

Executive Strategy: How many lawyers does it take to change?

by Kevin Sweeney - 7.5.06

For sustainability advocates working inside companies, the legal department is often viewed as a place where progress stops. The legal staff is often willing and able to say no in a confident tone and with clear reasoning.

Here's a real example of how this plays out. An apparel company's environmental strategies director wants the company's chief executive to talk directly about the environmental and human health impacts of dyes commonly used in their industry. He believes a frank statement will grab the attention of employees and prove that management is serious about changing how the company works with dye houses.

The marketing director says a strong statement will generate visibility and show the company is a leader. Both senior managers are pushing for a bold declaration.

The company's legal counsel, however, has a different perspective. She argues that anything from the company admitting to the harmful effects of dyestuffs could set up the company as the target of a lawsuit. She removes the direct statements from the speech, and she substitutes language that is honest, but vague. "We can't say that," she says of the initial draft. "We'll get sued."

In this case, counsel's perspective is important, and her comments are valid. The problem is what happens next: The discussion doesn't progress, largely because company counsel is assumed to have final say. I've seen this process unfold many times.

Potentially powerful reports, speeches or essays — which could build support for sustainability initiatives — are gutted without a great deal of discussion or challenge. It somehow has the feel of Gnosticism: the ancient Christian sect that you could only know about if, well, if you already knew.

If the legal staff is suggesting changes because a proposed course of action is against the law, by all means, we should heed their advice. But most of their recommendations do not involve such clear calls. They are instead offering their educated opinions about the risks of lawsuits, investigations or other legal challenges.

The advice is essential, but should be put in context, because good legal advice is just that: legal advice. Other forms of advice — about marketing, sales, supply chain management, reputation management, and so on — are no less important. No one group should presume to have final say.

Here are five steps to help establish new patterns of behavior:

1. Make sure the legal staff and other key players understand the company's long-term sustainability goals. Clearly stating where the company wants to be in five years defines the context for legal advice. If a company seeks to be a leader, it may need to make bold statements or establish stretch goals — neither of which can survive a highly conservative legal strategy. They may require counsel to be very flexible in its approach.
2. When edits or suggested changes come back from the legal staff, ask for clarity. If a potential lawsuit is the justification for an eviscerated letter to stakeholders, it's reasonable to ask how likely such a suit might be, and what individual or group might sue. It's reasonable to ask about the likelihood of a negative judgment, what it could



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cost the company, and what the legal costs are for fighting it. (While it's reasonable to ask this, it may be awkward the first time: So few people push for these kinds of answers.) All of this is valuable information, particularly when comparing options available to the company. It puts everyone in a position to compare the cost of potential lawsuits with the potential loss in sales due to a tepid position on a key public issue.

3. Help those involved in the discussions see the risks of inaction. Those who don't lead — and assume the risks inherent in leadership — may ultimately lose market share and the best recruits. A recalcitrant company may even be a more likely legal target for aggressive NGOs. Again, we establish a context for legal advice.

4. As legal advice is clarified, and as it is considered along with other forms of advice, insist that the decision is made at the proper levels. This means not allowing the legal staff to have automatic veto power. If the risks, as spelled out by counsel, don't obviously outweigh the potential gains from a proposed action, then don't let the legal staff make the call on its own. Push the issue further up the decision chain. Staff often wants to avoid this step, preferring to send a unified recommendation to executives, but this is the specific place where many good proposals see an early death. It is the place where sustainability champions should be willing to expend some personal or political capital. One tactic I've seen used is to identify a long list of unified recommendations, along with a much smaller set of "issues of non-consensus." Outline the risks and opportunities, make sure senior executives see the various forms of advice, and let them make the call.

5. Work actively to create an atmosphere in which the legal team is valued for its ability to discern the risks and opportunities facing the company, and for actively helping to identify creative solutions. This is no small change — far too many people judge corporate lawyers only by their ability to keep the company away from lawsuits and controversy of any kind. The last step requires us to stop the lawyer jokes — they really do get in the way. Try instead sending complimentary notes to the legal staff when they offer a clear assessment or creative insight. Really. And be sure to copy senior executives on your notes. Some of the best sustainability advocates I know happen to be corporate counsels, though their leadership is often unrecognized. If we expect to rely on their help to succeed, they should also know they can rely on ours.

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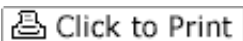
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