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The Value Equation . . .

Establishing and Maximizing Corporate Legal Resources

Corporate budgets have tightened, compelling in-house attorneys to focus more and more on the costs that their companies incur for outside legal services. Cost efficiency, which had been a competitive necessity, became a corporate necessity as the economic environment grew bleaker. Whether this refocusing represents a transient phase in law department management or a new way of life remains to be seen.

In 2008, coinciding with the uncertainties of the times and economic stresses in the global economy, the Association of Corporate Counsel (ACC) launched its Value Challenge. The ACC Web site (*http://www.acc.com/*) describes this project as an "initiative aimed at reconnecting value to costs for legal service across [the] profession."

A goal so simply stated masks a difficult task. Due to the intangible, and often adversarial, nature of legal service, in-house counsel have long faced challenges with respect to controlling the costs of legal representation for their companies. We can recall many conversations and meetings with other in-house attorneys where one or another participant bemoaned examples of how their companies were spending more on a case or a transaction or an issue with legal consequences than the matter seemed to merit.

Unseen Challenges

Many in-house counsel fear awakening to the realization (and subsequent criticism from cost-conscious executives) that they've spent $100,000 to defend a slip-and-fall "worth" only $20,000. Yet we all recognize that significant issues can lurk in otherwise benign-appearing matters. That recognition leads to over-lawyering, as companies and their lawyers, both inside and outside, fear the possibility of overlooking a dispute that will lead to a very substantial adverse jury verdict or worse.

One case example that appears in all law school curricula demonstrates how situations that do not strike a participant as monumental may take on far greater prominence than anticipated. Earl Gideon was arrested for having broken into a poolroom to commit a misdemeanor, elevated to a felony because of the breaking and entering. Mr. Gideon represented himself against the charge because the state of Florida did not provide free counsel to indigents charged with such crimes.

Though he had no formal legal education, Mr. Gideon did one thing effectively: He continued to press his argument that the Florida courts violated his constitutional rights by not providing him with a lawyer to defend himself. Finally, he prepared and submitted a petition asking the US Supreme Court to accept his appeal and address the question decided against him in the lower courts: Does the Constitution require the state to provide an attorney for him without charge to enable a proper defense? The Supreme Court appointed counsel for Mr. Gideon so that the Court might receive more complete briefing and argument of the question that it wished to consider: "Should th[e] Court's holding in *Betts vs. Brady*, 316 U.S. 455, be reconsidered?"

Since Mr. Gideon was asking the Supreme Court to reconsider the continuing viability of a case decided less than 20 years earlier, the attorneys for Florida must have anticipated a relatively low risk that the state would lose the appeal. Ultimately, of course, the Supreme Court issued its decision that the "procedural and substantive safeguards designed to assure fair trials before impartial

tribunals in which every defendant stands equal before the law" represent a "noble ideal [that] cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him." Failure to provide counsel to a defendant such as Mr. Gideon was a constitutional violation sufficient to reverse his conviction. (*Gideon v. Wainright*, 372 U.S. 335 (1963) is posted at *http://www.law.cornell.edu/supct/html/historics/USSC_CR_0372_0335_ZO.html*.)

It's irrelevant to our discussion whether a more robust defense of the state's case might have persuaded the Supreme Court to refuse Mr. Gideon's petition or to grant it but support the lower court decisions. The point is that *Gideon* underscores the challenge of identifying those disputes that carry significance beyond (perhaps far beyond) the specific facts from which those cases develop. Certainly, an observer who considered only the costs of providing Mr. Gideon defense counsel likely would have failed to anticipate the Supreme Court's interest in the larger constitutional question.

The goal is to use counsel appropriate to the task at hand.

