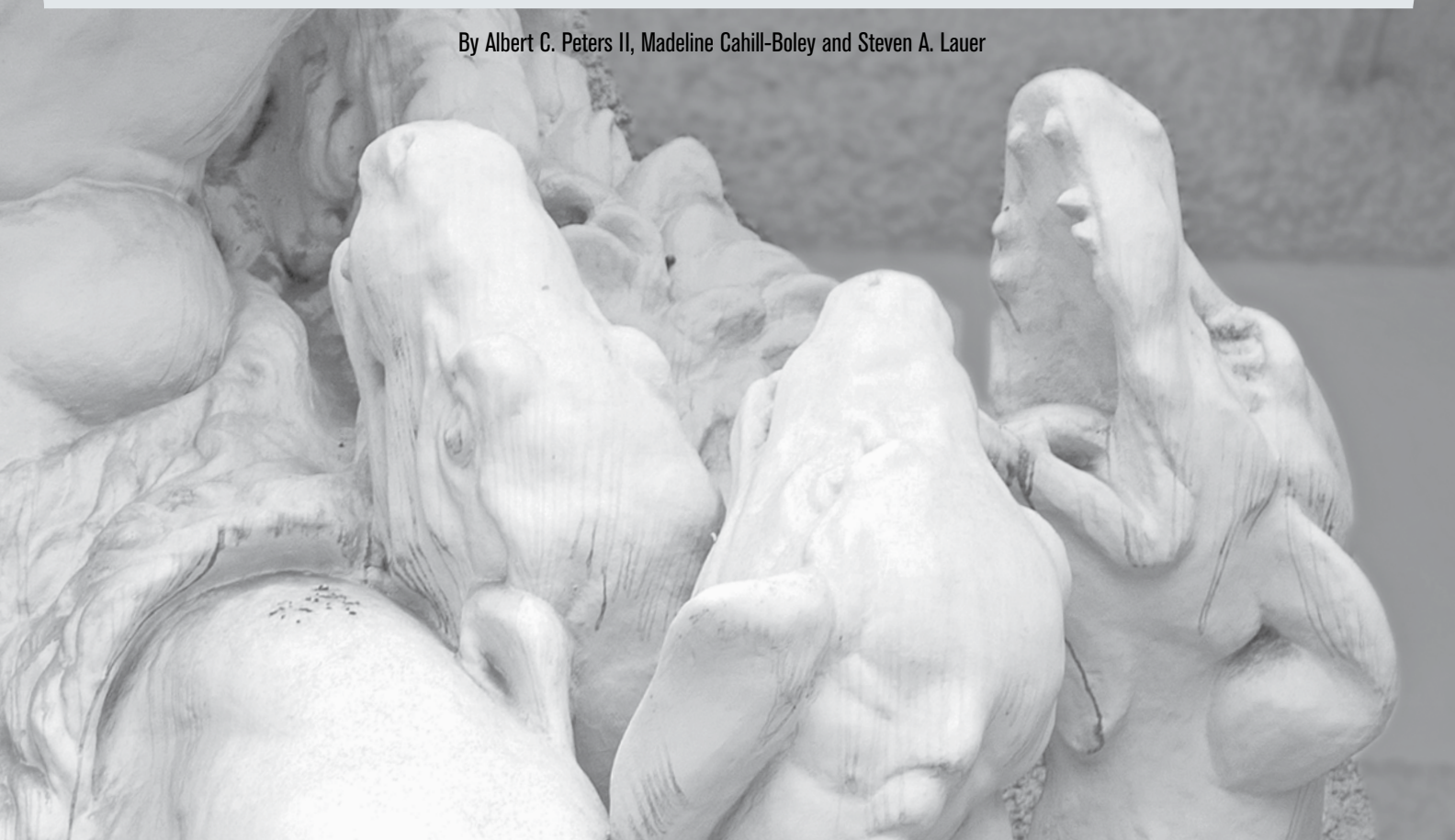
DISPUTES and LITIGATION:

TAME THE TWO-HEADED BEAST

By Albert C. Peters II, Madeline Cahill-Boley and Steven A. Lauer



30-SECOND SUMMARY The value of legal service isn't represented by a single, easily calculated number. The impact of legal efforts varies depending on the context of a dispute. In order to maximize impact on a judicial proceeding, counsel should evaluate the dispute to make appropriate resource and staffing decisions. As the legal team is assembled, communication between members must remain in sync to ensure that all share a vision of the client's situation and goals. To control costs in the long term, law departments should establish a litigation management protocol that dovetails with the company's compliance program because both serve the same goal of preventing the company from triggering law-related problems.

