DLA Piper Global Women's Leadership Summit
September 20, 2016
CLE Written Materials

Moderator:
Melinda Upton, Head of the Intellectual Property and Technology Group in Australia, DLA Piper LLP, and intellectual property partner with extensive experience across all aspects of brand protection, exploitation and enforcement, both in Australia and globally.

Panelists:
Jodi Fullarton-Healey, General Counsel, ANZ
ANZ operates in one of the most regulated industries placing constant demands on the role of a General Counsel. Despite this, the banking industry is consistently embracing new technologies and expansion into developing markets bringing with it a host of concerns for Jodi as General Counsel. In addition to embracing a multijurisdictional approach to her work, Jodi has a strong focus on the leadership capabilities that accompany the role of a General Counsel.

Angela D. Jilek, Senior Vice President, General Counsel and Secretary, Pentair
Pentair has a global presence operating in developing to developed countries and is pursuing projects in jurisdictions with differing legal frameworks to that of developed countries. As a publically-listed company, stakeholder relationships create a unique risk profile for Angela as General Counsel. Angela approaches her business from many perspectives addressing the concerns that face a conglomerate operating in various industries.

Maryanne R. Lavan, Senior Vice President, General Counsel and Corporate Secretary, Lockheed Martin Corporation
Operating as a major player in the aerospace, defence, security and advanced technology market brings with it a heightened sense of ethics and integrity. Lockheed Martin has completed domestic and international transactions presenting cultural changes and considerations that Maryanne has addressed in her role as General Counsel, and which many companies are now facing. Maryanne's role at Lockheed Martin involves navigating risks while being mindful of the heightened focus on her firm's reputation and brand given its government contracts and work in these industries.

Karen Pedersen, Group General Counsel, Lendlease
At any given time, Lendlease has over 700 active projects around the world. Karen reports to a Board of Directors predominantly based in Australia. Karen speaks highly of the value-based culture of Lendlease. Her role involves considering Lendlease's projects and transactions in light of these values and embracing the challenges of operating in new markets and environments. Karen believes strongly in the value that the internal legal teams bring to proactively resolving issues at the front end to avoid disputes and litigation.

Panel Topic

The Evolving Relationship Between the General Counsel and the Board of Directors, Including the Effects of Globalization on Their Roles and Requirements

I. COURSE OVERVIEW

The relationship between the general counsel and the board of directors has changed significantly over the past 10-15 years. So has the role of general counsel, especially in multinational corporations. The cause and effect of these changes, as well as the impact of globalization on the general counsel, will be explored by our experienced panelists who will discuss impactful issues including how the general counsel handles differences in regulations and legislation in the different countries in which the company operates and how the general counsel obtains appropriate global awareness and provides appropriate guidance.

II. COURSE DISCUSSION

A. The Evolving Role of General Counsel as a Key Member of the Corporate Decision-Making Team: Tensions Between GC as "Guardian" of the Company and GC as "Partner" to the CEO

General Counsel ("GC") today bring more to the table than just their legal expertise. GCs are no longer limited, as they have been in the past, to a reactive role overseeing litigation delegated to external law firms. Today, GCs are being called upon to participate in strategic meetings and provide wide-ranging counsel as decisions are made, rather than to clean up messes after they have occurred. High-performing general counsel develop reputations as business-savvy advisors on a range of issues and strategies, and often simultaneously hold non-legal positions in their companies. They are a fully functioning member of the senior leadership team who "just happens to be an attorney."

Moreover, GCs are increasingly relied upon as a trusted advisor to the board of directors, who rely on the GC's guidance to preempt problems and bring additional insights to strategic decisions. The GC must balance the concerns of corporate integrity with helping to remove obstacles and foster business objectives. In a recent report, when asked which competencies directors and officers anticipate would be the most valuable for the GC to have in 2020, the top two traits were sound judgment (72%) and high integrity (69%), ahead of legal expertise (63%). NYSE Governance Series, 2016 Survey Report, "The Rise of the GC: From Legal Adviser to Strategic Adviser" (2016). Additionally, the board looks to the GC to be in alignment with the CEO so that all appropriate risk factors in business decision making are being considered and addressed. Being an effective partner to the board of directors both on business concerns and the law establishes the trust and credibility that allows the GC to be an effective guardian of the corporation. This in turn dictates the degree to which the GC can make a contribution to the corporation.

Yet there is an inherent tension for today's GC between being a "partner" to the CEO and being a "guardian" of the company. On one hand, the GC cannot be effective unless he or she has a good relationship with the CEO and can help the CEO accomplish high-performance goals – in a legal and ethical way. But there are many hard issues with gray areas as to what is legal, what is ethical, and how something will affect reputation or affect other stakeholders. In such instances, the question for the GC is not merely "what is legal?" but more broadly "what is right?" Even in very good companies there is going to be some tension in the relationship, as there should be. If the GC is only a partner, saying "yes" because the CEO wants to accomplish a business objective, both the GC and the company may face greater liability in the end. On the other hand, if the GC is only a guardian and says "no" without being a creative problem solver, the GC may be excluded from the decision-making process and thus ineffective in guiding the company to the right course of action. Resolving this tension between partner and guardian is at the core of being GC.

The panel will discuss how the GC can effectively work with the board and the leadership team to achieve both business and legal objectives. The panel will also discuss how managing the guardian role depends on many factors such as corporate culture, the size and maturity of the company, the industry in which the company operates, and the level of regulatory oversight within the particular industry.

Reference materials:

- McArdle, E., "In the Driver's Seat: The Changing Role of the General Counsel," Harvard Law Today, today.harvard.edu (July 1, 2012)
- Heineman, B., "The Rise of the General Counsel," Harvard Business Review (Sept. 27, 2012)
- Egon Zehnder International, Experts: The Journal for Practice Knowledge, "Legal Professionals Practice, The General Counsel and the Board," Issue No. 3 (2011)
- Your ABA E-News, "Inside Counsel Rising: Expectations and Obstacles, as Power and Status Grows," Your ABA e-news for members (July 2016)
- Association of Corporate Counsel, "Today's In-House Counsel: Evolving Roles as Business Enablers," ACC Docket (January/February 2014)
- Korn Ferry Institute, "More Than 'Just a Lawyer': General Counsel as Senior Leaders," www.kornferryinstitute.com (2015).
- NYSE Governance Series, 2016 Survey Report, "The Rise of the GC: From Legal Adviser to Strategic Adviser" (2016)
- Johnson, L., "What CEOs Want in a GC: Five Stages in the Evolution of the Position to the Key Role it is Today," Metropolitan Corporate Counsel (April 2016)
- Maleske, M., "General Counsel's Heightened Influence in the Boardroom," Inside Counsel, www.insidecounsel.com (April 30, 2012)

- Heineman, B., "The General Counsel as Lawyer-Statesman," A Blue Paper, Harvard Law School Program on the Legal Profession, law.harvard.edu/programs/plp
- Egon Zehnder International, Experts: The Journal for Practice Knowledge, "Legal Professionals Practice, The General Counsel and the Board," Issue No. 3 (2011)
- Veasey, E. & C. Di Guglielmo, "General Counsel Buffeted by Compliance Demands and Client Pressures May Face Personal Peril," The Business Lawyer, Vol. 68 (Nov. 2012)
- Heineman, B., "The Inside Counsel Revolution," Corporate Counsel, www.corpcounsel.com (April 27, 2016)

B. Globalization and Cultural Integration: The General Counsel's Role in Maintaining Corporate Reputation While Realizing Global Legal Goals

An understanding of how global businesses are run is key to the GC making a real contribution to the board of directors and the company. Globalization has compelled GCs to master difficult and complex regulatory regimes in each jurisdiction in which the company operates, including the effect of various political and cultural climates on business operations and enforcement practices. Today's global general counsel may deal with issues ranging from corrupt regimes and rule of law matters in developing nations to concerns about corporate reputation, sweatshop labor among suppliers, piracy, safety threats to executives and other employees, intellectual property issues, labor and employment issues, counterfeiting issues, and failure to comply with laws such as Sarbanes-Oxley, Dodd-Frank, and the Foreign Corrupt Practices Act ("FCPA"). The GC's increasingly broad role means that he or she is often best positioned to ensure that the board of directors acts across its many areas of activity to create and maintain a consistent and responsible corporate identity.

This globalization of corporate legal operations demands a certain level of flexibility and willingness to alter practices to realize global legal goals. When successful, the general counsel and his or her team operate as global change agents, driving a shift in perspective, processes, and adoption of tools that allow the corporate legal department to operate in a manner that supports the global enterprise. In a world where general counsel and the team surrounding them are being asked more than ever to act as a key advisor and partner to global organizations, acting as a strategic visionary willing to implement and see through necessary changes will position the corporate legal department to operate as a best-run function within the organization.

The panel will discuss how the GC handles differences in regulations and legislation in the different countries in which the company operates, and how the GC obtains appropriate global awareness and provides appropriate guidance.

Reference materials:

- McArdle, E., "In the Driver's Seat: The Changing Role of the General Counsel," Harvard Law Today, today.harvard.edu (July 1, 2012)
- Heineman, B., "How the CFO and General Counsel Can Partner More Effectively," Harvard Business Review (July 25, 2016)
- Egon Zehnder International, Experts: The Journal for Practice Knowledge, "Legal Professionals Practice, The General Counsel and the Board," Issue No. 3 (2011)
- Mitratech, "General Counsel: The Global Corporation's Next Agent of Change," White Paper (2014)

C. Technology and the Corporate Legal Department: From Innovation to Risk

Without a doubt, the digital revolution has improved the lives of millions of people all over the globe. Likewise, companies use today's rapid pace of information exchange to tell the world about their products and maintain their social media presence, while at the same time attempting to keep up with the speed of information and controlling risk and exposure. While technology has brought a great many opportunities for businesses, it can also be one of its biggest sources of risks.

Technological advances have been transformational for corporate legal departments in recent decades. Such technology advances that impact in-house legal departments include: smart contracts; effective contract management systems; crowd sourcing; artificial intelligence (its value in analyzing vast amounts of data, but could it ever replace lawyers?); legal apps; and cryptocurrency (such as Bitcoin), among others. The GC's creative use of these technology advances, while being mindful of their potential issues, can be transformative in the way both internal clients and external partners interact with the corporate legal department.

On the other hand, many companies face a significant and largely unappreciated problem – they may not realize the depth and breadth of their digital exposure. They also may not fully understand the means and motives of sophisticated threat actors for gaining access to valuable corporate data. Social media also creates issues for the legal department in managing corporate reputation in a digital world, where a business's reputation can be damaged by a single tweet. More than a quarter of crises spread to international media within an hour, yet it can take on average 21 hours for a business to respond. Today's GC must be aware of the digital tools they can use to monitor what is being said, and to respond quickly but proportionately when a negative story breaks, including challenges such as how to keep up, whether and how to respond to which groups, and in which order.

The panel will discuss their experiences with innovative technology advances in their legal departments. The panel will also discuss the challenges they see for a global company's digital exposure and mitigating those risks.

Reference materials:

- PwC, Current Issues in Digital Management for Corporate General Counsel (April 2014)
- The Economist, "General Counsel: Creating Value in a Disruptive World" a Summary Paper (October 15, 2015)
- Mintzer, R., "Focusing on the Evolving Role of the GC," Corporate Counsel (June 5, 2014)
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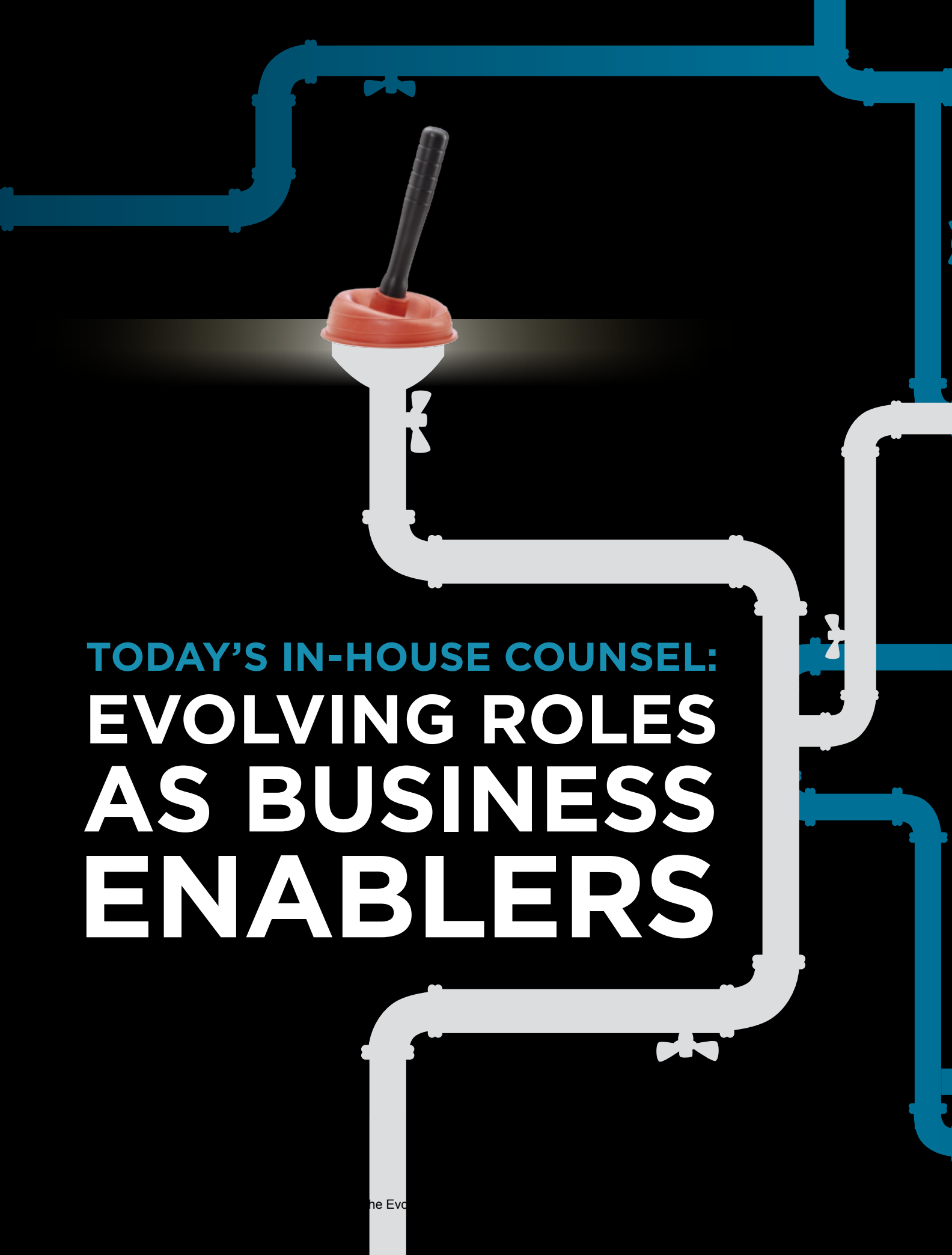
III. CONCLUSION/COURSE SUMMARY

Building on a major shift that took place over the past three decades, GCs are no longer limited to a reactive role overseeing litigation farmed out to law firms, but instead are key members of the corporate decision-making team. Many find the job unmatched within the legal profession, in both demands and rewards.

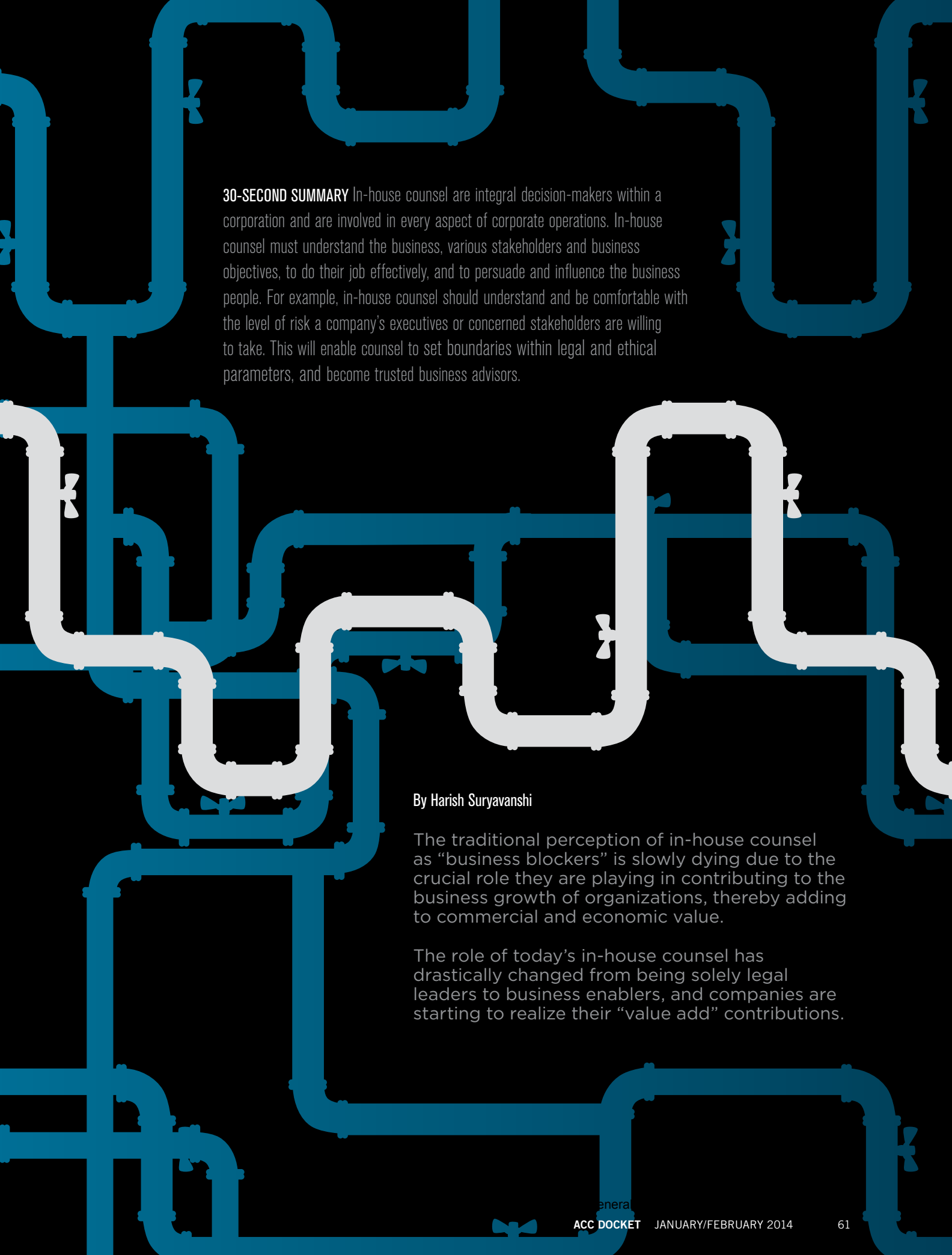
In today's environment, GCs are leaders, not just scriveners or secretaries. The skills required of a GC extend far beyond being a technician in the law, which is only the beginning. For a great GC, the first question is "What is legal?" The last question is "What is right?" This expanded role means that the GC is often best positioned to ensure that the board acts across its many areas of activity to create and maintain a consistent and reputable corporate identity.

Under these parameters, the job of GC offers enormous opportunities for innovation, leadership, and decision making at the highest levels – especially as companies have gone global.



TODAY'S IN-HOUSE COUNSEL:

EVOLVING ROLES AS BUSINESS ENABLERS



30-SECOND SUMMARY In-house counsel are integral decision-makers within a corporation and are involved in every aspect of corporate operations. In-house counsel must understand the business, various stakeholders and business objectives, to do their job effectively, and to persuade and influence the business people. For example, in-house counsel should understand and be comfortable with the level of risk a company's executives or concerned stakeholders are willing to take. This will enable counsel to set boundaries within legal and ethical parameters, and become trusted business advisors.

By Harish Suryavanshi

The traditional perception of in-house counsel as "business blockers" is slowly dying due to the crucial role they are playing in contributing to the business growth of organizations, thereby adding to commercial and economic value.

The role of today's in-house counsel has drastically changed from being solely legal leaders to business enablers, and companies are starting to realize their "value add" contributions.

Countering perceptions: Business enabler, not just gatekeepers or business blockers

One of the major challenges in the evolution of the in-house counsel role is eliminating long-held perceptions that legal is just a support, cost function rather than a contribution to the business.

It is essential to lift that perception, demonstrating that you can add value and will work as part of a team to find the right solution.

It is pertinent that you demonstrate to concerned internal stakeholders and management legal's contribution to the business, through terms derived from the business itself.

Expanding responsibilities and influence

We have greatly expanded responsibilities and influence. We are integral decision-makers within a corporation and are involved in every aspect of corporate operations — helping determine a company's strategic growth plans, analyzing risk factors, and even framing the business's public image and becoming a profit center.

In-house counsel are enablers of business outcomes, working with senior management and business unit leadership to use legal talents in contributing to the bottom-line. Hence, you must have the ability to see legal considerations in the context of business outcomes in addition to legal consequences.

For instance, in the IT services industry, which is getting more competitive every day and becoming more market-driven, in-house counsel play a crucial and proactive role in successfully closing commercial deals in coordination with the internal and external stakeholders, counsel and management as required, based on business urgency and critical nature of the deal.

In addition to working on commercial contracting and helping to close all the loops for end-to-end contracts, in-house counsel provide legal advice and opinions on contractual legal issues, disputes related to operational issues, outstanding payments, settlements, etc.

When selecting external lawyers, in-house counsel look for experts or reputed law firms, while also focusing on minimizing spend and taking the necessary steps to support closing certain matters or deals with due diligence. Further, in-house counsel must have an understanding of local statutory/regulatory requirements on a case-by-case basis.

In-house counsel must successfully manage the internal legal issues of various department and stakeholders through an advisory role, and handle litigation with the help of outside counsel to settle disputes for or against the company.

To be effective business enablers, in-house counsel need to:

Understand the business. In-house counsel must understand the business, various stakeholders and business objectives to do their job effectively, and to persuade and influence the business people. We need to have detailed knowledge about the businesses we are dealing with. You will do a better job if you understand how the business works, what business issues keep executives awake at night, and how to approach those issues given the business's current circumstances. You must also comprehend the deals and their legal and commercial intricacies.

Understand the company's risk profile. There's a lot about running a business that requires interpretation, and running a business involves taking risks. We need to understand, and be comfortable with, the level of risk that a company's executives or concerned stakeholders are willing to take within certain set boundaries.

Know about the work process and practices. Once the in-house counsel gets well acquainted with the business, it is essential to establish processes and standards to deal with legal issues and risks, to protect business interests. While operating within your legal framework and not deviating from the risks stakeholders are willing to take, it is also important to understand business priorities and varying degrees of urgency.

Following calculated processes can help to enhance your image, capabilities and reliability, while also boosting the confidence of your team. In-house counsel cannot afford to work in a haphazard manner, and at all times need to be careful to communicate effectively.

Become a trusted business advisor in strategic decision-making. Today's in-house counsel should support business expectations by becoming advisors in strategic decision-making. Once in-house counsel comprehend the corporate philosophy, they are frequently involved in the decision-making process and strategy development, adding value to the business by balancing legal risk with business interests.

Adopt smart practices for partnering with the business. Develop foresight and emphasize your commitment to business counterparts to achieve corporate objectives.

If you, as in-house counsel, want to perform exceptionally well, then you need to hone your soft skills. In addition to developing effective communication, negotiation and persuasion skills, you will also need to:

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- be trained to have the right approach from the outset to add value to the business;
- understand how to get things done and how to best manage both internal and external customers;
- deliver an articulate opinion with impact;
- have superb listening skills, attention to detail and the ability to grasp issues quickly;
- be focused on strategic business issues and building strong relationships with key constituents;
- demonstrate leadership abilities and sound business judgment that can lead to corporate growth and competitive advantage;
- focus on opportunities to resolve problems and provide practical solutions; and
- understand what is right for the business, while at the same time, making the best effort to safeguard its critical interests and risks.

Practical tips to enhance your image as a valuable "business enabler"

Align with the business needs

The most effective in-house counsel make a concentrated effort to understand the goals, drivers and realities of the businesses they advise. They spot pressure points and identify where legal input can enhance the business proposition, while at the same time help to close the deal. This has really helped to raise the work profile of in-house counsel and the perception of their value.

At our organization, with the recent amalgamation of Satyam Computer Services Ltd with Tech Mahindra Limited, business dynamics have drastically changed. The CEO has set a goal to achieve a target of USD 5 billion in revenue from various service verticals in 2015.

The most effective in-house counsel make a concentrated effort to understand the goals, drivers and realities of the businesses they advise.

Today, the organization and senior management have fully recognized the potential and the crucial role in-house counsel play in dealing with critical contractual issues. Changes in the structure of the legal department, with our CLO directly reporting to the managing director, has helped change the perception of business folks. It has elevated the importance of the legal

function, and as a result, legal advice is taken more seriously and is more valued than what was perceived earlier.

1. Define strategic objectives by:

- *Building a client-focused approach*. Develop a commercial mindset and better understanding of potential opportunity, the right skills, sound leadership and good communication strategies.
- *Improving the way we work*. Develop good rapport with internal and external clients; be proactive when advising on certain issues/risks; persuade the business to stick to certain positions/standards on very critical and onerous issues; have alternative resolutions to issues; communicate effectively with stakeholders; and prioritize to meet critical deadlines.
- *Establishing credibility*. In the workspace, credibility grows out of two sources: expertise and relationships. People are considered to have high levels of expertise if they have a history of sound judgment or have proven themselves knowledgeable and well-informed about their proposals. On the relationship side, people with high credibility have demonstrated — again, usually over time — that they can be trusted to listen and to work in the best interests of others.
- *Speaking persuasively*. Get directly to the point but be as thorough as possible. The key to effective in-house counsel advising is thorough preparation. You must be able to anticipate questions and have ready arguments to respond with, if and when they arise.

2. Be approachable, learn and serve

Absorb the intricacies of your client's business. Develop business empathy — be curious and become an active listener to understand your client's goals and needs.

Walk around to meet different stakeholders and see other functions. Meet your colleagues, collect information about their responsibilities and learn what is expected from specific positions in order to understand how to best support business challenges.

3. Educate business folks

Don't let your role be misunderstood. Trust comes from understanding.

Organize trainings or launch periodic internal newsletters or workshops on the legal implications and risk each stakeholder has to be aware of or deal with.

4. Communicate practical advice concisely and logically

In-house counsel must realize that effectively communicating about the services and contributions of the legal function is almost as important as actually providing high-quality services. Today's in-house counsel should be sensitive to the need to convey the value of their work, communicate tangible results, and attempt to measure results in quantitative terms. It is expected that in-house counsel will continue to develop performance measures, especially those that are results-oriented.

In general, find a solution that complies with the set standards while achieving the required business purpose. Make sure your legal advice is understandable and formulate it in a meaningful way for a non-legal audience.

Communicate in open and collaborative ways to get work done in a logical, practical manner.

From the format perspective, communicate by sending short(er) emails to those concerned, summarizing attachments and using bullet-points.

5. Improve your time management

You will always have to deal with pressures from ever-demanding business people and other concerned units for meeting stringent deadlines. Manage your time strategically.

Prioritize the issues you have on your plate as you will not be able to deal with them all at once. Respond cautiously and buy more time where required. This will help your internal customer understand what is most important for the business.

Be prepared to shift priorities based on business needs and deadlines.

6. Be supportive, drive initiatives

Support superior execution of deals and transactions. Don't hinder a deal with unnecessary legal input or revisions. Weigh legal risk probabilities against business perspectives to reach

ACC EXTRAS ON… Legal's business impact

ACC Docket

Increasing the Organizational Impact of Your Law Department (Dec. 2011). *www.acc.com/docket/org-impact_dec11*

Tips & Insights – Meeting the Business Needs of a Globally Growing Organization (Nov. 2013). *www.acc.com/docket/t&i_nov13*

Research study

Skills for the 21st Century General Counsel® (Dec. 2013). *www.acc.com/clo21*

Top Tens

Top Ten Roles of the Law Department Business Operations Director (Sep. 2012). *www.acc.com/topten/bo-dir_sep12*

Top Ten Ways to Run Your Legal Department Like a Business Unit (Sep. 2012). *www.acc.com/topten/ld-bu_Sep12*

Article

Emotional Intelligence: Driving Success in Today's Business Environment (Oct. 2011). *www.acc.com/emotional-intelligence_oct11*

InfoPAK℠

Organizational Effectiveness: The New Imperative for Developing a World-Class Legal Department (July 2011). *www.acc.com/infopaks/wcld_jul11*

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In-house counsel are enablers of business outcomes, working with senior management and business unit leadership to use legal talents in contributing to the bottom-line.

a practical, commercial outcome. The ability to make a judgment call is one of the most valuable traits in-house counsel can offer.

7. Offer strategic and proactive advice
It is inevitable for today's in-house counsel to play a more strategic and proactive role, making their added value to the business more clear.

The greatest challenge facing in-house counsel is anticipating developments within their businesses and industries, to ensure that they evolve and develop successfully and effectively. Above all, remain proactive and relevant, thereby securing your position as a trusted business advisor.

As in-house counsel, you have to figure out what the law is and how to apply it to the business. It is all about working out the steps that the business needs to take to solve the issues it is facing.

Prepare for the future

In the changing business milieu, you will have the increased responsibility of providing clear, practical and workable business solutions in an authoritative, articulate and timely manner.

You should always have a can-do attitude and should provide all advice in context, which is critical to achieving buy-in from the commercial side.

It is likely that the definition of best practices and critical success factors will continue to evolve in the coming months and years, and companies as well as in-house counsel will need to adapt to the new business environment. Essentially, stocking up on your legal skills and keeping these in-sync with what the business needs is critical. **ACC**

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Issue No. 3

THE GENERAL COUNSEL AND THE BOARD

Interview
Beat Hess, former Legal Director of Shell, on how the General Counsel has become a trusted advisor to the board

Expertise
How board expectations and governance trends are making the General Counsel role more demanding than ever

Insight
General Counsel and Company Secretary – why there is a trend in the UK to split the roles

Dialogue
Ben Heineman, former General Counsel of GE: the General Counsel as 'Lawyer-Statesman' and part of the board culture

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The General Counsel and the Board

The Legal Professionals Practice of Egon Zehnder International is one of our firm's diverse functional practice groups. Now in existence for five years, the Practice handles over 100 high-profile assignments in the legal field every year. More than half of these engagements relate to searches for General Counsels. Supported by a group of dedicated researchers, our team of experts, listed in the back of this publication, takes care of these critical placements for our clients.

Our Experts publications aim at globally disseminating the experience and thoughts of leading General Counsels as well as our own insights and ideas. Our day-to-day interactions with senior legal practitioners and their key interlocutors provide us with a privileged view on how the environment and the profession of the General Counsel are evolving.

For each issue of Experts we choose topics that we believe will be of great interest not only to General Counsels, but also to CEOs and Boards of Directors. While in our first issue we focused on the challenge of increased pressure on companies regarding compliance and what role the General Counsel should play in this new field, the second Experts publication looked into what constitutes the core of our profession: best practices in General Counsel selection and recruitment.

Here, in Experts No. 3, we dive into the sensitive relationship between the General Counsel and the Board of Directors. The increased importance of professional governance also impacts the role of legal officers, both in how they deal with governance issues themselves and in how they interact with the board as a whole and its individual members. This subject is also critical in the various Board Effectiveness Reviews we undertake every year.

In this issue, in addition to interviews with Beat Hess, former Legal Director of Shell, and Ben Heineman, former General Counsel of GE, two of our colleagues share their observations and recommendations on interaction between the board and the General Counsel. Jörg Thierfelder describes the complexity of the General Counsel position and the enhanced expectations from boards, imposed externally and internally, while Ian Maurice zooms in on the meaning and relevance of the Company Secretary as an additional role next to the General Counsel.

We hope that this publication will again trigger reflection about your own situation and how it might be enhanced. It would be a pleasure for us to discuss in more detail any questions or concerns you may have about finding and positioning top talent for the General Counsel role in your organization and along your corporate governance.

The Legal Professionals Practice
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INTERVIEW

Beat Hess

Former Legal Director at Royal Dutch Shell

"Whether the issue is governance or strategy, the degree to which the General Counsel can make a contribution boils down to establishing trust with the board."

Beat Hess, former Legal Director at Royal Dutch Shell, has seen the role from all sides – as General Counsel, Company Secretary, Executive Committee member, and Non-executive Director. EXPERTS invited him to share some insights on best practices and roads best left untraveled.

Photos: Rüdiger Nehmzow

Experts: How has the relationship between the General Counsel and the Board of Directors changed over the past ten to 15 years?
Beat Hess: The key development beyond doubt is that the General Counsel has gone from being seen as a necessary evil – or even an unnecessary evil – to being seen as a trusted advisor to the board. At Shell I attended and actively participated in all board meetings. This significant change was introduced shortly after I joined Shell in 2003. Board members looked at me, among other things, as the mitigator of exposure to liability and other risks.