What lesson, if any, does this historic case now hold for in-house counsel? Viewed in isolation, the minor charge lodged against Mr. Gideon seemed to present a relatively minor risk to the state of Florida. Had its counsel anticipated the case's true portent or appreciated the possibility that the US Supreme Court might wish to revisit its fairly recent ruling in *Betts*, the state might have approached the matter differently. In-house counsel should view disputes and potential disputes from a strategic perspective because what might appear at first blush to be a minor issue could instead mask larger risks. A dispute between a lender and a borrower, for example, might seem to focus on one fact-specific aspect of the loan agreement, yet a loss for the lender could endanger its entire business plan if the dispute affects related issues core to its business model.

Taken to an extreme, however, such extended analysis disserves corporate clients, and it would be a strategic error to use it to support an overly aggressive defensive posture. Such an approach has led many companies to expend enormous resources to defend against or pursue simple or low-risk disputes.

How, then, can you avoid or minimize that danger and achieve the appropriate balance?

Crucial Middle Ground

The goal is to use counsel appropriate to the task at hand. We use the term "appropriate" advisedly. In some circumstances, appropriate counsel might be the best attorney you can find, cost be damned. In other situations, appropriate counsel might mean someone who can achieve the best feasible result at the lowest cost. Selection of counsel should thus be based on a constellation of criteria that includes cost as well as legal acumen. (*See* Lauer, "What is the Most Important Task of In-House Counsel?," *Corporate Counsel's Quarterly*, Vol. 19, No. 2 (Apr. 2003), p.73.)

That different counsel represent different value propositions is well illustrated by an anecdote from the legendary career of Clark Clifford, who worked for Presidents from Truman to Johnson and who was also extremely successful in private practice. As recounted by Joseph C. Goulden (in The Superlawyers: The Small and Powerful World of the Great Washington Law Firms, (Weybright and Talley 1971), p.71):

> "What a lawyer ultimately wants is to become a senior advisor and counselor. The value of his advice is not based on the hours he spends, but on his years of experience, his understanding of law and government, and clients are willing to pay a premium for that sort of representation. I have never charged by the hour. We sit down and agree on a reasonable fee." What is [Clark] Clifford's definition of reasonable? Hire him and find out, one of his associates suggested. But anyone

who takes the elevator to his softly lighted twelfth-floor office at 815 Connecticut Avenue NW can be reliably admonished to bring a minimum of $5,000.

There is a story, perhaps apocryphal, of the corporation general counsel in the Midwest who asked Clifford what his company should do concerning certain tax legislation. After several weeks Clifford responded, "Nothing," and enclosed a bill for $20,000. Unaccustomed to the Clifford style, the general counsel testily wrote that for $20,000 he certainly was entitled to a more complete explanation of the recommendation. He got it. "Because I said so," Clifford said in letter two, and billed the corporation for another $5,000.

In a transactional context, large fees do not raise eyebrows even when they dwarf the sums paid for litigation-related legal service that results in consternation on the part of the client. A six-figure or greater fee may be accepted as appropriate for purchaser's counsel in a corporate acquisition but an equal fee might lead to much heated discussion if billed for a contract dispute.

No company, regardless of its size, can afford to employ sufficient in-house attorneys to provide all the legal service.

There's a reason for this discrepancy. If the legal work for the transaction is measured in the context of that transaction, the cost of which is clear, and if the fee represents only a small percentage of the overall transactional cost, the value that the legal service contributes to achieving the goal of closing that transaction is more easily identified and therefore accepted.

Excess cost in litigation might also result from communication failures between in-house and outside counsel, who may not realize that they do not actually share the same goals or even speak the same language. (*See* Lauer, "Maybe Humpty Dumpty Was a Lawyer," *Law Department Manager* (Dec. 2001), p.5.)

Selection Process

Once a law department has determined that it needs to retain outside counsel rather than let the in-house attorneys handle the work or hire additional internal resources, it obviously needs to identify and select that outside counsel. (*See* Lauer, "Strategic Strengths: The Basis of an Efficient Design for a Corporate Legal Function," *Law Department Management Adviser* (Sept. 1997), pp.9, 10.) To secure the greatest value possible, the company must avoid the two extreme situations that we've discussed: spending much more to defend against a claim or lawsuit than the claim itself might be worth and failing to appreciate (a la Florida in *Gideon*) the magnitude of the legal risk represented by a situation and the potential for losing much more than resolving the specific case might itself cost.

