-trick pony," having to bring in another specialist lawyer for each issue that arises, therefore decreasing efficiency, and increasing the bill. With the shift in responsibilities in-house, however, general counsel now have more leverage to demand increased value, efficiency, and expertise at every turn.

Clients now expect process and project managers, expert market knowledge, technology tools to review definitive documents and due diligence in real time, ownership and accountability, and perhaps most importantly, solutions not just advice. In-house counsel wish to have access to networks, introductions to third-party financing, and smooth post-closing integration. Clients want outside attorneys who have a clear understanding and ability to provide insight into the "big picture." General counsel expect process and project managers to stay in touch personally and communicate as friends and strategic partners. Outside corporate counsel must have a deep understanding of the client's needs and how the business (not just the legal department) operates as a unit within the industry.

Outside corporate counsel must evolve to meet clients new demands. They can no longer take for granted long-term dealings, but must work every day to grow and protect strategic client and referral relationships, create value at every turn, and provide the expert advice and knowledge clients desire. They must maintain and build brand leadership, and understand their clients underlying business decisions and they must remain relevant, lean, strategic and well-connected to meet evolving clients' essential needs.

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