When you were advising the board on possible liabilities, how often were there issues for a director personally?
Issues of personal liability rarely arose at board meetings. That said, if I sensed that board members were worried about their own exposure, I would take the initiative to address what might be their concerns and reassure them that they were not personally at risk.

Do litigators often try to hold directors personally liable?
If your company is quoted in the U.S., you can take it for granted that, as a board member, sooner or later you will be included in a lawsuit. That is increasingly happening in Europe as well. In securities class actions, for example, board members are almost always automatically included.

What is the logic behind that?
Plaintiffs often know that including individual board members in the suit is meritless, but it can provide them with leverage in negotiations. They offer to drop a particular Director from the suit if you agree to something they want, like easy access to certain documents or witnesses. It's pure blackmail. Plaintiffs know that board members do not like to be named in lawsuits. Further, litigation increasingly involves some criminal element: Plaintiffs allege fraud, misleading information, forgery in documents – charges that are extremely upsetting to Directors, especially when they are reported in the press. Litigators have endless fantasies about what they can sue for, so that kind of litigation has increased enormously.

What did you do as General Counsel to prevent those kinds of risks for board members?
We conducted regular risk analysis, and we had issues briefings for the board. The issues ranged from environmental matters, such as the effects on polar bears and gray whales, to litigation, to extreme legal instability in certain countries. We had a very structured process of taking the board regularly through all of these issues, with matrices that depicted the likelihood of a particular occurrence and its potential impact.

To what extent does D&O – Directors and Officers – liability insurance protect individual board members? Aren't there usually exclusions for fraud or criminal acts?
There are exclusions, and some companies will only insure in situations where the company cannot give an indemnity. Actually, the company might as well provide an indemnity to board members and then limit D&O insurance to situations like derivative litigation, where the company cannot insure the board member because it is the plaintiff. The company cannot indemnify and sue at the same time.

Did you see yourself primarily as an advisor to the board as a whole or to its individual members?
We tried to avoid counseling individual board members because it would almost certainly have entailed conflicts. If board members had an issue personally, related to the company, we provided them with outside counsel. Ultimately, my job was to look after the interests of the company, which meant our shareholders, not individual board members or even the board as a whole.

What did that mean for the relationship between the General Counsel and the Chairman of the Board?
The Chairman is certainly more exposed than other board members, but, like I said, we counseled the board as a whole. Of course, for special events like the Annual General Meeting we counseled the Chairman about issues that were likely to come up, especially those where there could have been legal minefields. One is tempted to carefully script what a Chairman should say. However, we generally advised him to speak from the heart rather than appearing artificial in order to avoid an issue. If someone wanted to make a case out of something the Chairman said, we would defend it.

"Board members have become more sensitive to particular issues that they were largely unfamiliar with in the past."

Did your board ever ask for outside counsel? Are there any cases where you could imagine this being useful?
I believe the board at Shell would have been very reluctant to retain their own counsel, unless they had really felt that I had a conflict. When we had a crisis with respect to the declaration of our hydrocarbon reserves in early 2004 I advised the Audit Committee to retain outside counsel because I did not want to be involved in investigative activity. Otherwise one might suddenly find oneself in the witness chair or being accused by regulators or judicial authorities of trying to cover up. The Audit Committee retained their own counsel and it turned out very well.

Has the increased exposure of boards and their individual members to liability led to more attention being paid to risk analysis at the expense of, say, strategy?
Boards don't necessarily devote more time to risk analysis than to other matters, but board members have become more sensitive to particular issues that they were largely unfamiliar with in the past. Take disclosure, for example: In the past I might have had to advise the board not to discuss a particular issue

in detail, because we might have to disclose it. Today, board members themselves raise the question. They are also, to mention another example, far more sensitive to compliance issues. Twenty years ago, board members might have believed that generously entertaining a government official of a foreign country was common practice. Today it is unthinkable that a board member in a large company would go anywhere near that, which is a very healthy development.

In what specific areas did you contribute to the daily work of the board?

My primary role was still chief lawyer. My main contribution was around risk and legal issues, including governance. With strategic issues I took the perspective that I had as an Executive Committee member, although I generally did look at them through a legal lens. As oil and gas drilling became more challenging environmentally and politically, with more competitors and less stability, I had to advise the board on what type of legal challenges we were likely to face in 15, 20 or 30 years. We had almost thirty billion dollars every year in capital expenditure, and because we were in a very long-term business we might not know whether an investment was wise, including from a legal exposure perspective, until many years later. But whether the issue is governance, legal risk, or strategy, the degree to which the General Counsel can make a contribution boils down to establishing trust with the board. Board members are very experienced people. You can’t sell them things that are not authentic, not true. So it sounds a bit old-fashioned, but the older you get, the more you come back to the values of truth, honesty, integrity, trust, and respect.

What about board committees? As General Counsel to what extent were you actively involved in committee work?

As a member of the Executive Committee at Shell I heard much of what was dealt with by the other board committees there. So while I didn’t attend the Audit Committee meeting, for example, for the entire day, I had a standing invitation to come and go whenever I wished. Of course I reported on risk and litigation regularly at Audit Committee meetings, and sometimes I attended for other agenda items where I believed I could add value. Adding value was probably the key consideration, because the same applies to

VITA
BEAT HESS

Beat Hess was appointed Legal Director of Royal Dutch Shell plc in 2003. In that post, he had ultimate responsibility for the Shell global legal function and advised Shell Group management on all legal matters of Group-wide importance. In 2007, he was appointed a member of the Executive Committee. He retired from Shell at the end of 2010. He is also a member of the Board of Directors of Nestlé S.A. and Holcim Ltd. Before joining Shell in 2003, he was employed for 26 years by the ABB Group of companies – for some 15 years as its General Counsel and Company Secretary.

the Corporate Social Responsibility Committee that I sometimes attended. Other committees, like remuneration, fell under the purview of the head of HR, for example.

For all their experience, how can board members really add value at the strategic level?
They may be unable to judge whether it makes sense to invest in new drilling activities in Alaska or whether a joint venture in Malaysia will work, but they can ask probing questions. For example, they can ask if we have considered the environmental issues or what risk assessment procedures we have applied. Someone who also serves on the board of another company could be in a position to offer a totally different view, which can induce the board or management to re-evaluate an issue.

Do you find one-tier or two-tier governance more effective?
Let me put it this way: If you are clear about the boundaries, about distinguishing day-to-day management responsibilities from supervisory tasks, then there is no reason a one-tier system should not work. Personally, I would advocate a system with a non-executive board and a Management Committee whose members, with the exception of the CEO and perhaps the CFO, are not on the board. This is a two-tier system, which I find the most effective and the most clear cut.

So you're not in favor of one person filling the dual role of Chairman and CEO?
I think combining the two roles is fundamentally wrong. If you understand the separation of the roles of Chairman and CEO correctly, it works extremely well. The Chairman should not interfere with day-to-day business and should understand that he or she gets involved only to the extent determined under the company's governance charter. Otherwise, the Chairman should remain in the background and keep a very watchful eye on the company's exposure. In exceptional cases a combination of the two roles may work, or even be advisable, but then it should be limited in time.

Isn't it paradoxical that such a basic principle of corporate governance should be so widely ignored in the U.S., where liability and shareholder activism are so pervasive?

Yes. The feeling there is that there is a litigation system that will take care of excesses and that executive and non-executive directors are more forceful in controlling the Chairman and CEO. However, there are changes in progress, as U.S. companies increasingly separate the roles of CEO and Chairman.

During your tenure with Shell the minutes were taken by the Company Secretary, who was somebody from your staff. As General Counsel, did you see any advantages of having a Secretary, who is not part of your staff, reporting to the Chairman?
No, I saw disadvantages in terms of conflicting opinions that might be given to the Chairman. In our case, the Secretary and I were well coordinated. I made sure that he was always informed when I dealt with board members or with the CEO on board matters. In many companies the General Counsel is the minutes-taker, but it is difficult to make a substantial contribution on legal matters if at the same time you have to worry about the minutes.

You advocated a two-tier governance system a moment ago, but in Germany, where the two-tier system applies, it is rare for the General Counsel to be so closely involved with executive management. He or she will not normally be a member of the Management Board and certainly not of the Supervisory Board. How did you ensure at Shell the necessary close links between the General Counsel and senior management?
The situation is evolving in Germany. I know General Counsels there who enjoy close links either to the chairman or members of the Management Board. Ultimately, if you have credibility with the board and with the Executive Committee, you will be consulted whether you are a member or not. Of course it is more desirable to be there when the action takes place, rather than before or after, but if people trust you and feel you can add value, then they will involve you.

In the future, will General Counsels make more attractive board members in general?
I think so. As General Counsel you need substantial experience in a large multinational company, and then I feel that you can make a real contribution to the board. As a supervisory or non-executive board member, a General Counsel should contribute without interfering with the company's General Counsel. A former General Counsel of IBM on the Shell board made tremendous contributions, but he stayed out of the legal arena. I try to do the same as a member of the Nestlé and Holcim boards.

What do you think of law firm partners becoming board members?
I think they might have a more difficult time understanding the inner workings of a large company. You need an understanding of how global businesses are run; otherwise, you run the risk of being lost or asking stupid questions.

We generally advise against appointing a law firm partner to a board, because if you need legal advice, you can always ask a lawyer.
Absolutely. With Nestlé and Holcim I am thrilled to serve on the board, but not as a legal advisor but as someone who for thirty-plus years has seen how large global companies function and where the risks are. But that doesn't just apply to General Counsels. You can also ask what an engineer, a scientist, or an IT expert can bring to the board of a large company. On many global companies' boards there are people with very diverse backgrounds who come from their own particular perspectives and ask critical questions; questions that are genuinely worth thinking about. That is precisely what effective board members should do and, ideally, that is why they have been asked to serve. It should be no different with General Counsels.

The interview with Beat Hess was conducted by Joost Maes, Egon Zehnder International Brussels, and Jörg Thierfelder, Egon Zehnder International Hamburg (right).

EXPERTISE

The Role of the General Counsel with the Board of Directors

Besides filling the traditional role, today's top legal officer has become a key resource for corporate boards.

Illustration: Paul Blow/eastwing

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Jörg Thierfelder of Egon Zehnder International explores the evolution and impact of a role that has never been more challenging on the different corporate levels than it is today.

OVER THE PAST decade, a variety of forces and events has made the role of the General Counsel (GC) more prominent than ever. The market turmoil following the bursting of the internet bubble in early 2000, the ensuing corporate scandals, ever-growing litigiousness and, most recently, the issues of risk and liability raised by a worldwide economic crisis unparalleled for generations, together with the ongoing vulnerability of private and public finances have all contributed to a renewed focus on the chief steward of the legal and ethical behavior of a company. At the same time, globalization has compelled GCs to master difficult and complex matters of ever more stringent regulatory regimes and enforcement practices, local jurisdiction and political impact, taxes, capital markets, and many others, including the challenges of more diverse and unpredictable business situations and industry trends.

Therefore, it is no surprise that their expertise is required more extensively and at an earlier stage for critical management decisions. That is why in many companies there is a strong argument for integrating the role much more closely with the business to the point that this expertise extends far beyond functional issues to distinct matters of strategy. Instead of simply and often somewhat reactively analyzing an issue from a legal perspective, GCs help remove obstacles and foster business objectives in a proactive manner. Meanwhile, they are expected to ensure that the company maintains the highest standards of legal and ethical behavior, adroitly balancing the dual imperatives of company performance and corporate integrity. Against this background GCs make use of their deep knowledge of the company, their insight, and broad experience to engage actively with all parts of the business.

However, while the GC increasingly and visibly acts as a close and trusted advisor to the CEO new developments and demands call for an extended role for the GC in corporate governance as well. In this context, the cooperation and influence of the General Counsel vis-à-vis the Board of Directors often gets less attention than it should. But this relationship is more relevant than ever due to growing requirements in surveillance and guidance of core business activities and strategic direction, as well as deeper involvement in key topics like audit and compliance, nomination and remuneration of executive management, and social responsibility. GCs today work much more closely with their Boards of Directors and board committees. Hence, it is interesting to take a look at the functional relationship of the GC with the board in more detail, assess the impact of specific governance aspects on the GC role, and draw some conclusions about the implications of these issues for the careers of senior lawyers.

Functional relationship of the GC with the board

The degree of involvement of the GC in meetings of the board and its committees has risen continually in recent years. This trend is now stronger also in Europe, where GCs have significantly more often become members of the executive management team, thereby interacting regularly and closely with the board. Besides offering legal expertise and advising on risk exposure, liability, compliance, and governance, these GCs take a broader view that encompasses the company's reputation and integrity. As Ben Heineman, former General Counsel of GE and currently distinguished senior fellow at Harvard Law School's Program on the Legal Profession, says, "The General Counsel should ask not just whether something is legal, but whether it is right." The GC should therefore stimulate and assist the board in leveraging its authority to set the tone for the legal and compliance culture of the whole company. At the same time, it is the GC's duty to take an active role in counseling the board on how legal and regulatory environments can be used to a company's strategic advantage. This constructive

Good governance today requires the right of the GC to interact directly and periodically with the board.

engagement today is fundamentally influencing the role of the GC with the board – a factor that boards, in many instances, may not even be aware of yet. Further, while board members have become much more sensitive about the company's exposure to liability they are also more concerned about their personal exposure, especially given the likelihood today that at some point in their tenure they will be included in a lawsuit. As a result, besides seeking the GC's advice about general company matters, board members consult more frequently and in more detail about those issues that are of a clear-cut supervisory or even personal nature. However, in this context the GC should always realize and clearly signal to the other stakeholders that he ultimately serves the company as a whole and must not represent individual interests of board members or other particular stakeholders. Finally, today's GC also makes significant contributions in a broad range of other board matters and activities, including board composition and competencies, the selection of external advisors, compensation, crisis management, and communications. As the gatekeeper of the company's most important information, the GC is best positioned to ensure that the board acts across all of these and its many other activities to create and maintain a consistent and impeccable corporate identity.

Impact of specific governance models

With the more intense focus on corporate governance around the globe, the changes in the role should also be viewed in light of the different governance models applicable to large and mostly listed corporations. In one-tier governance systems (like those prevailing in Anglo-Saxon jurisdictions) the GC by nature has closer links to the board, especially when functioning as a member of the management team. By contrast, the strict differentiation between non-executive boards and executive boards in two-tier governance systems (as, for example, in Germany) traditionally leads to a stricter separation of the GC from the board. However, these differences appear to be decreasing. In two-tier governance systems, GCs have clearly become more directly involved in management decisions, even having become more than before members of the Executive Board (first tier). And, as described above, they are and should be regularly consulted for Supervisory Board matters (second tier). At the same time, in one-tier systems, like that of the U.S., companies are increasingly separating the roles of Chairman and CEO, thus emphasizing the difference between day-to-day management responsibilities and the oversight function of the board, and creating a routine culture of checks and balances. In this latter development the role of the GC with the board gains in importance as it requires distinct relationships with the CEO and the Chairman. In both systems, the GC works more closely with non-executive directors, who are under pressure to provide more transparency and independence in their roles – requirements that the GC is uniquely suited to address.

Importance of direct board access

This situation obviously has an impact on the relationship of the GC with the CEO, especially in the event of conflict. While it seems best practice today that the GC has a direct reporting line to the CEO he must have the right to bring controversial issues to the Chairman or individual board members without the prior consent of the CEO. This is comparable to the dotted line to the Audit/Compliance Committee that the Chief Compliance Officer typically is entitled to. This privilege should be made clear upon appointment of the GC or even included in the company's statutes. Even if the GC is a member of the executive management team, good governance today requires the right of the GC to interact directly and periodically with the board, particularly if he feels a need to do so in the company's best interests. It is a good idea to establish meetings of the GC with the board and its audit or other relevant committees on a regular basis, including time during which the CEO is not

present. The GC's ultimate client is the company, and its interests must be his guide. This also means that in extreme cases a strong and autonomous GC should have the courage to resign when he feels that the key interests of the company are not properly being served.

Formalizing the GC's role and access to the board is one thing. However, in the end, it is ideally the GC who has to attain a level of trust with board members such that they will turn to him no matter what the governance structure of the company might be. As Beat Hess, former Legal Director of Shell and active member of several boards, says: "Ultimately, if you have credibility with the board and with the Executive Committee, you will be consulted whether you are a member or not."

Ensuring good governance at all levels

The GC also has another relevant relation with the board around corporate governance at the subsidiary level. Many executives are appointed to boards of subsidiaries, joint venture companies, or other affiliates of a group without ultimately realizing related legal consequences. The interests of a subsidiary or affiliated company may conflict with the interests of the parent company or other entities of the group. Examples of crucial and legally dangerous situations might be under-capitalization or even insolvency, inter-company loans, guarantees, or transfer pricing. In this context, the board members of these companies can come under severe scrutiny of regulators and attack from minority shareholders, employees, unions, media, and other stakeholders. Board membership at the subsidiary level should therefore not be taken lightly. GCs play an important role in educating executives about the importance of these mandates and how to deal with them. It is part of the GC's responsibility to ensure that good governance is respected not only on the holding company level but at all levels of the group. In fact, as often happens in various situations, there may be good reasons to appoint GCs to subsidiary boards, a practice which, while not infrequent, must be carefully balanced against the GC's other priorities and overall workload.

GC and Company Secretary

Another important governance issue lies in the distinct relation of the GC with the Company Secretary vis-à-vis the board. While in the U.S. the functions of General Counsel and Company Secretary, there named Corporate Secretary, are often combined in the GC role, there is a trend in the UK to split the roles as described in the following article by Ian Maurice, Egon Zehnder International London. The rationale for this split is not so much that the GC should not be the mere minutes-taker of the board, but that he must concentrate on the breadth of tasks in relation to functional and business expertise as well as managerial skills. In fact, this argumentation broadly applies because the role of Company Secretary has also gained in scope with expanded responsibility for regulatory and compliance matters, risk, and audit, besides including the central role in governance and administration of the company. Therefore, the long list of duties and related complexity of these issues, particularly in bigger international companies, speaks against combining the two roles in one person. And whereas the Company Secretary due to common practice or as required by law in relevant jurisdictions often has the reporting line to the Chairman of the Board, the GC is installed in the CEO's chain of command. This may be another strong argument for the GC having the right in delicate situations to approach the Chairman directly to bring matters to his attention at the same level as the Company Secretary does, thereby underlining the independent and crucial role of the GC. In any case, the two roles require effective combination in one person or seamless collaboration between two to fulfill all the relevant tasks.

Implications for the careers of senior lawyers

As our experience working with boards and GCs confirms, the role will only grow weightier and

As non-executive directors, GCs can contribute highly specific expertise, as well as a broad perspective on governance, strategy, and risk.

more challenging as the supervisory and advisory functions of the board grow in complexity and rigor. Given the worldwide drive for intensified transparency and accountability in corporate governance, coupled with rising regulation and public scrutiny, boards will more and more find legal, reputational, and operational risk at the forefront of their deliberations and they will need the assistance of GCs with broad experience and exceptional skills.

Although GCs generally do not or, depending on the governance system, must not serve as formal members of the boards of their companies, their experience and skills make them excellent candidates for non-executive board membership in other companies. In an increasingly legalistic business environment, GCs as non-executive directors can bring highly specific expertise, as well as a broad perspective on governance, strategy, and risk. They are accustomed to analyzing problems, offering reasoned recommendations, handling confidentiality and, when necessary, disagreeing about an issue or course of action while remaining collegial and possibly even being able to mediate a conflict. In addition, GCs often have deep institutional knowledge of the company and the industry in which they serve. Bringing those skills to outside boards represents a further evolution of a role that is being reshaped by companies around the world and, in turn, is reshaping the way those companies approach major issues.

However, those GCs on other companies' boards should explicitly step out of their legal mindset and assume responsibility in the broad sense in the role of member of the board. The value of a GC on a board is not primarily legal skills, but a comprehensive business perspective and wisdom. It is the role of the relevant company's own GC or mandated external counsel to advise on individual legal matters. They are not only best qualified to do so, but also the board does not then have to appoint members for special tasks instead of for covering the bigger picture. This generally does not exclude senior attorneys of law firms as valid board candidates who, if they fit in terms of personality and wide experience, can contribute valuable outside views and know-how.

Involving the board in GC recruitment

Finally, when it comes to selecting and hiring a GC the question arises as to whether the board should be involved in the process. The assumption is that this occurs in far too few cases and often not at all. However, the elevation of the role of the GC, as well as the required upgrade in competencies of the individuals who fill that role, calls for the Chairman and the Nominating Committee of the board to have their say in it. The GC's recruitment is a shared responsibility of the CEO and the board.

Through all of these dimensions of the relationship of the GC with the Board of Directors, today the GC has the opportunity to build strong personal relationships with its non-executive as well as executive members and become himself a member of the team of key decision-makers in the company. Of course, the extent of the role and the influence of a particular GC will depend not only on the individual's functional expertise, business acumen, and leadership skills, but also to a substantial degree on character – the indisputable level of integrity, trustworthiness, and values that makes the GC someone board members and top leaders alike naturally turn to for wise counsel.

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INSIGHT

General Counsel and Company Secretary: To Combine or Not to Combine

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Ian Maurice of Egon Zehnder International discusses the relation of General Counsel and Company Secretary and describes the UK trend to split the roles.

A QUICK STUDY of the top 100 companies ranked by market capitalization listed on the London Stock Exchange (FTSE) shows that in just over 40 percent of the companies the role of General Counsel and Company Secretary is combined, while the other 60 percent have different individuals filling the two roles. Undoubtedly, there is a move towards a separation of the roles.

Why? Regulation around the world will continue to get tougher, requiring companies to increasingly emphasize risk management and compliance. As a result, the complexity of both roles, let alone the combined role, will increase dramatically. When the two roles are combined the individual is one of two people in the organization – the other is the Head of Internal Audit – who have a direct reporting relationship to two senior individuals within the organization. As General Counsel, he or she reports to the Chief Executive and acts as the Senior Legal Officer of the organization serving on the Executive Committee. As Company Secretary, there are clear responsibilities to the board, and the reporting line is to the Chairman. The question is whether in times of increasing complexity it is reasonable to expect one individual to have the breadth of skills to be able to fulfill these tasks.

The role of the Company Secretary is enshrined in law, and company secretaries play a central role in the governance and administration of companies. Historically, part of the role has been seen very much as administrative and can be regarded as "non-value-adding." However, it is clear that correct governance procedures must be instilled and embedded within the organization and that the Company Secretary is vital in that regard.

The decision to combine the roles or separate them depends on a number of factors, especially the size and the maturity of the business, as well as the sector in which it competes. For example, smaller, lower-risk companies may have only a Company Secretary and no, or only junior, in-house lawyers. Businesses that compete in highly regulated industries are likely to employ far more senior legal talent. The choice of organizational structure may also influence the disposition of the roles. Some businesses adopt a functional structure, others a geographical structure and others a business unit structure, each of which imposes particular responsibilities on the legal function. Regardless of structure, however, there is an increasing trend to have the legal function centralized, both from a training and career development perspective.

In addition, centralization gives the General Counsel visibility into the individual operations so that he or she can act as a further check and balance alongside the finance function in the post-Enron environment.

Although the trend, as the FTSE figures suggest, is to separate the roles, combining them is not without benefits. For example, the Company Secretary attends all board meetings. When the role is combined the board then has the General Counsel, albeit in the role of Company Secretary, present at the meeting. Should the board want a legal opinion or advice, they can simply ask the individual to take off the Company Secretary hat and put on the General Counsel hat.

An additional benefit of combining the roles may come from the increasing focus it affords on the management of risk at board level. One of the key aspects of the General Counsel's role is to make judgments regarding risks across a business, often driving processes in key areas. Most GCs work hand-in-hand with Internal Audit, a function which in turn reports to the CFO/CEO as well as to the Chairman of the Audit Committee. When the Company Secretary/GC role is combined then the GC's reporting relationship as GC, and the GC's presence at board meetings in the role of Company Secretary, ensure that there are two routes for raising key risks at the main board level, thereby providing the board with greater comfort.

Nevertheless, given the far more onerous responsibilities that GCs and Company Secretaries increasingly must shoulder, it is hard to envisage many supermen who can play both roles simultaneously. For GCs, a number of trends have converged to leave little room for an additional role:

- An increasing number of regulations covering corruption, bribery, proceeds of crime, money laundering and the like require the full attention of a seasoned General Counsel, in addition to a greater focus on compliance and risk.
- Companies have come to understand the benefits of having the GC deeply involved in the business and expect the General Counsel to have far more business acumen. Rather than acting as "just a lawyer," a modern General Counsel will need not only technical excellence but also broader skills in change management, project management, leadership, technology, and even an understanding of sales and marketing.
- The in-house legal function has grown in importance. Historically, the General Counsel may have been seen mainly as a conduit to external professional advice. However, the recent recession, the cost and the lower perceived value-add of some activities provided by external counsel, coupled with the ease of technology-enabled outsourcing, has changed the balance in the relationship.
- The increased importance of the legal function requires today's GC to be a good manager as well as a functional expert. The GC must be able to build teams internally, grow the department, and develop talent – abilities that were not needed during the downsizing which typified the 1990s and early 2000s.

At the same time, the role of the Company Secretary is growing also, with an increasing focus on compliance, covering codes of conduct and whistle blowing provisions, audit, insurance, company secretarial procedures and risk management, including taking overall responsibility for the risk register.

Both roles will continue to grow in importance – and to diverge. Whether we will get to the point where the appointment of an executive Legal Director is as common and as the appointment of a Finance Director alongside the CEO, time will tell. However, it is clear that the legal function in its broader sense will have an increasing part to play in the management and development of corporations. The corresponding breadth of experience and management skills that will be required of the GC and the Company Secretary will challenge those currently in leadership roles to focus on talent development and career planning to ensure that their successors are in the best position to fulfill the roles in the future.

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DIALOGUE

Ben Heineman
Senior Fellow at John F. Kennedy School of Government and Harvard Law School

"Resolving the tension between being a partner to the CEO and the guardian of the company is at the core of being the General Counsel."

Ben Heineman, former General Counsel of GE and a leading writer on legal issues, talks about the role of today's GC – an expanded role he helped pioneer.

Experts: You have talked and written about the role of today's General Counsel as that of a 'lawyer-statesman.' Can you tell us what you mean by that?

Ben Heineman: The lawyer-statesman is an ideal; people don't call themselves "lawyer-statesmen." I didn't call myself that when I was a General Counsel, but now that I'm an academic writing about this it seems to me that it is an ideal to which General Counsels should aspire.

To understand this role you have to define the mission of the corporation. Mission one today ought to be risk-taking – in the creation of new products, innovation, economic performance – but that has to be balanced with risk management in an operational and financial sense. Mission two is to fuse that high performance in creating sustainable economic growth with high integrity – a culture inside the company which promotes law, ethics, and values. The General Counsel has a very fundamental role in helping the CEO and top business leaders do that, both in achieving the high performance and also in achieving high integrity. That also means that the General Counsel is no longer concerned only with the law, although that is of course a core function. But the General Counsel should ask not just whether something is legal, but whether it is right. And the General Counsel should either lead or share responsibility for including considerations of public policy, ethics, reputation, communications, country risk – a whole variety of other issues – in business decision-making. So I believe that the General Counsel's role should be very broadly defined, either as the lead or as a member of the team, both on the performance side and on the integrity side. Integrity has three elements: adhering to the formal rules, legal and financial, setting global ethical standards beyond what the law requires, and following them and then inculcating the employee population with the core values of honesty, candor, fairness, trustworthiness, and reliability.

Did the role evolve in that direction, or has it always been that way?

There isn't consensus on this view of the role. I think it would be shared, though perhaps articulated slightly differently, by the large multinational companies in the United States, by some multinationals in Europe, and by a relative handful of multinationals elsewhere in the world.

The evolution really turns on several trends. About 25 years ago, some companies – GE was one of them – began to hire General Counsels who were considered to be at the top of the profession, either in terms of government service or private practice, or both. They then allowed the General Counsel to hire top-flight lawyers both to be generalists, counsel to business divisions and P&L centers, and to be the top specialists in the company on matters like environment, labor, tax, trade, M&A, and intellectual property. So the quality of the inside legal team began to approach or exceed the quality of outside counsel. And because many of these people had both private and government experience they were able to bring to bear broad perspectives beyond simple technical skills.

"The General Counsel should ask not just whether something is legal, but whether it is right."

There are three fundamental roles for lawyers: the acute technician, the wise counselor, and the lawyer as leader. The senior lawyers in a company have to play all three roles. First, they have to know exactly what the law is and be very sophisticated about "gray areas" and how the law might evolve. Second, they also have to be a broad counselor to the business leaders on the question of what is right, which involves perspectives beyond the law such as reputation, public policy, the media, what have you. Third, they have to be the leaders on any number of issues. When I was at GE I was in charge of law, trade, taxes, environment, and public policy. About 85% of the time, I was the decision-maker of last resort – the issues didn't go beyond me to the CEO or to the board. So another dimension of being an inside lawyer for a sizeable company and having broad responsibilities is that you are making decisions that have been delegated to you by the CEO.

In addition to hiring the best-in-class General Counsels, those companies paid generalists and specialists the market price. That really shifted the balance of power from the outside lawyers to the inside lawyers. In what I am calling here the multinational model, the General Counsel replaced the senior partner from the outside law firm as the senior advisor both to the CEO and to the board. And indeed as the world changed and business and society issues became terribly important, the General Counsel began to assume the same importance in the company as the CFO because the sensitive issues that the General Counsel had to

deal with were as important both affirmatively and negatively for the company as some of the financial issues that were the province of the CFO.

How does this lawyer-statesman interact with the board today and does that differ from ten years ago?

The trust of the CEO that senior lawyers began to earn as the chief advisor on the public side of the company translated into confidence on the board's part that the General Counsel could serve as their lawyer, too, except of course in cases of conflict at the top of the company. General Counsels of this quality and their subordinates began to win the complete confidence of the board. In the United States the General Counsel represents the company and the board, not just the CEO, as is clear in the law. That's a very important point in the law that CEOs sometimes don't understand, but it's what we call "black letter law" – a very clear principle. Many General Counsels are also secretaries to the board, which simply means that they sit in all board meetings and keep the minutes. As secretary, you are part of the board culture. You are not only present at board meetings, but also at board dinners, outings, retreats. You may also dive deeply into strategy, and over time you develop a strong personal relationship with the board members. In the company where I worked I developed individual relationships with all the members of the board, and I think that happens because the General Counsel is increasingly very much part of the board culture, not just the board meetings. In fact, the CEO had no problem with board members calling me directly.

Do you see any advantages of separating the corporate secretary role from the General Counsel role?

None. I had a person who worked for me who did the administrative work – the notices, the writing up of the minutes. Those activities were not the highest and best use of my time. But I had to be at the meeting to take notes; so, in effect, you've got a secretarial

function staffed by other people, but the General Counsel should be there to take minutes. Whether that's called the secretary or not doesn't really matter. What's important is that the General Counsel have a very high-level relationship with the board and have colleagues to do some of the more routine work.

Which board committees should the General Counsel interact with most these days, and what are the expectations of the General Counsel by the board and the committees?
Consistent with this concept of providing broad counseling, not just technical lawyering, the General Counsel should be present at meetings of all the committees, except the Compensation Committee because how much everyone is paid is usually very closely held in the company. There has been a trend toward reducing the number of board committees, so the committees typically include audit, nomination and governance, public responsibilities, in addition to compensation. As at board meetings, the General Counsel is heavily involved in those committee meetings. For example, after Enron's collapse I worked closely with Sandy Warner, chair of GE's Nominating and Governance Committee and the head of J.P. Morgan at the time, to revise all of GE's governance practices. The Public Responsibilities Committee is very concerned with environmental matters and public policy matters, areas directly within the province of the General Counsel. The Audit Committee is all about risk and compliance, be it financial or legal, so the CFO and I were deeply involved in the work of that committee.

Is the General Counsel more active at the committee level than at the full board level?
I think there's no real difference. The amount of interaction with committees depends on what the issue is. For example, the meetings of the Public Responsibilities Committee would be attended by the CEO and the CFO, but the General Counsel would organize those meetings. On the other hand, Audit Committee meetings would be organized by the CFO working with the Lead Director and the members of the board, but the General Counsel would have a role on specific issues. Governance would also be in the province of the General Counsel.

You have also talked and written about the 'partner-guardian.' What do you mean by that?
In all key staff positions in a large corporation, especially the roles of CFO, head of HR, and General Counsel, there is a tension between being a partner to the CEO and being guardian of the company. You cannot be effective unless you have a good personal relationship with the CEO and you and your team can help the CEO accomplish high-performance goals – in a legal and ethical way. But there are lots of hard issues with gray areas as to what is legal, what is ethical, how something will affect reputation or affect other stakeholders. In those instances, the question for the General Counsel is: What is right? The CEO may just want to know if something is legal, and the General Counsel may say "Yes, but it's not the right thing to do for the company." There may be a need to gather more facts and, depending on how much time is available, you may want to slow the process down. So even in very good companies there is always going

VITA
BEN HEINEMAN

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To learn more of his views on the role of the General Counsel, see Ben W. Heineman, Jr, "The General Counsel as Lawyer-Statesman" (Harvard Law School Program on the Legal Profession, 2010).

