

Forging a Strategic Alliance with your Legal Department

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Over the last five to ten years, more and more companies have set up and operated their own CI programs. Yet many senior executives still do not fully understand their own role and responsibilities in using this management tool. Some even avoid its use altogether, fearing it will place their company in legal jeopardy.

Forging a working relationship with your company's legal department can ameliorate these problems. By developing this alliance, you will earn your senior management's acceptance of your CI activities and create a valued partner for some of your own CI operations.

Our premise and proposition are rather straightforward: the CI and legal departments are undeniably linked, yet in most companies they do not truly understand each other. As a result the company, and most likely the CI department, suffer. By forging a visible alliance between the two departments, you cast CI in a more positive light and enhance its perception among senior executives as a legitimate and necessary business activity. This results in CI's greater use and benefit to the company.

THE ALLIANCE'S PURPOSE AND OBJECTIVE

For a CI/legal alliance strategy to be successful, you must be clear about what you want to achieve with it. An alliance for *alliance sake* is not a good strategy! For this proposed CI/legal alliance, we see three key goals:

- Create a sense of CI's legitimacy by associating it with your legal department.
- Make the general counsel an ally, and place an important CI advocate inside the company's key decision-making body.
- Improve the analytical depth of your CI team.

Lawyers are logical thinkers and often make good analysts. In addition, they have access to some rather unique sources of intelligence and information.

In the final analysis, a joint effort with your legal department accomplishes two very important objectives: it

gives senior management assurance that the company's CI operations are being conducted legally and ethically, and it increases the overall benefit of CI to the company through its greater use by those same corporate executives.

WHY CI NEEDS THE LEGAL DEPARTMENT

Based on our experiences, here are several very good reasons why you need your legal department's help.

Legal advice and assistance assures your management that your CI operations are being planned and run properly.

There will be no question about what is or is not legal. In some cases, a thoughtful lawyer can actually help with some of the more difficult CI tasks, such as using a third-party to collect intelligence directly from your competitors, even though your company's policy prohibits you from doing it yourself.

By having the legal department as your partner, management is more willing to accept that what you are doing is not only necessary but also legitimate.

Such legitimacy-by-association is likely to carry over into other areas of CI operations. Management is more likely to accept the increased risk of certain CI operations, such as counterintelligence, when the legal department is involved.



The legal department should create the legal & ethical (L&E) guidelines for your company's CI operations.

This is possibly the most important document that you produce for the company, but you need the legal department's assistance to do it well. Furthermore, several important actions naturally flow from this joint act. The legal department can:

- Play a key role in all the CI training associated with the company's L&E guidelines.
- Provide oversight and, if necessary, enforcement of the L&E rules should any infractions occur.
- Keep with changes in the law, particular internationally, that affect the way you conduct your CI operations abroad. This could be as simple as updating country-by-country changes associated with the European Union Data Privacy Act, or more complicated tasks such as interpretations of a court case that might change the way one uses aerial photography.

The involvement of the legal department in your CI activities reassures employees that what you are asking them to do is both appropriate and acceptable.

This is particularly true when you ask them to participate in CI collection operations. A legal presence in either planning or directing such activities usually alleviates employee concerns. A good way to accomplish this is through an official letter to the employees that includes legal *do's and don'ts*, with appropriate contacts in the legal department for questions.

Some special CI operations require legal assistance.

Acquiring court documents is the most obvious one. The proper acquisition and handling of select pieces of CI information as evidence that the company might later wish to use in court also requires legal oversight. A lawyer should be on the assessment team whenever a CI issue requires the analysis of legal and regulatory factors.

When conducting CI operations in foreign markets, the rules of competition are often both legally and culturally different. In general, having lawyers on your CI collection and analysis teams brings both a different perspective and very logical approach to your business analysis tasks.

Several very sensitive business activities should not even be considered unless you have your legal department involved.

The legal department can help develop competitive strategies that explicitly use legal actions, such as lawsuits designed to attack or distract a competitor. Knowing those competitors' management culture and their legal capabilities are critical to the success of such competitive strategies.