The cost of legal service and having to handle more legal work continues to plague members of ACC. "Reducing outside legal costs" occupies (again) the top spot as the most pressing issue facing in-house counsel.[1] An area of particular concern for in-house attorneys, in respect of delivering value to their companies, consists of disputes and litigation.[2]

All too often, counsel feel that the company is subject to forces and developments beyond its control, and that costs and risks can mount quickly and unexpectedly to points beyond the client's tolerance.

Moreover, disputes and litigation can entail risks that can run the gamut from routine slip-and-fall cases to bet-the-company matters. In addition to the substantive risks that such matters represent, companies face often-unknown costs associated with resolving those matters.

We need to keep in mind that a dispute, whether or not already in litigation, represents a series of actions by multiple parties. Each of those parties may adhere to a different version of those events. Accordingly, in-house counsel must be aware of the need to establish — and present to an adjudicator at some point — the company's "story" (i.e., its version of those events). By presenting a coherent, consistent story, the company improves its chances of prevailing in the dispute.

Value can be achieved in different contexts by varying means

While much has been written about controlling the costs of resolving disputes and litigation, the value of legal service lies in achieving a satisfactory result and in the costs of doing so.[3] In other words, the total value of the efforts of a company's lawyers in this situation represents an assessment of how the resolution matches up against the company's needs or desires, and the costs of that resolution. This means that the "value" of the service represents the relationship between the benefits that the company realizes from that service and the costs of that service.[4]

How should we approach the definition of value in the context of disputes? How can we apply that definition so that the client realizes a greater benefit for its investment in the legal service delivered and managed on its behalf?

The value of legal service doesn't represent a single or easily calculated number. While attorneys might be able individually to identify instances when the cost of legal service is disproportional to its impact (i.e., they "know it when they see it," to paraphrase Justice Stewart), their individual perceptions in that regard will differ. Even experienced trial attorneys might use the same term in very different ways.[5] This disparity of perspective can influence individuals' approaches to the same problem (such as a dispute), so we need to be aware of that possibility as we approach the definitional task and, ultimately, the decisions regarding how to resolve a dispute.

To gauge the value of legal service in the context of a dispute,[6] we must step back to fundamental points. The value of a service represents the relationship between the cost of that service and the benefit realized by virtue of that service. That benefit depends, to a degree, on its context, so the same service will have a different value in a different context. In other words, the value is not immutable. To analogize from a far different type of service, a plumbing repair speedily completed at 4 AM may represent greater value to the homeowner than would the same repair done at a more leisurely pace at 4 PM, even though the latter repair might cost less.

Similarly, the same amount and type of effort to provide legal service in different contexts might yield entirely different values to the client. Research regarding an issue involving intellectual property might greatly improve a company's position in an infringement suit. That same research in the context of weighing the need for changing the corporate name and logo, on the other hand, might matter much less to the client. This is so even if the same amount and type of effort were expended in both situations.

The impact of the lawyers' efforts might vary for other reasons, which increases or decreases the value of those efforts to the client. In-house lawyers understand the benefits of preventive lawyering, such as counseling their internal clients about the legal ramifications of contemplated acts. That approach applies in a much broader sense, though, and members of the in-house bar would benefit (along with the companies that employ those lawyers) from applying their talents in that regard. Identifying and learning the lessons of resolved litigation, for example, through post mortems or after-action reviews (or similar terms) will yield much benefit. So too do efforts directed toward compliance with the behavioral expectations and standards that apply to the business.[7]

The value of legal service also depends, to a degree, on its context. In addition, that value must be measured from the perspective of the client. The client can — and should — define how and the extent to which the efforts of its lawyers enable it to achieve its business goals.