"I think you need to be very clear whether you are acting as a business person or as a lawyer."

to be some tension in the relationship, as there should be. Resolving that tension between being the partner and the guardian is at the core of being the CFO and being the General Counsel. The danger is that if you are only a partner – a yea-sayer – you get rolled. There have been lots of indictments of both CFOs and General Counsels who just said yes because the CEO wanted to do something. On the other hand, if you just say no and don't try to be creative, then you can be excluded from meetings. You've got to resolve this tension and be a good partner to the CEO, but also be the guardian of the company and, in a sense, represent the board as the trustees of the company.

Can the General Counsel really be a partner to the board, and is it appropriate for the GC to weigh in on strategic issues and decisions that the board is discussing?

I think you need to be very clear whether you are acting as a business person or as a lawyer. This is not an unusual distinction, but it needs to be made. When you are acting as a lawyer you're giving legal or quasi-legal advice and your communications are privileged, at least in the United States, though not in Europe. On the other hand, a company works best when everybody brings their specialties to the table with the CEO. You have people in manufacturing, in sales, in marketing, in IT, in engineering, in law, in finance, in HR and, if you are dealing with a major matter, everybody speaks on their particular issues. I might talk about our chance of getting this cleared or whether we have problems with the SEC and so on. But at some point you take your hat off as a specialist and if you're smart, engaged, and curious, you have broader views on the deal or the new geography or new product. You don't make the decision but you help as a generalist to sharpen the issues that need to be decided and what the options are. The board and the CEO make those decisions, but you can contribute as a non-technical generalist in focusing and adding to the debate.

You mentioned differences between North American and European governance practices. In your view, what is the effect of these differing governance models on the role of the General Counsel and the board?

The board model I'm suggesting has not yet been widely accepted in Europe, where there is a wide variation in General Counsel roles, but it is gaining some traction. To some extent the General Counsels don't serve on the Management Boards, much less the Supervisory Boards, but in some cases they are on Management Boards. There are some General Counsels in major companies who report to the CFO and don't even report to the CEO, and they are basically concerned with rather mundane matters like the minutes, the filings, and the technicalities. They are not making broad legal judgments, much less giving wise counseling on big issues or leading big initiatives.

On the other hand, there are clearly companies where that has changed and the General Counsel has a big role. The vision I have enunciated is widely accepted in American transnational companies, and I think as a matter of intuition and observation, but not of study, that there is an evolution in that direction in Europe, but I cannot quantify it. Even with a two-tier system the role can work out pretty much the same way. I think the difference may be in some cases the Supervisory Board has its own staff, which I think is a bad idea. Additional staff means additional bureaucracy and a lot of time spent answering questions back and forth. But with a unitary board management function the General Counsel should be representing the board and should be able to answer all sorts of board questions and present matters fairly and honestly.

Putting aside the two-tier system and turning to companies where the Chairman and CEO role are split, which is increasingly the case, how should the General Counsel interact with the Chairman versus the CEO and the rest of the board?

First, let me say that I think this question about whether there should be an independent Chairman or a leading Presiding Director is a phony issue. The real issue is function, not form. Way too much time has been spent worrying about form. You need a strong leader of the board, but that person doesn't have to be called Chairman; it could be Lead Director or Presiding Director. What's critically important is that the board meet without management present, which post-Enron is now pretty much the practice in most American companies. Then the function of that

"If the CEO doesn't want the General Counsel and the CFO to be candid, then you've got a problem."

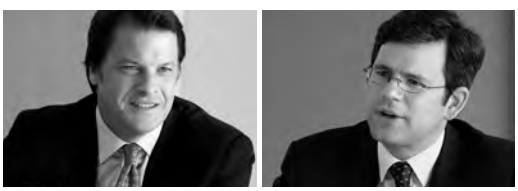
person is to work with the board to make sure that its agenda deals with the most important risks and opportunities facing the company, that materials are readable and honest about the core issues at the center of any decision and that there is appropriate monitoring and follow-up. The CFO and the General Counsel have a role to play in answering questions and helping determine whether the agenda and materials are appropriate and candid and not an attempt to hoodwink the board and blow a decision by them. After Enron, one of the innovations we tried at GE, with some success, was a year-end board meeting to look at risks and opportunities, identify the highest priorities, and make them the subject of detailed briefings in the year to come. In other words, we set key board issues in December for the following year, although important issues would subsequently arise which would become items at board meetings. Obviously, both the CFO and the General Counsel can play a role in helping to define those issues. If the CEO doesn't want the General Counsel and the CFO to be candid, then you've got a problem, but I don't think modern corporations can work that way.

When should the board seek its own counsel, instead of relying on the General Counsel?

If there is an investigation of people high in the company, then the board needs its own counsel. The General Counsel can't lead an investigation of the CEO or of someone in the finance function, or a senior lawyer in the legal function, or of problems at the top of HR. At the GC's peer level or just below, it may be very prudent to have an independent lawyer looking at the matter. In some areas of the law, like derivative suits, you have to have an independent committee and an independent lawyer. There may be specific situations, mostly relating to decisions made at the top of the company, that are being challenged for one reason or another; or there may be very difficult issues where the board wants a second opinion. I would heartily support that. Let's say there is a very difficult negotiation with the anti-trust authorities, or the SEC, or the federal communications commission. And it's a very hard call – partly policy, partly politics, partly law, and partly how you run a campaign to win outside of the normal administrative process if that's allowed. Although I as General Counsel could come in and present both sides, it might also be desirable for the board to hear from the world-class expert in communications, anti-trust, banking, or whatever is at issue. The board should have an opportunity not just to cross-examine me but to cross-examine the true expert in the area. Should the board do that regularly? No. But there are lots of situations where it may be appropriate. Context is everything.

What are the most important competencies the General Counsel as lawyer-statesman should possess?

As I have said, it goes back to the three functions the General Counsels perform. As acute lawyers, they need to be absolutely world-class in their ability to analyze legal problems, cross-examine their subordinates, whether specialists or generalists, as well as the outside lawyers. To be wise counselors they also need enormous breadth of vision. That means a lot of worldly experience, an understanding of history and culture, communications, and ethics. They need this tremendous breadth of mind because they need to bring all of these dimensions to defining a problem. If you improperly define the problem, you're not going to solve it. As lawyer-leaders they need to understand leadership skills like building organizations, motivating people, and – to use the old business school jargon – providing vision. They have to be both a leader, which means adapting to change, and a manager, which means adapting to complexity. That's how I see the role today: acute lawyer, wise counselor, and lawyer-leader in strong support of the corporation's fundamental mission to fuse high performance with high integrity.



The interview with Ben Heineman was conducted by Justus O'Brien, Egon Zehnder International New York, and Jörg Thierfelder, Egon Zehnder International Hamburg.

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Harvard Business Review

GLOBAL STRATEGY

How the CFO and General Counsel Can Partner More Effectively

by Ben W. Heineman, Jr.

JULY 25, 2016

Commentators and researchers have focused on the crucial role of the CEO in leading effective corporate action to promote high performance, high integrity, and sound risk management. What receives far less attention is that, more and more in our increasingly complex, volatile, and fully-globalized business world,

the effectiveness of such action depends on a powerful partnership between the Chief Financial Officer (CFO) and the General Counsel (GC). This critical alliance needs and deserves much greater analysis and application.

The CFO-GC alliance has always been important because the finance function and the legal function are truly the nervous system of the corporation—sending critical signals to all parts of the company about the accuracy of the financials and compliance with law. But, the integration of finance and legal is even more consequential today because what the corporation can and cannot do across the globe is affected directly not just by financial and commercial issues which the CFO analyzes but, increasingly, by evolving "business and society" issues which the General Counsel and the corporate law department must address. These issues include legislation, regulation, litigation, enforcement, investigations, geopolitical risk, demands for ethical actions, and public criticism, affecting all the functions of the corporation in their interaction with all levels of global governments (central, regional, local). Especially in light of ever-increasing variety and intensity of stakeholder demands on the corporation, these business and society issues, under the purview of the GC, must be closely fused with the CFO's financial and commercial analysis to serve the CEO and top business leaders when they make and implement core strategic and operational decisions.

Indeed, due to increased commercial complexity in global companies as well as the growing impact of business and society issues, the expertise, quality, breadth, power, and compensation of the General Counsel have increased dramatically in recent decades. At many firms, the GC has replaced the law firm senior partner as primary CEO counselor, becoming a core member of top management and participating in decisions and actions not just about law but also about business. Also, the GC now often leads units beyond the legal department, such as public affairs, taxes, and environment. In more and more global companies, the CEO, directors and other key stakeholders see the GC as having importance and stature comparable to the Chief Financial Officer. It is primarily the GC who must navigate complex and fast-changing law, regulation, litigation, public policy, politics, media

and interest group pressures across the globe, often in a public, outward-facing role as negotiator, spokesman or representative. As a result, the optimal CFO-GC alliance is now much more like a peer relationship, jointly coordinating and overseeing fundamental corporate issues of performance, compliance, ethics, risk and governance, and organization. Here is a brief discussion of how the alliance works in key areas:

Performance. Financial, legal, ethical and risk perspectives obviously need to be integrated when the corporation is making decisions about new deals, about new types of customers, new geographic markets, new technologies and new products. For example, the financial and legal staffs are bound at the hip on the various phases of mergers and acquisitions, from the memorandum of understanding, to representations and warranties, to due diligence, to definitive agreement, to closing and then to deal integration. On major deals, the GC and CFO are strong partners on a personal level because the robust integration of their complementary views on key issues can spell the difference between success and failure, both in closing and in subsequent performance. For example, failure to identify a serious accounting or environmental failure of the target company in due diligence can lead to a major criminal or civil liability for the acquiring company after the deal is sealed.

Compliance. Although the CEO and division heads should, in my view, be the ultimate leaders of the corporate compliance program, the CFO and GC jointly share responsibility for actually designing and implementing the systems and processes that ensure adherence to formal legal and financial rules. Compliance always has been and always will be a basic corporate responsibility, and any such program must be comprised of three essential elements: protection, detection, and response. What's radically changed in recent years is complexity. Responding effectively to this means the CFO and GC, working with Compliance and Risk, together develop a robust method of process mapping, risk assessment, and risk mitigation relating to those formal rules that apply to all corporate functions—e.g. sales, marketing, manufacturing, intellectual property—in all business units in all

geographies. Ideally, the legal and financial staffs together conduct compliance reviews which report up to the CEO, CFO, and GC, and also act as core investigators in the event of a major compliance failure like bribery or accounting fraud in a major overseas division.

Ethics. In exemplary corporations, the CFO and GC jointly staff the systematic processes the CEO and top business leaders use in voluntarily adopting vital global standards for the corporation, which go beyond what the formal rules require. Once the company establishes these ethical positions on key issues—whether on global sourcing or greenhouse gas reduction, or extra consumer protections—they are implemented systematically just like formal, mandated rules. In my experience at GE, what worked best is to have the CFO and GC jointly identify a range of possible ethical issues for consideration; help select a salient sub-set for analysis; and then develop options to guide the ultimate decision-making process by the CEO and the board of directors. Deciding among those options involves a combination of considerations both prudential (enlightened self-interest of the company) and moral (rights of—duties to—others) which vary with context. Decisions about not doing business in a corrupt nation are very different than those considering whether to voluntarily reduce the corporation's emission of greenhouse gases. And then, of course, there are costs. The CFO and GC determine together whether the cost of a particular voluntary global standard is amenable to hard financial analysis (e.g. cost of reducing pollution) or if it turns on a broad-gauged judgment about corporate reputation without financial precision (benefits of imposing labor standards on third party suppliers).

Risk. The CFO and GC are key in developing together, with business leaders and other staff officers, safety processes, management practices, and a safety culture to handle both economic and non-economic risks beyond legal and ethical threats. One key to this partnership is identifying risk priorities—whether economic (e.g. leverage and liquidity risk, operational and technology missteps, or macroeconomic threats) or non-economic (e.g. injuries to third parties from company processes/products, security and safety, and country/geopolitical risk). A

second key dimension is justifying the costs of instituting prevention and response steps for risk events that may not happen—especially for the vexing issue of low probability/high impact catastrophic threats. The CFO and GC can work up pro forma cost scenarios and also look to analogous disasters (e.g. the Challenger explosion, Hurricane Katrina, the Siemens bribery scandal, BP gulf explosion) to explain the types of adverse effects/costs which could happen and which investments in prevention and response make sense in attempting to avoid or mitigate the disaster.

Finally, and most importantly, the CFO and GC must support each other as "statespersons" in a corporation. This means asking first whether a corporate action complies with legal and financial rules, but asking last whether an action is "right" in terms of the corporation's mission of high performance with high integrity and sound risk management. To be effective statespersons, the CFO and GC must manage a dynamic tension: acting as "partners" to the board of directors, the CEO and top business leaders, but also, ultimately, as "guardians" of the corporation. And they must work together to help create a pervasive culture of integrity under CEO direction. Business pressures, practices, attitudes, and internal politics (a courtier's desire to please the CEO) can create obstacles to the statesperson's role, the partner-guardian fusion, and the integrity culture.

A strong, respectful, mutually-supportive partnership between the Chief Financial Officer and the General Counsel is one critical way to overcome these obstacles. More broadly, that alliance has become an imperative, helping global corporations to be more responsive, resilient, and effective in a fast-changing and ever more complicated world where commercial and societal issues are intertwined.

Ben W. Heineman, Jr. is former GE General Counsel and is a senior fellow at Harvard University's schools of law and government. He is author of the new book, *The Inside Counsel Revolution: Resolving the Partner-Guardian Tension*, as well as *High Performance With High Integrity*.

This article is about GLOBAL STRATEGY

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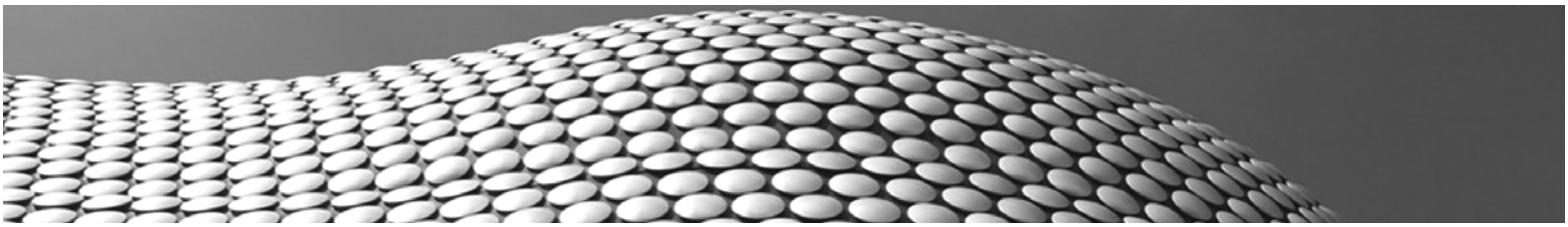

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THE GENERAL COUNSEL AS LAWYER-STATESMAN

A Blue Paper

By Ben W. Heineman, Jr.

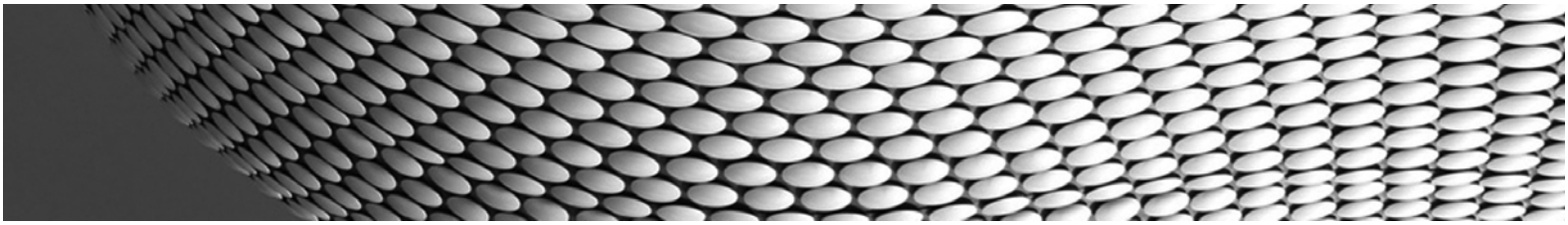

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TABLE OF CONTENTS

FOREWORD

The Harvard Law School Program on the Legal Profession was founded in 2004 to:

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- Foster broader and deeper connections **bridging** between the global universe of legal practitioners and the academy.

This manuscript by the Program's Senior Distinguished Fellow, Ben Heineman, launches a new "blue paper" series of substantial essay, speech and opinion pieces on the legal profession selected by the Program for distribution beyond the format or reach of traditional legal and scholarly media channels. Thank you for your interest and we look forward to your feedback.

THE FUNDAMENTAL MISSION OF THE CORPORATION

The foundational goals of the modern corporation should be the fusion of high performance with high integrity. The ideal of the modern general counsel is a lawyer-statesman who is an acute lawyer, a wise counselor and company leader and who has a major role assisting the corporation achieve that fundamental fusion which should, indeed, be the foundation of global capitalism.

I believe that this concept of General Counsel as lawyer-statesman has strong roots in major American companies, is growing in the UK and has adherents in some companies elsewhere in the world. Trends over the past 25 years have made possible a powerful, affirmative leadership role for General Counsels, at least in large transnational enterprises. But to understand the role, it is necessary, first, to understand in some detail what (in my view) should be the mission of the contemporary global corporation.

High performance means strong sustained economic growth through provision of superior goods and services which in turn provide durable benefits for shareholders and other stakeholders upon whom the company's health depends. Such performance entails an essential balance between risk-taking (the creativity and innovation so essential to economic growth) and economic risk-management (the financial, commercial and operational disciplines so essential to the soundness and durability of business institutions).

High integrity means robust adherence to the letter and spirit of formal rules, both legal and financial; voluntary adoption of global ethical standards that bind the company and its employees; and an employee commitment to core values of honesty, candor, fairness, trustworthiness and reliability. It involves understanding, and mitigating, other types of risk—beyond directly economic risk—which can cause a company catastrophic harm: legal, ethical, reputational, communications, public policy and country-geopolitical.

But the fusion of high performance with high integrity is not just about risk mitigation. It is about creating affirmative benefits in the company, in the marketplace and in the broader global society. Ultimately high performance with high integrity creates the fundamental trust among shareholders, creditors, employees, recruits, customers, suppliers, regulators, communities, the media and the general public. This trust is essential to sustaining corporate power and freedom which drives the economy with widespread economic and social benefits—trust which in the past 10

years has dramatically eroded due to stark corporate scandals and unthinkable business failures.

The core task of CEOs, and top senior executives like the General Counsel, is to build a performance with integrity culture that permeates the corporation. Such a culture entails shared principles (values, policies and attitudes) and shared practices (norms, systems and processes). Although this culture must include elements of deterrence against legal, financial and ethical wrong-doing, it must, at the end of the day, be affirmative. An underlying tenet of this culture should be that people want to do the right thing because leaders make it a company imperative and live it themselves. Clear expectations must be driven down into the company, and this must be a uniform global culture that applies in every nation and cannot be bent by corrupt local practices, regardless of short-term business costs.

The Role of a General Counsel—and Inside Lawyers—In a High Performance with High Integrity Corporation

Given this view of the global corporation's fundamental mission, the role of the General Counsel, and other inside lawyers, is extremely broad, involving three distinct functions: acute technical lawyer, wise counselor and lawyer as leader. The essence of being a lawyer-statesman is to move beyond the first question—"is it legal?"—to the ultimate question—"is it right?" Such a role involves leadership, or shared responsibility, not just for the corporation's legal matters but for its positions on ethics, reputation, public policy, communications, corporate citizenship, country and geopolitical trends.

The lawyer-statesman role involves not just dealing with past problems, but charting future courses; not just playing defense, but playing offense; not just providing legal advice, broadly defined, but being part of the business team and offering business advice. It means being both a partner to business leadership but ultimately the guardian of the company. Even more broadly, it involves the wise counseling and leadership roles which stem from practical wisdom, not just technical mastery; which requires broad judgment based on knowledge of history, culture, human nature and institutions, not just a sharp tactical sense; which flows from the ability to understand long-term implications, not just achieve short-term advantage; and which is founded on a deep concern for the public interest, not just the private good.

In aspiring to be a lawyer-statesman, the General Counsel, and inside lawyers, must be skilled in asking "what ought to be" questions; in articulating systematic and constructive options that expose and explore the value tensions inherent in most decisions; in assessing risk, but not being paralyzed by its existence; in understanding how to make rules realities and develop strategies for meaningful implementation of policies; in understanding the hurly burly world of politics, media and power outside the corporation and how to navigate with principle and purpose in that domain; in leading and building organizations, creating the vision, the values, the priorities, the strategies, the people, the systems, the resources and the motivation; in having understanding, intuition, perspective and respect relating to different cultures around the globe; in, ultimately, having the quintessential quality of the great generalist to envision and understand the multiple dimensions of issues—to define the problem properly—and the ability to comprehensively integrate those dimensions in decision-making.

Given this definition of fundamental corporate purpose, this delineation of the general counsel's broad responsibilities and this description of essential qualities of mind a lawyer leader must possess, let me very briefly highlight ten essential tasks of the General Counsel as lawyer-statesman. Each task could, in and of itself, be the subject of an article (and most apply to all senior inside lawyers as well).

The General Counsel must build a world class legal organization…

…hiring the best possible global talent which includes both top-flight generalists (to head legal teams at profit and loss centers) and world class specialists. These lawyers must be capable of handling the most difficult matters facing the company on their own, and, as necessary, in forging strategic partnerships with outside counsel. The General Counsel must lead in creating an inside-outside relationship which minimizes conflicts over money and is instead characterized by a powerful value proposition of providing high quality services with alignment of economic incentives (through, for example, fixed fee arrangements). The inside legal team must be integrated with other staff (Finance/HR) and business teams. And the General Counsel must effect world-wide integration (one legal culture) through specialist global practice groups, cross-company lawyer councils at national and regional levels (e.g. China or Europe) and close partnering at the senior lawyer level.

The General Counsel and the legal team must be creative, affirmative partners to business leaders in using their broad skills to accomplish the corporation's high performance objectives.

The General Counsel should be at the table with the CEO on the broad array of performance issues: key operational initiatives, economic risk assessment and mitigation, major transactions, new strategic directions (new products, new markets, new geographies), important template contracts, resolution of major disputes (through mediation or arbitration if possible), and major accounting decisions that have a forensic dimension (as many do today). The fundamental task is to establish critical facts, define applicable legal principles, identify areas of risk and generate options for accomplishing performance goals while minimizing legal, ethical or reputation risk.

The General Counsel must also provide perspective and advice as a business person, not a lawyer.

Others at the table with business leaders come, like counsel, from specialist backgrounds: finance, marketing, engineering, IT, HR. Beyond providing advice as members of different disciplines, they all need to generate energy as intelligent persons with a broad understanding of the products, technology, competition and other dimensions of business decisions. The General Counsel, as curious, broad-gauged business partner, must help define, debate and develop business positions on broad company issues.

The General Counsel must be a leader in building an integrity infrastructure that embeds formal requirement (law and finance) and the company's ethical rules into business operations.

This task requires an understanding of the enormously complex web of law and regulation of both general (competition law) and specific (health care law) application at national, state and local level in nations all across the globe. Each business process (finance, sales, marketing, engi-

neering) in each business unit in each country must be mapped to understand where requirements intersect—then those points of intersection must be risk-assessed with appropriate risk mitigation systems integrated into the business processes. The broad purposes of the integrity infrastructure are to prevent legal and ethical misses, to detect misses as soon as possible and then to respond quickly and effectively. This merger of integrity and business process requires business leader commitment with the General Counsel (and other inside lawyers) providing expertise and advice on such key leadership issues as resource allocation and in-depth management reviews which demonstrate commitment from the top down.

The General Counsel must play a lead role in defining and adopting ethical standards—beyond what the formal rules require—which bind the corporation across the globe.

Great corporations often impose rules upon themselves: no bribery (even when not prohibited), building new facilities to world, not local law, standards; engaging in ethical sourcing so that third parties avoid child or prison labor and provide safe and healthy working conditions. The General Counsel has a key role in these decisions which, as noted above, go beyond asking "is it legal" to asking "is it right." The chief lawyer helps generate issues (by, for example, systematically reviewing claims on the corporation by various stakeholders); determining which ones require in depth analysis; conducting that analysis under an "enlightened self-interest" standard which understands that "costs" are also "investments," that "benefits" may be expressed in strictly financial terms but may also require judgment, and that the proper "accounting period" may be years, not just the next quarter. The General Counsel will be at the center of resolving conflicts between national laws (which transnational companies must follow) and global ethical standards, a vexing problem illustrated by Google's recent decision to stop complying with Chinese censorship laws because of global ethical standards against suppression of information.

The General Counsel must help develop early warning systems which allow the corporation to stay ahead of emerging global trends and expectations relating to formal rules, ethical standards, public policy and important country and geopolitical risk.

The integrity infrastructure and adoption of global ethical standards focus on immediate issues, but looking into the future and anticipating changes is one of the characteristics of a lawyer-statesman. These early warning systems are systematic: careful compilation of information from a variety of sources (cases, legislative proposals, commentary, NGO agendas); regular meetings to determine which issues require analysis; and then decisions about whether pro-actively to change policies and practices far in advance of when the company might be forced to do so.

The General Counsel must play a lead role in fostering employee awareness, knowledge and commitment to a high performance with high integrity culture.

Employees must understand their basic obligations; must do the right thing under those duties; must live the core company values; and must understand enough about the technical rules to seek advice when in "gray areas." It is the task of the General Counsel, working with other key corporate staff, to create education and training materials on business and society issues which are as engaging as the education in business disciplines. This involves tracking, training and test-

ing employees in high risk jobs; creating meaningful case-based learning; being candid about company failures; and integrating integrity training with business training. It also means confronting cultural differences head on (explaining why conflicts of interest involving family members may be the norm in Chinese society but why they are not tolerated in a global corporation).

The General Counsel must develop systems which give employees at all levels "voice" to express concerns about the corporation's adherence to law, ethics and values.

Based on nearly 20 years in one of the world's most complex business enterprises, I believe that integrity is greatly advanced when employees are encouraged (indeed required) to report concerns without fear of retaliation. The General Counsel has a vital role in developing different forums for "voice" to be heard: through bottoms-up compliance reviews that start on the shop-floor; through a powerful independent, internal audit staff doing compliance reviews; through candid communications from lawyers in the businesses to the General Counsel; and, most importantly, through a company "ombuds" system. Such a system allows employees to report in many languages in many forms (email, phone, letter) to many recipients (in the division or at headquarters) either anonymously or not. The General Counsel (and the CFO) must treat all concerns promptly with dignity and respect and follow the facts wherever they lead—up, down or sideways. Employee trust in the integrity of the processes is key to a successful ombuds system that detects and deters (and avoids back-biting because cheap shots won't work).

The General Counsel should have either the lead role, or a strong supporting role, in the development and implementation of the company's positions on public policy…

…in capitals all across the globe, from Brussels to Beijing, from Washington to Moscow. Policy development requires marrying substantive expertise with the corporation's business strategy and should be done with business teams at headquarters. Many of the substantive experts on public policy which cuts across the company will work for the General Counsel: antitrust, environment, IP, securities law, labor and employment law, tax, trade etc. These corporate legal specialists should have broad knowledge and experience in public policy and its processes. The General Counsel should also help the individual business units find industry specific policy experts (e.g. communications, energy, healthcare). Once policies are developed and prioritized then the government relations staff (whose customers are executive and legislative branch officials) should work with the business people and the policy experts on political implementation. One of the most challenging tasks for the General Counsel is defining policy positions based on credible facts that advance public interests not just the corporation's narrow private interest and thus can command assent, rather than just being viewed as a business land-grab.

The General Counsel will also be a core member of crisis management teams responding to investigations, law suits, product problems, personnel emergencies and threats to company people, facilities, information or supply chain from terrorism, natural disaster or war.

Working with the CEO, the General Counsel must seize the issue the moment top management learns about it; develop a crisis management team with clear responsibilities; meet continuously

to adapt to changing developments; and, ultimately determine an appropriate response. A key related role, one for which the General Counsel is well suited, is to develop the facts both expeditiously and carefully. And the General Counsel must be closely integrated in all communications stemming from the crisis to assure accuracy and credibility. Crisis management is often a stress test for the corporation's integrity—and for the General Counsel.

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Integrating all these foundational roles, the General Counsel should develop the corporation's essential position on corporate citizenship for review by top business leaders, the CEO and the board of directors. Consistent with my emphasis on high performance with high integrity, I believe that corporate citizenship (a much better concept that corporate responsibility for assessing business' role on society) consists of three elements:

- Sustained economic performance which provides benefits to stakeholders across the society;
- Robust adherence to the spirit and the letter of the laws and regulations designed to advance social goods; and
- Adherence to global ethical standards and public policy positions that are in the enlightened self-interest of the company but fairly balance private concerns with the public interest.

General Counsel Trends

The greatly enhanced role of the General Counsel in large transnational companies—whether headquartered in the US, the UK, Europe or elsewhere in the world—is due a number of trends which have occurred over the past 25 years. The future growth of the General Counsel role in major global corporations—and its spread to smaller and medium sized companies—will depend on the continuation of those trends.

- General Counsel have increasingly been hired from the upper reaches of government and private practice. A former U.S. Attorney General, a former Deputy Attorney General, distinguished former federal appeals court and district court judges, and a former White House counsel now all serve as chief legal officers of major American companies. Similarly, law firm partners in their forties and fifties are being recruited away from their firms to General Counsel positions.

- This remarkable upgrade in the quality of General Counsel has increased the status and prestige of inside lawyers and has made it possible to hire superb lawyers from outside the company to serve as heads of large business divisions or as heads of specialty functions (tax, environment, trade, antitrust, mergers and acquisitions, labor and employment, intellectual property). Indeed, larger companies are developing specialty practice groups, headed by a nationally renowned practitioners, which rival law firm practice groups.

- As a result of this increase in inside talent, the General Counsel has become, in many cases, the chief legal advisor to the CEO and to the board of directors, replacing the venerable senior partner from the great law firm. The General Counsel is a member of the core management team—and, as business and society issues have become of ever greater importance to corporations, has come to have comparable status to the Chief Financial Officer in some major companies.

- To attract this talent, corporations have been willing, at least for the General Counsel and division and lead specialist lawyers, to meet market pay, although some of that compensation may be in the form of deferred equity which may lose (or increase) its value. *Corporate Counsel*, an American magazine for inside lawyers, each year publishes a table of highly paid General Counsels in US companies—and it can only get this information because many GCs are among the companies' five most highly compensated executives whose pay packages must be disclosed, per government regulation, in the annual Proxy Statements.

- The new inside lawyers—who now have skills equal to their peers in outside law firms—have begun to manage actively major issues staffed by joint inside/outside teams. Not only has power over control of matters shifted in a number of instances, but inside lawyers have also sought to break up old monopolies (when single firms represented companies on a broad range of matters) and introduce competition among firms. Thus, the new inside lawyers forged new cooperation on *matters* with outside firms and fostered new competition on *money.* As noted above, today both corporations and law firms are trying to develop new strategic alliances in which financial incentives are aligned and value and quality, rather than sheer hours billed, are emphasized.

In sum, in the course of a generation, General Counsels' prestige, status, compensation, power and position at the core of major transnational corporations have been transformed. But, this enhanced role will only continue, and be expanded at other companies, if boards of directors and CEOs see the value of a strong inside team working closely with business leaders. They must be willing both to pay for talent and to carry the legal headcount.

I believe that a strong inside legal team—that is part of the company culture, understands its rhythms and personality, is in the daily flow of business—is far more effective, and far more cost-effective, than outside counsel can possibly be in helping the company achieve both high performance and high integrity. In difficult economic times, there is always the call to cut costs by cutting headcount. While the legal function can never be immune from a relentless quest for productivity, it is very short-sighted of business leaders to use the traditional meat-axe ("10 percent down") and either push costs (which will be higher) outside or degrade the core goals of performance with integrity which can lead to far greater, even catastrophic, costs down the road.

THE PARTNER-GUARDIAN TENSION AND THE LAWYER-STATESMAN ROLE

Although the role of General Counsel has been transformed in recent years, one dimension remains the same: the reliance on a good relationship with the CEO. And, at the core of that relationship, is what I term "the partner-guardian" tension. Indeed, in many recent scandals (from Enron-like accounting fraud to improper options back-dating to the credit crisis), General Counsel have failed as guardians. They were either excluded from decisions or failed to ask broad, probing questions about dubious actions.

