

Some Thoughts on Proactive Counselling and Legal Mentality

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1 Preface

Lawyers working in today's business environment face great challenges. Both the environment and business relationships are in a state of constant turbulence. Traditional legal systems and processes are in a transition phase.¹ To provide clients with value-adding counselling in this unstable situation, lawyers have to re-evaluate their skills. Even though these skills are based on education and experience, the way they are used by individual lawyers is based on mindset and mentality. He or she acts in the way or ways that are considered "right" for lawyers to act. Lawyers do what they think lawyers are expected to do.

The viewpoint that court cases are the standpoint for legal studies and education has dominated legal education for a long time.² The whole legal system, the structure of law, legal procedures and legal mentality has been oriented towards the past.³ The education received by lawyers has been geared toward crisis management rather than crisis prevention.⁴

As can be seen from the articles in this journal, traditional legal education and legal processes are oriented in a manner that reacts to the past and they do not offer either the tools, the methods or the mentality required to serve clients effectively in today's unstable business environment. If lawyers are to provide value -adding counselling, new skills and an expanded mental view of the lawyer's role are needed.⁵

Business relationships are always based on agreements, and these can be written, oral or silent. These agreements are the manuscripts for business relationships. They steer business, money, people and material and they perform a variety of functions.⁶ While it is important to get the parties to an agreement to sign it, successful implementation of the transaction in question is far more important. In an ever-more-complex business environment, agreements are the only factor that connects the parties. How these manuscripts are written and managed, and the attitude adopted in them, are not irrelevant.

The purpose of this article is to illustrate why lawyers who counsel clients in business relationships should be focused on the future, developing skills that help in enabling and facilitating each client's business rather than focusing on a

¹ For example new legal procedures such as mediation, court-ordered settlement and other hybrid procedures are being devised.

² Nystén-Haarala Soili, *Preventive Law – Some Theoretical and Practical Aspects*, 2000, available at "www.preventivelawyer.org/main/default.asp?pid=essays/nysten-haarla.htm".

³ Barton, Thomas D, Copper, James M, *Preventive law and creative problem solving: Multi-Dimensional Lawyering*, available at "www.preventivelawyer.org/content/pdfs/Multi-Dimensional_Lawyer.pdf 2000", p. 4-13.

⁴ Goldblatt Michael, Hardway Robert, Scranton Robert, *Establishing the Mindset of Practicing Preventively* Preventive Law in Corporate Practice Lexis Publishing 2000, Excerpt available at "www.preventivelawyer.org/main/default.asp?pid=essays/goldblatt.htm".

⁵ Barton, Copper 2000, p. 4.

⁶ Haapio, Helena, Haavisto Vaula, *Sopimusosaaminen projektiliiketoiminnassa*, Projektitoiminta 1/2005, p. 33.

“winner-take-all” attitude in disputes and battles.⁷ If the question concerns a long-term relationship, the winner-take-all attitude does not help a client in his business. Such transactions call for constant and mutual effort by all contracting parties and value is created in the long term. It is for this reason that the lawyer’s attitude must differ from that of a fighter of battles. In long-term transactions, short-term victories have no place. If the overall relationship is not a victory for both parties, it is reasonable to assume that it will face problems.

To put these thoughts into concrete form, I will use the fictional example of an IT outsourcing transaction, a good example of the complex and long-term relationships that are a feature of today’s business environment. The relevant themes are what a lawyer should take into account when offering counsel in connection with a given transaction, and why a different attitude is required in order to create value for the client.

This article focuses on the role taken by the lawyer, his or her mindset in a business environment, and the factors that must be taken into account when counselling clients.

2 A Counselling Situation

Imagine a fictional situation in which a client asks their lawyer to design an outsourcing relationship and a detailed service agreement to support it. The client intends to outsource IT capacity management, system-maintenance and support services to a service provider.

How can the lawyer provide effective advice? What should be taken into account before advising a client on how to design the outsourcing relationship and why?

Firstly, we must consider the lawyer’s role in this situation. The client has certain objectives in mind, and is not just looking for a statement of the legislation applicable to outsourcing relationships. The request for advice has probably resulted from the client’s wish to establish a successful and profitable outsourcing relationship and avoid potential pitfalls.⁸ The client’s objectives are a combination of business and legal issues, and the solution being sought is presumably one, which represents the best-possible alternative from both a business and legal standpoint. In this situation, the lawyer should regard him/herself as a designer of relationships. The client is not asking the lawyer to fight a courtroom battle, but requesting help with the structuring of a well-functioning relationship. The driving factor in counselling should be the client’s

⁷ While the role of a fighter is a necessary one for a lawyer in a democratic society, it should not be the lawyer’s only role and the dominant one. See also Barton, Copper 2000, p. 2-3.