Today's environment, of course, accentuates the importance of this balancing act, in large part because of four increasingly salient circumstances:

1. Globalization
2. The speed of change in the legal landscape
3. The heightened level of competition among businesses (even businesses that until recently may not have competed against each other directly)
4. The complexity of international business that results from multiple, sometimes inconsistent, regulation in disparate political jurisdictions

No company, regardless of its size, can afford to employ sufficient in-house attorneys to provide all the legal service—counseling, transactional assistance, dispute-management expertise, and compliance services—necessary to confidently and safely conduct business worldwide. Accordingly, virtually every company

will rely to some degree on outside legal service providers in order to leverage internal resources. Those outside providers must then function as extensions of the in-house law department, which directly heightens the importance of the selection and vetting process.

To strike the appropriate balance when selecting counsel, a company must understand several things well enough to evaluate and differentiate the candidates. It must appreciate the significance of the legal work that it needs accomplished. It must understand the qualifications of the law firm or lawyer and how those qualifications match up best against its needs for the specific matter. To this end, a number of practices worth emulating have emerged.

First, to really understand the matter that requires legal service (*e.g.*, closing a transaction, representing the company in litigation, counseling, etc.), the company should undertake an evaluation of the associated legal risks and other related factors. This analysis may not need to be as extensive or even as accurate as the case evaluation that it will later undertake in order to manage the litigation itself effectively. (*See* Lauer, "The Evaluation of Cases is a Critical Element of Litigation Management," *In-House Practice & Management* (Altman Weil, Jan. 1999), p.9). After completing the initial analysis as a prelude to selecting outside counsel, however, the company should at least understand in general terms the potential impact on its business or operations.

There are several criteria that should animate this analysis (although one cannot be too specifically prescriptive at this earlier stage). In a transactional context, how much is the potential deal worth? Does it require analysis or application of unusual areas of law or merely application of well-settled and familiar principles? If the matter entails a dispute or litigation, does it attack a central element of the company's business operation or plan? Does it represent potential personal liability for officers or directors of the company? Might it undermine the company's ability to do business, as a criminal conviction might for a company with federal government contracts?

The company should also understand the strengths of the outside counsel that it is considering retaining and how those strengths apply to its situation. If it wishes to retain a law firm simply because its name or reputation might preclude second-guessing later on, the legal department should be explicit on that point (at least for internal departmental consumption).

In any event, by carefully analyzing the needs of its matters, as well as the strengths of the counsel available to handle them, and then matching those needs and strengths against each other, a law department will maximize its chance of applying the "right" capabilities and resources to its needs. It should avoid, as a rule, both deploying expensive talent unnecessarily and under-serving its needs in problematic situations.

Substantively, counsel obviously must have sufficient expertise related to the case or transaction. In addition, however, bar admissions, the geographic range of the firm's presence, the extent to which the law department does not itself possess the various capabilities for completing the work, outside counsel's ability and willingness to work with the law department in whatever way the department prefers, along with myriad other factors, can and should affect the selection of appropriate counsel.

In a sense, then, in-house attorneys reviewing the choices available to them among the outside providers should attempt to measure those providers' appropriateness along the following axes:

- Relationship: How well will they work with the in-house attorneys?
- Solution-focus: Do those providers understand the importance to the company of the resolution of problems and issues? Have those external providers demonstrated the ability to augment the company's internal legal resources by serving as additional eyes and ears to anticipate issues that might cause the company problems or represent possible advantages?

- Price: Will the cost of the providers outweigh the extent to which their service contributes to achieving the company's business goals?
- Brand: How much importance does the company attach to having its interests represented by a "name" law firm?