Here are some business goals for which law-related resources might be deployed by a business embroiled in a dispute:

- to prevent a loss due to a claim or accident (e.g., an on-premises slip-and-fall case);
- to achieve a gain, such as by pursuing a claim of infringement on the business's intellectual property;
- to preserve the current situation, in which the company is thriving (e.g., the pursuit of a temporary restraining order or injunction against a proposed government regulation); and
- recovery of loss suffered by the company, such as a claim against another company for contractual damages, falls in this category.

While no party to a dispute can control all aspects of the matter, it can take steps and utilize processes that

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Habits for effectively getting the important things done

The reality is, that in an era of limited time and company resources, it is critically important for in-house counsel to direct resources to company operating priorities, and to minimize the time and resources spent on violations, disputes and litigation (so that more resources are available for company operating priorities). We need structure, systems and processes that connect compliance, risk, disputes and litigation in a strategic way with company operating priorities.

Recommended Books:

- **In *Getting Things Done, David Allen says to* categorize, and then identify the next action.**
- **Stephen Covey's *Seven Habits of Highly Effective People, says* do what is important, not what is urgent.**
- **In *The Effective Executive, Peter Drucker says* effective means doing the right things, and efficient means doing things right.**

Connecting this advice gives us "habits for effectively getting the important things done."

will maximize the impact that it will have on the progress of the matter. Such steps should also increase the value that it realizes from its law-related efforts in respect of that matter.

Uncovering the story of the dispute so as to maximize its impact

One of the first steps, and certainly among the most important, that counsel should take is to evaluate the dispute methodically. The importance of this step stems from several factors and from its broad utility.

First, in order to properly manage one's posture in respect of that dispute, one must understand its potential impact. How you approach a minor dispute over a straightforward consumer transaction will — and should — differ from how you deal with a government investigation with criminal implications that might lead to the loss of a government-issued license on which the company's business depends. The latter situation presents a make-or-break decision for the company and should be approached accordingly.

Second, the choice of counsel will vary depending on the issues and other aspects of the dispute. Since these resource and staffing decisions must be addressed quickly, in-house counsel likely will want to conduct a limited evaluation of the matter strictly to decide what level of effort to expend and who should handle the representation.

After addressing those two preliminary issues, in-house counsel must turn to a more comprehensive analysis of the matter to consider the mode of resolution. Should the client desire to steer the dispute toward an extra-judicial resolution, whether through alternative dispute resolution, mediation or some other mechanism? To a large degree, the determination of how significant a risk the matter represents will affect that determination, as will the comparative length of time it will take for one method of dispute resolution over another.

While no party to a dispute can control all aspects of the matter, it can take steps and utilize processes that will maximize the impact that it will have on the progress of the matter.

All of those considerations should occupy important places in how any organization approaches disputes. In addition, without conducting a strategic analysis of the major risks and uncertainties at the first awareness of a dispute or at the outset of litigation, a party will be hard-pressed to control its legal costs or to use its resources more effectively. Controlling costs and using resources effectively, of course, are critical to ensuring that the legal service provides sufficient value to the company to justify the expense that it represents.

The significance of a dispute to the party in question (i.e., its "value" to that party, whether expressed negatively or positively) thus possesses considerable significance for a variety of reasons. Performing an effective, thorough evaluation of the dispute should rank among the first steps taken by a corporate client when it finds itself embroiled in a dispute (or anticipates becoming embroiled in one shortly).

Treatises and articles on the subject of litigation agree with this commonsense view. For example, Richard Weise (formerly general counsel of Motorola, Inc.) has written that "[a]t the heart of the ADR concept lies early settlement before enormous costs are incurred for defense, interference with valuable relations, and business and client interruption. At the heart of the settlement lies the knowledge of what it will cost you if you do not settle."[8]

The purposes and uses of a thorough case evaluation include the following:

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Chapters of the dispute story

Early warning systems: Claim forms (e.g., daily incident reports), info system, training/meetings on safety, preventive culture

Early case assessment: Evaluate the case to assess the dispute in light of the organization's operating priorities

Case plans: Include a 30-second case theme, and update quarterly

These early case assessments that are updated quarterly help you recognize the relative value of the case to the organization's operating priorities (categories such as "bet the company," "important," "routine/recurring"), which leads to setting a resolution goal and then a resolution plan (thus giving you purpose, focus and direction).

Thinking and writing down your ideas for tasks, timing, staffing and budget leads to project planning.