Although the General Counsel must be a strong business partner for the CEO and other business leaders (to help the company but also to grain credibility), he or she must, at the same time, be guardian of the company (whom the General Counsel actually represents). This guardian role can involve slowing decisions down until facts are gathered and analysis completed—and, on occasion, it can involve saying "no" if no legitimate actions are possible. I do not believe that the choice for General Counsel (and inside lawyers generally) is to go native as a "yes person" for business leaders and be legally and ethically compromised or to be conservative, inveterate "naysayer" ultimately excluded from core corporate activity and decisions. Being at the table to assess facts, law, ethics, risk and options—to help find an appropriate way to accomplish business goals—is essential.

Resolution of this tension is key to a company's high performance with high integrity and to the ability of the General Counsel to play to the kind of lawyer-statesman role I have outlined above. But, this requires a strong degree of independence. Yet critics have questioned whether such independence can exist when candid General Counsels run the risk of being fired and losing unvested economic benefits (like stock options, restricted stock or deferred compensation).

Certain conditions inside the company must be met before a General Counsel can resolve the tension and aspire to be a lawyer statesman. Most importantly, the board of directors and the CEO must understand and approve the broad role for General Counsel I have outlined here. They can demonstrate that by hiring a General Counsel with deep experience (hopefully in both public and private sectors), with superlative legal skills but also broad vision, with both credibility and courage. The CEO must also support the General Counsel in hiring the outstanding, independent lawyers for key inside positions. This is not to say lawyers make critical decisions for the company: their primary job is to give the business leaders a range of legitimate options with different

degrees of risk and explain pros and cons. Only after acute analysis, integrating all relevant perspectives, should they make recommendations. And, unless the action is unlawful, General Counsels, having spoken their piece, should defer to the CEO's discretion.

Certain processes can help assure that the proper conditions exist. General Counsel candidates should do extensive due diligence on the CEO, the company culture, the attitudes of top staff and business leaders. They should clarify the conception of the chief legal officer held by those executives. They should meet with one or two board members before accepting the job. Once in place, the General Counsel should meet alone with the board (or the Audit Committee) on a regular basis.

But the General Counsel must go into the position prepared to resign if asked to condone or do something clearly illegal or highly unethical or if excluded from major decisions. With a good CEO and a good Board, this will not happen, although there can be friction as hard decisions may yield tough conversations. With a bad CEO and a good Board, the General Counsel may be able to negotiate an honorable withdrawal. With a bad CEO and a bad board, the General Counsel obviously may simply have to quit—but with proper diligence before accepting the job this risk should be minimized.

At the end of the day, the rise of the General Counsel to a broad lawyer-statesman role, and an increase in status to be a true peer of the Chief Financial Officer, turns on intense commitment of board of directors and CEOs to high performance with high integrity.

About the Author

Ben W. Heineman, Jr. was GE's Senior Vice President-General Counsel from 1987-2003, and then Senior Vice President for Law and Public Affairs from 2004 until his retirement at the end of 2005. He is currently Distinguished Senior Fellow at Harvard Law School's Program on the Legal Profession, Senior Fellow at Harvard Law School's Program on Corporate Governance, Senior Fellow at the Belfer Center for Science and International Affairs at Harvard's Kennedy School of Government, and Senior Counsel to the law firm of WilmerHale. A Rhodes Scholar, editor-in-chief of the Yale Law Journal and law clerk to Supreme Court Justice Potter Stewart, Mr. Heineman was assistant secretary for policy at the Department of Health, Education and Welfare and practiced constitutional law prior to his service at GE. His book, High Performance with High Integrity, was published in June, 2008 by the Harvard Business Press. He writes and lectures frequently on business, law and international affairs. He is also the author of books on British race relations and the American presidency. In 2007, he served on the Independent Review Panel on the World Bank Group's Department of Institutional Integrity (the Volcker Panel) and is currently on an international panel advising the President of the World Bank on governance and anti-corruption. He is a fellow of the American Academy of Arts and Sciences, a member of the National Academy of Science's Committee on Science, Technology and Law and recipient of the American Lawyer's Lifetime Achievement Award and the Lifetime Achievement Award of Board Member Magazine, was named one of America's 100 most influential lawyers by the National Law Journal and was named one of the 100 most influential individuals on business ethics in 2008 by Ethisphere Magazine. He serves on the boards of Memorial Sloan Kettering Cancer Center (chair of patient care committee), the Center for Strategic and International Studies (chair of program committee), Transparency International-USA (chair of program committee) and the Committee For Economic Development (chair of the corporate governance committee). He is a member of the board of trustees of Central European University.

Endnote

This blue paper is drawn from a chapter written by the author for a German language book: The In-House Counsel in Multinational Corporations (Beck, 2010). This work in turn is based, in important part, on his writing on integrity, law, ethics and the role of inside lawyers since retiring from GE at the end of 2005. This writing includes a book---High Performance with High Integrity (Harvard Business Press, 2008)---and numerous articles: e.g. "In the Beginning: GE's Legendary Lawyer Explains How He Revolutionized the Role of In-House Counsel," Corporate Counsel, April, 2006; "Hands Across the Water," Corporate Counsel, October, 2006 (arguing that corporations need an affirmative "foreign policy"); "Law and Leadership," The Preiskel-Silverman Lecture in the Program on the Practicing Lawyer and the Public Interest, Yale Law School, November, 2006 (reprinted as essay in The Journal on Legal Education, December 2006); "Caught in the Middle," Corporate Counsel, April, 2007 (tension for general counsel and chief financial officer in being business partner to CEO and guardian of the corporation's integrity); "How to Say NO to Your CEO," Association of Corporate Counsel Docket, October, 2007; "Before You Sign Up: Prospective GCs Need Due Diligence on CEOs," Corporate Counsel, October, 2008; "Big Isn't Always Best: One Stop Shopping at Giant Global Firms Isn't Necessarily Wise, Says GE's Former Top Lawyer," Corporate Counsel, November, 2008; "Getting Your Fix: Two Veteran Lawyers Say That Now Is the Time for Fixed Fees," Corporate Counsel, September, 2009 (with William Lee, senior partner at WilmerHale). The Corporate Counsel articles also appeared in The American Lawyer.

CORPORATE COUNSEL

The Inside Counsel Revolution

Ben W. Heineman Jr., Corporate Counsel

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The practical ideal of the modern general counsel is a lawyer-statesperson who is an outstanding technical expert, a wise counselor and an effective leader, and who has a major role assisting the corporation achieve the fundamental goal of global capitalism: the fusion of high performance with high integrity and sound risk management. For the lawyer-statesperson, the first question is: “Is it legal?” But the ultimate question is: “Is it right?”

This vision of the general counsel has been a critical element of the inside counsel revolution that began in the late 1970s and that has increased in scope and power ever since. Working with the CEO and other senior executives, the GC must forge an unbreakable bond between performance, integrity and risk on a set of foundational corporate issues: business strategy, culture, compliance, ethics, risk, governance, citizenship and organization. In so doing, the GC must help create the trust in the enterprise that is so vital to its sustainability and durability: trust among employees, shareholders, creditors, customers, partners, suppliers, regulators, media, NGOs and the public. To carry out this challenging role, the GC must resolve the most basic problem confronting inside lawyers: being partner to the board of directors, the CEO and business leaders but ultimately being guardian of the corporation.

This prescriptive vision is attainable because general counsel and inside law departments in outstanding corporations have become far more sophisticated, capable and influential, transforming both business and law in two important descriptive ways.

First, the role of the general counsel inside the corporation has significantly grown in importance.

- The general counsel has now often replaced the senior partner in the outside law firm as the primary counselor for the CEO and the board of directors.
- The general counsel job has a very broad scope—beyond law—that includes: business initiatives, ethics, values, reputation; governance; communications; public policy; enterprise risk; crisis management; and, ultimately, corporate citizenship.
- The general counsel is now often a core member of the top management team and participates in discussion and debate—not just about risks but also about opportunities; not just about law but also about business; not just about public policy but also about geopolitics.
- The general counsel now often has a broad leadership role and final decision-making authority beyond the legal department, heading such areas as tax, trade, environment, security, real estate, customer care, community relations and public affairs.
- The general counsel is now often seen as having importance and stature comparable to that of the chief financial officer by directors, CEOs and business leaders because the health of the corporation requires that it navigate complex and fast-changing law, regulation, litigation, public policy, politics, media and interest group pressures across the globe.

- All these developments have now often combined to increase dramatically the expertise, quality, breadth, power and compensation of the general counsel and inside counsel, with GCs now being hired from the highest reaches of government, from leading law firms and a from growing pool of highly talented inside counsel.

Second, the role of general counsel outside the corporation has also significantly grown in importance, with a related, dramatic shift in power from outside law firms to inside law departments over both matters and money.

- The general counsel and inside lawyers, rather than just throwing issues over the transom to law firms, have taken on day-to-day management and strategic direction of major matters affecting the corporation—ranging from cross-border transactions to multifront litigation to international enforcement investigations to consequential public policy debates to building a culture of integrity. This is so because corporate legal departments are increasingly staffed by outstanding specialists in all the areas covered by private firms and by superb generalists who are general counsel of major divisions, not just of the whole company. These generalist and specialist inside lawyers—with skills and knowledge at least equal to their peers' in law firms—lead mixed inside/outside teams in managing hard problems facing the corporation.
- The GC and inside lawyers have also strongly reasserted control over money spent on outside law firms. Inside lawyers have broken up monopolies or oligopolies that particular private firms had previously enjoyed with particular corporations. They have forced law firms to compete for business. They have focused on cost control from front-end budgeting and negotiated fees to back-end audits and cost disallowance, from preferred provider relationships to "strategic partnerships." They have brought important work inside the corporation by increasing corporate legal staff. Increasingly, they are using new technology and specialist vendors (e-discovery, specialized research, form drafting, contract lawyers) to reduce further the scope of traditional private law firms.
- Finally, general counsel and inside lawyers are increasingly advocates, points of contact or negotiators with important public and private parties outside the corporation in both developed and developing economies. Because governments affect markets in all nations—along a spectrum from the state capitalism of former Communist states to the variety of "mixed economies" in traditional "liberal" democracies—the "business in society" issues in these diverse global economies pose serious risk and significant opportunity. Boards and business leaders now delegate major responsibility—and key outside relationships—to the general counsel to help the corporation reach its commercial and citizenship objectives across a minefield of policy, law, regulation and public scrutiny.

As briefly noted above, two related aspirational roles are the key to my vision of the general counsel—and to the inside counsel revolution: the GC as lawyer-statesperson and the GC as partner-guardian.

In helping to fuse high performance with high integrity, the general counsel as lawyer-statesperson must engage in robust debate on major corporate initiatives of all shapes and sizes about what are the "ends" of that action, not just about "the means" for carrying it out; about "purpose," not just "process"; about consequences, not just acts; about what is "right" as seen through the lenses of performance, integrity and risk, not just about what is "legal." With training and experience in policy, law, ethics and process and with independent expertise, breadth, judgment and practical wisdom, the archetypical general counsel is well positioned to introduce a dose of "constructive challenge" to such discussions, not as the conscience of the corporation, but as an important voice of conscience in a matrix of shared power under the CEO. I use the old-fashioned term "lawyer-statesperson" because I want to connote the GC's search, in a practical, real-world setting, for the right action of a corporation embedded in a broader community, for the right vision of business in society.

To discharge this foundational responsibility, the general counsel as lawyer-statesperson must function, often simultaneously, in the three fundamental roles of a great lawyer: as technical expert, wise counselor and accountable leader.

As technical expert, inside lawyers must address the daunting challenge of determining "what is the law" that the global corporation must follow in multiple jurisdictions, with varying enforcement practices, conflicting formal mandates and legal ambiguity. The inside lawyers must not only exercise sound judgment in determining within a reasonable range of discretion what "law" the corporation will follow; they must also address strong pressures for corruption at the core of capitalism (e.g., bending the rules to make the numbers) and play a major role in deploying the systems, processes and resources necessary to ensure adherence to formal legal (and financial) rules.

In their role as technical experts, general counsel and inside lawyers should call out and reject certain courses of action underlying numerous corporate scandals.

- It is wholly inappropriate to ignore the law and hope the corporation can get away with it, sometimes through bribes.
- It is wholly inappropriate to be Holmes' "bad man" and decide whether to follow the law based on a cost-benefit calculation: Do the benefits of disobedience outweigh the costs of being caught?
- It is wholly inappropriate to look solely at the "face of the documents" and render a hypertechnical judgment on legality that not only is outside the range of reasonable discretion but also fails to ask hard questions about what is the real purpose of the legal arrangements and what are likely, or even possible, consequences.

General counsel must accept the binding force of existing law—and not supinely follow improper business pressure—even though that law may be unwise or politically motivated. Leaving a country or seeking to change the law are acceptable courses of action in the face of a "bad" law. Ignoring it, weighing costs and benefits of noncompliance or interpreting away its impact through noncredible hyper-technicalities are not.

In the lawyer-statesperson's other two roles—wise counselor and accountable leader—the general counsel needs capabilities far beyond legal expertise.

The general counsel must help the corporation decide what actions to take voluntarily beyond what the mandated, formal rules (legal and financial) require. These issues of "organizational ethics" or "corporate global standards" occur in four broad areas.

- Responsibilities to the corporation itself, including its employees who are high-priority stakeholders.
- Responsibilities to the people and organizations outside the corporation that it serves or affects —all other corporate stakeholders, from shareholders and creditors to customers and suppliers.
- Responsibilities to the legal system and rule of law that are the foundation of sound political economy and healthy constitutional democracy, including such issues as access to justice and an independent judiciary.
- Responsibilities to secure other broad public goods and enhance sound private ordering in order to create a safe, fair and just society in which individuals and institutions can thrive over the long term.

Answers to these issues may turn on "prudential" grounds—what is in the corporation's enlightened self-interest. Or, they may be some combination of prudential considerations and fundamental moral concepts about the rights of—or duties to—others, such as loyalty or transparency or fiduciary duty or respect for individual dignity. Setting voluntary standards requires judgment; each decision turns on different contexts and multiple factors.

The GC as lawyer-statesperson must possess not just “core” legal competencies, but “complementary” competencies that are essential to multidimensional counseling and leadership. The general counsel and inside lawyers must, for example, be skilled in asking “what ought to be” questions; in articulating systematic and constructive options that expose and explore the value tensions inherent in most decisions; in having financial, scientific and technological literacy; in assessing risk, but not being paralyzed by its existence; in knowing how to implement effectively rules, policies and decisions; in understanding the hurly-burly world of politics, media and power outside the corporation and being able to navigate with principle and purpose in those domains; in leading and building organizations; in having understanding, intuition, perspective and respect relating to different cultures around the globe; in, ultimately, having the quintessential quality of the great generalist to envision and understand the multiple dimensions of issues and the ability to comprehensively integrate those dimensions in decision-making.

To function effectively as a lawyer-statesperson in a complex CEO-led corporate organization, the general counsel must assume a second aspirational role: partner to the board and business leaders and guardian of the corporation. Under appropriate conditions, being an effective partner on business and law establishes the trust and credibility that allows the general counsel to be an effective guardian. The fusion of the partner and guardian roles turns on GC integration into the core activities of the corporation. This means being at major corporate decision meetings (strategy, budget, deals, new products, new geographies, etc.) and being deeply involved in implementation of those decisions.

Such involvement provides an opportunity for the GC both to help the business leaders achieve legitimate commercial goals and to give independent views on whether corporate action comports with standards relating to integrity, risk and citizenship. This guardian role can involve slowing decisions down until facts are gathered and analysis completed—and, on occasion, it can involve saying no to improper actions. It requires character, stature, independence and courage so that the GC does not just passively salute and obey when business leaders suggest actions.

But resolving the partner-guardian tension faces obstacles that critics often cite when expressing doubts about whether GCs can possess the independence to be true guardians. These obstacles include: negative business attitudes about lawyers; business leaders’ lack of understanding about law and policy; a leader’s overbearing personality; group pressures to conform; inside lawyer fear of CEO retribution; problems of having only one client; and lawyer concern about their compensation (either withdrawal of unvested benefits or lack of future increases). In many recent scandals—from accounting fraud to improper options backdating to global bribery to the credit crisis—general counsel and inside lawyers, in their eagerness to be partners, have failed as guardians. They did not act with independence and courage; they failed to ask broad, probing questions about dubious actions; they failed to say “slow down” or “stop.”

I do not believe that the choice for general counsel (and inside lawyers generally) is to go native as a “yes person” for business leaders, and be legally and ethically compromised, or to be a conservative, inveterate “naysayer,” ultimately excluded from core corporate decisions and activity. The obstacles to the partner-guardian fusion can be overcome by many factors: the character, reputation and independence of the general counsel; an alliance with other top staff officers (finance, HR, compliance and risk) who should share the performance with integrity objectives and who face the same partner-guardian tensions; and a close relationship with the board of directors, which should ask for private meetings with the GC and should oversee the GC’s compensation and job status. Ultimately, however, the capacity to serve as partner to business leaders and guardian of the corporation turns on the CEO. The CEO, like the board of directors, must have the vision of high performance with high integrity and sound risk management and must affirmatively want a general counsel to be a lawyer-statesperson and partner-guardian, never afraid to speak out on what is “right” for the corporation.

I am optimistic that these board and CEO attitudes can—and will—exist. This is so not because of some nice theory, but because of hard necessity. The inside counsel revolution occurred in part as a

reaction to the excesses and acquisitiveness of outside law firms. But the key driver was the dramatic increase in global commercial complexity and in related "business in society" issues that sophisticated inside lawyers can handle with speed and skill. Astute CEOs and boards know that successful performance depends importantly on navigating effectively and fairly myriad laws, regulations and geopolitical risk—and addressing myriad, critical NGO, media and public voices—which limit business. They know that legal function itself can create significant value: in, e.g., taxes, trade, environment, IP, M&A, commercial law and public policy. They know that highly talented, broadly experienced, analytically rigorous and consistently innovative general counsel—and an outstanding law departments—are needed to deal in a systematic and rigorous way with the core issues of business strategy, culture, compliance, ethics, risk, governance and citizenship.

Because these necessities, and the external pressures on corporations, are only going to increase, I believe that the inside counsel revolution—and support for the concomitant roles of lawyer-statesperson and partner-guardian—will continue to gain board and CEO adherents in global companies, both in in the U.S. and in the rest of the world.

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Harvard
Business
Review

RISK MANAGEMENT

The Rise of the General Counsel

by Ben W. Heineman, Jr.

SEPTEMBER 27, 2012

In a special *New York Times* section on business and law, Andrew Ross Sorkin opines: "As regulations change and the threat of litigation rises, the importance of lawyers has never been greater." He, and writers in the rest of the section, then go on to talk about the downward pressures on private law firms to sustain profits per partner and the burgeoning crisis in private practice, symbolized by the collapse of Dewey & LeBoeuf and the exodus of young associates.

But from a business person's point of view, Sorkin and other writers in the section don't even discuss one of the most important developments of the last 25 years: the rise in the role, status and importance of the general counsel and other inside lawyers employed directly by the corporation. The following two critical trends for major companies in the U.S. — and increasingly in Europe and Asia — are not mentioned:

1. The general counsel, not the senior partner in the law firm, is now often the go-to counselor for the CEO and the board on law, ethics, public policy, corporate citizenship, and country and geopolitical risk. The general counsel is now a core member of the top management team and offers advice not just on law and related matters but helps shape discussion and debate about business issues. Because "business in society" issues pose so much risk (and in some cases opportunity), the general counsel is viewed in many companies having the same stature as the Chief Financial Officer. Company legal departments are staffed not just by broad generalists but by outstanding specialists in all the areas covered by private firms, including litigation, tax, trade, mergers & acquisitions, labor and employment, intellectual property, environmental law.

From the company point of view, building up a first-class inside team has two striking benefits. Having experienced, expert inside lawyers inside is the best way of controlling outside legal costs. Morever, having broad-gauged, high-integrity, business-savvy lawyers around the coffee pot and around the conference table increases speed and productivity. These lawyers operate seamlessly in business teams, gaining credibility by helping more swiftly to achieve performance goals and by assisting business leaders promote high integrity down the line inside the corporation. The productivity of outstanding inside lawyers — their ability to lead, handle and join teams on many issues — can result in a smaller total legal spend (inside plus outside) for the company.

It is thus no surprise that the quality of general counsel has risen dramatically over the past two decades. In great global companies, the position is now occupied by former Attorney Generals and Deputy Attorney Generals of the United States, by former White House counsel, by former federal district and appellate court judges, by the heads of enforcement at critical regulatory agencies, by senior partners in law firms who would prefer to practice inside great corporations. And these general counsel in turn have recruited outstanding lawyers from private practice and government to head business divisions or be super-specialists for the company. Similar upgrading in inside talent is also occurring in large and medium-size companies.

2. There has thus been a related, dramatic shift in power from outside private firms to inside law departments. Inside lawyers have broken up monopolies that particular private firms had previously enjoyed with particular corporations. They have forced private firms to compete for business and, through a variety of techniques, from budgeting to negotiated fees (instead of the hourly rate), have been driving corporate costs down and forcing private firms to cut their own costs if they want to keep their margins (their profit per partner).

Inside lawyers — who have skills equal to their peers in outside firms — now manage major matters facing the corporation which are staffed by mixed inside/outside teams. Corporate law departments have tried to break up private firms' absurd billing for paralegals or routine work by outsourcing, either in the United States or overseas (in nations like India).

Inside lawyers, in short, have forged new leadership and cooperation with firms on *matters* and fostered new competition and control on *money*. The most important current trend in the relationship is that both corporations and law firms are trying to develop new strategic alliances. In

these, financial incentives are aligned (i.e., where the law firm definition of productivity as more input — lawyers — for less output is replaced by the business definition of productivity as more output with less input). Inside teams emphasize value, quality and productivity, beyond controlling (or abolishing) sheer billable hours.

Obviously, private law firms have terrific lawyers who provide great service to business. And obviously the two trends described above are not uniform or universal. But there is a crisis in private firms, at the same time that there has been increasing growth, prestige and pay for general counsel and other inside lawyers. (For a more extended treatment of the views, go here.) No report on the the "uncertain times" facing "big law" should ignore the rise of inside counsel. Boards, CEOs and other business leaders have increasingly recognized that hiring outstanding general counsel and other inside lawyers is vital to the twin goals of the global corporation: high performance with high integrity.

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What CEOs Want in a GC

Five stages in the evolution of the position to the key role it is today

By Lloyd M. Johnson Jr. / Chief Legal Executive LLC

For many years, CEOs looking to hire general counsel have looked beyond legal skills to find good, solid, strategic business counsel. That's no longer enough.

The ability of the chief legal officer to manage the legal department and to stay one step ahead of both the C-suite and the board are the baseline requirements. But there are new factors to be dealt with. Institutional investors are increasingly impatient. CEOs and board members have more sophisticated expectations of the general counsel. And many sitting CEOs and general counsel are on the verge of retirement.

As a result, while CEOs looking for new general counsel are looking for top attorneys whose skills have been forged in a solid, forward-looking understanding of business and industry, they no longer expect that attorney to simply help guide the company along the right road. That attorney, instead, is expected to be the company's mapmaker.

Given this development, it occurred to me that it would be useful – for general counsel, future general counsel and the CEOs to whom they report – to see just how we got here and where we're likely to go in the years to come.

For help with that, I touched base with four executive search professionals who specialize in placing top legal officers: Cynthia Dow at Russell Reynolds, Julie Preng at Korn Ferry, Victoria Reese at Heidrick & Struggles and Paul Williams at Major, Lindsey & Africa. Williams, who was general counsel at Cardinal Health, a Fortune 500 healthcare services company, from 1995 to 2005, offered a unique from-the-trenches perspective.

The Captive Law Firm

Back some 40 years ago, the legal department wasn't usually the first choice for the most ambitious attorneys, for whom law firm partnership was the brass ring. Though it offered less stress and fewer hours, the legal department seemed short on challenges, glamour, glory and competitive compensation.

That started to change in the mid-1980s. "All of a sudden, I was getting calls to go in-house," remembers Preng, who was then an associate at a New York–based law firm. "A friend got a call to be a corporate secretary. We didn't even know what that meant."

What happened, Preng says, is that people running legal departments "started hiring outstanding lawyers. They started to say, 'We're going to create a captive law firm and become better than outside counsel for less money. We'll start thinking about the business, and people will want to come to us.'"

GC as Gatekeeper

The late '90s, says Williams, was "a heady period, an exhilarating time of tremendous growth, with lots of M&A activity going on and many companies really soaring." And given the general counsel's elevated prestige, it was also a heady time for the legal department. General counsel, Williams says, had "worked long and hard to be taken seriously as business people. They had moved out of the legal box, were invited to the table with the top executives and were seen as respected business advisors."

But then came what Williams calls the "age of the scandals." Tyco, HealthSouth and Enron were "all earthquakes for GCs." Suddenly, he says, the general counsel's naive presumption that "if you got to be a CEO or CFO, you were not a crook and would abide by the rules" was shaken to its core. In addition, adds Preng, there was a realization throughout the C-suite that "everything I've done is at risk, and I'm not going to hang myself out to dry." And that, she says, "gave rise to the concept of someone who would be the holistic risk manager for the CEO and the board."

That someone, of course, was the GC, and with the backdrop of Sarbanes-Oxley, general counsel found themselves pushed right back into the policing, gatekeeper role. "If you didn't do that," says Williams, who speaks eloquently about the "blood, sweat and tears of getting through that period," then "things could blow up."

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CEOs need top attorneys with skills forged in a solid, forward-looking understanding of business.

GC as Business Partner

But by 2005, Preng notes, "the paradigm of the successful GC profile had started coming back – and this time a number of additional components were added to it, in particular risk management and leadership." The difference was that risk management was so much more broadly defined, with the GC managing risk for the whole organization and enjoying a newfound credibility throughout the business. The top in-house counsel now "had to think holistically and broadly about what the regulatory and legal environments mandated, but he or she also needed to think about what the client was trying to achieve, the desired results – and the best solution."

GC as Strategic Advisor

As the century progressed, the acceleration of business, the growth of technology, the spread of globalization and the increase in regulation made it imperative, says Dow, that general counsel had a well-developed business acumen, a curiosity about the business, an understanding of market dynamics and the ability to make quick, informed decisions. This required, Preng adds, the ability to "bend around corners to see what's coming, to think ahead about managing risk, to understand what the tolerable risk level will be, to be comfortable making a decision *and* creating a solution, and to step out to be a leader, helping people through problem-solving."

Summed up, Dow notes, this meant that the general counsel needed "to provide dynamic leadership, cut through bureaucracy, distill enormous amounts of information and communicate in a business-friendly manner."

The general counsel, Reese points out, "needs a great backbone, a great moral compass and great influencing skills." Moreover, adds Williams, the general counsel must have "phenomenal interpersonal skills," since "in the course of the day, the GC will be playing countless different roles, from being deferential with the board to going toe to toe as a one-on-one counsel with the CEO to inspiring a large legal department."

And then there's chemistry. How well the CEO and the GC will get along will vary, and this, says Williams, "is such a critical element in the effectiveness of the general counsel."

The Activist Investor

All of this has been intensified in the last two years as companies have found themselves the targets of impatient institutional investors, eager to show the CEO the door, with the general counsel following close behind. It's now critical, says Preng, "that the general counsel be prepared to understand how to balance successfully what the investors are looking for and what the company wants to provide," steering the ship along the route that the general counsel, as mapmaker, has devised.

Given all of the above, how important is it that someone looking for a GC position has previous GC experience? All of the recruiters I spoke with say the same thing: It depends. Many companies looking for general counsel tell their recruiters that they're looking for what Dow calls "enterprise perspective and breath of experience," which means, she says, that "they're looking for the closest possible fit to the current role, essentially plug and play."

But Williams and others say they prefer to present a combination of backgrounds, "someone with GC experience as well as some who have been poised below the GC level and need the opportunity to move up to the GC chair." With a whole generation of GCs on the verge of retirement, he notes, "we have to replenish the pool."

The Self-Awareness Test

Still, these recruiters caution, not everyone is ready to jump into that pool. For those not yet ready, Preng suggests finding ways to close the gap by getting exposure to a broader range of responsibilities. Even with that, Williams says, some people are just not meant to be general counsel, and he adds, "that's not a bad thing." What's critical is self-awareness, an ability to look at oneself – and the GC role – dispassionately. "I often ask people who say they want to be a GC but haven't yet been a GC why they want to take this position. About 30 percent of the time the person looks at me quizzically because it's their assumption that everyone should want to be a GC. I'm often amazed at how often people haven't thought it through and how often there is misalignment."

And as we've seen, alignment – of skills, personality, work style and more – is critical to the success of any GC. There's a reason, Williams notes, that the compensation has climbed the way it has. The job, as now defined, demands it.

Next month we'll begin a three-month deep dive into the legal departments of three companies that have successfully transformed themselves to fit the new paradigm and the GCs who make a major difference, as mapmakers, throughout their corporations. And we'll see the impact the changed role of the general counsel has had on that transformation.


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More than legal expertise.

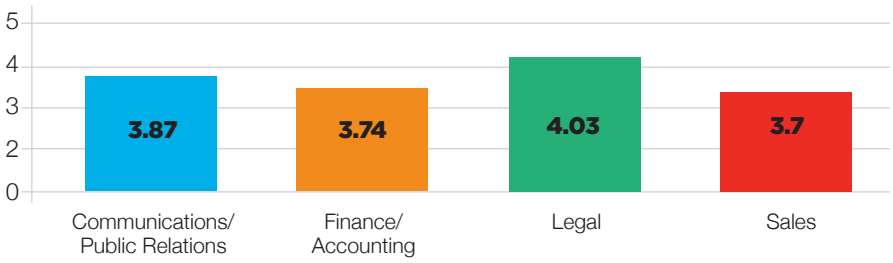
General counsel today bring more to the table than just their legal expertise. Acting increasingly as legal and business advisors to the CEO and senior leadership team, general counsel draw upon broader business knowledge and a wider skill set. Having the legal pedigree—deep knowledge of the law and regulations, negotiating skills, and specializations such as securities law—is a given. Differentiation comes from being, in the words of one general counsel, "more than just a lawyer."

"To be effective means being someone who is not only a good attorney, but also someone who has an appropriate influence on the overall activities of the business—someone whose advice is sought out and heeded," said Brian Woram, executive vice president and general counsel, KB Home.

As professionals, attorneys are trained and valued for their technical skills and expertise. Assessments of legal executives illustrate their strengths in influencing and negotiation (Figure 1), which is to be expected. Some legal executives try to advance their careers by increasing these strengths and developing greater breadth and depth of legal knowledge.

Figure 1

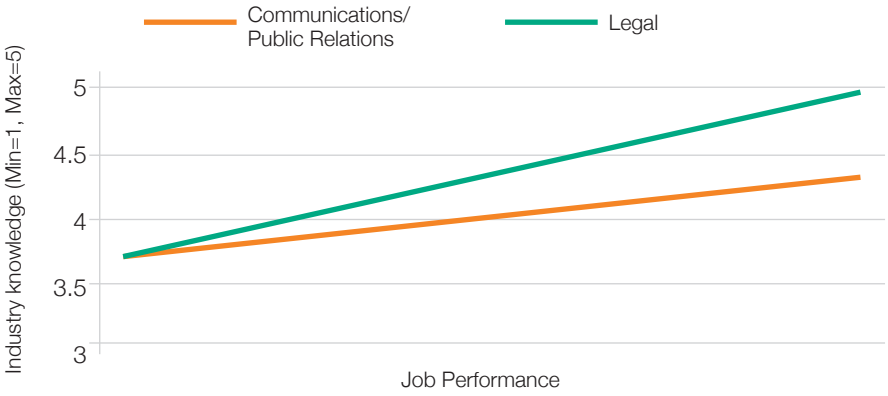
Average competency scores in influencing and negotiating for legal executives compared to scores for other corporate functions. *(Landis 2014)*



To truly distinguish themselves, however, legal executives must develop other attributes, such as greater knowledge of the business, as illustrated in Figure 2. The more attorneys know or learn about an industry, the better they perform as legal and business advisors; they then can advise a company in the context of the business issue and are not merely dispensing pure legal advice.

Figure 2

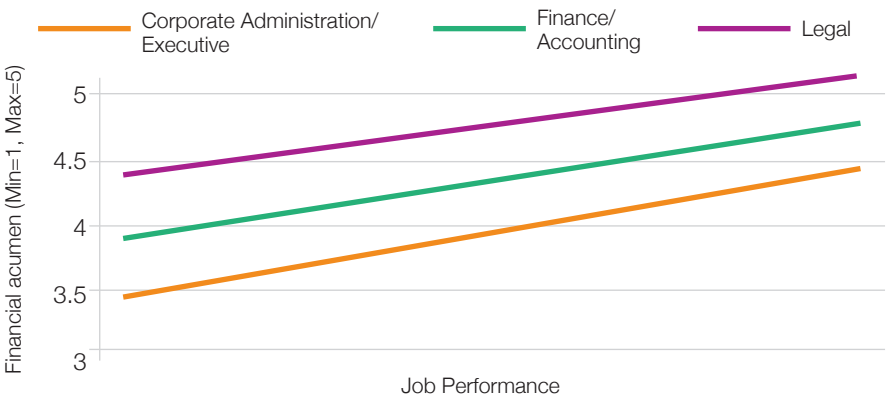
Greater industry knowledge accelerates job performance for legal executives—in this example, even more so than for their colleagues in communications/public relations. *(Landis 2014)*



Further, as Figure 3 illustrates, lawyers' overall job performance improves with increased financial acumen, following a track similar to that of corporate administration/executives. High-performing general counsel develop reputations as business-savvy advisors on a range issues and strategies, and often simultaneously hold non-legal positions in their companies. The best-in-class general counsel is a fully functioning member of the senior leadership team who "just happens to be an attorney."