Managing on Dual Planes

Selection of counsel is, of course, but the first step in managing a company's legal affairs. Failure to properly manage outside counsel will undermine the company's ability to maximize its return on investment in its outside resource. But the trick for the law department is to essentially operate on two planes: to manage both the matters entrusted to it and the outside counsel serving as its extension.

Ongoing communication is an investment in the relationship that, in the long run, will serve well both the client and outside counsel.

The primary tool for both tasks is communication, which is both a simple and a complicated challenge. Since we all understand how to communicate (as lawyers, we've been trained to use language carefully and well), this required skill seems to fall toward the easy end of the spectrum. The problem, however, consists of (1) knowing what subjects to address, (2) being able to do so in such a way as to further the goals of the relationship, and (3) incorporating constant, consistent communication into the dynamics of the client-counsel relationship without adversely affecting the work needed to complete the assignment.

Perhaps the most important communication between a law department and the outside law firms that represent or will represent the company occurs at the commencement of the relationship. Accordingly, the law department should plan specifically how it will establish clear, well-understood guidelines for the outside attorneys as to how the company wants to be represented.

Once settled on that message, the company can convey it in a variety of ways. If it has yet to select outside counsel, for example, it might use a request for proposal or similar tool to set the ground rules for the relationship. (*See* Lauer, "Ask and You Shall Receive: How RFPs can improve corporate legal services," *Corporate Counsel Magazine* (Dec. 1997), p.137.) The retention letter or agreement is another suitable vehicle for communicating expectations, especially if the law department has developed guidelines for outside counsel that can serve as an attachment to such a letter or agreement. (Retention letters and how to establish the appropriate terms of the client-counsel relationship are discussed in chapter 7 of *The In-House Counsel's Essential Toolkit*, published in 2007 by the American Bar Association.) You need to assure that in-house and outside counsel share sufficient definition and clarity about the company's goals for the representation so that neither is at a loss regarding the other's expectations as the matter unfurls.

Don't overlook the need to continue this "expectations dialogue" over the course of the relationship. Not only will unanticipated or unexpected issues arise, but the context for the relationship will change as other parties, government agencies, legal developments, etc. affect the nature of the legal services required over time. To be sure, ongoing communication is an investment in the relationship that, in the long run, will serve well both the client and outside counsel.

Include representatives of the company's business units in some of the discussions. First, they will likely make good contributions to support the application of legal services directly affecting the company's operations, especially in a transactional context. Second, to the degree that they might later feel that their expectations of counsel were unmet, their criticisms could prove counterproductive for the law department. So secure their consensus on specific issues

early on. Their involvement in those discussions should ensure better alignment of the interests of the true client, which is not the law department but the business unit, with those of outside counsel.

DuPont Legal engaged a consultant several years ago to assist in identifying possible business objectives that the company might have for resolving litigation. The purpose of the exercise was to provide both inside and outside attorneys with a list of business-focused objectives that could infuse their conduct of litigation on DuPont's behalf. (*See* sidebar, p. 12.)

Specific Discussion Areas

Again, one cannot be too prescriptive about the specific topics that in-house and outside lawyers should address, since the appropriate subjects will depend on the client and the law firm, as well as on the substance of the representation. That said, one often-overlooked topic is basic to the communication process itself: the language that the lawyers use and how that language can affect perceptions both positively and negatively.

In-house and outside attorneys often think differently about the same subjects. Whereas the latter typically think about litigation from a tactical perspective (*e.g.*, what motions might advance the client's legal position or improve the chances of a successful result), in-house attorneys often weigh the strategic considerations that, while inherent in the legal battle, also affect the broader scheme of things. What, for example, might happen if we lose this case? Is absolute victory the only acceptable outcome? (*See* Lauer, "Maybe Humpty Dumpty Was a Lawyer," p.9 in *Law Department Manager*.)

