Sometimes change is sought. Sometimes it is dictated.

Billy Beane, general manager of the Oakland A’s major league baseball team and protagonist in the Michael Lewis book “Moneyball” (2003), found himself in the latter category as his club was cutting expenses—including his best players—while his competition was spending more. He needed a way to beat those teams, and traditional ways of winning typically required great players making big salaries.

We’re in a place now in the legal industry where change is sought and, in many cases, dictated. This is specifically the case for corporate transactions, where many lawyers see the gains in other areas of law and want to duplicate them, or see the opportunities for improvement but don’t know the steps to take to achieve them.

Beane’s solution was to identify how many wins his team would need to make the playoffs over the course of a year, and then ‘unbundle’ all the aspects of how to get those wins. It boiled down to making the sum of the parts greater than the whole, with players who excelled in certain areas (like just getting on base) playing specific, albeit untraditional, roles to achieve success as efficiently as possible. He transparently assigned value to their skills and identified players based largely on data, not necessarily his scouting department. This objective model flew in the face of baseball’s status quo, but was almost immediately successful.

We too can break our legal work into separate, component parts, and put value on each. Unbundling allows each task to be assigned to the service provider—inside or outside counsel, or a third party—whose service model and capabilities are best suited for that specific task, thus empowering the corporate legal executive to maximize efficiencies and reduce the company’s legal spend.
This is especially true in corporate merger and acquisition (M&A) transactions where the diligence component can be outsourced to a third-party service provider whose business model and capabilities are best suited for the diligence function. As Beane proved in his field, sometimes there is a traditional way of handling work that is ripe for improvements and efficiencies—getting the same or better result for less time and money.

**Arguments for the Status Quo**

To break this overview into a “pros and cons” analysis, we should start with the reasons that the current way of handling corporate transactions is still utilized. Like much work in the legal profession (or baseball), it’s simple: because, until recently, that’s the way it’s always been done.

Yes, it is easy to send all the legal work involved in a transaction to a law firm. The firm usually asks for it, or it is assumed it will handle it all. But in today's business and legal environment, is that realistic or responsible?

A transaction is a daunting exercise that needs expertise—for negotiation, strategy, market analysis, risk assessment and a host of other factors. This is a core function of a law firm; its attorneys have that high-level expertise needed. Yet at the end of the day, the experts rely on the key information found within the data involved, and there is more data today than ever before. Is it an expert’s core function to know how to organize that data? Or how to utilize lean and better processes to get to the important information efficiently? Even if it is, should a client be charged a premium hourly rate for the expert to handle that function when it could be done by data and process specialists who work at a fraction of the cost?

The “pro” in this debate is that law firms are experts in strategic decisions, assessment and analysis, and their highest and best use is in those areas.

**Unbundling: The Modern Solution**

Given the fact that the primary purpose of diligence is to identify risks, the process by which these risks are identified becomes paramount to any successful diligence assignment. And we have made significant progress in the areas of legal process development and big-data management over the last decade. It all begins with a hard look at the work involved and the process to accomplish that work.

With outside (and inside) counsel handling strategy and high-level transactions work, let’s look at other pieces of work that can be transparently unbundled:

**Workflow/Process Refinement**

All the benefits of disaggregating come from a detailed look at process and workflow first and foremost. These words have practically become jargon in the legal profession now, although not necessarily in the transactions world. But the protocols and technology proved to work by third-party providers on other data-driven matters should absolutely be utilized in diligence. While the use of this model might be new, there’s no need to reinvent the wheel when it comes to a best-practices workflow.

A high-functioning workflow is cyclical, so that the various team members can be plugged into the process at any time during the transaction. With outside counsel managing the overall diligence function, the review of the data (particularly the material contracts) is outsourced (disaggregated) to a third party; solid workflow is vital to ensure the identification and communication of risk, proper integration of technology, quality control and proper reporting.

**Work Product**

The majority of the work involved in a transaction, especially diligence, can be laborious and repetitive in nature. Repetition allows for the process work detailed above, and (good) process begets efficiency and consistency. Yet this is not how transactions have traditionally been approached.
The best way to achieve efficiency and consistency is to utilize the same, experienced attorneys on deal after deal. These diligence teams serve as an extension of the corporate legal department and, in some cases, of outside counsel; they are “on call” and work at a fraction of traditional costs. In many cases, the team members are, at their core, experienced M&A attorneys with a particular focus and skill in performing the diligence function—not the first- or second-year attorneys utilized in the traditional diligence approach. These team members not only know what is before them, but know what may be missing and the right questions to ask.