After-action reviews: Connect back to one of your existing preventive systems, or create a new one.

- greater consistency in the organization's treatment and management of distinct or similar situations;
- improved ability to report to corporate management regarding the risks facing the company, whether in the context of its compliance program or otherwise;
- identification and collection of data for purposes of periodic analysis; and
- aggregation of historical data (both positive and negative) in respect of the company's history of disputes and litigation.

When designing a protocol by which to conduct an evaluation, in-house counsel should strive to satisfy at least two goals: keeping the protocol as simple as feasible, and documenting both the process and the relevant considerations carefully and clearly so as to provide guidance to all members of the law department, or for a sole in-house practitioner, a successor or later associate.

Because most companies retain outside counsel to represent them in disputes even when they have in-house attorneys, the law department must also lay out the role of those external counsel in the evaluation process. Those roles should reflect and take advantage of the different perspectives of outside counsel compared to those of in-house counsel.

What does an effective evaluation entail? How does one conduct such an exercise?

An evaluation should lead to a careful review of the various factors or considerations that might affect the ultimate resolution of the dispute. Some are obvious and static, such as the applicable law. Others, however, are less clear and might prove more difficult to define or measure. Here are some points commonly covered in an evaluation:[9]

- salient facts about the dispute;
- assessment of opposing counsel, the judge and the potential jury pool;
- assessment of damage claims; and
- possible or recommended litigation strategy.

Some evaluations are conducted using decision-tree analysis, detailing the possible choices to be made on a number of relevant considerations and calculating for each series of decisions a likely outcome, which includes a probability of its occurrence. For all but the simplest cases, however, this type of analysis can lead to a complex decision tree. Moreover, lawyers often have difficulty assigning probability to the varying possible outcomes with sufficient accuracy or certitude. Decision trees are also susceptible to manipulation, with a desired or expected outcome affecting the evaluator's assignment of probabilities or likely results of each decision stream.

Other types of evaluation require somewhat more subjectivity in their analysis. They call on counsel to apply their judgment when assessing the likelihood of various issues arising or of certain factors affecting the progression of the dispute in favor of one or the other of the disputants. Given the inherent subjectivity built into the judicial system and its analogues, subjectivity cannot be eliminated. Thoughtful application of subjective judgment may be the best available option for these evaluations.

Whether using a decision-tree analysis or an evaluation approach that explicitly incorporates the attorneys' subjective judgment, a law department should ensure that the differing perspectives of in-house and outside counsel (and, perhaps, of multiple outside counsel) are accorded sufficient latitude. For example, an assessment of the risks associated with specific jurisdictions should rely heavily on the opinion of outside counsel most familiar with those jurisdictions (except in the unusual event that the in-house

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attorneys have sufficient experience in those particular jurisdictions). An understanding of the implications for the client of a suggested litigation strategy, on the other hand, probably lies in the province of that client's in-house counsel rather than that of an outside attorney retained solely for the dispute in question.

Whatever evaluation protocol is used, counsel must ensure that the purpose and results of that exercise lead toward and provide the information with which to construct the client's story of the dispute. Each element of that story must find adequate support in the facts developed during the investigative phase of the matter. The evaluation can serve as the mechanism by which to test the elements of the story for their strength and cohesiveness. By enabling counsel to identify weaknesses in the client's case, the evaluation serves to highlight the missing elements that might make the difference in how the client's position will be received.

In conducting the evaluation, counsel should ask themselves (and each other) periodically what problem the client is trying to solve or redress, what they need in order to achieve that goal and whether the story they expect to present to a court or other fact finder hangs together. When they can answer those questions affirmatively and assuredly, they likely will have a winning position.

The communication between and among members of a company's legal team is critical. Without it, they likely will not present a unified front to the opposing side, permitting that side to exploit differences among them.

Communication enables a party's counsel to jointly develop and share its story

The law revolves around language and communication. This is particularly true with respect to disputatious situations. To convince another party or a fact finder to accept his *client's* view as to the "correct" outcome of the dispute requires a command of language that conveys one's position accurately and convincingly. Because companies often retain outside counsel in such situations, an in-house attorney must be in sync with all other members of the company's legal team.