⁸ “The lawyer should try to find out all the facts related to a transaction, business objectives and also hidden business purposes because they can dramatically affect the analysis and a recommended solution. The lawyer has to be aware of real business purposes before he can find real solutions”. Jones, Ronald L, *Practise preventive corporate law. Ten reasons business people don’t take legal advice and what you can do about it*. The American Law Institute 1985, p. 186.

business objectives.⁹ One difficulty is that if a legal education has favoured the “fighter” mindset, changing the lawyer’s role from that of a fighter to a designer is difficult. Fighters have a hard time building consensus and framing situations that offer mutual benefits.

3 Traditional, Adversarial Lawyering

On occasions, business people are reluctant to ask a lawyer to join a team that is designing commercial relationships. Lawyers are sometimes viewed as an obstacle to doing business. Some business people characterize them as nothing more than punctual individuals in grey suits using complicated language, which does not make sense. The role played by a lawyer is either misunderstood or simply unclear to business people. Prejudices concerning the lawyer’s role and value are reinforced by television series, which present lawyers as fighters, battling for judgements, which decide between winners and losers.¹⁰

According to the traditional adversarial approach of legal practice, the definitions just given are true to some extent. In the adversarial approach, the job of the lawyer is to assume the merits of the client’s position and prove that the client’s opponent is in the wrong¹¹ or to act as a “hired gun” - a fighter whose job is to threaten and sue the other party in court and thus make them pay.¹² In business relationships, the role of the lawyer as fighter only focuses on the consequences of failed transactions.

The background to such definitions is that traditional legal education and the legal system has supported the role of lawyers as fighters. If lawyers are educated to win court cases by finding legal rules that favour their clients, and clients are also looking for people to fight on their behalf, they themselves will believe that this is the right way to practice law.¹³

The question is whether a lawyer who practises adversarial law actually does the client’s business any good. Usually, when people end up in court, they are already fighting with each other and any existing business relationship will have been destroyed.

4 The Preventive and Proactive Approach

The courtroom-based winner-take-all attitude and adversarial way of practising law does not facilitate better business and human interaction.

Fortunately, different approaches to the profession of being a lawyer exist. There are both academics and practising lawyers who concentrate on studying

⁹ Jones 1985, p. 163.

¹⁰ Barton, Cooper 2000, p. 10.

¹¹ Jones 1985, p. 1.

¹² See, e.g. Bernstein, Lisa, *The Silicon Valley Lawyer as a Transaction Cost Engineer*. Oregon Law Review, Spring 1995.

¹³ Barton, Copper 2000, p. 20.

and practising preventive law. In the preventive approach, the focus is on learning about and resolving legal problems, or even preventing their occurrence at a very early stage, before the only remaining option is to initiate the litigation process. This approach is dedicated to preventing legal risks from becoming legal problems.¹⁴

In addition to the preventive approach, a proactive approach to the study and practice of law has been developed. This proactive approach focuses on primary prevention as a means of promoting a client's success and eliminating the causes of problems in business relationships. In this approach, lawyers and clients work together as a team to achieve better business.¹⁵

Proactive law focuses on how legal knowledge should be used to create value before something goes wrong, rather than, as traditional adversarial law does, handling the consequences of a failed transaction. Proactive law focuses on eliminating the causes of problems in business relationships. The aim is to promote a client's business and work together to create successful business relationships which offer mutual benefits to the client and to his business partner. While there are still many lawyers whose mindset is oriented towards the adversarial route, the popularity of a preventive and proactive approach is growing.

When counselling clients in the designing of long-term relationships, the key ability a lawyer should have is the ability to provide solutions that maximize the future value of the transaction. This calls for a new way of thinking and acting as a lawyer because the lawyer's task then becomes the facilitation of an environment that prevents problems from arising. The lawyer has to transform him/herself from being an object that merely reacts to events into a purposeful shaper of the environment.¹⁶ In proactive law, the focus is on the future. This is why it is a suitable approach when planning long-term human interaction such as business relationships.

5 IT Outsourcing Example – the Client's Business Objectives

Outsourcing has been a popular concept in recent years. Companies outsource a part or parts of their business processes in order to focus on their core business and reduce costs. Cost reduction is not the only reason to engage in outsourcing. Companies also seek to obtain strategic advantage, and outsourcing should facilitate more-effective business relationships. Companies that outsource their business processes have all these three: cost reduction, strategic advantage and more-effective business relationships as business objectives.