Figure 3

Increased financial acumen accelerates job performance for legal executives. *(Landis 2014)*



Given the benefit of greater business and industry knowledge and financial acumen for legal executives, when recruiting general counsel CEOs and boards should look for candidates who possess these traits. For those who aspire to become general counsel, intentionally seeking out development assignments to build their business and financial knowledge and skills will be essential and also may open doors to general management positions.

Standing out from the legal crowd.

While organizations frequently retain outside law firms, general counsel play a special role: they are the go-to advisors for CEOs and boards on laws and regulations as well as public policy, ethics, and risk. With broader knowledge and skills, general counsel participate in leadership discussions of complex problems and creative solutions.

Often, a best-in-class general counsel contributes as much around strategy and driving the business as do other senior leaders, such as the chief financial officer (CFO) or chief marketing officer (CMO). As *Harvard Business Review* observed, "The general counsel is now a core member of the top management team and offers advice not just on law and related matters but helps shape discussion and debate around business issues." (Heineman 2012)

Among in-house legal talent, lawyers who stand out can read balance sheets, understand profit and loss statements, possess at least a working knowledge of finance, and have good relationships with the finance team. They also possess team building and leadership skills, and collaborate well with leaders of other functions such as finance, human resources, information technology, research and development, marketing, and sales.

"A good general counsel has to be a strong leader who can attract the right talent and not be afraid to make tough decisions," said Keith Nelsen, executive vice president, general counsel, and corporate secretary of Best Buy. General counsel also must possess "the gravitas and knowledge required for credibility with the board and senior management," he added.

5 Thinking broadly about the business and shareholder value.

General counsel never take off their legal hats. Their thinking, however, should be broader than purely legal matters to consider the longer-term impactions of a transaction, litigation, or other corporate matter. In fact, there are times when general counsel think more about the impact on the business over time than a short-term legal strategy. For example, when the senior leadership team makes a decision, general counsel can help project and analyze the likely outcomes, including the long-term impact on business strategy and shareholder value. "If you are thinking about things from that perspective all day long, you aren't going to make decisions based on the short-term, quarterly impact. It's much longer-term, broad-based thinking," said Martha Wyrsch, executive vice president and general counsel of Sempra Energy.

If they display broader thinking, general counsel can dispel the perception that having a law degree means they are only interested in legal issues. Instead, legal talent is recognized for being business minded. Lawyers also must take it upon themselves to dispel stereotypes that they are risk averse and excessively detail oriented. Giving explanations in "plain English" and business terms instead of in "legalese" can help tremendously.

In-house lawyers must be intentional about their own career development. Although organizations have brought more legal work in-house, much of it tends to be transactional in nature and potentially overwhelming in volume. As a result, in-house lawyers may end up going deep into a particular issue without the broader context of the overall enterprise. To develop business perspective, lawyers must seek out opportunities to learn more about the enterprise and the industry. For example, serving on the internal legal team working on mergers and acquisitions establishes the bridge between law and business. To develop the lawyers who report to them, general counsel (especially those who held operations roles earlier in their own careers) may move legal staff into general management assignments to broaden their knowledge. As Wyrsch commented, "We have moved someone into the finance department, two people into operations, and someone into the lead environmental role for one of our utilities."

Besides seizing on these developmental assignments, in-house legal talent must be proactive in finding opportunities and not shy away from tough, complex projects. These experiences also can help build emotional intelligence and judgment, which are crucial to becoming a better leader. “You need the skills and intelligence that people expect from an attorney, as well as the personality and emotional maturity to engage everyone from the field to the board of directors, as well as the ability to tolerate politics and difficult personalities,” Woram said.

The learning-agile general counsel.

To expand their business knowledge, gain financial acumen, and develop leadership skills, legal executives who aspire to be general counsel must learn from a variety of experiences. This requires learning agility, which Korn Ferry defines as the willingness and ability to learn from experience and subsequently apply that learning to perform successfully under new or first-time conditions. People who are learning agile are more willing to seek out challenges and take risks. Learning agility amplifies the ability to be successful in difficult, ambiguous, and first-time situations—a highly desirable trait for all leaders, including legal executives.

Legal talent that aspires to general counsel positions must develop and demonstrate learning agility by seeking out new challenges that allow them to see the bigger picture. Joining cross-functional teams, even for one project or as part of an in-house task force, exposes legal talent to other parts of the business. It is less about dispensing the "right" answers on demand and more about being recognized for collaboration and broad-based thinking.

As Korn Ferry research shows, prior experiences and the lessons gained from them are instrumental to readiness for new challenges and roles. Thus, experiences are considered one of four dimensions of leadership, along with traits (personality characteristics that exert a strong influence on behavior), competencies (leadership skills that matter most for success), and drivers (the preferences, values, and motivations that influence a person's career). (Crandall, Hazucha, and Orr 2014)

For learning-agile general counsel, all four dimensions enhance their contribution to the organization as part of the senior team.

"Don't ever feel like you're confined by your title. You can add value in different ways," Nelsen of Best Buy advised. "Attorneys have advanced degrees, a high level of intelligence, and are capable of doing a lot more than just drafting contracts."

Mentors inside and outside the legal department also can foster learning in areas such risk taking and relationship building across the business. "The CEO who hired me introduced me to several dozen people when I first started. That gave me an immersion into the business quickly. You also need to be good at building relationships," Nelsen said. "As a general counsel who has been in different industries, I can tell you that the chassis changes, but the other parts remain the same."

In summary, qualifications for general counsel extend beyond legal expertise to broader business and industry knowledge and financial acumen. As CEOs and boards address general counsel succession and development of in-house legal talent, legal expertise, business perspective, and financial acumen are a highly valued combination.

References

Crandell, Stu, J. Hazucha, and Evelyn J. Orr. 2014. "Precision Talent Intelligence: The Definitive Four Dimensions of Leadership and Talent." Korn Ferry Institute.

Heineman, B. Sept. 27, 2012. "The Rise of the General Counsel." *Harvard Business Review* online.

Landis, D. November, 2014. Presentation at the Annenberg Forum 2014. Los Angeles, CA.

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KORN FERRY

General counsel's heightened influence in the boardroom

Current and former general counsel, outside counsel and other governance experts weigh in on how and why the GC-board dynamic has changed

BY MELISSA MALESKE
APRIL 30, 2012

Over the past 15 years, the legal concerns and regulatory requirements of public company boards of directors have drawn general counsel into the highest echelons of senior management and made them key advisers to, and educators of, the board.

These heightened duties have changed what it means to be the general counsel of a public company (and of the private companies that emulate their board governance standards).

Many of the issues general counsel must manage today have become as important to a company's success as its financial performance, and today's general counsel have become as important to the board as the CFO, says Ben Heineman, former general counsel of GE and distinguished senior fellow at Harvard Law School's Program on the Legal Profession.

"General counsel are responsible at the senior levels of not only asking the first question— is it legal?—but also the last question: Is it right?," he says. "That means the skills that are required of them go far beyond being a technical lawyer. They have to be wise counselors and leaders. They can't just hide in their offices and wait for someone to ask them a legal question, and then look in their Rolodex and call somebody."

Instead, general counsel are now in the center of the action of the company because most of a company's decisions now involve the kinds of issues that involve the essential skills of general counsel. At the same time, the quality of general counsel in the Fortune 100 and beyond has changed dramatically, Heineman says.

"If you look at the top of the profession now, you see White House counsel, judges from federal appeals courts, former attorneys general and senior partners in law firms," he says. "The very best in the profession are becoming general counsel now. The chief lawyer is often [reported in proxy statements] among the top five highly compensated people in a company—that's a reflection of the relative importance inside the company of that position."

The importance of the issues GCs must manage today means their role has grown far beyond that of a legal clerk farming out work to outside firms.

"It's just phenomenal the amount of legal exposure faced by directors and management today," says Carrie Hightman, CLO for NiSource Inc. "It's a different environment than it was 10 to 20 years ago. Because of that change, it's more important than ever that the general counsel is knowledgeable and involved in what's going on in the business."

General counsel's heightened influence in the boardroom

Current and former general counsel, outside counsel and other governance experts weigh in on how and why the GC-board dynamic has changed

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349

Rising Regulations

A number of forces have come together to bring about the sea change. First, at the turn of the century came the Enron era of accounting scandals, which drew attention to the importance of properly run, independent boards. The Sarbanes-Oxley Act of 2002 (SOX) and similar New York Stock Exchange (NYSE) rules followed.

SOX heightened disclosure requirements that would continue under the Dodd-Frank Wall Street Reform and Consumer Protection Act and significantly increased the role of the audit committee. It also imposed new rules on audit committee independence and governance, creating a new host of regulatory requirements for boards on which general counsel had to advise them.

At the same time, it mandated that corporate lawyers who became aware of a potential violation of the law had to take the matter to the board, making clear that the general counsel represents the overall entity, not management. That made the general counsel the “person on point,” says Bill Ide, former general counsel of Monsanto Co. and a partner at McKenna Long & Aldridge.

“It ups the ante of what lawyers have to do. If something happens, there’s a spotlight on the lawyers,” says Ide, pointing to Ann Baskins, who resigned as general counsel of Hewlett- Packard Co. after criticism of her role in the company’s spying scandal of 2006. “The buck stops with the general counsel, so that’s a lot of responsibility.”

Just as public companies were becoming comfortable with SOX, along came the 2008 financial crisis and the 2010 enactment of Dodd-Frank.

Dodd-Frank built upon SOX's corporate governance reforms. In addition to its numerous industryspecific regulations, Dodd-Frank placed new requirements on compensation committees, fine-tuned the role of governance committees and provided a whistleblower program that allowed employees who spot wrongdoing to report directly to the government—on all of which the general counsel must now advise the board.

This series of major regulatory developments has made government relations both increasingly important and complicated, to the extent that now the general counsel tends to handle such issues more, says Susan Webster, who leads Cravath, Swaine & Moore's General Corporate practice. In the past, a corporation's Washington, D.C., office might have taken the lead in government relations, but that is changing.

"As a result of the significant number of new regulations and increased regulatory scrutiny, what we're seeing now is that in a number of companies, government relations is becoming the responsibility of the general counsel," Webster says. "The general counsel is the person who is talking about these issues at the board level."

General counsel's heightened influence in the boardroom

Current and former general counsel, outside counsel and other governance experts weigh in on how and why the GC-board dynamic has changed

BY MELISSA MALESKE
APRIL 30, 2012

349

Changing Tides

Beyond regulatory scrutiny, general counsel must guide boards through the added pressure of increasing shareholder activism and the rise of the Institutional Shareholder Services (ISS), which has aided and emboldened shareholders.

“Ten to 15 years ago, it wasn’t uncommon for a shareholder proposal to get, at best, a couple percentage points of the vote at a meeting,” says Patrick Quick, a partner at Foley & Lardner. “These days, through a combination of a better choice of proposals and an increase in the respect and stature of these activists, it’s more and more common for these shareholder proposals to pass. In that sense, the tide is turning.”

Because the general counsel tends to be the chief minder of governance practices and is involved with the governance committee, and many shareholder proposals are governance-related, Quick says the general counsel typically helps the governance committee understand the proposal, interfacing with the proponents of the proposal and potentially negotiating with the proponent for withdrawal of or changes to the proposal.

General counsel often sit in on direct communications between shareholders and board directors to stay in compliance with Regulation Fair Disclosure (FD), the 2000 Securities and Exchange Commission (SEC) rule that prohibited directors from disclosing material nonpublic information to one shareholder (say, a major institutional shareholder) and not to another.

“There’s a lot of protocol around [those communications], and the general counsel is extremely important in sorting out these matters,” says Alexandra

Lajoux, chief knowledge officer of the National Association of Corporate Directors.

Another area of concern to the board is the significant increase in recent years in the SEC's enforcement of the Foreign Corrupt Practices Act (FCPA) and similar statutes, particularly the U.K.'s Bribery Act.

"Companies are very focused on trying to put programs in place that will mitigate the FCPA risk. This is something the general counsel takes on that holds a great deal of importance to board members," Webster says. "It's all about managing risk and, in particular, the reputational risk."

As boards and general counsel deal with this confluence of issues, they do so in the harsh glare of the public eye thanks to the 24-hour news cycle and the Internet.

"Today the public is much more directly involved in the scrutiny of everything a company does, and that just wasn't true 15 years ago," Ide says. "Companies were much more insular. A general counsel's work was about litigation and contracts, and not as much about shareholders asking about executive pay, regulators asking whether you have a compliance program in place and the FCPA abroad."

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349

Risk Report

Because the general counsel's role has evolved to become a true part of the senior business team, it is on this basis that the GC works with the board. A good example is the general counsel's role in the focus of senior management and the board on enterprise risk management. It's a focus that grew out of the financial crisis, both as a business imperative but also because of 2009 SEC proxy disclosure enhancements that require companies to disclose how their boards oversee risk.

"Enterprise risk management became a very natural place for the general counsel to step up … and one of the biggest issues for general counsel working with their boards today," Webster says.

They're working with senior management to identify, evaluate and communicate risks to the board, creating a process that helps the board set its risk tolerance levels, and then monitoring them going forward.

Webster says, "One of the things I've heard from GCs is that part of their role is helping to facilitate a consensus on the limits of the risk the business is going to take: What are the risks we are going to take, how are we going to measure them, and how are we going to measure our success in connection with those risks?"

Bob Scott, general counsel of TE Connectivity Ltd., attends every meeting of his board, where time is allotted on every agenda for Scott to update board members on what he sees as the key risks the company is facing.

"Really the most important thing a board can do is to have an understanding and oversight of risk," he says.

To prepare this report, Scott looks to new legislation, new regulations or legal updates occurring around the world to gauge what risks the company is facing and what the board should know about, and he does so independently, rarely giving TE's CEO or chairman a preview. He often picks three issues to raise at each meeting, along with updates on his previous reports. Scott has found that many other general counsel lack such a regular pattern of discussing risk with their board, but it's a practice he recommends.

"By being very open and transparent with the board about how we view these risks and how we're impacted by them, they don't get surprised or overexcited by issues, because they know they're going to regularly hear about them," Scott says. "There's a lot of trust that you're going to tell them about these issues. Without surprises, they can act in a calm manner with us as we try to explain how we can mitigate these risks."

Heineman says it's important to keep such an open dialogue on risk and priorities instead of the general counsel making one recommendation. He advises being very clear about the tradeoffs and issues at stake in any particular decision.

"General counsel should be as honest as they can be about the uncertainties and how the decision can go wrong just as the decision can go right," he says. "They should be as honest as they can be about that so they can generate a good discussion with the board on the real issues in any particular decision the board's making so the board understands it reasonably well. What general counsel owe to the board is honesty, candor and fairness in the way that they present the issues."

General counsel's heightened influence in the boardroom

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349

Constant Presence

Scott is not the only general counsel becoming a regular presence in the boardroom.

"General counsel are in the room much more frequently for committee and board meetings, whereas in the past, they may not have been in as many discussions," Webster says. "Their involvement is broader, and the dynamic has changed: It's a constant dynamic process, and there's less reporting on the latest isolated law."

The general counsel also maintains heightened contact with the board outside the boardroom.

Before SOX kicked off the changes that would enhance the GC's role in the boardroom, the general counsel wouldn't have thought of developing a relationship with a particular board member without the CEO as a conduit, says Stasia Kelly. A partner at DLA Piper, Kelly has served as general counsel at AIG, MCI/Worldcom and Sears, Roebuck and Co. In fact, Kelly says that back then, the CEO controlled contact between the board and any member of senior management.

Things have changed. Director relationships have always been vital in the group dynamics of a board, and now the same relationships form between the general counsel and members of the board and its committees, certainly with the chairman/ presiding director and the head of the audit committee.

Today, "the best general counsel are the ones that have those great relationships with each board member," says Maureen Errity, director of Deloitte's Center of Corporate Governance. "They know their board well, and they're constantly interacting with board members."

Over the past 15 years, a healthy new dynamic has developed and taken hold. Both CEOs and general counsel have come to recognize that a direct line of communication between the GC and the board is a good thing; at the same time, the board has come to want the opportunity to communicate directly with the GC outside the boardroom setting.

Because the GC's role is to inform the board, open communication is critical.

"I sit on two public boards, and if I thought my access to the general counsel was being controlled or discouraged by the CEO, that would raise serious flags for me in a way it would not have 15 years ago," Kelly says. "Those direct lines of communication not only give the directors more insight into issues the company faces, but also give the general counsel the ability to discuss issues with directors in a way that is very helpful and productive. … There's better transparency, better communication and better information—I don't see a downside."

HARVARD LAW Today

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Theme: **Alumni Focus**

In the Driver's Seat: The changing role of the general counsel

By ELAINE MCARDLE, July 1, 2012

At the airport in New York one day last year, Alex Dimitrief '85 was on a call regarding a problem that his company, General Electric, faced in China. When his plane landed in London, he took a call on a different matter in Vietnam. And late that night, when he arrived in Lagos, he fielded yet another call, dealing with an issue back in the U.S.

"It was an incredibly complicated day," recalls Dimitrief, who in November was appointed vice president and general counsel of GE Energy, where he oversees the legal and compliance function for the company's portfolio of energy and power interests. Three conference calls made from three continents, addressing serious issues unfolding around the world. He pauses, and adds, "That's just exciting."

It's a day that illustrates the emerging role of today's global general counsel, who may deal with issues ranging from corrupt regimes and rule of law matters in developing nations to concerns about corporate reputation, sweatshop labor among suppliers, piracy, and safety threats to executives and other employees. At the same time, GC have assumed the critical role of ethical watchdog, tasked with ensuring corporate compliance with U.S. law, not to mention understanding the political and cultural landscape of each jurisdiction in which the company operates. And all of this unfolds on a 24/7 timetable in time zones across the globe.

Building on a major shift that took place over the past three decades, GC no longer are limited to a reactive role overseeing litigation farmed out to law firms but instead are key members of the corporate decision-making team. Many find the job unmatched within the legal profession, in both demands and rewards.

"I am more excited about what I'm doing right now than I've ever been at any stage in my career," says Dimitrief, who, after serving as a White House Fellow under President Reagan and as a partner at Kirkland & Ellis, joined GE in 2007 as vice president for litigation and legal policy. "No two days are ever the same."

Benjamin W. Heineman Jr., Distinguished Senior Fellow at the HLS Program on the Legal Profession, is widely credited with revolutionizing the role of general counsel in major corporations 25 years ago. While general counsel at GE, Heineman devised a model of hiring the best and brightest for inside legal departments and bringing work inside rather than farming it to outside firms, reducing legal costs and shifting the power relationship.

1

Benjamin W. Heineman Jr., former head of GE's legal department, is widely credited with transforming the role of the general counsel in major corporations.

"Twenty-five years ago, if you asked an inside lawyer a question, they'd say, 'Give me two days,' and they'd call someone outside," explains Heineman. But by hiring superstars from firms and major government positions, "All of a sudden, the businesspeople were saying, 'Wow, these people can do a remarkable number of things.'" Corporate counsel were called to participate in strategic meetings and provide wide-

ranging counsel as decisions were made, rather than to clean up messes after they occurred. And some, such as Kenneth Frazier '78 at Merck & Co., have taken the once unheard-of leap from GC to CEO.

"They are leaders, not just Bartleby the Scrivener," notes Heineman, who has written a number of articles on the modern role of the GC, in which he urges lawyers to serve as statesmen upholding corporate integrity. "As you go up the chain, the skills you need extend far beyond being a technician in the law." Indeed, as he will emphasize in a new course he will co-teach next fall with HLS Professor David Wilkins '80, director of PLP, titled Challenges of the General Counsel, the legal aspects of the job are only the beginning. For a great GC, he says, "The first question is, 'What is legal?' The last question is, 'What is right?'"

Under these parameters, the job offers enormous opportunities for innovation, leadership and decision-making at the highest levels—especially as companies have gone global. "I could deal with any issue I wanted to," explains Heineman. "If you want to worry about intellectual property issues in China, you can do that; if you want to worry about reducing the power of the mob in Russia, you can worry about that."

2

Laura Stein, senior vice president and general counsel, Clorox.

"It's a great job," agrees Laura Stein '87, Clorox's senior vice president and general counsel, who started her career at the company, did a stint at Heinz and then returned to Clorox seven years ago. However, things changed in that span, she notes. "I was an international lawyer from the minute I went in-house, so I was used to doing legal work in many countries in the world for my company," she says. "But … the speed of things you're doing has definitely accelerated." With so many areas of concern in so many different legal landscapes—from intellectual property and labor and employment disputes to counterfeiting issues—the breadth of responsibility is extraordinary, and GC must be equipped to respond immediately. "When you're hoping to manage risk and ensure compliance, the world moves very quickly these days," Stein adds.

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With heightened attention from shareholders, the public, and U.S. and foreign regulators and a continuous news cycle from around the world, companies face unprecedented scrutiny of all they do. Failure to comply with laws such as Sarbanes-Oxley and Dodd-Frank as well as the Foreign Corrupt Practices Act—which makes it a crime for American companies and their subsidiaries to bribe foreign authorities—can lead to severe consequences, including fines and criminal penalties for board members and officers.

The New York Times article in April alleging a widespread bribery scheme by Wal-Mart in Mexico and a subsequent cover-up may end up being the latest cautionary tale, according to Heineman.

"Both the general counsel of Wal-Mart Mexico," he says, "who is alleged to have orchestrated the bribery scheme and then ended the investigation with a superficial report, and the general counsel of the company—who allegedly gave no support to other headquarters lawyers who wanted a full, independent investigation—apparently acted as ethically and legally compromised partners of business leaders and not as guardians of Wal-Mart's integrity. The company could pay a heavy price for those alleged failures."

3

Alex Dimitrief, vice president and general counsel, GE Energy

According to Dimitrief, in the wake of the financial crisis, regulatory officials are understandably more aggressive in 2012 than they have ever been. "Hand in hand with that scrutiny are the higher expectations all our stakeholders have—employees, shareholders, customers, partners, people who live in the communities where we operate, government officials, thought leaders," he says. "They all rightfully expect a company like GE to conduct itself with high integrity."

Risk management is a prime requirement of board oversight, says Stephen F. Gates '72, former senior vice president and general counsel of ConocoPhillips, who serves as special

counsel at Mayer Brown, "and GC are now key advisers to the board regarding the total compliance program."

In addition to building a first-rate team of lawyers, today's GC require a certain skill set; according to Gates, this includes having a "great relationship" with the CEO and CFO, and being a respected adviser to the board of directors, so they will rely on the GC's guidance to pre-empt problems as decisions are being made. They must also be fast on their feet, "to learn the nuances of new situations as they encounter them," he says. And it's essential to be able to marshal appropriate resources within a critical time period of 24 to 48 hours of a new problem arising, he adds.

4

Stephen Gates, former senior vice president and general counsel, ConocoPhillips

"Levelheadedness and issues management and problem-solving are the three great characteristics, in addition to the historic characteristic of providing good counsel," says Gates, who published an overview of some of the issues GC face today in "Challenges in Lawyering: Business Operations in Troubled Jurisdictions and Conflict Zones," in the Harvard International Law Journal in 2010. Given the nonstop pace, he adds, "It's best to have a sort of calm—I'd say, unflappability."

"To me, the measure of success is, Do people want to hear what I have to say even when they don't want to hear what I have to say?" Dimitrief says, chuckling. "That's the ultimate test of a good GC."

Dimitrief believes that today's corporate counsel owe a debt of gratitude to those who forged the new model of GC, morphing it into a leadership position that he enjoys so much. In particular, he credits Heineman's vision at GE, which was then copied by corporations around the U.S. and, increasingly, the world (see sidebar). Not only have corporations benefited from this influx of talent, but lawyers are given unprecedented opportunities for leadership.

And that's the reason it's worked so well, Heineman notes. As he built the GE legal team, "I never had someone say 'no' to me when I tried to hire them out of a law firm," he says. "I mean never. Everyone is excited about coming."

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Links

1. http://today.law.harvard.edu/wp-content/uploads/2005/10/heineman_web.jpg
2. http://today.law.harvard.edu/wp-content/uploads/2012/07/HLB-su12-12583.jpg
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Focusing on the Evolving Role of the GC

#GCEast

Rebekah Mintzer, Corporate Counsel

June 5, 2014

On the first day of Corporate Counsel's 26th annual General Counsel Conference, perhaps the most important theme to emerge has been that the role of the GC is in a period of real change when it comes to both the challenges that these general counsel face and their roles vis-à-vis their organizations.

Two panels on Wednesday addressed these issues head-on. The first, titled "Critical Organizational Threats Facing General Counsel," looked at the way general counsel and their legal department colleagues are handling emerging and growing risks from cybersecurity to regulatory challenges. Another, "General Counsel Are Now Business Leaders, First," demonstrated how the GC's responsibilities have changed from being strictly a legal adviser to that of a business collaborator and leader.

Critical Organizational Threats Facing General Counsel

The first panel used the results of Grant Thornton's "2014 Corporate General Counsel Survey" as a jumping-off point to discuss the various threats legal departments face and what GCs can do to handle it all. One of the in-house counsel challenges the survey looked at was regulatory compliance. Only 17 percent of the corporate counsel in the survey disagreed with the statement, "The pace of new regulatory legislation/regulations is more than we can keep up with." Many said they were not in full compliance with U.S. Department of Justice and U.S. Securities and Exchange Commission guidelines because they lacked budgets and staffing within their organizations or because they faced such varying regulatory and compliance models around the world and across jurisdictions.

Kelly Gentenaar, director of forensic investigation and disputes services at Grant Thornton and a panelist, said one of the keys to getting in full compliance is to create a program that deals with specific organizational risks rather than trying to encompass it all. "It becomes very difficult for organizations to figure out what they need to do," she said. "So one of the things we try to really focus on is not taking something that is off the shelf—you have to tailor your compliance program to your organization. One-size-fits-all does not work in this at all."

One specific regulatory issue that ranked as a top concern for in-house counsel in the survey was compliance with data privacy law. Some 61 percent said that this is the riskiest regulatory issue they faced. Greg Starner, a partner in the U.S. Disputes Group at White & Case and a speaker on the organizational threats panel, said there are many factors that general counsel need to keep in mind to maintain the enterprise's data security.

"In terms of civil liability, there's a lot of questions as to what your obligations and duties are," he said. Starner emphasized the importance of looking at industry standards and keeping jurisdictional location in mind when evaluating how to stave off threats and how to respond to an incident if it happens. "Another really big issue is: How do you contract for this type of issue? How do you contract with your vendors? How do you contract with your clients and customers to protect against this type of situation, and then when it does happen, who is liable?" he said.

It seems that despite the growing problem of cyberattacks and data breaches from both inside and outside organizations, general counsel and their partners aren't necessarily doing all they can to defend themselves, perhaps because the pace of growth of technology can be overwhelming.

"Most clients know they need to do more, and then are just not really leaning into it, and its not getting board-level recognition, but the litigation is going to continue to increase in the weeks, months and years ahead," said Kevin Morgan, a principal in business advisory services at Grant Thornton, who also sat on the panel. He added that in his view, the general counsel can really be the "bridge to the board" by raising technology and risk issues, matters with which board members may have little practical familiarity.

General Counsel Are Now Business Leaders, First

Participants in the business leadership panel discussed the idea that, in addition to posing cyberrisks, evolving technologies can provide opportunities for general counsel and law departments as a whole to play bigger roles within the operations of the company. Panelist Scott Rosenberg, a solution group leader in corporate legal services at Project Leadership Associates, said that in the law department and beyond, technology provides the data support "that allows decision-making to happen," adding, "not all GCs quite recognize it, but more and more are coming on board."

The general counsel, he postulated, is in a good position to support technology and process efficiencies that improve the overall business because, as defenders of the their companies, they have good perspective on the company's holistic needs. They also often have the skills and relationships to bring together disparate groups of people around a project. "We see that in particular in the contracts area, where there are so many different people and business units, and other managed resources that deal with contracts—and really, who is the one who can deal with that?" asked Rosenberg. "I think it's often the general counsel."

The panel identified building effective contract management systems as one task that general counsel can take a lead on within their organizations. In doing this, legal will most likely end up having to make a business case for improvements to the contract management process or new technology for contracts.

Panelist Prashant Dubey, president and CEO of the Sumati Group, advised that general counsel looking to pitch improvements in this area "have an ROI framework that's organized with things like cost, risk and cycle time, clearly articulated—and then CFOs will absolutely back you up in this particular domain." Dubey added that through a cost-saving process such as this, legal departments may even become something they rarely are in companies—part of revenue generation.

"If they can map out a process to contract the commercial sales cycle for an organization so the time to revenue is faster, they can actually tie an initiative championed by legal to driving more top-line revenue to an organization," Dubey said, "which is probably the best justification they can have for garnering funding to do something that ultimately will also benefit the legal department."

The general counsel can also step up as a business leader in areas other than contract management. Brett Durand, senior director of legal operations at Pfizer Inc. and another participant in the panel, named just a few: tax planning, entity management, cash repatriation and financial consolidations.

"Look for those areas where there are multiple stakeholders involved and multiple dimensions of a business process or a function but that have a strong legal component," Durand advised. "Because it's likely that nobody's owning it, and it's a great opportunity for the GC to step up and really to provide a lot more guidance than they maybe have traditionally."

GENERAL COUNSEL:

THE GLOBAL CORPORATION'S NEXT AGENT OF CHANGE

In this highly complex and regulated business environment, general counsel are increasingly being asked to act as a trusted advisor, risk-mitigation agent, and counselor-in-chief for the organization's board and executives. Controlling costs, managing the increased risk and complexity of the regulatory environment, and defending business litigation are just some of the things that keep general counsel up at night. As these challenges have become increasingly global in scale, the demands on the general counsel have only grown.

U.S.-based businesses are overwhelmingly focused on international markets to fuel growth, expand operations, roll out new products, and partner with overseas vendors. Today, the average Fortune 500 Company is seeing global legal costs and requirements increase as global revenue also increases. Whether it be understanding the risks of doing business in a certain locale, negotiating contracts that won't expose the company to undue burden, ensuring adherence to varying local regulation, or helping defend the company should litigation arise, corporate legal teams now have the added responsibility for managing these tasks worldwide.

This all amounts to a set of market dynamics which necessitate change within the corporate legal environment. While the concept of globalization is not new, its impact on the legal department has often lagged the impact on front-line business operations. To put it another way, now that so many organizations are running integrated operations delivering on their core business mission, the legal department is finding that it must do likewise to operate as a true business partner.

This globalization of corporate legal operations demands a certain level of flexibility and willingness to alter practices to realize global legal goals. When successful, the general counsel and his or her team operate as global change agents, driving a shift in perspective, processes, and adoption of tools that allow the corporate legal department to operate in a manner that supports the global enterprise. Stacey Coote, AIG's Director of Legal Operations in EMEA and APAC noted, "For AIG, rolling out legal tools and processes on a global scale is a massive change management program."

Whether your specific challenges are focused on controlling global legal spend, increasing collaboration amongst geographically distributed teams, or creating repeatable, predictable workflows, the challenges of globalizing operations will almost certainly be aided by the implementation of a robust change management program.

As power continues to shift away from outside counsel and into the office of the general counsel, general counsel are now well positioned to lead their teams forward to refine their global operations and truly become best-run departments within the organization. But what does it require?

OPERATING AS A CHANGE AGENT

Operating as a change agent for globalization means that the general counsel must move people and processes toward a future state in which global legal operations is viewed as an integrated system, one where the entire global team understands how they should be operating, has visibility into business performance, and is able to efficiently collaborate in order to get work done. That future state is one in which the entirety of global legal spend can be accounted for, understood, and analyzed—and where process can flex across the system as the global legal ecosystem changes. The future state allows the general counsel to position his or her team to best support the already global business and enables the corporation to behave as a consumer of legal services while also providing the in-house legal team with the resources it needs when working with outside counsel. In order to reach these and other globalization goals, the general counsel and legal operations leaders will be required to:

WHAT WE HEARD FROM THE LEGAL INDUSTRY

"For AIG, rolling out legal tools and processes on a global scale is a massive change management program."

- Stacey Coote,
Director of Legal Operations,
EMEA and APAC,
AIG

"Understanding the real requirements of each individual country is very hard but paramount to success."

