



MAY 9, 2005

The Big Picture

Compliance and knowledge management in today's law department.

**BY JOHN M. SPINATO
AND STEVEN A. LAUER**

IN THIS post-Sarbanes-Oxley world, corporate law departments no longer simply manage and provide legal services. Many corporate counsel are also responsible for their companies' corporate compliance programs. While the compliance-related responsibilities present demands that are distinct from — or even conflict with — those that flow from the legal-service role, they both require the creation, organization and reference to information and knowledge. Because some of that information arises outside of the organization, and sometimes the organization itself generates the relevant information, the department must know and understand the relationships among disparate information and data in order to successfully apply old information to new situations or new knowledge to old problems.

With what sorts of information and data must an organization's compliance program contend? Any information that will or might affect the firm's business operations presents sufficient value (positive or negative) for the firm that the compliance program should at least review that information in some fashion. That externally generated information includes the following: existing and new laws and regulations; interpretations promulgated by governmental administrative agencies; proce-

John M. Spinnato is vice president-general counsel, pharmaceutical operations, at sanofi-aventis in New Jersey. **Steven A. Lauer** is director of Integrity Research, a division of Integrity Interactive Corp. of Waltham, Mass., a provider of Web-based corporate ethics and compliance services to Global 2000 companies. Mr. Lauer, who is based in Matthews, N.C., has previously worked as in-house counsel.

dures and policies issued by various associations and standard-setting organizations; court decisions; and even news reports.

Ultimately, a company's compliance with law and practice depends on its employees and agents. If their day-to-day activities conform to those requirements and expectations, then the organization is in compliance; if those actions violate one or more of those standards, the firm is out of compliance. (The degree to which it is out of compliance — and the legal and other consequences that might flow from that non-compliance — will, of course, vary.) Providing all those employees and agents with the information by which they can know (1) what is expected of them and (2) how they should act so as to comply with those expectations, constitutes the core of a compliance program.

Vital to a law department's success in either role is its recognition that the same data can have differing significance in varying contexts. For example, in an environmental context, a specific level of contamination in a well, even a short-term reading, might represent a violation of law absent a prior permit from regulators allowing a heightened level during maintenance; knowledge of the existence and terms of that permit represents an important compliance knowledge requirement. How can an organization effectively assess a situation, which might require an investigation that could lead to the finding of a compliance violation, without knowing of the history and past practice of the firm and without having the tools to access information about that history and practice in order to apply that to the new compliance issue at hand?

To achieve success in either the law or compliance, then, the practitioner must create processes by which he or she maintains supremacy over the information that can so

easily overwhelm people and organizations. In other words, knowledge management represents the key to a viable approach to the provision of legal service and to the assurance of compliance.

Adequate Information Is Crucial

Information and data that the organization creates itself represents a considerable amount and variety of material. That material could include at least the following types of information:

- the organization's basic ethical code of conduct (an essential, internally generated document);
- policies on various areas of concern, such as environmental or personnel policies;
- the delegation of authority to various employees to make specified types of decisions on behalf of the firm;
- procedures by which employees should address various types of issues;
- forms developed or used in specific transactions that might serve as templates for future matters;
- contracts and other documents relative to relationships between the firm and other organizations;
- correspondence with government officials;
- documents related to litigation; and
- internal correspondence (much of which likely exists only electronically).

Why does all that information matter in the context of compliance? Most directly, any of that information might relate to whether and how the organization complies with applicable standards of behavior.

Sometimes, compliance is measured against legal standards, as those contained in a law or a

government regulation. Failure to satisfy those standards can lead to investigation by the government or even, in a worst-case situation, criminal proceedings. (If a compliance failure triggers criminal proceedings, of course, the role of a compliance program becomes much more important, since it can affect the sentence that a federal court applies to the firm.)

More frequently, though, a firm will find itself judged, in terms of its adherence to internal or external standards of behavior by other private parties. Private party disputes, if they proceed to litigation, generally will be adjudicated in court or a court-like proceeding, such as mediation or arbitration. The importance of compliance standards continues to grow in significance in these private party proceedings as they do in the governmental arena. This makes the urgency of developing appropriate compliance standards more critical than ever.

The inadequacy of information available to a business' employees can lead to compliance failures. Sometimes that information is the external type, as was the case in the situation that led to the jury verdict in New Jersey earlier this year against the concessionaire at a professional football game because an employee of that concessionaire had sold several beers to a fan at a game despite stadium rules against such a sale. The jury awarded punitive damages in favor of a child who was permanently disabled in an accident caused by that fan who was driving after the game while under the influence of alcohol. A situation of this type obviously calls into question the necessity of an adequate training program as an essential part of good compliance practice.