In our outsourcing example, a service provider offers customers IT capacity management, system maintenance and support services.¹⁷ In this situation,

¹⁴ See, e.g. Brown, Louis M, *Preventive Law*, New York 1950.

¹⁵ See, e.g. Haapio, Helena, *Jäikö jotain sopimatta: Ennakoiva sopiminen*, WSOY 2002.

¹⁶ Barton, Copper 2000, p. 21.

¹⁷ There is no legal definition for outsourcing, and legal rules do not recognize outsourcing. Usually, it concerns a complicated transaction in which a corporation focuses on its core business and outsources one of its functions to a third party. There are many structures for

outsourcing means that the service provider makes investments in equipment and software on behalf of each customer. Because of these investments and their amortization, outsourcing agreements are usually long-term relationships and it is difficult for the customer to conveniently terminate an agreement before the initial period is over without being obliged to pay a significant fee. Challenge for outsourcing relationships are on-going changes in technology and business models that drive changes in contract pricing and service levels. To be successful, an outsourcing relationship should have flexible mechanisms for ensuring continuous improvement in quality of service and pricing structure.

When counselling a client in the structure of an outsourcing transaction, the lawyer should keep in mind the client's business objectives: cost reduction, strategic advantage and more-effective business relationships. In this situation, the solution required can be defined as "the alternative course of action that accomplish the business objectives of the client to the extent possible while maintaining high-quality legal practices within the predetermined levels of legal risk, exposure and cost to the client".¹⁸

6 The Tide has Turned from Goods to Services...

Before counselling a client, the lawyer should be familiar with that client's business, business objectives and the legal rules that affect that particular business. But what happens if a lawyer works to rules, which are not designed to facilitate business interaction?

Outsourcing relationships are just one example of increasingly -complex, long-term commercial arrangements. As the business models that mix business and technology are new and continually developing, to many people they are unfamiliar. Keeping up with constantly -changing business models is difficult, and trying to apply existing legal rules to them is even more difficult. For example, in legal terms, the application of existing laws to services based on new technologies is somewhat complicated. In the main, laws focus on defining the rights and obligations of the buyer and seller in transactions that concern the buying or selling of tangible objects – i.e. goods. Concepts related to the sale of goods are not helpful when dealing with complex and long-term human interaction in which the object of a transaction is on-going service, the level and capacity of which may change. The traditional adversarial approach adopted in legal practice makes this situation even worse.

Complex commercial relationships call for new ways of acting as lawyers to define and manage these relationships. While it is critical that the desired performance levels are defined in an agreement, this is not in itself sufficient. When planning an outsourcing relationship, the focus should be twofold: how to facilitate and then secure on-going performance by the parties involved; and the success of the relationship in the long run. When designing this kind of

outsourcing transactions such as asset purchasing, share purchasing, the establishment of a joint-venture company or a partnership structure. These structural issues are not dealt with in this essay.

¹⁸ Jones 1985, p. 164.

relationship, it is critical that the adversarial mentality is rejected in favour of a proactive and creative mindset, and that the focus is on creating a management structure which reinforces the interests of the parties involved rather than working to separate them. Because existing legal rules offer little help, a lawyer should use his creativity and encourage the parties to formulate their own rules, which support the business objectives of the relationship.

7 From Buy-and-sell Deals to Relationships

The traditional attitude towards business transactions has concentrated on the concept of getting the deal done. The seller has played his part as soon as the buyer has signed on the dotted line. In these transactions, value is exchanged instantly. There are countless books and guides on the subject of how to make a good/optimal sales contract, which is watertight once it has the buyer's signature. In "buy-and-sell" transactions, effort is spent on the drafting of contractual commitments without thinking about the time following signature of the contract. When thinking about today's complex and long-term service relationships, the way in which contracts are made is quite different. To facilitate relationships that offer mutual benefit, the focus is different to that of "buy-and-sell" transactions. In complex long-term relationships, the value-creation model is different.¹⁹

IT outsourcing relationships are usually long-term. The customer's aim is to reduce costs and gain strategic advantage. On the other hand, IT service providers concentrate on delivering standardized services to their customers and if they have a large-enough base of customers who own substantial quantities of similar or compatible equipment and software, services can be delivered at an effective price. Both customer and service provider should have a mindset that facilitates long-term value creation. In today's ever-changing business environment, the "buy-and-sell" mindset and contracting processes and structures based on this are just as destructive as legal counsel with an adversarial winner-take-all attitude.