- Sonya Bland,
Director of Technology Solutions,
Global Legal Department,
HP

At AON, the office of the general counsel embarked on a global business process standardization initiative across the entire legal team in order to gain the full visibility needed to be a best-run legal department.

- AON

THE RISKS OF NOT EMBRACING LEGAL CHANGE ON A GLOBAL SCALE

Lacking the forethought, willingness, or ability to change can have negative consequences. If the general counsel is unwilling and unmotivated to act as an agent of change, the legal department may find itself in a very different state of affairs. What might that look like?

It looks like a reality where new global product launches open the company up to risks that could have been prevented, contract generation activities have unnecessarily long lifecycles, and staffing levels are not in sync with the global workload. This non-ideal state is one where the general counsel is not able to provide the executive team with an accurate picture of legal spending because too much is being handled in a non-standard manner, and the operations team is not able to accurately forecast future legal spend globally. This unfortunate future is one where tools and processes that worked domestically are recycled for the sake of convenience—only for them to fail to be adopted—resulting in a global team that has disparate workflows, operating procedures, and little predictability.

It is risky to assume that just because something works in the U.S., it can be replicated with the same results elsewhere. Jerome Raguin, Founder and Director at LexConnect, a global legal consultancy, noted that "for process or technology implementations that are driven solely out of the U.S., you sometimes find that they are initially accepted to reduce friction." However, over time, these processes often entropy and are replaced by a slew of disparate processes that are perceived to better address localized needs. In EMEA, for example, the legal procurement relationship may not be the same as that found in the U.S., where directives to vendors (both legal and non-legal) are often routed through the general counsel's office. A clear understanding of the process and relationship norms is essential to establishing any process efficiencies. What works in one geography may not work in another.

While not the norm, many legal departments are embracing their role as change agents and transforming the business of law on a global scale. At Mitratech, we have the benefit of working with some of the best-run legal departments in the world; some of these clients are ahead of the globalization curve and others are still exploring how to lead their teams in these efforts. We find that many of them are collaborating together to solve their challenges. Several best practice examples of leading global legal departments acting as change agents are highlighted below.

KEY CHANGE MANAGEMENT INITIATIVE 1: The Challenges of Managing Global Legal Spend

The change associated with rolling out formalized procedures to control legal spend are clearly a challenge for companies looking to globalize their legal operations. Spend management can include budgeting, electronic invoicing, rate negotiation, non-hourly billing arrangements, and tracking spend over time. Clearly there are benefits from having full visibility into legal spend worldwide. This visibility enables the corporate legal team to be more predictable when forecasting future spend, highlights additional regions or matter types that warrant alternative fee arrangements, and empowers the in-house team to negotiate better rates. However, in order to realize these benefits, there are a number of challenges that must be solved for as part of the global change management initiative.

Firstly, the adoption of LEDES billing is still progressing outside the U.S., and not all firms are tracking at the level of granularity to which those with electronic billing systems have grown accustomed. Vendor adoption programs, such as the one AIG is currently undertaking, will help continue to drive this progress. Corporate legal teams and vendors alike must partner to help understand the local billing guidelines of different jurisdictions, create processes that encourage the adoption of the e-Billing system, and provide support to vendors at the times they are operating. Ultimately, vendor adoption will be key to the success of any spend management initiative.

Sonya Bland, Director of Technology Solutions for HP's Global Legal Department, explained that managing the change management process and training staff were the top two challenges they faced when rolling out global matter management and e-Billing. One area that created an impetus for change was that very little matter information was being tracked in their systems outside the U.S., especially when it came to budgeting for litigation and other matters. "It was difficult to get all of the local countries on board and there were definitely language challenges," explains Ms. Bland. "Understanding the real requirements of each individual country is very hard but paramount to success." By planning for and rolling out a global budgeting process, records of every matter, budget, and invoice are stored within the centralized TeamConnect system, which now affords HP

the luxury of pinpointing exactly where their global legal spend exists. Through this initiative, they were able to leverage existing tools which were already being used in the U.S. to gain that traction overseas.

Ms. Bland noted that the combination of currency, tax, and processing of non-U.S. invoices are other top challenges in implementing global spend management. While there may be corporate standards in processing non-U.S. invoices, the ability to collect and process invoices submitted in non-U.S. currency, as well as displaying the invoices in a preferred currency for review and tracking purposes, will very likely be an important requirement for success. An additional layer of complexity is also introduced when dealing with different regions that prefer to review invoices in their local currency. While the accounts payable system may be the system of record, the financial data that resides in the e-Billing system should closely match and be justifiable. There must also be a way for that billing data to seamlessly make its way to the accounts payable system, which is further complicated when dealing with global financial teams who may use disparate systems and practices.

HP has implemented a budgeting process to help better manage global spend. The Operational Support team aids the legal group on the financial components of managing matters. This team is accountable for the accuracy and predictability of budgets, and the key performance metric for this team is 99% predictability for every fiscal quarter. The HP legal and Operational Support team work together with outside counsel, who actually update their budgets monthly, to create and track budget on a monthly basis and generate rolling six month forecasts. The Operational Support team is also global and able to support regional counsel across the world so that HP can gain a better understanding of their legal spend, and ultimately be smarter about making projections. Having a global team would not be nearly as beneficial if the tools being used are not able to scale to the level of supporting tens of thousands of matters and hundreds of users worldwide. This is one contributing factor to HP having 95% of legal spend in a traceable, reportable format.

As AIG embarked on a global roll-out of matter management and e-Billing, their initial challenge was getting all of their vendors on board and properly adhering to standards. AIG has spent a significant number of focused hours and tremendous effort creating training materials to help firms understand how to electronically bill and host workshops with the vendors to drive adoption. This effort was time-consuming but necessary to create the foundation for change. Coote notes, "U.S.-based firms and large, global firms are just more used to and accepting of e-Billing, but onboarding and gaining buy-in from the dozens of smaller firms around the world who partner on AIG matters is just as important to obtaining full visibility over global legal spend and operations." Communication is key in order to execute this change management initiative, and having processes and technologies that facilitate refinement over time will further the success in these efforts.

Lastly, legal operations teams must understand taxes outside the U.S. in order to successfully roll-out global spend management practices. The most common tax to be handled is value added tax (VAT). Similar to sales tax, VAT is paid to a law firm performing services that are then in turn responsible for payment to the government. VAT can be applied at different rates for different services, and rates vary by jurisdiction and are typically applied at the individual line item level, as opposed to most U.S. tax which is applied to an entire invoice. For auditing purposes, the invoice must be in human-readable format and a large amount of scrutiny can be placed by tax enforcement bodies outside of the U.S. Being able to systematically track and store taxes on the line item, while entering varying rates for different services, will be an important part of successfully globalizing spend management practices.

KEY CHANGE MANAGEMENT INITIATIVE 2: Business Process & Collaboration

One of the most obvious challenges facing those wanting to globalize their legal operations is communication. Given that globally dispersed teams operate on different wavelengths—whether due to a different pace of work, language challenges, time zone differences, or a combination of all of these factors—it can be hard to get everyone on the same page.

Dan Herbek, Senior Manager of Applications-Legal at AON, noted, "English is the standard language of our business, which is acceptable on paper. If you were to hand someone new training material who is a non-native English speaker, they may be able to understand it and learn from it. The real problem is when you are trying to converse and collaborate; it's just more nuanced." It is important that, as legal teams analyze their operations and staffing levels, appropriate consideration is given to those who have multi-lingual skills. These multi-lingual team members can play an important role in facilitating the change conversations.

At AON, the office of the general counsel embarked on a global business process standardization initiative across the entire legal team in order to gain the full visibility needed to be a best-run legal department. For example, while a process for selecting vendors from preferred lists was in place,

it was found that this process broke down when working on matters outside the U.S. The headquarters team did not know who the best firms were in every international jurisdiction or for a particular matter type, and this was not captured on their preferred vendor list. Therefore, for situations with anticipated significant fees, AON implemented a process to gain approval from the regional head and/or the Chief Operations Counsel in order to authorize and negotiate rates with vendors who are not on the preferred list. This allows for the right amount of flexibility and does not prevent regional counsel from doing their job.

Simply having tools and processes in place for geographically dispersed teams to work together on legal matters will go a long way toward achieving success. AON is using TeamConnect today for legal department staff throughout the world to collaborate together on matters. This enables them to preserve intellectual capital generated by the legal department for all of their matters, which can ultimately reduce re-work, generate productivity gains, and foster a better legal community, especially in a situation where team members work in so many different time zones.

Another area of complexity facing a global collaboration initiative centers on security and data privacy and who has the right to access what information. Attempting to centralize global counsel on one system of record requires thoughtful planning to understand how data will be accessed in a way that ensures users can see only the things to which they actually have permission. Using TeamConnect at AON, Dan and the team have been able to apply the appropriate business rules and lock down access to specific information on a country by country basis. Access to impermissible data introduces an increased level of risk, so AON takes advantage of their tools to ensure they mitigate this risk as much as possible.

Data privacy concerns are also not just limited to the systems and processes that the legal department put in place. As a key strategic advisor to the business, it is increasingly important that the general counsel and his or her team be able to advise the business on this issue. Some jurisdictions require that data reside within that country, which will ultimately affect both U.S. businesses operating overseas as well as non-U.S. based businesses dealing in data. Regional counsel familiar with the data privacy rules and regulations will be called upon to help navigate this complex environment and stay informed on regulatory changes and challenges, such as challenges to Safe Harbor, as the future of data protection and privacy continues to be established.

MOVING TOWARD A GLOBALIZED FUTURE STATE

In today's fast-paced, global business environment, general counsel must consider how they will successfully globalize their operations. Implementing a formal change management program to reach this goal is the best way to mitigate the risks facing the business. As noted through the examples above, those that have successfully embarked on a global change management program are realizing tremendous results for the overall business.

In order to implement the type of change needed to roll out global processes and tools, it is key to identify those areas that will have the most impact on your team and the greater organization, and then to work with all stakeholders to ensure that a realizable vision for an ideal future is documented. As the plan is put into action, communication and collaboration are essential to ensuring strong adoption of the changes as you strive to meet those end-state goals. In a world where general counsel and the team surrounding them are being asked more than ever to act as a key advisor and partner to global organizations, acting as a strategic visionary willing to implement and see through necessary changes will position the corporate legal department to operate as a best-run function.

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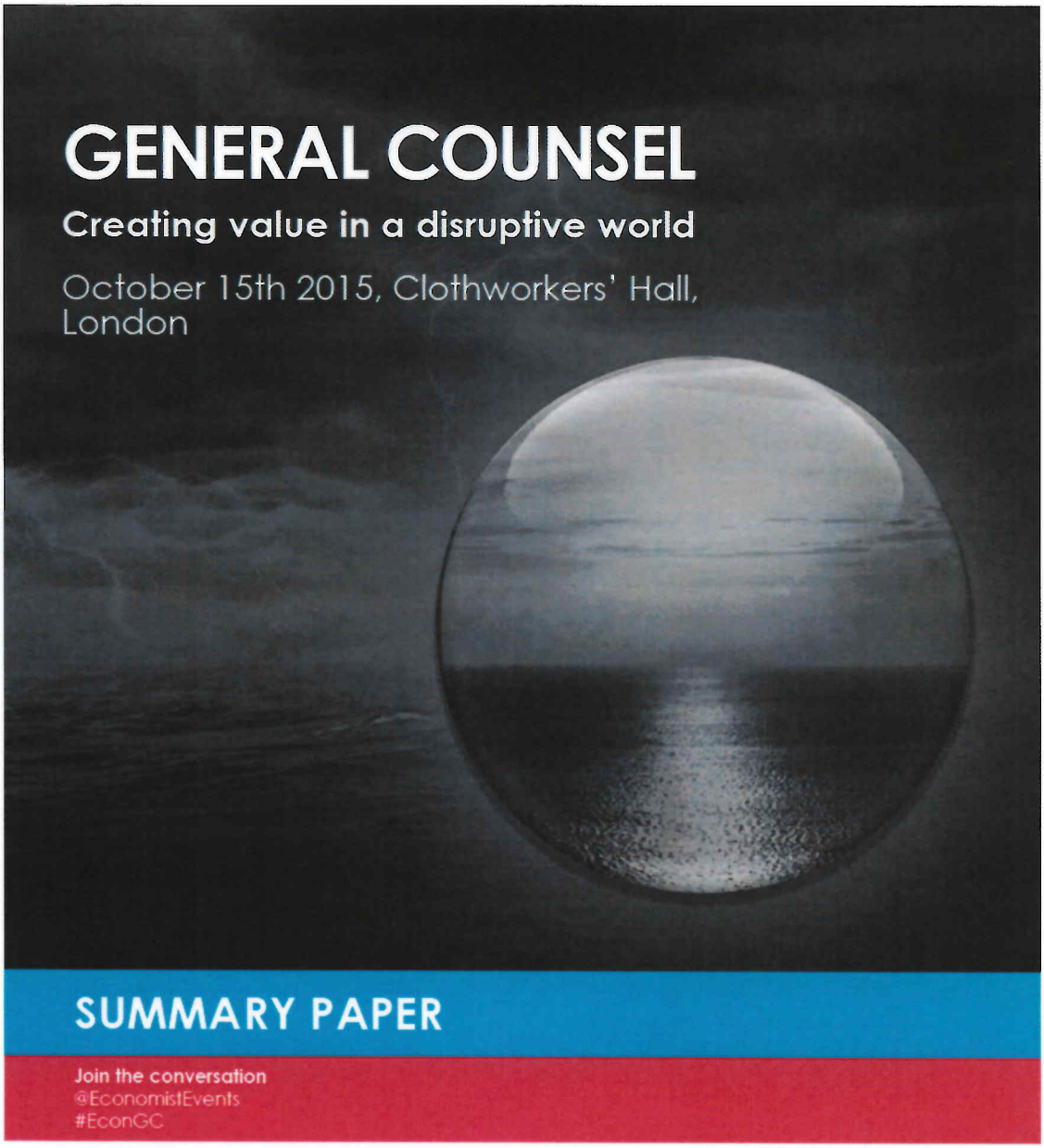

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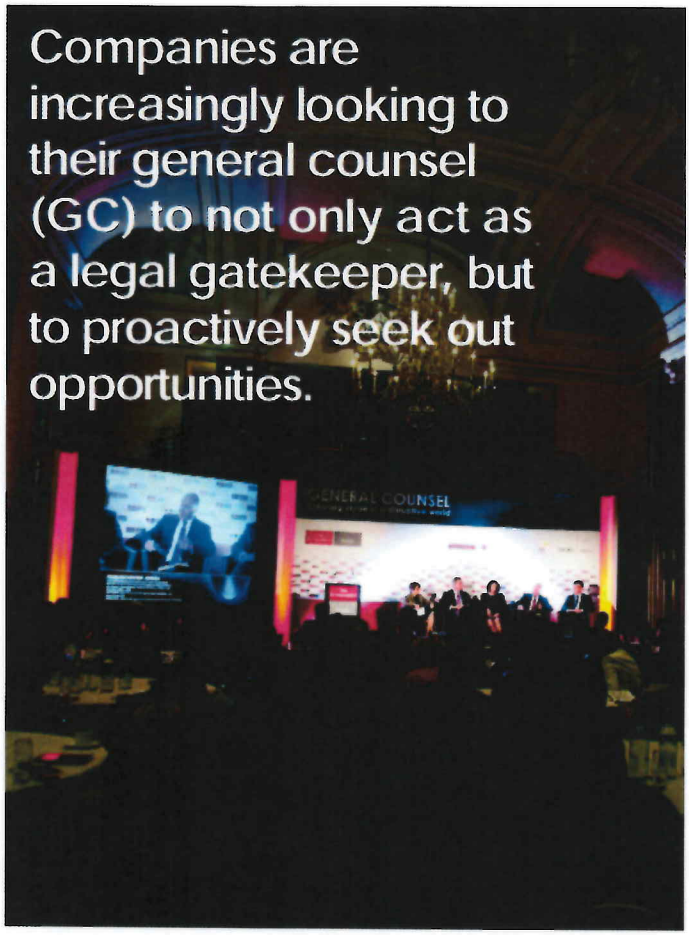
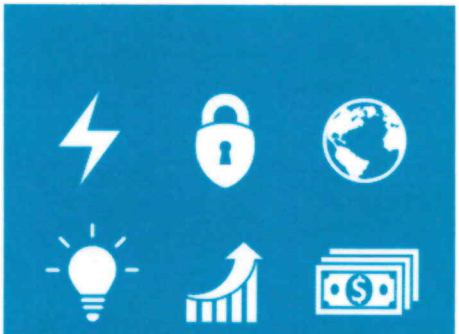




Economic strife, geopolitical uncertainty and technological upheaval have created a difficult business environment. Companies are increasingly looking to their general counsel (GC) to not only act as a legal gatekeeper, but to proactively seek out opportunities.

In this transition towards trusted advisor to the business, the GC faces a host of pressures and challenges. General Counsel 2015 brought together a wide range of GCs from different industries to debate the pertinent issues of the day. How can general counsel gain the necessary influence in a business, what can they do to harness technology and bring innovation while mitigating risk, and, ultimately, how can they create real value for their organisations?

We thank all participants for their invaluable contributions, the essence of which are presented in this summary paper.

The Changing World

Leading GCs need to be alert to changes in the wider business environment. Alasdair Ross, Global Product Director at The Economist Intelligence Unit, gave an overview of what is happening around the world, and the possible impact on business in 2016.

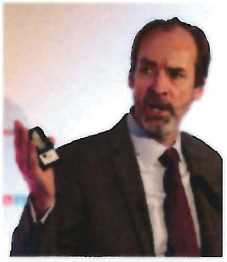
Most of the developed world economies are growing. The United States looks increasingly strong, politics aside, and remains the fundamental driver of global growth. Overall, the trends are positive with a rally in employment, a stronger housing market and low energy prices, delegates heard. The UK looks similar, but is coming from a lower base. Europe, meanwhile, is seeing a slow and painful – but still sustainable – recovery. Japan's future depends on the success of its "Abenomics" policies, but these risks will play out over the long term.

The emerging markets are under pressure. Political risk is back on the agenda in a big way, although these countries have better fiscal and external buffers than in the past. However, while some emerging economies will struggle next year, others will thrive. Asia still leads, with India destined to be next year's star performer.

In Latin America, the likes of Peru, Colombia and Chile are seeing consistent year-on-year growth. Unfortunately Brazil is unpredictable, and although reforms will be forthcoming, there are still questions over how this will play out. The story in sub-Saharan Africa is positive but at only 2% of the global economy, the impact on the rest of the world will be marginal.

Although China is slowing it is still growing at nearly 7% per year, and adding to global demand in large numbers. China's services sector is strong, but manufacturing is weakening. Overall, China looks like it will be successful in its efforts to restructure the economy. But Mr Ross warned that the country does have a 30% chance of a hard landing over a longer time span.

The conference moved on to look in detail at Britain's place in Europe. The referendum on whether the UK should leave the European Union is a key issue facing business and there was a warning that GCs should take action now to assess the possible risk to their organisations of a negative outcome. If the UK votes to leave, then we could see years of instability and uncertainty. No one knows what a post-Brexit environment will look like in terms of regulatory coherence, the overarching legal framework, and access to the single market. Negotiation after a decision to leave would be fraught with difficulties.



The New Risk Agenda

The range and severity of risks facing business have increased massively, and GCs are on the front line in mitigating the threats.

Without risk, there is no reward. This can put the GC in a difficult position. Their duty is to protect the business while also recognising what would be a prudent risk. One delegate said that the GC has to take a measured approach. If you are seen as the 'department of no' you won't be listened to by the business.

Appetite for risk can often depend on the size and maturity of a business, with start-ups open to higher levels of risk, a delegate noted. But it can also vary between departments in the same company. Therefore, the best conversations on risk happen outside the boardroom and give an insight into the overall appetite for risk across the organisation.

GCs need to get out from behind their desks and tap different areas of the business if they are to understand which risks are worth taking, while spotting any dangers early on that could break laws or codes of conduct. Often, it's employees at ground level who identify potential problems. So the GC also needs to be approachable.

Delegates discussed some of the challenges in embedding compliance throughout an organisation. All employees need to be identifying the risks in their area of specialisation. The legal function must look at what happens at all levels of the company so that compliance becomes ingrained in everyday tasks.

Instilling core values throughout the organisation is important in driving compliant and ethical behaviour, but you also need transparency, sound processes, and consistency to back them up. It was argued that having values is all well and good but they are only as strong as the lowest common denominator. International businesses should be aware of potential differences in culture at a local level as what is seen as ethical in one region may not be acceptable in another. The business also needs a culture in place where employees feel able to challenge decisions.

Delegates discussed whether you can be compliant without being ethical. It might be possible, but bad behaviour will catch up with a business in the end. There is an expectation now that businesses have to act more ethically. Companies have to think about long-term trust and sustainability, not just short-term profit. Trust has to be at the core of what you do, and ethics is not a bolt-on, a delegate said.

The GC must be at the centre of ethics and compliance and communication is vital. Technology has made everyone closer, so the old defence of not knowing what is going on no longer works, a delegate warned. There is also intense political pressure to make sure senior managers are accountable for wrongdoings and unethical behaviour.

A participant asked what the GC should do about the 'CEO who does not want to know' and is willing to turn a blind eye to unethical, or plain illegal, practice. The GC is a servant of the law first and foremost and must be prepared to walk out, a delegate said.

The conference looked at who owns legal risk. One argument put forward was that it should be the person who signs the contract, and not the lawyers or compliance.

Risk in the Digital World

While technology has brought a great many opportunities for businesses, it can also be one of its biggest sources of risks. Data breaches and email scams happen with alarming regularity.

You have to have the mindset that you will be hacked at some point, said a delegate. Having robust systems are a given but speed of response is also critical. This is challenging, given that it can take many months before a data breach is even spotted.

Social media also creates a huge headache for a company's legal department. A business's reputation can be damaged by a single tweet. Gossip travels fast and what can start as a piece of online tittle tattle quickly gets picked up by the press: more than a quarter of crises spread to international media within an hour, and yet it can take on average 21 hours for a business to respond.

Delegates looked at how to manage reputation in a digital world. Early warning signs are often out there, and businesses need to be aware of the digital tools they can use to monitor what is being said.

When a negative story breaks, the key is to act fast but proportionally. Drawing attention to a few lines on an obscure blog may end up making it a story. Rather than threatening to sue everyone, delegates heard how they should work with editors on what is fact and what is plain gossip. It is possible to get the right message out there. If you have a reputation that is resilient then you can weather a storm.

Technology, an Enabler and Disruptor

Today's GC needs to be forward thinking when it comes to the impact that technology might have, not only on their business but also their profession.

Pete Swabey, Senior Editor at The Economist Intelligence Unit, looked at three sources of disruption: smart contracts, crowd-sourcing and artificial intelligence.

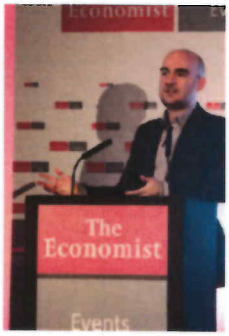
The idea of smart contracts, computerised contracts that also execute a transaction once agreed conditions are met, is not new. But this technology is now gaining traction thanks to the likes of cryptocurrency such as Bitcoin, which cuts out the middleman – the bank – to authorise and release money.

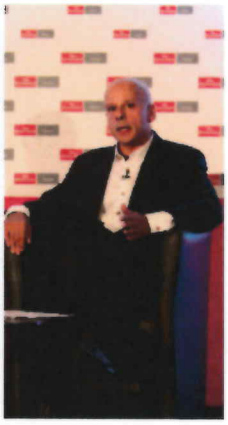
Potential applications include wills being automatically executed and even smart property contracts, which grant or restrict control of a physical object like a car or house, depending on whether payment had been made.

The power of crowd-sourcing and on-demand is huge and is changing various areas of our lives such as booking a taxi through Uber. In the same way, legal apps could prove transformational. An app called Fixed enables users to take a photo of a parking ticket they have been issued with, and send it to legal experts to assess whether it can be contested. CaseHub, meanwhile, plans to crowd-source class action lawsuits.

Artificial intelligence could also have a major impact on legal work. A report in 2014 by Jomati Consultants predicted that artificially intelligent bots will cause "structural collapse" of law firms by 2030, with process-oriented legal work being carried out by bots. AI can be an extremely valuable tool in analysing vast amounts of data and drawing conclusions, but could it ever replace lawyers? We have seen IBM's Deep Blue beat chess champion Garry Kasparov, it's Watson super computer won the quiz show Jeopardy, and we have self-driving cars. Machine learning has moved forward rapidly and the likes of facial recognition and speech recognition are increasingly sophisticated. However, challenges still remain and more research is needed.

One question posed was if computers would ever be able to make laws. He is sceptical that this is viable, at least in the short to medium term. Machines are good for interpreting laws and they could learn the craft of law making, but it will only happen if they get to a level where they have a more generalised form of intelligence.





Dealing with Disruption

All industries have been disrupted by technology. But perhaps one of the most heavily impacted has been the traditional publishing industry with ebooks now accounting for nearly half of all adult fiction sold in the UK.

Ebooks weren't even on the horizon 15 years ago, and publishers mainly focused on making sure nothing defamatory was published. But ebooks changed everything, bringing in challenges over rights ownership, piracy, and pricing regulations. Now, the role of publishers involves looking at other possible disruptors to the business such as the implications of a digital single market.

Complacency around disruption was discussed and delegates identified the need to self-disrupt before being disrupted by others.

A Call for Innovation

Creativity has always been an under-rated but vital part of being a lawyer. Delegates looked at examples of how GCs are thinking creatively to deliver value to their organisations.

A participant talked about how their legal function sought out inventive ways to get product to the consumer in difficult markets, as well as getting around onerous advertising restrictions in certain regions. Another pointed out that in their regulation-heavy industry, the legal team must bring innovation in how it interprets regulation in order to grow the business. Our lawyers prove their value many times over, they said.

Another delegate gave an example of how they have used technology in a creative way to make the legal function more accessible. Millennials expect to solve a problem with a simple app or a button to push so the company decided to use this approach to simplify areas such as compliance. The participant added that it has been transformative in the way internal clients work, and as people realised how easy it was to interact with the legal department they have demanded more services.

The issue of how to reward innovation was discussed. How do you judge what has been truly transformative? Delegates talked about the use of financial incentives to drive business performance. There was an emphasis on rewarding certain behaviours such as taking ownership of a problem and delivering solutions.

If the relationship with the board is still not forthcoming, then a GC needs to question whether they are in the right organisation

Changing Perceptions of the GC

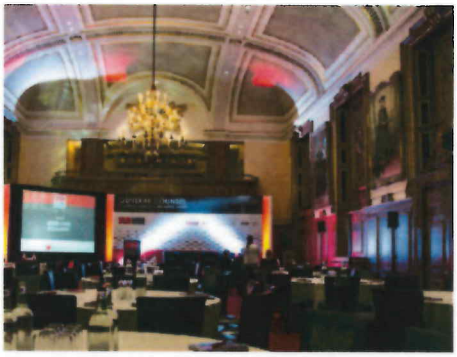
The role of general counsel is evolving hugely from a reactive legal function to a proactive business partner. We are now at a stage where some GCs are business leaders who just happen to be lawyers. But this transition raises questions over where the GC should sit in the business.

Today's GCs need to be both protector of the business and an enabler.

Clearly, given their new responsibilities, they need to have influence. Delegates discussed whether general counsel should sit on the board. Probably not, but it is imperative that the GC is at board meetings. A board that meets without the GC is open to risk, a delegate said. But some companies are reluctant. You need to earn your place, and to do that general counsel need to be actively contributing to its growth. A seat on the executive committee paves the way to the board. If the relationship with the board is still not forthcoming, then a GC needs to question whether she is in the right organisation.

Today's GCs need to be both protector of the business and an enabler. Getting under the skin of the organisation to understand the business imperatives while protecting its integrity is key, and that requires engaging with all levels of the company. The GC has to remain independent but also immersed into the company, a delegate added. It can be a tough act to balance.

The GC needs a wealth of talents on top of lawyering such as commercial acumen, people skills, and a sound grasp of technology. But while the role is more challenging than ever, there is now every opportunity to make a real difference to help grow a successful business.



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THE RISE OF THE GC: FROM LEGAL ADVISER TO STRATEGIC ADVISER

A 2016 NYSE GOVERNANCE SERVICES/BARKERGILMORE SURVEY REPORT

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As the scope of both enterprise risk oversight and corporate governance continues to expand and evolve, so does the role of the corporate general counsel. There is little argument that today's GC has a much wider purview beyond the customary responsibility of serving as the organization's chief legal officer and, quite often, its corporate secretary. As these roles shift, many organizations are finding that the perspective of the general counsel—who has been trained to analyze issues legally, ethically, and objectively, is uniquely positioned to bring additional insights to strategic decisions.

In early 2016, NYSE Governance Services and BarkerGilmore conducted a study of US corporate directors and executive officers to identify trends related to the general counsel's role and responsibilities and determine how legal departments can better prepare for the future needs of the corporation.

KEY TAKEAWAYS

- Ninety-seven percent of respondents expect the GC to be part of the executive management team by the year 2020, an increase of 16 percentage points from 10 years ago.
- The role of the GC continues to evolve, with 14% currently acting as chief risk officer, a number that is expected to more than double to 31% by 2020.
- When asked which competencies directors and officers anticipate would be the most valuable for the GC to have in 2020, the top two traits were sound judgment (72%) and high integrity (69%), ahead of legal expertise (63%).
- A compelling majority (79%) of directors and officers surveyed agree that by 2020, one of the general counsel's most valuable functions will be to advise the board and the CEO.
- Only 40% of directors and officers said ROI is of importance in evaluating the GC.

THE BROADENING SCOPE OF THE GC'S ROLE

While the scope of GCs' responsibilities varies depending on company size and industry, our research shows that increasingly, many are becoming influential components of the senior management team. Indeed, a compelling majority (more than 70%) of directors and officers agree that by 2020, in-house counsel's most valuable functions will likely shift from serving as an ethical sounding board and ensuring the board adheres to best governance practices (which ranked first and second in 2015) to acting as adviser to the board and the CEO (Figure 1).

This evolution from legal adviser to strategic adviser is significant because it wasn't very long ago that the GC's role was more narrowly defined. In fact, a review of practices throughout the second half of the 20th century shows that most general counsel didn't report to the CEO like other members of the executive team, but rather to the CFO (in most cases)—a reporting structure that further fueled the perception that the role of the GC wasn't on par with the rest of the C-suite, much less that of an adviser to the board.

Since that time however, a rapidly escalating regulatory landscape and a growing wave of complex mergers and acquisitions have paved the way for general counsel to assume their recognized place among the leadership team.

Moreover, in recent years, we have observed a change in the perception of in-house counsel as contributors to the organization's success. In fact, 93% of our respondents now consider the GC to be part of the executive management team (compared with 81% a decade ago), and this number is expected to climb to 96.5% by the year 2020 (Figure 2).

In addition to traditional areas of responsibility, such as compliance and transactions, our study shows that the role of general counsel will continue to evolve

to encompass strategic issues, such as corporate governance, where 85% of directors and officers believe GCs will add value in 2020. In addition, 49% believe GCs will add value to enterprise risk oversight and crisis management as well (Figure 3).

"Businesses are ever more global; regulatory schemes are ever more complex and often divergent; and the pillars of business units within a company are becoming more intertwined," explains Eric J. Dale, chief legal officer at Nielsen. "The most effective general counsel understand this context and bring to the role not only an intimate understanding of the business, the industry, and the global economy, among many other important factors, but they develop talented, motivated legal teams that operate in sync with the day-to-day business."

In *The Inside Counsel Revolution: Resolving the Partner-Guardian Tension*, former GE general counsel, Ben W. Heineman Jr, notes, "The greatest challenge for general counsel and other inside lawyers is to reconcile the dual—and at times contradictory—roles of being both a partner to the business leaders and a guardian of the corporation's integrity and reputation."

ADDITIONAL HATS

All this change means GCs are adding much wider responsibilities to their workload and broadening their oversight throughout the organization. Currently, 78% of general counsel act as the corporate secretary; 55% are also the chief compliance officer. Sixteen percent hold the title of chief government relations officer; 14% are the company's chief risk officer. Interestingly, the directors and officers we surveyed expect these additional titles to shift within four years, with fewer GCs acting as corporate secretaries and chief compliance officers (55% and 51%, respectively) and more GCs carrying the titles of chief risk officer and chief government relations officer (31% and 25%, respectively).