Unfortunately, much evidence suggests that in-house and outside lawyers and their common clients often hold divergent opinions about their joint efforts. Whether they simply fail to reconcile disparate definitions of critical terms, such as a defendant having a "high" chance of losing,[10] or they approach issues in dramatically different ways,[11] their ability to collaborate effectively is compromised. This has great implications for their ability to represent their clients successfully in dispute and litigation.

The communication between and among members of a company's legal team is critical. Without it, they likely will not present a unified front to the opposing side, permitting that side to exploit differences among them. More fundamentally, if they don't communicate well with each other, they may fail to achieve a meeting of the minds in respect of the client's position and not recognize that failure, to the client's ultimate disadvantage.

To ensure that they share a vision of the client's situation and of its goals, they need to communicate well and often. Because disputes evolve as new facts emerge, or as the parties respond to internal or external pressures, counsel must continue that dialogue so as to remain in sync.

In the context of litigation, the observation that in-house lawyers tend to approach matters they manage from a strategic perspective, while outside attorneys more often think tactically, has significant implications, many of which are negative. If a company that is embroiled in a dispute hopes to resolve that dispute outside of a courtroom but needs time in which to establish business-to-business discussions, retaining an outside lawyer who immediately plans motions, depositions and other lawsuit-oriented tactics might prove a mistake. Such steps can easily lead to a hardening of the parties' respective positions and less likelihood of a negotiated resolution due to increasingly hostile attitudes on both sides.

Inside and outside counsel must communicate on the evaluation of the matter discussed above. As noted, they likely hold very different perspectives in respect of a dispute. The company can use those differences to

ACC Value Challenge: Meet. Talk. Act.

Communicate with outside counsel (Meet. Talk. Act.) throughout the evaluation, resolution goal and resolution plan phases to identify what is involved in a case, and to define the desired result, strategy and tactics (the value and the story).

The communication should also include a discussion about how to find any commonalities in a "one-off" matter, which can lead to a billing arrangement that takes into account the value of the case, both to the department and the firm.

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Not only should the lawyers seek the client's perspectives on how the dispute or litigation might be resolved most beneficially for the client, but the lawyers should also engage the client regarding how to achieve that end, including how the client can contribute to a successful resolution.

its advantage by incorporating them in the evaluation. The in-house lawyer or outside counsel may be better suited to examine certain issues that an evaluation should cover; other issues should be examined by both of them, with their views being reconciled or integrated in the overall evaluation.

In-house and outside counsel should collaborate to develop the evaluation. As to certain issues or categories of facts (particularly in the early stages of evaluating the matter and determining a course of action) covered in that exercise, the in-house attorney should take the lead; as to other aspects of the dispute or case, the outside attorney has a clearer view or perspective on the underlying facts and should take the major role. As to all issues and the final product, however, they both should weigh in and provide the company the benefit of their strategic strengths in assessing the strength of the company's position.

It's the client's goals, stupid

"When developing a definition for 'value' in the context of legal services, we should not lose sight of the fact that, ultimately, the determination of the value of the legal service is the client's to make."[12] In the context of disputes and litigation, this means that we must ensure that we understand fully the client's goals in as much detail and completeness as feasible. Facile, simple aims may not suffice.[13]

For that purpose, of course, communication with the client is essential. Not only should the lawyers seek the client's perspectives on how the dispute or litigation might be resolved most beneficially for the client, but the lawyers should also engage the client regarding how to achieve that end, including how the client can contribute to a successful resolution.

> An executive can make a positive contribution toward litigation management. Business professionals may be more familiar with documents and files relevant to a dispute. They can help locate fact witnesses, such as present or former employees familiar with the underlying dispute from the perspective of the company. Executives also can provide the business sense needed for decision-making.[14]

Counsel must always ground their analysis in the client's needs and goals. Without doing so, they risk pursuing the wrong objectives or running up costs far in excess of what the matter or the client will bear. In any event, they certainly will pursue the client's goals inefficiently and probably ineffectively.

Ensuring that the presentation developed on behalf of the client clearly communicates a story that supports the client's objectives remains counsel's primary objective in developing the evaluation and assembling the evidence and legal theories during their preparation. All must relate to the business problem that the client wishes or needs resolved. Doing so will also ensure that the lawyers remain connected to the client's priorities in a way that increases the likelihood that the resolution options developed will reflect the appropriate relative value to the client of those priorities.