8 Preparation is Important when Designing Long-term Relationships

Preparation is a key element in the design of outsourcing relationships. Before customers enter into any outsourcing relationship, the lawyer should encourage his or her client to evaluate and define the contents and scope of that outsourcing relationship with the service provider. What are the business objectives of the customer, and on the other hand, the service provider? What are the services and processes being contracted for and how critical are they from the business viewpoint? What are the possible risks and how can they be avoided? What will

¹⁹ Ertel, Danny, *Harvard Business Review*: Sopimus – lähtölaukaus yhteistyölle, *Yritystalous* 2/2005 p. 37.

the situation of the relationship be after two years have passed? The results of this type of evaluation should be used by the parties to define realistic terms for the relationship that take into account *and secure* both parties' business objectives. Because the question concerns a long-term relationship, open discussion with all stakeholders is essential. Hidden agendas are usually destructive of value creation. Success in the relationship should be the concern of both parties. Both parties should have the possibility of commercial gain.

9 But Implementation and Performance Measurement is far more Important

A written manuscript is not enough to make an outsourcing relationship a success. The mental approach adopted by the parties is the most critical issue because the content of the manuscript reflects their viewpoints. If the manuscript is made with a winner-take-all attitude and in a buy-and-sell manner, there will be little use for it in a relationship, which aims at long-term value creation.²⁰ In such a situation, mutual success should be the driving force. The lawyer should ensure that contractual commitments are tested in practice before they are documented and implemented.

Head terms of the service agreement

- 1 Scope of services
 - Quantity and quality of services
 - Support requests
 - Sanctions when service levels are not met
- 2 Out-of-scope services
- 3 Service locations
- 4 Monitoring and reporting procedures
- 5 Benchmarking
- 6 Management and control
- 7 Cooperation duties
- 8 Intellectual property rights
- 9 Term and termination
- 10 Exit management and termination assistance
- 11 Miscellaneous provisions

This list illustrates that the parties should have a clear understanding of the desired service and what is required to accomplish a successful result. Equally critical is the implementation, governance and communication structure of a relationship. Service relationships need both on-going performance measurement and communication. The first of these means that the agreement must include success indicators which allow the parties to know whether the

²⁰ Business people should also learn the difference between buy-and-sell transactions and long-term relationships. If people designing long-term relationships have the wrong mindset, both the relationship and its success will be at risk.

arrangement is creating value or not. Clear structures by which the performance of the parties is measured and standards for judging whether performance is in compliance with contractual requirements are necessary, as are details of action or actions to be taken if it is not. When a lawyer provides counselling for his clients in connection with this kind of transaction, there is simply no room for the mentality employed by fighters or in “buy-and-sell” transactions.

A creative and proactive approach is the only one, which can truly add value for clients who are planning in long-term relationships. Such an approach offers the lawyer and business people both a mindset and the tools for creating a contractual environment which facilitates and enables on-going performance, one which will satisfy the needs of both parties in commercial terms.

10 Final Remarks

The role of the business lawyer is changing from that of a fighter to that of a designer of business relationships. This is a result of the fact that both society and the business environment is changing. IT outsourcing transactions are a good example of complex and long-term relationships, which call for lawyers to adopt a new approach.

Changes in society, a changing business environment, technology and business processes all dictate the need for new structures in contracting and managing business relationships. Lawyers should concentrate on designing manuscripts and structures that enhance value creation during a business relationship. Rather than engaging in passive documentation, lawyers should actively assist the parties in seeking out an optimal relationship that suits their needs. Since successful transactions are based on teamwork involving different competencies and clients should also be able to help themselves, legal knowledge and a proactive lawyer cannot by themselves make transactions successful, but the lawyer is an expert with legal knowledge who should definitely be one author of any manuscript.

To provide clients with value-adding counselling, a business lawyer must have transaction-specific knowledge of the business environment in question, proactive methods, and the mentality and willpower to encourage clients to structure and manage commercial relationships in a sustainable and healthy way.

Basic lawyering skills are learned in a faculty. If people are to act differently, they have to think differently.²¹ This is the reason that legal education and academia should hear the call and allocate resources to provide students with the basic skills that are needed in real business life. It should be possible to learn about the lawyer’s role as a problem solver and relationship designer in addition to the role of being a fighter.

Changing the attitude of practising lawyers is difficult. After evaluating their skills, they should ask themselves whether what they are doing creates true value for their clients. If it does not, improving those skills by learning something from preventive and proactive law will turn out to be a wise move.

²¹ Barton, Copper 2000, p. 9.

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