FIGURE 1

FUNCTIONS WHERE GCs ARE EXPECTED TO ADD THE MOST VALUE TO THE BOARD IN 2020

FIGURE 2

MEMBERS OF THE EXECUTIVE MANAGEMENT TEAM

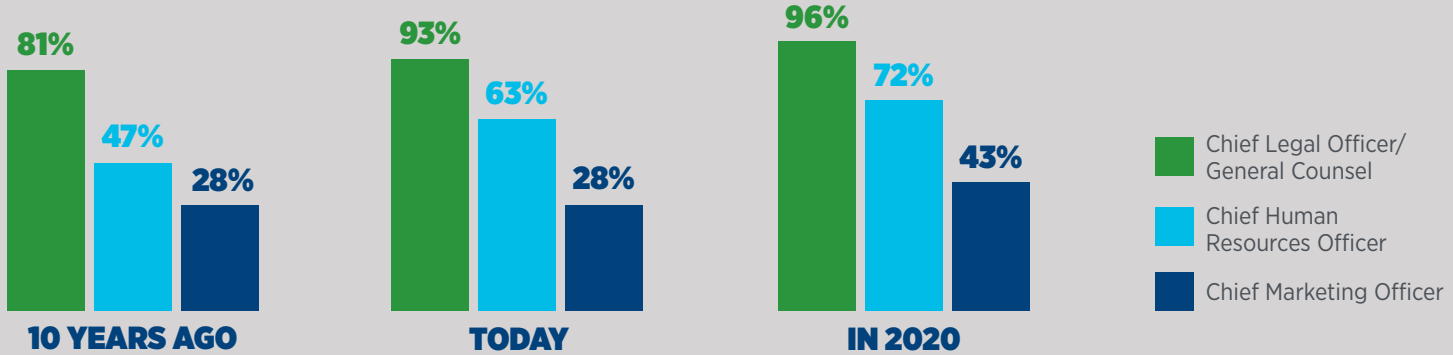


FIGURE 3

ISSUES ON WHICH THE GCs ARE EXPECTED TO ADD THE MOST VALUE TO THE BOARD IN 2020

85%	Corporate governance	48%	M&A	17%	Cybersecurity/IT risk
80%	Compliance/ethics	44%	Shareholder communications	9%	Data retention
49%	Enterprise risk management	19%	Industry issues	9%	Compensation issues
49%	Crisis management	18%	Global issues		

Today, about 11% of GCs are also chief administrative officers; slightly more GCs holding that title are expected in 2020. Finally, whereas today around 10% of general counsel act as chief human relations officers, less than 2% believe that will be the case at the turn of the decade (Figure 4).

There are tremendous benefits that stem from relying on an internal legal team that understands the collective history of the company and its goals and strategic objectives. Prominent attorney Carl D. Liggio wrote in *Arizona Law Review* that unless you are part of the organization and see it on a day-to-day basis, it is difficult to provide the quality services businesses need. "Utilizing in-house lawyers allows corporations to have an employee who is comfortable in the worlds of business management and law, [who] can translate and mediate between the concepts of business risk and the vocabulary of the law."

Marla Persky, former senior vice president, general counsel, and corporate secretary of Boehringher Ingelheim USA, agrees. As she clarified in *The Generalist Counsel: How Leading General Counsel are Shaping Tomorrow's Companies*, "A general counsel needs to be a business person first and a lawyer second—not a lawyer that understands the business, but a business person that happens to be a lawyer."

FUTURE COMPETENCIES

The evolving role of the GC means traits and competencies for those moving into this position will need to change. When asked which competencies directors and officers anticipate would be the most valuable for the GC to have in 2020, the top three traits were sound judgment (72%) and high integrity (69%), ahead of legal expertise (63%) (Figure 5).

Dale is not surprised. "As the role and responsibilities of a general counsel continue to expand into broader areas of risk, strategy, and compliance, as companies become more global and complex, as global regulatory schemes continue to change and are often inconsistent, and as technology innovation outpaces legal precedent," he notes, "the demand for a general counsel with excellent judgment and high integrity will increase, while excellent legal skills will always be valued but thought of as something that can be purchased as-needed."

Senior vice president and general counsel of Axalta Coating Systems, Michael Finn, concurs: "Sound judgment and integrity are the two bedrock qualities of a general counsel—there are many inside and outside lawyers that can explain a contract clause or the law of a particular country or state—it is the general counsel's job to help the CEO, the board, and other leaders as they grapple with the many challenges of running the business. The true expertise the general counsel brings is thoughtful analysis and unimpeachable ethics."

To complete the profile, Heineman writes in his book that today's GCs should also personify four vital "virtues": independence, courage, tact, and credibility. The independence to express judgments in the corporation's best interest, the courage to speak out and stand in front of the tank, the tact to contribute their views in a firm yet constructive manner, and the credibility necessary for peers to appreciate the GC's input, even in disagreement, are all vital to the role.

MEASURING THE GC'S WORTH

While key performance indicators, such as loss prevention, control of litigation cost, net revenue, output, and productivity, are used by about a third of companies surveyed, the value of the general counsel, particularly pertaining to the advisory nature of the job, extends far beyond financial metrics to include the totality of intellectual contributions made to the leadership of the company. In fact, when asked if ROI is important in evaluating the GC, 48% of directors and officers we surveyed said it had either "somewhat" or "no" importance. While nearly half do not measure the GC's performance quantitatively, one director noted that his company bases its assessment on the overall performance of the company, reinforcing the idea that some companies consider the general counsel a key contributor to the bottom line.

CONCLUSION

Even after decades of transformation, it appears the role of general counsel hasn't yet reached the pinnacle of its evolutionary ascent within the organization. In-house counsel's functions have evolved from reactive to proactive, and boards are reaping the fruits of this transition with more robust strategic discussions. As Heineman writes, the role of the GC "involves not just dealing with past problems, but charting future courses; not just playing defense, but playing offense; not just providing legal advice, broadly defined, but being part of the business team and offering business advice."

In an increasingly litigious corporate environment, it is no longer acceptable to have GCs wait on the sidelines in the event an incident occurs; rather, it is now critical to utilize their full business and legal acumen to propel the organization forward, make risk-aware decisions, and help management build strategies for success.

FIGURE 4

GC'S ROLE TODAY...

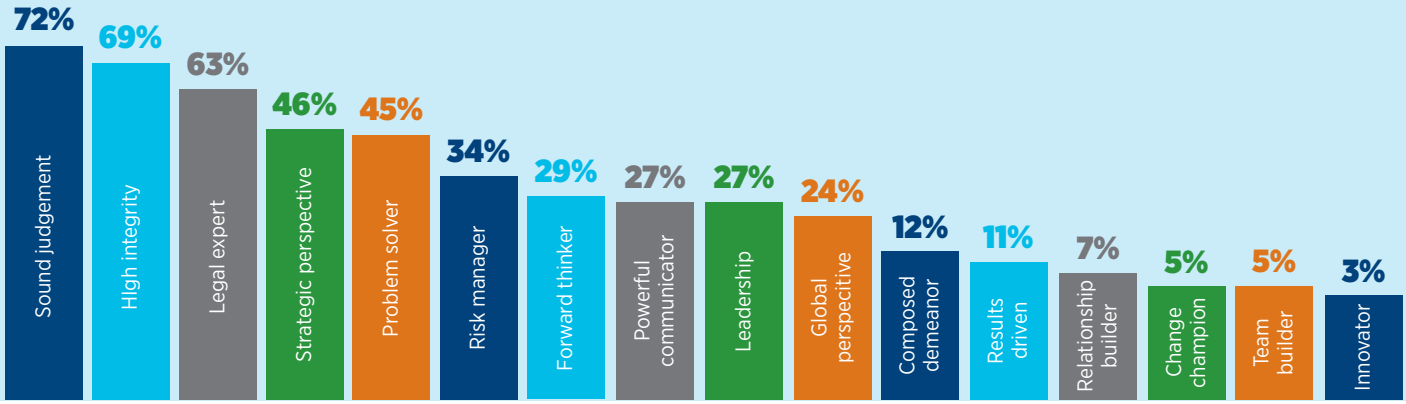
78%	Corporate Secretary
55%	Chief Compliance Officer
16%	Chief Government Relations Officer
14%	Chief Risk Officer
11%	Chief Administrative Officer
10%	Chief Human Resources Officer

...AND IN 2020

55%	Corporate Secretary
51%	Chief Compliance Officer
31%	Chief Risk Officer
25%	Chief Government Relations Officer
14%	Chief Administrative Officer
2%	Chief Human Resources Officer

FIGURE 5

GC COMPETENCIES MOST VALUABLE TO THE COMPANY IN 2020



Q&A

with Robert Barker and John Gilmore, managing partners of BarkerGilmore.

You both have followed trends in general counsel and legal department development for a number of years. What one piece of data really stood out to you from this year's survey?

The projected increase of GCs who will also become chief risk officer was unexpected, but it's understandable considering one of their fundamental roles is to protect the company.

While this one piece of data was surprising, the responses of the board members fortified what we are seeing every day. The board ultimately wants a leader with good judgment, someone who will guide on governance issues and be a trusted member of the executive team. The importance of the role that the GC is playing becomes more evident every year, as we watch the executive team and the board become more involved with the interview process and more care is taken with the GC candidates who are being considered.

Are most GCs today already well suited to discuss and understand business strategy as opposed to purely legal knowledge?

Absolutely. It's apparent that more general business acumen is important to the role of the general counsel as an adviser to the board and the CEO.

With virtually every GC being considered a member of the executive team today, their influence on the business is significant. GCs must be business minded or they will be quickly replaced with someone who is.

What can legal departments do today to help ramp up needed skills and competencies for the future?

A world-class law department has depth beyond the general counsel. Today's leading general counsel are mindful of succession planning, which is completely irrelevant to any expectation of their departure date. Successful succession planning revolves around hiring exceptional talent who have the ability to work outside of their practice area and putting these individuals in situations to learn new areas of law, compliance, or business.

By constantly challenging the lawyers in the legal department and bolstering their relationships with the executive team and the business, the company will be strengthened with leaders who can step up to new legal and governance challenges. Additionally, the board and the CEO will have peace of mind knowing that the quality of the law department will support the company's business goals.

What kind of questions should boards be asking to ensure they are hiring the right GC?

Since the relationship between the GC, the CEO, and the board is so intertwined, we are experiencing an increase of boards who are involved in the interview process. A few questions that the board should ask to assess the cultural fit with a potential new GC include:

- What is your view on the role of the board and the relationship between the GC, the CEO, and the board?
- What topics should the board make a priority?
- What issues should the audit committee focus on?
- After reading our proxy, is there anything on the governance process that you would do differently?
- Describe a few situations when you helped your company achieve its business goals.
- Describe a situation where you were forward thinking and identified a potential risk.

By the board becoming involved and showing a vested interest in the hiring process, it sends a clear signal to the candidate about the type of board they will be working with. A good GC is looking for an involved and strong board, one that will effectively challenge management and ask the tough questions.

Any final thoughts on the future of the role of the corporate GC based upon these findings?

The relationship between the GC and the board is extremely important. While the GC typically reports to the CEO, the GC is the company's lawyer. When push comes to shove, the GC is responsible to the company, and not to the CEO. Boards are looking for transparency and judgment from the GC.

The GC is responsible for maintaining a steady flow of information to the board. Since the GC can act as a gatekeeper for information, the board must trust that the GC is completely transparent. The board needs someone to guide them on the issue of the day. This might mean new regulatory and privacy issues, a major acquisition or joint venture, or an internal compliance or code-of-conduct matter. Whatever the challenge, the GC must be front and center.

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Current Issues in Digital Management for Corporate General Counsel

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pwc

Without a doubt, the "digital revolution" has improved the lives of millions of people all over the globe. Driven by the Internet, digitization has enhanced transportation, communications, healthcare, personal safety, the environment and countless other areas of our lives. Global sourcing and supply chains, disaggregated business models, cloud and mobility technologies have delivered the promise of efficiency and the consequence of security vulnerabilities. The "Internet of Things" has begun to take shape in both consumer and industrial markets. From automobiles to appliances, healthcare diagnostic equipment to electric metering, everyday objects that surround us are now arriving with built-in sensors that connect with the internet and large corporate networks.

PwC's 17th Annual Global CEO survey estimates that by 2020 there will be nearly seven times more networked devices than people in the world.

Many companies that are involved in the digital economy, however, face a significant and largely unappreciated problem: they don't realize the depth and breadth of their digital exposure. They don't fully understand that sophisticated threat actors have the means and motives to gain access to valuable corporate data and intellectual property. Realistically, without an informed understanding of the constellation of external and internal threat actors, their goals and their ways of operating, companies cannot identify their systemic weaknesses or effectively manage the genuine risk.

Look beneath the covers at many companies and one finds a technology environment and governance model that lags the company's obligations for operating in or producing products for the digital marketplace. The data on sources of known data breaches suggests that the prevailing corporate mantra of "doing more with less" is problematic as applied to technology budget cuts. Adversaries calculatingly capitalize on the deferred maintenance, failure to upgrade hardware, sporadic security patching, over reliance on outsourced skills, employees bringing their own devices to work, and lack of monitoring of corporate digital devices to gain unauthorized access to highly sensitive information, including trade secrets, at many companies.

For the US, the government estimate for industry losses due to intellectual property theft alone is $300B annually,[1] not to mention the additional costs associated with identity theft, money laundering, fraud, and economic espionage. A recent private sector study conducted by PwC and CREATe.org estimates that the value of trade secret theft ranges from one to three percent of the gross domestic product of the US and other advanced industrial economies.[2] 25% of participants in the PwC 2014 Global Economic Crime Survey reported experience with cybercrime, resulting in known losses of over $1 million for 11% of that participant group.

Adding further complexity and cost, regulators and courts have started to get involved—in meaningful ways. The appreciation for the damage caused by privacy breaches in the European Union (EU) has recently become even more acute. Data protection authorities there initially proposed penalties of 2% of global revenue for companies with future breaches, and the cost and

1 "The IP Commission Report: The Report of the Commission on the Theft of American Intellectual Property" May 2013

2 PwC and CREATe.org. "Economic Impact of Trade Secret Theft" February 2014.

compliance impact on global companies of these regulations (now under discussion within the EU) could be substantial.

In the US regulatory arena, the response has been more measured, but is increasing in pace and scope of coverage. In late 2011, for example, the SEC provided guidance for the voluntary disclosure of cyber risks and breaches. In early 2013, in response to the Senate's failure to pass a comprehensive cybersecurity bill, the White House issued an Executive Order to establish cybersecurity standards by industries within a "critical infrastructure" framework. Additionally, cases in the U.S. courts suggest judges are now reconsidering the enforceability of certain "boilerplate" exculpatory language in business contracts when one party does not properly secure its business infrastructure—resulting in damages. Increasingly, the various branches of governments are adding teeth to the proposition that the privilege of enabling digital commerce comes with an obligation to protect select elements and aspects of that exchange. Corporate General Counsel ("GCs") are necessarily devoting substantial time and resources in reacting to the varied and complex legal and regulatory issues resulting from a fast-moving digital marketplace.

I. Issues and excuses—how have we arrived at this situation?

How did we get here? A variety of factors contribute to problem—some within and some admittedly outside the control of GCs and corporate management. The rapid pace of technological change[3] has made it difficult to anticipate the direction or components of digital evolution. Fast-paced information technology innovation and shortened product life cycles have presented management, data security and operational challenges for corporations of all sizes—e.g. whether and how to keep up, how to maintain existing systems, and how to integrate the new technologies with legacy systems.

Another tough obstacle is the issue of SEC period-driven reporting priorities. The U.S. public markets construct encourages shorter term, three-month period by three-month period corporate prioritization and provides little incentive for thoughtfully taking the long view of evolving complex corporate issues such as data security.

Well within the realm of corporate managements' control is the basic, much-overlooked and increasingly important issue of digital governance—who has the responsibility to manage the company's digital opportunities and risks, and the related management costs?

3 "Technological breakthroughs" is one of the 5 PwC megatrends identified in its recent publication "Building trust in a time of change" Global Annual Review 2013 (PwC Review)

Generally, in the absence of clearly defined responsibility, corporate decision-making tends to be ad hoc and circumstantially-driven. Inaccurate assumptions are often made about who is responsible for what. The result is that potentially significant issues can fall through the cracks. It is therefore no surprise that in the vast majority of companies where there is no single point of responsibility for digital management, data-related issues have not received the appropriate level of attention because of inadequately informed and/or empowered personnel. We have seen this on many occasions, where a breach incident has been facilitated by ambiguous internal responsibility for identifying and mitigating fairly obvious system vulnerabilities.

These issues are obvious when a data breach of personal identifiable information (PII) happens and third parties need to be notified. It is at this point that the corporate management's often limited view of breach incident consequences gets exposed, as the costs of remediation extend beyond technical fixes. Repercussions may include: notifying regulators (requiring outside professional assistance), possible fines and penalties, unwelcome negative media attention and reputational loss.

It is also at this less than optimal stage that GCs must deal with the consequences, and are called upon to lead legal and regulatory consequence mitigation and remediation efforts.

Moreover, conditions are ripe for digital-conduct related negligence to materialize in the corporate liability landscape for the following reasons:

A. An increasingly sophisticated and informed data-consuming buyer: The digital market is highly competitive on price and features thanks to a huge, discriminating and demanding buyer sector. Corporations are digitizing product and service offerings at an unprecedented level. The mainstream and web-based media closely follow digital offerings, and are quick to highlight corporate digital missteps and the implications for individual privacy and other rights. Influential regulators and judges are part of the digital buying public, of course, and similarly rely on digital products and services in their personal and professional lives.

B. The often overly broad claims of digital service and products: A number of companies continue to make exaggerated or baseless advertising claims about their products' or services' usefulness, capabilities, reliability and security to obtain market share in crowded and competitive markets. Words like "secure," "trusted" and "reliable" are seemingly used indiscriminately, and without consideration of their possible legal meaning, impact and consequences. Terms such as "always on" and "tested by the leading experts" can create expectations and reliance—with attendant damages claims if those claims are not met.

C. Growing systems complexity in a continuously lean budget environment: The complexity of managing large digital environments continues to increase, even as corporate IT budgets face continued pressure to cut costs and 'do more with less.' In this situation, among the first areas to receive a cost cut is maintenance on legacy infrastructure components (often with latent security and other operational issues, but still important as repositories of critical historical data and/or as the means by which critical reports are generated.) The result, effectively, is a level of enterprise technical debt where delayed attention to existing technical issues results in increasing costs over time and off-balance sheet liabilities that may not be discussed by management

or raised to external directors. Even as the complexity and associated risk of the digitization of global commerce increase, corporate digital security expenditure and effort are not generally keeping pace.

D. An evolving (and increasingly digital consumer-oriented) legal and regulatory environment: Data protection has been the primary focus of US regulatory activity to date, at both the federal and state levels, as disclosure requirements and financial penalties, among other tools, have been used to protect PII, particularly in the financial services and healthcare sectors. At the federal level, certain cyber risks have received direct attention in the form of the SEC Disclosure Guidance issued in 2011, and indirect coverage through the FAR certification in cost plus contracts on "adequate accounting systems." [4] In 2013, the SEC began reviewing whether greater cyber-attack disclosure obligations should be placed on public companies, as SEC Chair Mary Jo White responded to the strong interest of Senate Commerce Committee Chair Jay Rockefeller and others in enhanced cybersecurity measures for U.S. industry. Additionally, the proposed Cyber Intelligence Sharing and Protection Act (CISPA), now under consideration by the Senate, emphasizes a voluntary collective public/private sharing of cyberthreat and cybersecurity system information, and the present House version is quite similar.[5]

More recently, however, there have been potentially significant digitally-related developments in the U.S. courts as various appeals courts have begun to deny procedural motions to dismiss based on technicalities, and are sending cases back to the trial courts for rulings on the merits. As such, cyber-related case law will begin emerging. Arguments concerning negligence or failure to apply commercially reasonable digital security procedures will be tested and ruled upon.

To summarize the current state of the legal and regulatory environment in the U.S.—we appear to be at one of these historical inflection points. After decades of rapid technological change with relatively little accompanying legal or regulatory movement, meaningful societal boundaries are beginning to take shape. In the next few years, we should expect continued and expanded attention to digital regulation, and creative and possibly disruptive litigation around digital rights and responsibilities in our court system.

Similarly, we should expect overseas jurisdictions to generate more guidance with respect to digital behavior within their respective legal and regulatory frameworks—given the pervasive influence of the digital economy on a global basis. The European Union is in the process of making its already strict data protection coverage even stricter and more detailed, and passage of its Regulation (the data protection framework) and the Directive (covering personal data protection) could take place during 2015. If the proposed changes take effect, any business with European customers will need to comply through implementation of detailed compliance policies and procedures, to include, in certain instances, prompt data breach disclosure to affected parties, audits, appointments of a Data Protection Officer and other measures involving additional resources and management attention. Europe's already strong interest in data privacy for its citizens was further spurred by the recent allegations of surveillance of European citizens by US intelligence

4 Federal Acquisition Regulations (FAR) 16.3013. January 2014.

5 US House of Representatives Permanent Select Committee on Intelligence. "Cyber Intelligence Sharing and Protection Act of 2013 (CISPA) H.R. 624" April, 2013.

agencies. Various Latin American and Asian countries are considering a range of approaches to data residency, breach disclosure and other related digital topics.

E. Lastly, but still significant and influential, are the various US digital standards that are emerging, particularly with respect to cybersecurity. For example, the President's February 19, 2013 Executive Order 13636—Improving Critical Infrastructure Cybersecurity, and the more recent U.S. Department of Commerce's National Institute of Standards and Technology (NIST) October 23, 2013 Preliminary Cybersecurity Framework are, for the first time, laying out a voluntary national digital security framework, and offering related methodologies and desired profiles.[6] If the large digital industry participants embrace the NIST standard, it effectively becomes the bar. Other serious market participants may need to meet or exceed those strategic and operational criteria to compete. It is also possible that aspects of NIST may become the de facto measure for the standard of care in future digital negligence cases. Accordingly, even though these voluntary standards are not 'hard' in the sense that they are required by law or regulation at present, characterizing them as 'soft' is misleading because of their potential to exert real power in the marketplace.

6 National Institute of Standards and Technology (NIST). "Preliminary Cybersecurity Framework – Improving Critical Infrastructure Cybersecurity Executive Order 13636" October 2013.

II. The needed response—and possible forms of that response

To help prepare for and help avoid or mitigate the potential costs involved, GCs may want to consider certain proactive steps.

A. Analyze and elevate communications about significant digital topics

Ask yourself: Are non-IT and IT executives communicating openly and honestly with each other about the company's digital risks and opportunities?

We've observed that sometimes, and particularly at crucial times, each views the other as a threat, and that therefore communication about important digital topics does not take place at an acceptable level of depth. Specifically, during budget or even operational planning, non-IT senior management often views the IT department as the proverbial 'black hole'—where vast and disproportionate quantities of money disappear, with seemingly little to show for it, and therefore makes arbitrary, albeit IT-impactful, decisions. On the flipside, IT management, for its part, often views the other group as out of touch with digital realities—especially in the area of security—and ill-informed. Since budget cuts or operational changes affecting IT appear inevitable, they absorb them often without communicating or documenting the consequences.

Both views miss the point—and are essentially a function of not fully understanding, or being inclined to take the time to fully understand the others' point of view. Because non-IT management may not be given the technical debt or impact information, this group doesn't understand the depth and breadth of the company's IT weaknesses and vulnerabilities, specifically with respect to its overall systems integrity and data protection capabilities. And because IT management is often faced with the non-negotiable 'do more with less' predicament, this group may understandably focus on the optically prudent new or enhanced services that result in reward and recognition for the department.

Furthermore, because critical facts or possible scenarios may not be openly and honestly discussed, other functions, such as the GC, for example, cannot add the value that they might otherwise provide.

To help remedy this situation, and to remain competitive in a digitally-based global economy:

- Have IT or an independent third party conduct a corporate digital risk and technical debt assessment focusing both on the company's systems and the data (its own and third parties') within its possession or control—and present same to management;
- Have the legal department conduct a holistic (to include legal risk areas that a breach could introduce) and thorough potential liability assessment—focusing on the findings of the assessment—and present same to management;
- Have a cross functional team identify and catalogue the company's digital assets (to include its intellectual property),

and provide recommendations on increasing the benefits and uses of this often under-appreciated asset base—and present same to management; and

- Conduct a Board presentation—with leaders of each of these respective activities presenting summary findings to the board, along with a presentation of senior management's overall corporate digital management strategy. These activities, if conducted on a reasonably transparent basis within the company, should help with making communications about difficult digital subjects more honest and open.

B. Establish Appropriate Corporate Digital Governance

Governance is a key component of any company's digital strategy—and one that is singularly lacking, in a real sense, in most companies. Who has the responsibility for managing the company's threats and opportunities? What is the scope of that responsibility—what does it include and what does it exclude? Within that scope, does the person have the requisite training and experience to be effective—and to quantitatively and qualitatively analyze the various strategic, operational and technical aspects of the company's digital past, present and future? What other significant corporate responsibilities does this person have that might interfere with or prevent the digital management function from getting the appropriate amount of time?

Too often we have worked with GCs (functioning as the de facto risk executive charged with cleaning up a crisis) and witnessed situations where companies are forced to address questions of this type from a defensive posture—where the absence of a single and qualified point of responsibility becomes obvious to regulators in the course of investigating a data breach.

The fact pattern that often emerges is that the CFO was nominally in charge of IT, but he or she was not able to effectively assess the business risks in order to make prudent business decisions. In other situations, we've found that executive responsibility for the IT function was disbursed among several persons—and that, in the absence of the ownership that comes from a single point of responsibility—significant digital governance issues simply fell between the proverbial cracks.

Functional departments often contract with third party providers without the knowledge of IT. As a result, safeguards are rarely properly applied. Product Development works beyond enterprise network protocols potentially creating unanticipated product liabilities. In these situations, it often comes to light that the board did not receive periodic reports from any member of management on potential digital issues or any related mitigation or response strategies. This is not a situation that any company wants to find itself in (or that the GC wants to defend), and it may be avoidable with proper attention to the digital governance issue.

C. Leverage Available Tools to Help Prevent and Prepare for Possible Digital Crises

Prudent companies recognize the value of preparing for foreseeable adverse digital incidents. There are a variety of tactical steps that a company can take with little additional cost or undue effort to help enhance its digital incident preparedness. Consider:

- **Risk Registers:** Many US companies have corporate risk registers generated as part of an enterprise risk management program, as part of a risk assessment exercise and/or for purposes of listing and analyzing risks for SEC reporting purposes. If such a list exists, critically review it for possible

updating or elaboration in connection with a more detailed treatment of digital risks.

- **Business continuity/specific incident response planning:** Responding to the disruption caused by Hurricane Sandy in the Northeast, the SEC recently issued staff guidance on business continuity planning for financial services companies. In time, this guidance could be expanded to include other business sectors and/or become an actual disclosure company covering whether or not, and if so, to what degree a registrant had such a plan in place. Table-top exercises can test the adequacy of business continuity and incident response plans, and a corporate team's response to the given challenge. There is no substitute for 'trial by fire' and these simulated exercises have proven to be helpful to identify and improve responses to the expected and unexpected communications, governance, logistical and other issues that inevitably arise in a crisis.
- **Internal audit assessments:** A knowledgeable and well-trained internal audit team can help add value through initial and subsequent audits of various aspects of the corporate digital threat and opportunity landscape. Internal auditors should look beyond the general computer controls for financial system reporting and into the reasonable controls required of the company for operating in the digital domain. If necessary, independent third party experts can supplement or provide subject matter assistance to the internal audit team.

The costs associated with using the above tools can be minimal, and are insignificant by comparison to the costs associated with any material adverse digital incident.

D. Capitalize Upon The Strategic Opportunities Associated With The Technical Debt and Digital Governance Issues

Even as the potential adverse impact of technical debt and digital governance issues becomes recognized by companies, management should also consider the associated opportunities. Competitive advantage may come from addressing these issues; the results are less vulnerable IT systems, less reactive demand on financial and human resources to handle the inevitable periodic system "patches" that are required, and an organization with a more realistic and transparent view of its true digital costs and priorities.

As the organization changes and evolves, there may be additional strategic opportunities. In an M&A context, an acquiror may want to add additional due diligence focused on the target's technical debt—both from the assumed liability and price of the deal/costs to integrate perspectives. In a potential joint venture, there may be more leverage of various kinds for the company having the least vulnerable, better managed IT systems. In a competitive situation, where a company is bidding with others on a sizeable piece of business, that company may wish to emphasize its internal digital priorities, to include its handling of technical debt, as a distinct differentiator.

III. The digital issues to focus on now—before others start asking the tough questions

Sophisticated private and state-sponsored actors are targeting successful companies on a global basis. They are systematically identifying IT weaknesses and illicitly obtaining intellectual property, moving funds and otherwise engaging in illegal and costly acts. The chances of becoming directly or indirectly involved in a digital incident continue to increase, largely because of three factors. First, certain state actors, as well as commercial competitors, have strong incentives to obtain technology from Western companies—with little real risk of specific attribution or commercial reprisal. Secondly, many companies continue to essentially 'leave the door open' to such intrusions through their technical debt and digital governance weaknesses. And lastly, there is the human factor: disgruntled or bribed present or former employees ("insiders") pose a particularly significant threat, as their knowledge of company systems and practices affords them better access to potentially vulnerable data. 31% of respondents to the PwC/CIO/CSO Global State of Information Security Survey 2014 estimated that their current employees were the likely source of digital incidents.

It is therefore prudent to address certain admittedly difficult digital issues on your own terms and on your own schedule, sooner rather than later. The costs may be greater, the stakes may be higher, and the circumstances may be less favorable if it is regulators or the chair of the company's audit committee asking the tough questions, in response to an incident. The GC can play a meaningful role in this process by emphasizing the importance of dealing with these issues on an internal basis, and on terms acceptable to management, rather than having regulators or other third parties involved in a dispute context.

Here's a list of questions that can help GCs get started on being better prepared to rapidly respond to an incident:

- Is there an understanding of the technical debt and its consequences in the company, particularly at the senior management level?
- What is your company's threat surface, and what are its vulnerabilities?
- Has the company otherwise identified and prepared for various possible digital crises that could impact the company and its operations, and have those plans been formalized and tested?
- What duties may exist to which parties in the event of a digital breach or event at the company, and what is the possible range of costs involved?
- Has the company decentralized IT governance or simply decentralized IT spending?
- Who is the single company officer responsible for the company's management of its digital rights and responsibilities?

Notwithstanding all the positives associated with the 'digital revolution,' it is now time for companies and their GCs to step back and objectively assess the aftermath of the last 20 years' rapid technological change and innovation. For many companies, there is work to be done on the issues of technical debt and digital governance before moving further and faster down the path of digital transformation.

www.pwc.com/us/forensics

To have a deeper conversation about how this subject may affect your business, please contact:

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General Counsel Buffeted by Compliance Demands and Client Pressures May Face Personal Peril

*By E. Norman Veasey and Christine T. Di Guglielmo**

In the "New Reality" of the world of corporate general counsel, the challenges and tensions thrust upon one holding that office have intensified exponentially. Not only does the general counsel uniquely straddle the world of business and law in giving advice to the management and directors of her client (the corporation), but also she may find herself personally in the crosshairs of regulators, prosecutors, and litigants. So, as the rhetoric and real pressures increase to target the general counsel, she must have and use the skills, balance, independence, and courage to be simultaneously the persuasive counselor for her corporate client while being attuned to the need for self-preservation. The lessons from the past targeting of general counsel and other in-house lawyers are ominous. But the quintessential general counsel, acting as both persuasive counselor and a leader in setting the corporation's ethical tone, will do the right thing and thus be prepared to deal with these challenges and tensions.

Introduction

The General Counsel, as the corporate client's Chief Legal Officer,[1] straddles the world of business and law, and thus occupies a status that is unique among both lawyers and business people. This article focuses on current issues that may impact the CLO who is confronted by conflicting business pressures and the demands of law compliance.

Corporations must take risks as part of their business strategies. The corporate constituents should carefully evaluate and understand the risk/reward ratio and

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1. We use the term "General Counsel" (abbreviated as "GC") and "Chief Legal Officer" (abbreviated as "CLO") interchangeably.

the potential consequences of the risks facing the corporation.[2] There may be times when the risks contemplated are overly aggressive, potentially courting compliance problems. The CLO—but not the CLO alone—plays a key role in risk analysis and management.

We use the term "compliance" broadly, incorporating the need for the corporation to adhere to the letter of the law but also appropriately to consider and act within the spirit of the law as well as principles of business and legal ethics. Thus, compliance includes, but is not limited to, the narrower obligation of compliance with financial controls and the oversight responsibilities embraced in the *Caremark-Stone* doctrine[3] and the requirements of the Sarbanes-Oxley Act of 2002 ("SOX").[4]

I. Overview of the Role of the Modern General Counsel

As we consider the potential for personal peril that may be visited upon the GC, we step back and reflect briefly on the nature and scope of the position. The CLO has a unique, dual role as both legal and business advisor.

First, the CLO, as a senior management officer, is a "business partner" with the CEO, CFO, COO, and other senior management "chiefs" in the "C-Suite." The senior management, of course, deals with the company's strategy, operations, opportunity, and risk. The CLO plays an integral role in that process, employing both her legal and business acumen.