Your legal department can identify ways to use the government to affect international competition. Examples include anti-dumping charges and efforts to get host governments to open up local markets. Both the planning and execution of such government actions requires good business intelligence. The role of the legal department, along with government affairs, is key to the success of such actions.

Leading edge firms use their CI departments to help with intellectual property protection along with their legal and security departments.

In such cases, the CI departments add counter-intelligence capabilities to their responsibilities. With these security-related responsibilities, CI departments must have legal advice and support to do these new jobs properly. The collection and handling of CI as potential evidence in court proceedings is a far more complicated task than the usual collect and report actions of most CI departments, and requires close coordination between the two departments.

The CI and legal departments need to work closely together if the company is going to succeed in today's increasingly competitive world. The partnership we advocate is critical to the effectiveness of both departments in this endeavor.

WHAT YOUR LAWYERS NEED TO KNOW ABOUT CI

Seasoned CI professionals recognize that CI is often not well understood by corporate executives and lawyers. The corporate lawyer generally decides the parameters of your CI activities by issuing corporate guidelines, often to the dismay of CI practitioners who want to engage in more aggressive information collection techniques.

As it is your corporate attorney's job to keep your company out of legal trouble, lawyers generally adopt conservative positions. Like the person who has a clean conscience because he never used it, if you do nothing you won't get into trouble doing that either.

While many factors go into corporate decision-making, legal risks are always of primary concern to corporate executives. As CI professionals, you have an incentive to insure that your company's lawyer understands:

- what CI is and is not
- how it is done
- what it can do to make your company more successful in its marketplace

Armed with a better understanding of CI techniques and their utility, your corporate lawyer may very well become a CI advocate, ultimately allowing you greater latitude and promoting management's acceptance of your CI activities.

ACCEPTED INDUSTRY PRACTICE

You must present CI to your lawyers as a legally valid and accepted corporate practice. The irony that the CI industry has a conservative approach to information collection techniques will be new to them. Investigative activities routinely undertaken by private investigators (and even investigative journalists) such as undercover approaches and pretext telephone calls, surveillance, and garbage collection, are frowned upon by the CI industry.

Lawyers and corporate executives have had few opportunities to learn about CI. Coupled with the ever-present media slant, which equates CI with corporate espionage, it will take planning and hard work to effectively present CI to your lawyers and change their perception.

Be prepared to explain to your legal department the objectives of your company's CI program and the methods and techniques by which these objectives are achieved. Your corporate lawyer will be unfamiliar with CI collection techniques and not at first recognize the distinction between CI and corporate espionage. Lawyers are trained to see the worst, to find any opening that the opposing counsel can use to his client's — your competitor's — benefit. Assume that if your lawyer can find it, your competitor's lawyer will use it.

If explained to them properly, lawyers generally soon realize CI's underlying legal validity. Once understood, your lawyer may very well recognize what CI can do for your company and become a major advocate for its use by your company's decision-makers.

Your lawyer's job is to protect and advance your company's interests. With legal as a CI advocate, corporate decision-makers are more likely to take notice of CI potential benefits and become more willing users of it.

LEGAL'S CONTRIBUTION TO CI

Finally, do not overlook your lawyer's potential contribution to CI. For example, county clerks' offices are valuable CI information sources. While CI professionals should be familiar with public records retrieval, court filings are a different matter. Lawyers can assist in identifying the types of information found in court dockets. A long docket sheet (the list of documents filed in that case) can seem to be written in another language, but your lawyer will be able to tell you which documents may contain valuable information.

Many legal documents filed at the courthouse deal with legal technicalities and court procedure. Others are substantive, containing a party's evidence for their case. Some filings may not be overtly substantive, but may nevertheless contain valuable information, discernable by reading between the lines. This is something CI professionals are quite familiar with when it comes to public records and media reports.

While your lawyer will be familiar with docket sheets and court filings, he may never have considered them to be a CI information source. With a better understanding of CI,

your lawyer can create insights from the information found in these documents.

FORGING THE ALLIANCE

The CI professional can take several actions to forge this alliance. (See Figure 1.) Let us explain a bit about each of them.