It well serves both law departments and their outside law firms to meet and specifically discuss how they can most effectively work together. (For a possible approach and format for such meetings, *see* Haserot and Lauer, "The Ultimate 'Partnership Culture': How to Improve Inside/Outside Relationships," *Law Department Management Adviser* (Dec. 1998), p.7.) By doing so, both can anticipate issues that might arise in the course of a matter or in the course of their relationship, ensuring that there will be communication channels and tools to address unanticipated issues with the least disruption to the work or to the relationship.

Such a relationship, with just such high levels of communication, has become known as "partnering," especially since DuPont Legal explicitly based its well-known DuPont Legal Model on just this idea of strategic partnering between in-house and outside counsel. (The resultant benefits for both DuPont Legal and the outside legal service providers are described in chapters 3 and 4 of *The New Reality: Turning Risk into Opportunity through the DuPont Legal Model* (S. DeCarli and A. Schaeffer eds (5th ed. 2009)). *See also http://www.dupontlegalmodel.com/*).

Strategic partnering has proven extremely beneficial in light of increased corporate legal interest in alternative fee arrangements as one means of realizing greater value from the work of outside counsel. As described in Lauer, "Conditional, Contingent and other Alternative Fee Arrangements" (Monitor Press Ltd. 1999), p.27:

> Alternative fee arrangements . . . put a premium on the relationship between client and counsel. This is particularly so on account of the unfamiliarity of all with such matters. Successful alternative fee arrangements need to be fine-tuned over the course of time in many cases. Even after the client and counsel have discussed the client's goals, tried to anticipate the different situations in which the arrangement will need to work and negotiated terms that they expect will address the eventualities, events may arise that they did not foresee. If they have a good, pre-existing relationship, they will be better able to adjust the terms of the arrangement to

accommodate the new factors. The trust that is a feature of a good client/counsel relationship can be critical in helping them overcome the "*bumps in the road*" that are inevitable in the course of a fee arrangement other than one based on

Business Objectives for Resolving Litigation

Marketplace perception/sales:

- Avoid perception of unsafe products.
- Enhance perception of safe products.
- Avoid perception of failing to support products.
- Enhance perception of standing behind products.

Precedent:

- Obtain favorable judicial interpretation of contract, plan, policy, or other recurring document or issue.
- Avoid adverse judicial interpretation of contract, plan, policy, or other recurring document or issue.
- Create favorable judicial precedent on recurring legal issue.
- Avoid adverse judicial precedent on recurring legal issue.
- Establish public policy principle.
- Avoid adverse impact or create positive impact on other pending or anticipated matters in administrative or regulatory proceedings.

Timing:

- Delay or time payment of money for settlement/verdict.
- Resolve matter quickly.

Avoid harm to relationships:

- With governmental agency.
- With suppliers.
- With other businesses.

Disruption:

- Avoid workplace disruption from discovery and/or trial.

Publicity:

- Discourage or not encourage filing of similar claims against organization.
- Deliver public "message" about organization's position or policy.
- Avoid adverse publicity.
- Do not encourage governmental scrutiny of business activities.

Opposing counsel:

- Discourage (or not encourage) opposing counsel from filing additional cases.

Cost:

- Minimize costs (outside counsel, experts, inside time, etc.) of handling.
- Minimize costs of settlement.
- Minimize time taken away from business for witnesses, managers.
- Reduce insurance premiums/payments.
- Ensure predictable costs.
- Keep settlement costs confidential.

Employees:

- Avoid workforce perceptions of unfairness or discrimination.
- Encourage diverse workforce to join and remain with organization.

Intellectual property:

- Protect IP assets of organization from infringement.
- Maximize competitive market share.
- Maximize licensing revenue opportunities. ■

hourly rates. A well-designed alternative fee arrangement can strengthen the relationship. Without a good relationship, however, an alternative fee arrangement may fail even though well planned.

A recent article similarly found that "[t]he success of any alternative fee arrangement depends on mutual trust." (*See* Miller, "GCs, Law Firms and Flat Fee Arrangements: A Matter of Trust," *The American Lawyer* (June 9, 2009), posted at *http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1202431310403*.)