Compliance and dispute management must fit together "hand in glove"

Compliance has assumed considerable significance for most companies and most in-house lawyers.[15] We recognize that compliance lapses that might, at first glance, seem relatively insignificant or minor may assume considerably greater importance due to other factors, or in combination with other events or developments (internal or external to the company).

ACC EXTRAS ON… Managing disputes and litigation

ACC Docket
Increase Legal Department Value: Establish a Goal Focus (Oct. 2003). *www.acc.com/docket/goal-focus_oct03*

Stop Rain Dancing: Five Management Habits for In-house Lawyers (Sept. 2002). *www.acc.com/legalresources/publications/accdocket/upload/raindance_sept02.pdf*

InfoPAK℠
ACC Value Challenge Practices for the Small Law Department (March 2012). *www.acc.com/infopaks/practices-sld_mar12*

QuickCounsel
Outside Counsel Retention Agreements (Sept. 2011). *www.acc.com/quickcnsl/oc-retention-agre_dec09*

Checklist
Effectively Managing Employment Litigation Checklist (Oct. 2002). *www.acc.com/list/employment-lit_oct02*

Presentation
In-house Litigation Management (Oct. 2008). *www.acc.com/inhouse_lt_mgt_oct08*

Blog Series
ACC Blog Series Focuses on Client–Firm Management of Litigation Work (Jan. 2011). *www.acc.com/blog/client-firm_jan11*

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Compliance, risk management and dispute management continuum

Connect to the "important things" in preventing (or at least minimizing) disputes and violations

<--->

Audits	Training	Negotiation	ADR	Formal proceedings
Assessing	Prevention			Adjudication/ Litigation
	Compliance			
	Drafting			

Compliance and dispute (or litigation) management represent two parts of a continuum.[16] When well designed and properly implemented, they serve the same goals: preventing the company from triggering law-related problems or minimizing the impact of violations if they occur. Viewed holistically, compliance and dispute management reinforce a company's business operations, ensuring that they operate effectively and with minimal "turbulence" in the form of investigations by government or other agencies, or by litigation and disputes.

A dispute management/compliance protocol will include the following elements:[17]

- a mechanism by which the company can learn about the existence of a dispute or other liability-creating situation sooner;[18]
- efforts to ensure that the company is more aware of and compliant with the law-related issues and liability-creating situations, or forces it might or is likely to encounter in its operations;
- a system by which it consistently and effectively assesses the merits of disputes (relative to other disputes in which it is or becomes embroiled) as early as feasible;
- a consistent method by which to choose appropriate representation for each dispute;
- a mechanism by which to treat each dispute as a project to be managed, using project-management tools and techniques;[19]
- deliberate staffing of its dispute-management team for each matter, reflective of the relative significance of each such matter;
- a corporate attitude or ethos that increases the likelihood that it will avoid disputes or, if they occur despite its efforts, that they are addressed appropriately;
- the identification and application of information and knowledge to each dispute so as to improve its resolution consistent with the company's interests; and
- policies that extract information about the company's dispute- and litigation-related experience for purposes of continual process improvement, and the identification and application of "lessons learned."

When viewed in this way, corporate compliance programs dovetail nicely with other elements of a law department's activities. Even if compliance is not part and parcel of the responsibility of a corporate law department, perhaps because it has been housed in a distinct corporate department, a company's lawyers (both in-house and outside) likely will play important roles in that effort, and the success of the lawyers' efforts in that regard will increase or decrease the dispute-related elements of their assigned responsibilities.

"The time has arrived for corporate ethics and compliance programs to emerge from [the shadow of the federal sentencing guidelines, under which they have appeared and matured], for they deserve recognition for many other benefits that they offer. Some of those benefits may even outweigh, in terms of their day-to-day impact on corporate activities and stature, the benefits created by the [federal sentencing] guidelines. After all, the real objective is to avoid situations where the guidelines even come into play — by creating and maintaining a culturally embedded and appropriately aligned ethical compass."[20] Not coincidentally, such an approach also ensures that the company will realize the most value for its investment in its internal and external law-related resources.