Internal policies as well as applicable laws and regulations must be adequately communicated to all employees and agents who in one respect or another represent an organization to the public. Recently, a family announced its intention to sue a major hotel chain, based in the United States, on account of the death of a child in a swimming pool at one of the chain's facilities in Southeast Asia. According to the family's announcement, they had selected the hotel overseas on account of the chain's reputation in this country, but the local hotel had not managed the swimming pool to the same standard of care as they had expected based on that reputation. Were the employees at that local hotel familiar with the hotel chain's policies and procedures vis-à-vis swimming pool maintenance and management? Were local laws and regulations followed? If not, how might the local hotel or the chain have better apprised the employees of the issues?

The Bandwidth Dilemma

While the deluge of information from outside the organization presents considerable

challenges, the other sources of data and knowledge generate their own difficulties. Every firm creates data as it follows its business practices. Moreover, each employee generates information and also creates knowledge.¹

One can quickly appreciate that the sheer volume of information to which a company's employees must have access will present possibly overwhelming challenges. While they must cope with that volume, however, businesses face the additional test of identifying which data elements present a sufficient basis for action or inaction. Differently stated, employees must separate the "wheat" from the "chaff" among the myriad pieces of information that flood their inboxes so as not to find themselves frozen into inaction on account of an overwhelming "data dump."

Data and information in electronic form, of course, present enormous issues in the litigation context, where discovery requests for such documents and electronic data can place huge burdens on companies dealing with the complexities of data storage for purposes of compliance with document-retention policies. Once they have organized the available data, employees must apply their knowledge of the business operation and its operational environment to identify those requirements that must be followed. In other words, they need to prioritize their activities. To do that, they must be conversant with the compliance standards as well as the information bombarding them.

The General Counsel Roundtable described the dilemma in a recent report. "The greatest challenge in identifying critical legal risks is limited bandwidth — legal departments lack the time and resources to process and prioritize an overwhelming quantity of risk-related information, while the business as a whole lacks the capacity to act on the prioritized risks effectively."²

The inability to focus on the highest-priority risks results from one or more of three causes: the excessive volume of information coming in; a failure to take advantage of knowledge already possessed by the organization; and a failure to communicate risk-related information to the business in a form comprehensible by that audience.³ Effective management of risk requires effective management of data. Take, for example, the audit requirements of any good compliance program. An effective audit, even outside the traditional financial audit, which is essential to identify and quantify risks, cannot be conducted adequately without the ability to review data, which must be accessible — or in other words, managed.

While the influx of data presents challenges, once an organization has accumulated that information, it faces another high hurdle — rendering that information available to those who might make valuable use of it on behalf of

the company: its employees and agents. In that regard, the bigger challenge for a compliance program constitutes communicating to each employee the information that will enable that individual to more effectively perform the duties of his or her job in order to meet the expectations — both internal and external — that concern the company from a compliance perspective. Knowledge management, alone and in a vacuum, does not suffice. Effective compliance is impossible without systems and processes that ensure that employees are educated and trained about that knowledge and how to use it.

Conclusion

Knowledge management represents a core competency of an organization. It can serve as the foundation for a comprehensive and effective compliance program. Fortunately, though, a functional knowledge management system serves other purposes also — purposes that directly support a business' operational and revenue-enhancing goals. The ability to access institutional knowledge and reuse or adapt it to the circumstances of a current operation can be a strategic advantage today by enabling the company to respond to market conditions faster.

By designing an effective knowledge-management protocol — a means for capturing, indexing and accessing data and knowledge — for its compliance efforts, then, a company will simultaneously enhance its business operations for other purposes. The compliance program should not represent a goal divorced from day-to-day business efforts. Rather, the two should exist in a symbiotic relationship supporting each other.

In any event, given the number of recent compliance- and ethics-related scandals, one can no longer hold any doubt as to the validity of the proposition that "good business and good ethics go hand-in-hand."



1. Whereas the basic facts that they encounter while performing their jobs constitute "data," the understanding that employees develop in the course of their jobs equals "knowledge." Knowledge thus represents the ability of employees, agents and others — and ultimately the organization — to "make sense" of all the data that they encounter.

2. "Safeguarding the Corporation: Engaging the Enterprise in Compliance and Risk Management" ((c)2003, Corporate Executive Board, Washington, D.C.), p. 20.

3. "Safeguarding the Corporation," at 21.