1. Jointly create the company's CI legal and ethical guidelines.

We strongly encourage creating an explicit set of CI legal and ethical guidelines rather than relying on some implicit wording in other company policy documents such as a Code of Conduct. The joint effort to develop such a CI document also serves as a way to educate your legal staff about CI.

SIDEBAR: ACTIONS TO FORGE THE ALLIANCE

1. Jointly develop legal and ethical guidelines for the company's CI activities.
2. Have your law department participate in CI collection training.
3. Determine law departments analytical skills and use them on CI assessment teams, e.g. wargames, competitor assessments, etc.
4. Identify law department KITS. . . and make them part of your company's intelligence-user group.
5. Involve your law department when planning major CI projects.
6. Seek their assistance in developing collection plans for all KITS involving legal information.
7. Insure the law department is included in any KIT operations involving intellectual property (IP) and the protection of your own company's IP.
8. Involve the law department in any KITS concerning "sensitive" actions, such as private investigations and mis-information.
9. Bring your lawyers to SCIP meetings and conferences.
10. Invite your lawyers to speak at CI functions.

2. Have your legal department participate in CI collection training.

Developing an understanding of how CI is collected is the single most important factor in securing your lawyer's assistance. Lawyers will have specific questions and your company will only benefit the more your lawyers understand how CI operates.

3. Identify analytical skills possessed by your lawyers – and use them in your CI work.

Lawyers are very logical thinkers and often possess analytical skills and experience the CI department can use. They are also very competitive and can help develop competitive strategies and conduct wargames. Identify those individuals who have both the skills and interest and invite them to participate in your CI activities.

4. Legal departments have real intelligence needs too.

Help them identify their own Key Intelligence Topics (KITs) and add them to your management's KITs. A primary interest is the protection of the company's intellectual property, particularly trade secrets. Another area of high CI interest to legal departments is support for court cases. The key here is to ask, just like you do for all other company executives.

5. Involve your legal department in planning major CI projects.

Lawyers who are involved in the planning and preparation of CI projects better recognize their legal validity. Moreover, lawyers who understand the legal underpinnings of CI will be able to advise CI professionals regarding *gray zone* questions and even suggest more aggressive yet legal collection techniques.

6. Seek your legal department's assistance in developing collection plans for all KITs involving legal information.

Lawyers routinely deal with information, but differ from CI professionals in their objectives in seeking that information and their use of the information they obtain. These differences can add a useful dimension to your CI objectives.

7. Include the legal department in CI work on any KIT involving a competitor's intellectual property (IP) and the protection of your own company's IP.

Since such CI work often originates with the company's R&D or manufacturing departments, you should be cognizant of the legal department's responsibilities and make sure they are involved. The use of your operations to collect intelligence on your competitors' efforts might possibly end up in court. The legal department's involvement can ensure such CI is properly collected and preserved as evidence for possible legal actions.

8. Involve the legal department in any KITs concerning sensitive action.

CI collection techniques are generally more conservative than information collection techniques routinely used by private investigators and investigative journalists. Still, your company may decide to use legal means that are outside the general scope of CI, such as the use of private investigators or outside market research firms. To the extent that the CI department is involved in these actions, make sure that your lawyers are similarly involved.

9. Introduce your lawyers to the CI profession by bringing them to SCIP meetings and conferences.

Help them learn about the profession and the kinds of operations you conduct. As they become more familiar with professional CI activities, they will not only understand you better, but will, in all likelihood, help you plan and run more effective and aggressive CI operations. SCIP's Conferences are great educational venues for this.

10. Invite your lawyers to speak at CI functions.

A lawyer's work is intense and competitive, providing useful and unique experiences from which you can benefit. Having your lawyers speak at CI functions will also help them better understand CI and CI professionals.

Forging a strategic alliance with your legal department helps promote your CI activities for the benefit of your company, and increase your company's competitive advantage in the marketplace. Your lawyers understand this principle and if explained correctly, will similarly understand CI's role in this dynamic. By forging an alliance with your legal department, you stand to gain a valuable ally in promoting CI throughout your company.

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