Commonality versus uniqueness – making the most of every situation, however different it might appear to be

Many processes for managing disputes and litigation seem designed for matters that have much in common. Fee arrangements premised on assigning multiple, similar matters to one law firm, and the creation and use of internal discovery-management centers,[21] reflect a portfolio-based approach.

In-house attorneys realize, though, that many disputes are (or appear) sui generis, with few facts or considerations in common with other matters that a company might face. Can the approaches described above work in that context?

They can. They must contain some intentional flexibility, however, to operate effectively. When creating and

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THREE QUESTIONS NEED TO BE ASKED OVER THE SCOPE OF THE CASE:

- **First: What is the story of this case and what is needed for *it*?**
- **Second: What is this case similar to? Connect this new case to something from before.**
- **Third: What preventative system can we connect this case to? (Ask this question during the after-action review phase.)**

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Using the client's "value drivers" to determine how and where resources are applied should lead to a more satisfactory result from the perspective of the business client. That, in turn, should lead to a more satisfied client.

implementing a dispute- or litigation-management protocol, a law department must allow for the exigencies of a specific situation to take precedence. It should not limit the number or types of considerations that its lawyers must take into account arbitrarily. Allowing them to work with the business objectives desired by the business operation, rather than imposing them on account of the lawyers' preferences, for example, will allow them to drive toward the client's goals more directly.

Using the client's "value drivers" to determine how and where resources are applied should lead to a more satisfactory result from the perspective of the business client. That, in turn, should lead to a more satisfied client.

Disputes often bear some resemblance, one to the next. That resemblance may be more or less significant in any particular case, though, so the lawyers must be prepared to adapt their techniques to the exigencies of the situation at hand. Identify the commonalities to the extent possible, reduce the idiosyncrasies of the specific situation if possible, and manage the core of the matter as diligently as possible and consistently with other matters.

Realizing greater value

Disputes and litigation both lead to considerable expense, both in terms of their processing (this includes the cost of legal service, costs associated with judicial or non-judicial resolution, the interference with a company's normal operations and the resulting hindrance on achieving its business goals) and potential payouts to aggrieved parties. Accordingly, in-house counsel must attend to cost-reduction or cost-control techniques. Realizing greater value from the efforts of a company's lawyers (both in-house and outside) in that context may seem a daunting task. Positive gains are available with efforts such as those suggested above. Success in that regard will not only reduce the company's cost of doing business, but it will enhance the reputation and recognized value of the law department within the organization. **ACC**

NOTES

1 See 2010 *ACC/Serengeti Managing Outside Counsel Survey*, "Executive Summary," p. 11. According to that survey, "Median total legal expenditures for 2009 (the sum of in-house and outside counsel expenditures) was $3,150,000. This is the highest reported spending since the start of the survey."

2 "Disputes," of course, encompasses a wide range of situations. Such situations run the gamut of minor disagreements about service or product delivery in consumer transactions to major differences of opinion between joint venture partners in a major real estate development. As much as possible, counsel should attempt to apply techniques such as those described in this article as consistently and diligently as possible across that entire range, with the company's appetite for risk and its value drivers as explained herein.

3 Edward S. Renwick, an experienced trial lawyer, has developed a protocol for managing disputes that applies several project-management techniques, including careful scoping and budgeting. Using a modified task-based billing method, Mr. Renwick expects his approach to reduce litigation cycle time and cost. See "Quicker, Better, Cheaper," posted at *http://thevalue-ablelawyer.com/wp-content/uploads/2011/01/QUICKER-BETTER-CHEAPER-introductory-text1.pdf.*

4 *ACC Value Challenge Practices for the Small Law Department* (March 2012), pp. 7-8.

5 Compare how trial attorneys might impart very different meanings to the phrase "a high chance of losing," as described in Lauer, "Maybe Humpty Dumpty Was a Lawyer," *Law Department Management Adviser* (Dec. 1, 2001), pp. 5-6, posted at *www.thevalue-ablelawyer.com/wp-content/uploads/2011/01/Maybe-Humpty-Dumpty-Was-a-Lawyer.pdf.*

6 This analysis applies in the context of a dispute whether or not it has matured into litigation.

7 Not all of those standards and expectations emanate from laws and regulations. See section "Compliance and dispute management must fit together 'hand in glove'" of this article, *infra.*

8 R. Weise, "Representing the Corporation: Strategies for Legal Counsel" (2nd ed. 1997, *Aspen Law & Business*), vol. 1, pp. 8-12.