In fact, more and more law firms are exploring ways to improve efficiencies by outsourcing the diligence function themselves to third-party service providers. Outsourcing enables these firms to utilize their personnel more effectively by allowing the junior attorneys at these firms—who are typically tasked with diligence assignments—to work on more sophisticated, higher-margin work. This progressive step by law firms not only aligns the transaction team with the client’s cost-containment goals, but allows the technology and process specialists (the third-party provider) to do what they do best.

In the end, a dedicated team gets to know the client and its business extremely well, and that knowledge retention is invaluable from deal to deal. Because the process is handled by the same attorneys over time, the work product is more consistent and efficient and there is dramatically less expense in the end.

**Diligence Reports and Checklists**
Consistency is an important benefit of having a solid process and dedicated team in place, and that means everything is documented, tested and continually improved. And, let’s face it, many of the templates utilized in transactions need attention.

To be blunt, traditional diligence reports are now obsolete. In most cases, these reports have little or no value to anyone after the transaction closes other than to those who have the time or have been tasked with poring through hundreds of pages to respond to a particular issue. Today’s diligence requires sophisticated reporting protocols that allow usable data to be accessed on demand, both during and after a transaction closes. Certain third-party providers have honed these functions over the last decade on large-data matters such as discovery, and put them to use in transactions.

In many cases, these third parties have also developed best-practices checklists and protocols specifically for diligence. Rather than relying on outdated, generic due diligence checklists typically used in most transactions, these checklists and protocols are industry-specific and have been fine-tuned in real time, increasing significantly the value of the information obtained and the costs associated with obtaining it. After all, the third-party providers’ business model is designed for efficiency and cost savings.

This is particularly useful in transactions where traditional diligence costs are so high that the legal team delays commencement of the diligence activities until the parties know they have a deal. Diligence can commence early in the process and enables the deal team to obtain a more thorough analysis of the issues that are important to the company, and to get a head start on the post-acquisition integration planning. It results in better information, better decision-making and ultimately better deal-making.

**Early Risk Identification**
Speaking of risk, there is some support among attorneys and scholars that effective diligence may actually result in the mitigation or reduction of risk. That may be true if the parties decide to walk away from the deal altogether as a result of the diligence investigation. In most cases, however, the diligence function is designed to identify and present risks. With the unbundling approach, this is just done in a more efficient manner.
Once the risks are identified, it is up to the contracting parties to allocate these risks by determining through a negotiated process which party is going to assume the risk. Allocating risks in a corporate transaction is primarily the function of the representations, warranties and indemnities contained in the acquisition agreement. However, it is the diligence examination that provides the data that the parties must have in order to identify and understand the risks to be allocated. Therefore, the diligence function has significant consequences.

Post-Deal Planning
Successful post-acquisition integration planning requires that the plan be designed well before the transaction closes so that it can be implemented immediately after the closing. Modern diligence reporting, coupled with a useable database, allows the transaction team members to simultaneously access the diligence information during the transaction process so that the integration team will have relevant and timely information to design the integration plan well before the closing.

However, modern diligence does not end with the closing of the transaction and implementation of the integration plan. Rather than adding new hires, many parties continue to utilize all or a part of the diligence team to handle the post-acquisition and other overflow work that are a part of new business acquisitions. These teams are extremely valuable given their expertise of the business and the underlying legal documentation. These teams can also monitor the representations, warranties and covenants of the parties contained in the acquisition agreement at least until the expiration of the parties’ indemnity obligations under the acquisition agreement. The review and monitoring of these provisions over the survival period allows a party to make a timely claim for indemnification under the acquisition agreement or determine the appropriate response in the event of a breach.

The Bottom Line
Ultimately, unbundling is the pathway to transparency. It empowers the corporate legal executive to truly understand and assign specific roles, maximize efficiencies and reduce the company’s legal spend. Moreover, the quality of work is superior because the tasks that are performed are among the core competencies of the parties performing these tasks.

It’s also about bettering the status quo. Legal departments cannot tread water in today’s environment—they have to continually improve, demonstrate value and do more with less. Unbundling is a giant leap in that direction, and we can see the same, immediate success Billy Beane did.

After all, Beane’s successful model was quickly duplicated throughout major league baseball.

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