To identify other subjects that the client and outside counsel discuss, ACC, as part of its Value Challenge, released what it describes as a "primer with guidelines on how law departments and law firms can get started to reconnect value to costs of legal services." (The document, entitled "Meet. Talk. Act." can be found at *http://www.acc.com/valuechallenge/resources/upload/VC-Meet-Talk-Act.pdf*.) ACC cites the following examples of "issues . . . that might be considered in [such] discussions":

- How can we reestablish trust and improve our relationship on both sides?
- How can we assure an adequate flow of work so that outside lawyers understand the client better and can be more efficient in what they do?
- How can we get junior lawyers better trained, priced at more reasonable levels, practicing law more on the front line, and less likely to leave?
- How can we better budget and manage costs and staffing?
- How can we better institutionalize the relationship?
- How can we evaluate progress and performance?
- How can we create a culture of continuous improvement on both sides?

The Prudential Example

In 1996-1997, the Law Department of The Prudential Insurance Company of America restructured much of the company's outside legal service. The initiative began with the development of an RFP form by which the department prospectively established the basis on which it wished to work with its preferred outside law firms.

After an intense review of the company's anticipated legal service needs, the Law Department sent 109 "work packages" to 132 law firms. Each work package consisted of the RFP document and a statement of the particular type(s) of work identified in the specific package. After a six-month process, those 109 work packages were awarded to 80 of the law firms that competed for the work.

Realizing that sending the RFP and associated work packages could not alone generate the desired relationships with the law firms, the Law Department also initiated a series of meetings with 22 of the law firms that had won the most work after responding to the RFPs. Over a multi-week period, departmental representatives met separately with each firm to discuss various subjects subsumed under the category of the inside/outside "relationship."

For example, the Law Department representatives provided an overview of the company and the legal department itself, even though the firms had all previously represented the company, in some cases for years. The reasoning was that, as a result of the RFP process, in most if not all cases the firms would be handling a broader range of matters than in the past. This meant that they might be unfamiliar with some part of the company with which they'd be working post-RFP. The representatives of the firms and the Law Department discussed, *inter alia*, staffing, budgeting, billing, and specific matters related to the types of work that each firm had been awarded under the RFPs.

In an effort to instill a continuous-improvement attitude among its own personnel as well as the law firms, the department also organized a best practices conference. Five

teams of in-house and outside attorneys spent several months researching and exploring ways in which legal services for Prudential could be more efficiently delivered. The teams focused on distinct areas that seemed to hold some promise of improvement: (1) planning, staffing, and fee management; (2) tracking and reporting legal risk; (3) discovery and document management; (4) project status reporting and communication; and (5) knowledge capture and re-use.

These three interrelated initiatives were designed by the Law Department to imbue a stronger business focus in the activities of all the lawyers serving Prudential. In that way, the Law Department hoped and expected that the legal service would provide greater value to the company and, equally important, be viewed as doing so by all company managers affected.

Initiatives such as those adopted by DuPont Legal and the Prudential Law Department are really efforts to determine what "value" means for them in the context of the legal services that they require. What attributes of that service increase its value to the client and what attributes might diminish its value? There will naturally be variance from one company to another, but just as importantly, there are service features that are likely universal to all corporate clients.

By spending time identifying how its legal service contributes to the achievement of its business goals and by following the guidelines described in this article to assure that the efforts of its legal team align with those goals, every company can maximize value along the entire service delivery equation. ■

—Thomas L. Sager and
Steven A. Lauer

Steven A. Lauer is Principal Value Consultant for Lumen Legal Consulting, where he works with corporate law departments to maximize the value that they realize from their investment in internal and external legal resources. He can be reached at slauer@lumenlegal.com. *Thomas L. Sager is Senior Vice President and General Counsel of DuPont. He can be reached at* thomas.l.sager@usa.dupont.com.

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