9 This list is far from exhaustive. Some additional issues might be included in an evaluation for purposes unique to the particular case, or on account of the client's needs due to other considerations.

10 See Lauer, "Maybe Humpty Dumpty Was a Lawyer," *supra,* n. 2, p. 6.

11 *Id.*, at 7-8.

12 *ACC Value Challenge Practices for the Small Law Department* (March 2012), p. 63.

13 Direction to "win," for example, might not connote the same thing to everyone who hears it, with some interpreting the term in its absolute sense while others take it as direction to achieve the best outcome feasible in line with an appropriate cost. See the discussion of how a direction to counsel "to win" a case did not accurately reflect the thinking of the corporate officer involved, who "meant that the company could not afford to lose." Lauer, "Maybe Humpty Dumpty Was a Lawyer," *supra*, n. 2, p. 7.

14 S. Lauer, "In-House Counsel, Executive Must Play Strong Role: To Win in Litigation, All Players Must Take the Field," *U.S. Business Litigation, vol. 2, no. 8* (March 1997), pp. 16-17, posted at *www.thevalue-ablelawyer.com/wp-content/uploads/2011/01/In-House-Counsel-Executive-Must-Play-Strong-Role-To-Win-in-Litigation-All-Players-Must-Take-the-Field.pdf.*

15 *ACC's Chief Legal Officers (CLO) 2013 Survey* (see *http://www.acc.com/legalresources/loader.cfm?csModule=security/getfile&pageid=1327206*) reports, "Chief among the top issues facing CLOs today is ethics and compliance and regulatory or government changes. These two issues rated high in terms of importance both for the past 12 months and the next 12 months."

16 Compliance failures often lead to disputes or litigation. If the failure relates to contractual obligations or another type of private inter-party relationship, that failure might serve as the basis for a private lawsuit. See Lauer, "Compliance Programs Redefined: Elevating Contractual Responsibilities to Their Proper Place," *Corporate Governance Guide Update*, issue 551 (March 21, 2011). If the failure consists of non-adherence to governmentally imposed laws or regulations, a regulatory action may very well follow.

17 For a discussion of this subject, see S. Chema and S. Lauer, "A Holistic Approach to Corporate Compliance and Dispute Management," *The Lawyer's Brief*, vol. 34, no. 24 (Dec. 31, 2004), p. 2, posted at *www.thevalue-ablelawyer.com/wp-content/uploads/2011/01/A-Holistic-Approach-to-Compliance-and-Dispute-Management.pdf.*

18 A hotline, typically found in a corporate ethics and compliance program, might serve this purpose well. Several years ago, over 90 percent of companies that responded to a survey had implemented a reporting hotline as an element of an effective corporate ethics and compliance program. Lauer, "Corporate Compliance and Ethics Programs: Don't Sell Them Short," *The Metropolitan Corporate Counsel,* vol. 14, no. 3 (March 2006), p. 58. For an example of a hotline that serves more than just compliance goals and that in fact contributed to a company winning a Malcolm Baldrige National Quality Award, see chapter 11 of Biegelman, *Building a World-Class Compliance Program: Best Practices and Strategies for Success* (John Wiley & Sons, Inc. 2008).

19 See "How to Move Toward 'Effectively Predictable' Legal Fees: Scoping," at *http://lasthonestlawyer.wordpress.com/2013/02/13/how-to-move-toward-effectively-predictable-legal-fees-scoping/?goback=%2Egmp_1589817%2Egde_1589817_member_213905649.*

20 J. Carr & S. Lauer, "Compliance programs reduce litigation exposure: Only the rare company faces prosecution, but all must limit liability risks," *The National Law Journal*, vol. 27, no. 33 (April 25, 2005), p. S3, posted at *www.thevalue-ablelawyer.com/wp-content/uploads/2011/01/Compliance-Programs-Reduce-Litigation-Exposure.pdf.*

21 See the examples of in-house discovery-management centers described in chapter 7 of S. Lauer, *The Value-Able Law Department* (Ark Group 2010).

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