Second, as part of her dual role as business and legal advisor, the CLO is the principal legal advisor to the company, which is—or should be—her only client. The CEO, for example, is not her client; he is a constituent of her corporate client, as are other senior officers and directors. In advising the company's constituents in the C-Suite and the boardroom, the CLO is the "guardian of the corporate integrity."[5] She should constantly strive to ensure that the corporation and its constituents adhere to the highest legal and ethical principles.[6]

Sometimes major or minor tensions may arise between the GC's various roles, all of which the GC must manage. For example, tensions may arise when the CEO and the board have opposing views. Other tensions may arise when the corporate client faces compliance demands from the government, based on

2. *See* Report of the NACD (National Association of Corporate Directors) Blue Ribbon Commission, Risk Governance: Balancing Risk and Reward 6 (2009) [hereinafter NACD Risk Report] ("Boards should encourage management to pursue prudent risks to generate sustainable corporate performance and growth.").

3. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996); Stone v. Ritter, 911 A.2d 362 (Del. 2006).

4. Public Company Accounting Reform and Investor Protection Act, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.). John Huber and Julie Hoffman have described sections 404 and 103 of the Act as "the Rosetta Stone of internal control over financial reporting." John J. Huber & Julie K. Hoffman, *The Sarbanes-Oxley Act of 2002 and SEC Rulemaking*, *in* 1 The Practitioner's Guide to the Sarbanes-Oxley Act I-3, I-66 (John J. Huber et al. eds., 2009).

5. *See* E. Norman Veasey & Christine T. Di Guglielmo, Indispensable Counsel: The Chief Legal Officer in the New Reality 4–5, 36 (2012) [hereinafter Indispensable Counsel].

6. *See id.* at xxv, 4–6.

the government's view that the corporation has adopted an overly aggressive business strategy. Recent changes in the legal and business landscape—the "new reality"—have amplified these tensions in recent years.

Two phenomena have been the primary drivers of this new reality: (1) the dramatic and ongoing changes in the past few years in the complexities of the law, business, investor activism, litigation, regulation, politics, the mainstream media, and social media; and (2) the considerable impact of globalization on business realities. This changing landscape has dramatically escalated the difficulties and tensions that are regularly experienced by general counsel of public companies.[7]

The enactment of SOX in 2002 heralded the beginning of this aspect of the new reality by effecting a paradigm shift aimed at enhancing the role, power, and responsibilities of the board of directors vis-à-vis management.[8] SOX imposed new laws relating to corporate governance in at least a partially federalized milieu;[9] moreover, it ushered in new standards of professional responsibility for lawyers.

Another high-water mark was the 2007–2009 global economic meltdown that ultimately led to passage of the Dodd-Frank Act in another election year, 2010.[10] Dodd-Frank ushered in further corporate governance mandates for most public corporations and tough new standards and regimens for financial institutions. Corporate lawyers, including general counsel, have had to master and manage the impacts of these laws and the associated regulations. Those impacts include heightened scrutiny by regulators, increased investor activism, more litigation, and more media and congressional attention.[11]

The first step for the general counsel operating in the new reality is to recognize that there *is* a new reality—that the world clearly has changed. The general counsel must therefore brace and prepare herself and her colleagues to deal with it.

The CLO's role is frequently interesting, always multifaceted, sometimes lonely, and potentially perilous. *Indispensable Counsel* addresses all four of those characteristics of the general counsel's job.[12] In this article, we focus on the potentially perilous aspect of the CLO's role.

7. *Id.* at xxvi.

8. *See* Huber & Hoffman, *supra* note 4, at I–5 ("The Act represents a paradigm shift for all public companies, both domestic and foreign, and their officers, directors and shareholders as well as market, accounting and legal professionals.").

9. *See* E. Norman Veasey, Shawn Pompian & Christine Di Guglielmo, *Federalism v. Federalization: Preserving the Division of Responsibility in Corporation Law*, *in* 2 THE PRACTITIONER'S GUIDE TO THE SARBANES-OXLEY ACT V-5-1, V-5-4 (John J. Huber et al. eds., 2009) ("Not only were these rules arguably unrelated to the corporate scandals they were supposed to address, but they also represented a perceptible shift in the established federal-state division of authority. And, perhaps more ominously, Sarbanes-Oxley seemed to presage further federal incursions of corporate governance and lawyer regulation—either directly through the SEC or indirectly through listing requirements promulgated by the stock exchanges.").

10. Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12, 15, 18, and 31 U.S.C.).

11. *See* INDISPENSABLE COUNSEL, *supra* note 5, at 14–20 (discussing the role of SOX and Dodd-Frank in creating the new reality).

12. *Id.* at 6–14.

II. Potential Peril in the General Counsel Role

The CLO is increasingly exposed to outside scrutiny and potential exposure to liability, prosecution, regulatory constraints, disbarment, and reputational harm. Another source of peril—real or perceived—is the risk of job loss as a result of the tension between promoting the corporate client's interests and adhering to compliance demands when the CEO or the board do not agree with the CLO's advice. The CLO must therefore employ great skill, integrity, and zeal in balancing her need for self-preservation with her need to serve her client, the corporation.

In reaching for this balance, the GC must not succumb to the temptation to "go along to get along." She cannot be mere "window dressing" on corporate decision making, placing her imprimatur of legal approval on tough questions. Instead, she must actively engage in and influence the decision-making process.

History provides examples of where CLOs may have failed in this role. Indeed, the new reality has reincarnated Judge Stanley Sporkin's famous rhetorical question following the savings & loan scandals of the late 1980s and early 1990s:

> Where were these professionals [accountants and lawyers], a number of whom are now asserting their rights under the Fifth Amendment, when these clearly improper transactions were being consummated?
>
> Why didn't any of them speak up or disassociate themselves from the transactions?
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> . . . .
>
> What is difficult to understand is that with all the professional talent involved (both accounting and legal), why at least one professional would not have blown the whistle to stop the overreaching that took place in this case.[13]

Only a little more than a decade after Judge Sporkin uttered those words, Enron, WorldCom, and other corporate scandals raised similar questions, prompting Congress to include in SOX a provision (section 307) directing the SEC to develop minimum professional standards for lawyers.[14] On the Senate floor during the SOX debate, one Senator targeted corporate counsel with the following remarks:

> The truth is that executives and accountants do not work alone. Anybody who works in corporate America knows that wherever you see corporate executives and accountants working, lawyers are virtually always there looking over their shoulder. If executives and/or accountants are breaking the law, you can be sure that part of the problem is that the lawyers who are there and involved are not doing their jobs.[15]

The SEC implemented section 307 by promulgating Rule 205, which includes elaborate provisions concerning when and how lawyers *must* report up the

13. Lincoln Sav. & Loan Ass'n v. Wall, 743 F. Supp. 901, 920 (D.D.C. 1990).
14. 15 U.S.C. § 7245 (2006).
15. 148 Cong. Rec. S6524-02, S6551 (daily ed. July 10, 2002) (statement of Sen. Edwards).

corporate ladder "evidence of a material violation" and *may* report outside to the SEC if intra-corporate remedies are not forthcoming.[16] For both supervising and subordinate lawyers, these rules contain significant responsibilities, as well as the potential for peril in connection with non-compliance with the rules.

Professor Coffee has described the "gatekeeper" problem in the Enron matter:

> That gatekeepers failed is not by itself surprising. The history of financial frauds reveals many similar failures over the last century. That gatekeepers failed en masse is probably more surprising. . . .
>
> In the wake of the Enron and WorldCom scandals, Congress rewrote the federal securities laws, invading an area traditionally reserved for state regulation in order to pass the Sarbanes-Oxley Act in 2002. . . .
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> . . . .
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> The premise here should be made explicit: corporate governance does not work, nor can management be held accountable, in the absence of a system that makes gatekeepers reasonably faithful to the interests of investors.
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> . . . .
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> At least a partial cause of Enron's collapse was the lack of disclosure of material information about the company's activities and liabilities. Both Enron's off-balance sheet liabilities and its related-party transactions with entities controlled by Andrew Fastow, its chief financial officer, were hidden from the market. Normally, the responsibility for ensuring compliance with the corporation's disclosures under the federal securities laws falls on the corporation's attorneys.[17]

As a result of Enron and other scandals, in addition to grappling with adherence to the SEC rules implementing SOX, some general counsel have been swept up in criminal investigations, civil suits, and SEC professional responsibility proceedings. Indeed, some general counsel have gone to jail.[18]

Now, in the aftermath of the 2007–2009 economic meltdown from the subprime mortgage crisis and other debacles, there is a renewed and increasingly intense scrutiny of general counsel and other in-house lawyers. But what is the long-term impact of Dodd-Frank as well as SOX and attitudes of regulators on general counsel and other in-house counsel?

As noted above, concerns about potential external perils like regulatory sanctions, prosecution, or ethical investigations are not the only concerns that may keep the general counsel awake at night. As we have noted, there is also the

16. Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. pt. 205 (2003) (implementing section 307 of the Sarbanes-Oxley Act).

17. JOHN C. COFFEE JR., GATEKEEPERS 15–18, 32 (2006).

18. *See, e.g.*, *2 Years in Prison for Ex-Software Executive*, N.Y. TIMES, Jan. 17, 2007, at C13 (reporting two-year sentence for former general counsel of Computer Associates in connection with "scheme to increase the company's quarterly revenue artificially through backdated sales contracts"); *Comverse General Counsel Headed to Prison*, ETHISPHERE (May 20, 2007), http://ethisphere.com/comverse-general-counsel-headed-to-prison/ (reporting on sentencing of former general counsel of Comverse Technology in connection with securities backdating).

very real, potential peril of losing her job as a result of internal conflict with the other representatives of the corporate client.[19] A general counsel may be tempted to refrain from challenging some of the courses of action promoted by management for fear of placing her livelihood at risk.[20] Whether or not this dependence raises an issue of compromised objectivity and the potential for conflict of interest is a concern.[21]

Professor Bainbridge has put his finger on the "go along to get along" problem. In a chapter entitled "The Gatekeepers" in his recent book,[22] he carefully analyzes the tension the corporate lawyer experiences between gatekeeping and job security:

> The gatekeepers failed rather miserably during the dotcom era. Enron was primarily an accounting scandal, little different from the 150-plus other accounting fraud cases that the SEC investigates in most years. Indeed, this was true not just of Enron, but also most of the dotcom era corporate scandals. . . .
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> . . . .
>
> There is little doubt that lawyers played an important role in the scandals. Sometimes their negligence allowed management misconduct to go undetected. Sometimes lawyers even acted as facilitators and enablers of management impropriety. . . .
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> . . . .
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> The nature of the legal market gives lawyers—both in-house and outside counsel—strong incentives to overlook management wrongdoing. As to the former,

19. *See* E. Norman Veasey & Christine T. Di Guglielmo, *The Tensions, Stresses, and Professional Responsibilities of the Lawyer for the Corporation*, 62 BUS. LAW. 1, 11–13 (2006).

20. *See* Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955, 956 (2005) ("[A] general counsel's dependence on a single client may call into question counsel's capacity to bring an appropriate degree of professional detachment to bear."); *id.* at 967–68 ("Conventional skepticism about the capacity of in-house corporate lawyers to exercise independent professional judgment focuses on the exclusivity of their relationship with a single client (their employer), which calls into question the feasibility of withdrawing from representation if professional norms so require."); *see also* Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057, 1099–1100 (1997) ("Whether in-house counsel can exercise the required degree of [professional independent judgment] is a question that has universally troubled the legal profession. Critics insist that a lawyer who is dependent on a single client, i.e., the corporate employer, for his or her livelihood cannot provide independent advice and judgment of the same caliber as outside counsel whose financial ties to a single client are presumably much weaker." (footnotes omitted)); *cf. also* Sally R. Weaver, *Ethical Dilemmas of Corporate Counsel: A Structural and Contextual Analysis*, 46 EMORY L.J. 1023, 1027 (1997) ("The first, and perhaps most critical, difference between [in-house] counsel and their colleagues in private practice is the economic dependence of [in-house] counsel on a single client.").

21. Rule 1.7(a)(2) of the Model Rules of Professional Conduct provides that a lawyer shall not represent a client if that representation may be materially limited by the lawyer's own interests. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2009); *see also, e.g.*, Z. Jill Barclift, *Corporate Responsibilities: Ensuring Independent Judgment of the General Counsel—A Look at Stock Options*, 81 N.D. L. REV. 1, 16 (2005) (noting that the commentary to Model Rule 1.7 "recommends that a lawyer withdraw from representing a client if the lawyer's financial interest in the client leads to the reasonable conclusion that the representation would be adversely affected," and suggesting that this may be the case for general counsel, particularly when they receive stock option compensation).

22. STEPHEN M. BAINBRIDGE, CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS (2012).

> even if the board of directors formally appoints the in-house general counsel, his tenure normally depends mainly on his relationship with the CEO. . . .
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> . . . .
>
> Both the general counsel and outside lawyers necessarily have access to a wide range of information, including but hardly limited to information relating to law compliance by the organization. Because the management-attorney relationship tends to become the focus of the attorney's relationship with the firm, however, lawyers have strong incentives to help management control the flow of information to the board of directors.
>
> Worse yet, attorneys may be tempted to turn a blind eye to managerial misconduct or even to facilitate such misconduct. . . .[23]

While these excerpts highlight the anxieties and temptations that may face in-house counsel, the entirety of Professor Bainbridge's book paints a balanced picture of the temptations as well as the integrity of in-house lawyers. In the modern era, with all the tensions and challenges of the "new reality," we suggest that the occasional "rogue" lawyer should not overshadow the competence and integrity of most modern general counsel and their staffs.

In 2007, the Association of Corporate Counsel published a report entitled *In-House Counsel in the Liability Crosshairs*.[24] That report examined the liability exposure of in-house counsel and concluded that, following the Enron, WorldCom, and other scandals of 2001–2002, "liability has increasingly been imposed or sought against in-house lawyers, particularly by the Securities and Exchange Commission (SEC) and federal prosecutors."[25] But the report balanced that conclusion with the observation that "[w]hile the number of suits and other proceedings against in-house lawyers has increased exponentially in recent years and deserves appropriate attention, the absolute number of corporate counsel who have been targeted is still a very small number."[26] The ACC report therefore concluded that:

> In reality, the fundamentals have not changed: Lawyers are and always have been professionals with a strong ethical creed and a focus on doing the right thing. This important fact partly explains why in-house lawyer roles and attendant "responsibilities" to influence the behavior of others in the corporate structure are under such close scrutiny and increasing demand by stakeholders who want to guarantee better corporate legal compliance.
>
> The result: Heightened scrutiny applied to lawyer behavior leads to a new focus, increased vigilance, and an experiential change in the tone and tenor of daily routines and relationships in the company by corporate counsel the world over, in large and small departments, and in every conceivable industry and specialty.[27]

That was 2007. Is the CLO's potential exposure to peril different today?

23. *Id.* at 179–88.
24. Ass'n of Corp. Counsel, In-House Counsel in the Liability Crosshairs (Sept. 2007).
25. *Id.* at 5.
26. *Id.*
27. *Id.* at 4.

III. Conceptualizing the Role: The General Counsel as Advocate, Gatekeeper, or Persuasive Counselor

The "heightened scrutiny applied to lawyer behavior" raises the threshold question of the extent to which one should view the primary role of an in-house lawyer for a public company to be that of a "gatekeeper." There is a widely held view—particularly among regulators and some academics—that corporate lawyers have a central and primary responsibility to act as gatekeepers.

But of course the general counsel's role is holistic. CLOs have many responsibilities, and they serve their clients as both advisors and advocates. Does viewing lawyers primarily as gatekeepers shift the understanding of a lawyer's primary role from that of advisor, protector, and advocate for the corporate client's interests to that of guardian of the *public* interest? Does viewing general counsel as gatekeepers subjugate to secondary status the zealous pursuit and protection of their clients' interests? Of course, in many instances pursuing and protecting the client's interests and the public interest are not mutually exclusive. Keeping the client out of trouble is a key mission of the CLO, and that goal is in both the public interest and client's interests. But if corporate lawyers become targets of civil and criminal law enforcement because things go awry "on their watch" when they are not active perpetrators has the pendulum swung too far?

There is considerable discussion about the issues that keep corporate counsel "up at night."[28] A principal insomnia-inducer seems to be a perception among some corporate lawyers that some government regulators and prosecutors have a "gotcha" mentality, which drives them, among other things, to elevate compliance to "regulation by investigation." Panelists at a December 2011 meeting of CLOs of major corporations articulated this perception as follows:

> American businesses are increasingly anxious about regulatory uncertainty. Both within its current scope and as a specter of additional regulations, this new system [of regulation under the Dodd-Frank Act] is an unknown factor.
>
> . . . .
>
> In this new competitive environment, regulators are also resorting to "regulation by investigation," wherein competing agencies conduct duplicative investigations in search of newsworthy information that could garner public attention. The problem, according to panelists, is that such investigations lead to investigation reports, which often trigger litigation.
>
> . . . This "gotcha" environment and the apparent need to lay blame for the difficult economic and political situation in the U.S. seems to have led to the criminalization of what used to be ordinary business mistakes.[29]

In June 2012, Weil, Gotshal & Manges LLP, the Center for Audit Quality, and Columbia Law School sponsored a colloquium that was attended by more than

28. *See, e.g.*, *What's Keeping U.S. Corporate Counsel Up at Night? LCJ's General Counsel's Roundtable Examines Regulation Post Dodd-Frank*, Metro. Corp. Couns., Jan. 2012, at 1, 45.

29. *Id.* at 45.

seventy general counsel. In response to an anonymous survey during one session of the colloquium, the general counsel in attendance recorded their principal concerns. The concerns that topped the list—by far—were compliance and liability. Two of the survey questions were particularly relevant. The results are reported in Tables 1 and 2.

Table 1

Question: The area that "keeps me up at night" most is:	**Responses**
Risk management	19.18%
Supporting business goals	8.22%
Providing quality legal services	9.59%
Compliance and liability issues	63.01%
Totals (72 respondents)	100%

Table 2

Question: Time dedicated to compliance issues over the past two years has:	**Responses**
Decreased overall	2.78%
Not changed	8.33%
Moderately increased	26.39%
Drastically increased	62.5%
Totals (72 respondents)	100%[30]

Those who view corporate lawyers—and particularly general counsel—solely or predominantly as gatekeepers may be taking an approach that is either too broad or too narrow. The overly broad view counterfactually assumes that the general counsel has and can exercise omnipotent authority and has the power to bring to a halt risky corporate activities. The overly narrow view discounts the many other important qualities and roles that the GC can and usually does bring to bear on her job, including independence, judgment, wisdom, problem solving, a strong ethical compass, compliance, and the ability to give sound and persuasive advice.

Instead, a fuller and more nuanced understanding of the quintessential general counsel embraces the concepts that she is a gatekeeper, enabler of business strategy, advisor, problem solver, and advocate. The general counsel and in-house lawyers should be understood to be—and should in fact be—"persuasive

30. The complete survey results are on file with the authors.

counselors."[31] Under the persuasive counselor model, lawyers attempt to guide their clients to the right course of action by providing independent advice, backed up by the persuasive power of the lawyer's personal courage and influence. In order to carry out their role effectively as persuasive counselors, lawyers must therefore develop and hone their independence (or objectivity) and courage—key qualities for in-house counsel—and must earn the trust and confidence of other key corporate constituents in order to have the ability to persuade them to the right course of action.[32]

Of course, the ability of general counsel to be persuasive counselors also depends on their timely receiving the fullest quantity and quality of information required to see potential pitfalls, to consider issues in the context of the company's bigger picture, and to anticipate how matters will be viewed in hindsight. Thus, the general counsel should see to it that the company implements a robust information flow—for both the general counsel and the rank and file of the legal department—that will enable lawyers to fulfill their roles as persuasive counselors. This includes making sure that the input of the legal department occurs early enough in the process of considering and executing business strategies to allow that input to impact the outcomes.

Some cynics may fear that the persuasive counselor model would allow a lawyer to shirk responsibility for corporate misconduct by arguing that the lawyer gave accurate advice concerning the law and how to comply with it, but executives simply chose not to follow the advice. But that view assumes a disingenuous general counsel who lacks independence, follow through, and courage. That is *not* the persuasive counselor model.

Of course, corporate strategy often involves taking prudent risks and properly managing risk in the C-Suite and the boardroom.[33] If the CLO succumbs to improper pressure imposed by an overly aggressive CEO, not only will her corporate client be in jeopardy, the gatekeeper component of her role as persuasive counselor is lacking. In addition to incurring harm to her reputation, she may be exposed to SEC and DOJ enforcement, as well as disbarment or civil liability problems.[34]

31. Veasey & Di Guglielmo, *supra* note 19, at 30; *see also* E. Norman Veasey, Chief Justice of the Delaware Supreme Court, Response for the Court at the Delaware Bar Admission Ceremony (Dec. 15, 2003) (on file with *The Business Lawyer*) ("In my opinion, the best lawyers are the persuasive counselors: those who make the professional effort to see pitfalls that may lie ahead and persuade their clients to change course. . . . Judge Stanley Sporkin [] said famously from the bench many years ago . . . : 'Where were the lawyers?' It was clear to him then that good lawyers might have foreseen and prevented those scandals. In my opinion, the lawyer's responsibility is to be holistic and to eschew tunnel-vision in service to clients and justice.").

32. INDISPENSABLE COUNSEL, *supra* note 5, at 46–54; *see also* Omari Scott Simmons & James D. Dinnage, *Innkeepers: A Unifying Theory of the In-House Counsel Role*, 41 SETON HALL L. REV. 77, 90–92 (2011) (warning against a "myopic focus on independence" and promoting a vision of the in-house counsel role that "consider[s] how the input of in-house counsel could positively impact business enterprises and the design of corporate reform," particularly in light of in-house counsel's greater ability to monitor the corporation as compared with outsiders).

33. *See generally* NACD RISK REPORT, *supra* note 2.

34. *See* Interview with Susan Hackett, Senior Vice President and General Counsel, Ass'n of Corporate Counsel (Sept. 2, 2009) ("I think that the taint of being in an organization that has a cultural

The up-the-ladder reporting requirement under SOX, which includes not only an obligation to report up but also an option to report to the SEC certain unremedied wrongdoing,[35] has the potential to create an adversarial atmosphere within the corporation. If other constituents within the corporation perceive in-house counsel as internal whistleblowers,[36] they may be reluctant to bring issues to counsel's attention. But, in contrast, this perception may empower the general counsel by giving her a stronger internal voice as the persuasive counselor to achieve the right outcome from a legal and ethical point of view.

IV. Understanding the Risks: Types of Potential Liability Exposure Confronting In-House Counsel

A. SEC Enforcement

The SEC has increasingly focused its attention (or at least its rhetoric) on in-house counsel as the objects of enforcement actions following the corporate scandals of 2001–2002 leading to the passage of SOX,[37] and the financial meltdown of 2007–2009, leading to the passage of Dodd-Frank.

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or corporate failure problem is a far greater problem in a practical sense for CLOs than the likelihood that they will actually have to walk the perp line themselves.").

35. In addition to the "reporting up" provisions, the rules provide that an attorney may report "out" to the SEC:

> An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:
>
> (i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;
>
> (ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury . . . ; suborning perjury . . . ; or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or
>
> (iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

17 C.F.R. § 205.3(d)(2) (2012).

36. Beyond reporting out by lawyers after an internal process of reporting up has been followed and has failed, the Dodd-Frank whistleblower provisions and the SEC's implementing rules now have further empowered non-management whistleblowers to make reports to the SEC, without first exhausting (or even using) the company's internal reporting system. *See* Indispensable Counsel, *supra* note 5, ch. I.C.3 (discussing the Dodd-Frank whistleblower provisions). The general counsel, in conjunction with other company leadership, should ensure that the internal reporting system is robust, structured, implemented, and monitored to facilitate and encourage internal reporting before external reports are made. *Id.*

37. *See* John K. Villa, *Inside Counsel as Targets: Fact or Fiction?*, ACC Docket, Nov./Dec. 2005, at 104, 104–05; *see also* Colleen P. Mahoney, Recent SEC Enforcement Actions Against Corporate In-House Counsel 2 (Dec. 14, 2007) (unpublished manuscript) (on file with *The Business Lawyer*) ("Prior to passage of the Sarbanes-Oxley Act . . . , SEC actions against corporate in-house counsel were relatively infrequent. Since the passage of Sarbanes-Oxley in 2002, the SEC has stepped up its pursuit of in-house counsel allegedly involved in purportedly false or misleading financial statements, and the number of actions against lawyers involved in options backdating in particular has dramatically increased.").

In a speech in 2004, then-Director of the SEC Division of Enforcement, Stephen Cutler, articulated why and how the SEC planned to focus on investigation and prosecution of corporate counsel wrongdoers. He said: "We have seen too many examples of lawyers who twisted themselves into pretzels to accommodate the wishes of company management, and failed in their responsibility to insist that the company comply with the law."[38] He went on to delineate how the Commission would use its enforcement power to investigate and pursue actions against in-house and outside corporate counsel who allegedly engaged in various types of malfeasance or misfeasance.

More recently, in June 2011 in remarks to the Criminal Law Group of the UJA-Federation of New York, the current SEC Director of Enforcement, Robert S. Khuzami, also set an aggressive tone on the subject of enforcement actions against counsel—a tone that should be heeded, but perhaps with some skepticism. To be sure, he did not focus his remarks on general counsel or other senior in-house counsel. Rather, he focused on defense counsel (presumably outside counsel) who have engaged in questionable tactics in defending clients in SEC enforcement proceedings. In that context he said:

> There also is the view that, as sovereign, the SEC should not be distracted by questionable defense practices, even those perilously close to the line, but rather should focus only on the objective evidence regardless of the externalities like the conduct of counsel.
>
> . . . .
>
> What is the appropriate response for the SEC to situations where counsel appears to cross the line from aggressive practice to unethical or obstructive behavior?
>
> . . . .
>
> We can and will increase the number of referrals under Rule 7(e) of the SEC Rules Relating to Investigations (17 CFR Sect. 203.7(e)) where appropriate. That section authorizes the Enforcement staff to report dilatory, obstructionist or contumacious conduct to the Commission, which in practice means a referral to the SEC's Office of General Counsel, who conducts an investigation.
>
> If the Commission finds unethical or improper professional conduct, as was found in at least one recent case, *SEC v. Altman*,[39] counsel may be suspended or barred from practice before the Commission, excluded from participation in the particular investigation, or censured.

38. Stephen M. Cutler, Director, Div. of Enforcement, U.S. Sec. & Exch. Comm'n, Speech at the UCLA School of Law: The Themes of Sarbanes-Oxley as Reflected in the Commission's Enforcement Program (Sept. 20, 2004) (transcript available at http://www.sec.gov/news/speech/spch092004smc.htm).

39. *See In re* Altman, Exchange Act Rel. No. 63306 (Nov. 10, 2010), *available at* http://www.sec.gov/litigation/opinions/2010/34-63306.pdf (permanently denying lawyer right to appear before the SEC, where the lawyer, while representing a prospective witness in an SEC administrative proceeding, offered to have his client evade service of a subpoena or testify falsely in exchange for remuneration for his client).

> We can and will increase referrals to the Department of Justice for witnesses who engage in obstruction and perjury, including false claims of a lack of recollection. We can and will also increase referrals to state bar associations, and to the Department of Justice where appropriate, of attorneys who participate or assist in such misconduct.
>
> . . . .
>
> Our enforcement recommendations to the Commission are based not only on testimony and documents gathered in the investigation, but also on staff's view of the credibility of counsel.[40]

Did he paint with too broad a brush, not only criticizing unspecified defense counsel but also implying that in-house advisors are in the SEC's crosshairs?

In the past, the SEC enforcement activity against general counsel and other in-house counsel seems largely to have tracked the notorious corporate scandals of the day, some of which led to SOX and Dodd-Frank. For example, of the nine enforcement actions that the SEC filed against or settled with in-house counsel in 2007, six involved stock-option backdating and pricing issues—a corporate scandal that was very much in the news that year—and one involved Enron.[41]

Thus, any prior increase in enforcement activity against general counsel and other in-house counsel may not have been the result of a particular decision by the SEC to target in-house counsel, but rather may correlate to the nature of specific corporate compliance issues of the day. Moreover, another of the nine actions in 2007 involved insider trading allegations—allegations that are not directly tied to the defendant's status as a lawyer.[42] Certainly, if a perpetrator of hard-core fraud happens to be an in-house lawyer, it is not his status as a lawyer that makes him a target, it is his status as a fraudster.

Actions that the SEC has traditionally initiated against in-house counsel include civil injunctive actions under section 21(d) of the Exchange Act,[43] administrative actions under section 15(c)(4) of the Exchange Act,[44] cease-and-desist orders under section 21 of the Exchange Act,[45] and proceedings to prevent a lawyer from practicing before the Commission.[46] SEC enforcement actions

40. Robert S. Khuzami, Director, Div. of Enforcement, U.S. Sec. & Exch. Comm'n, Remarks to Criminal Law Group of the UJA-Federation of New York (June 1, 2011) (transcript available at http://www.sec.gov/news/speech/2011/spch060111rk.htm).

41. *See* David B. Bayless & Tammy Albarrán, *Recent SEC Enforcement Actions Against In-House Lawyers: An Ominous Trend for the Legal Profession*, Andrews Sec. Litig. & Reg. Rep., July 25, 2007, at 2 (summarizing SEC enforcement actions against in-house counsel in 2007); *see also* Coffee, *supra* note 17, at 17–18 ("The premise here should be made explicit: corporate governance does not work, nor can management be held accountable, in the absence of a system that makes gatekeepers reasonably faithful to the interests of investors.").

42. Bayless & Albarrán, *supra* note 41, at 2; *see also* Report of the New York City Bar Association Task Force on the Lawyer's Role in Corporate Governance (Nov. 2006), *as reprinted in* 62 Bus. Law. 427, 462 & n.134, 488 & n.245 (2007) (discussing lawyers' role in the backdating scandal).

43. 15 U.S.C. § 78u(d)(1) (2006).

44. 15 U.S.C. § 78o(c)(4) (2006 & Supp. IV 2010).

45. 15 U.S.C. § 78u-3(a) (2006).

46. 17 C.F.R. § 201.102(e) (2012); *see* Villa, *supra* note 37, at 104 (identifying the possible noncriminal actions by the SEC against lawyers).

against lawyers have typically targeted the chief legal officer of a company,[47] and most involve situations in which the subject of the action did not rely on the advice of outside counsel.[48] In-house counsel appear to be at greater risk for SEC enforcement actions against them if they are generalist lawyers who failed to seek out specialized advice when needed.[49]

In 2005, the SEC charged Google, Inc. and its general counsel, David Drummond, with failure to register the issuance of over $80 million in stock option grants to employees or make associated financial disclosures required by the securities laws in the two years preceding Google's initial public offering.[50] The SEC's order found that Drummond

> was aware that the registration and related financial disclosure obligations had been triggered, but believed that Google could avoid providing the information to its employees by relying on an exemption from the law. According to the Commission, Drummond advised Google's board that it could continue to issue options, but failed to inform the board that the registration and disclosure obligations had been triggered or that there were risks in relying on the exemption, which was in fact inapplicable.[51]

To settle the charges, Google and Drummond agreed to a cease-and-desist order.[52] Commentators have argued that the charges against Drummond make securities law claims out of "what arguably amounts to providing incorrect legal advice."[53]

Other cautionary tales include the SEC's Nature's Sunshine Products settlement of an FCPA matter. In that matter, the SEC settled with two executives (non-lawyers) based on a "control person" theory.[54] One certainly could conjure up circumstances where that theory could be deployed against an in-house lawyer.

SEC enforcement is a "mixed bag." In 2010 an SEC administrative judge ruled that Theodore W. Urban, former general counsel of a broker-dealer, acted reasonably in his supervision of a rogue broker and dismissed charges brought

47. *But cf.* Bayless & Albarrán, *supra* note 41, at 2 ("Historically, the agency has not pursued enforcement actions against lawyers (much less against general counsels) as aggressively as it has [in 2007].").

48. Villa, *supra* note 37, at 105; *cf. also* Alicia Mundy & Brent Kendall, *U.S. Rebuffed in Glaxo Misconduct Case*, WALL ST. J., May 11, 2011, at B1 (reporting court's directed verdict acquitting in-house counsel of criminal charges for obstruction of justice, where in-house counsel relied on advice of outside counsel).

49. Villa, *supra* note 37, at 106.

50. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Google and Its General Counsel David C. Drummond with Failure to Register Over $80 Million in Employee Stock Options Prior to IPO (Jan. 13, 2005) (No. 2005-6), *available at* http://www.sec.gov/news/press/2005-6.htm.

51. *Id.*

52. *Id.*

53. Yuri Mikulka, *Be Careful Out There*, CORP. COUNS., Mar. 2008, at 73, 73. In 2007, the SEC instituted proceedings against Drummond for conduct in another matter, which predated the Google issue. *See In re* Drummond, Exchange Act Rel. No. 56105 (July 19, 2007), *available at* http://www.sec.gov/litigation/admin/2007/34-56105.pdf.

54. SEC Charges Nature's Sunshine Products, Inc. with Making Illegal Foreign Payments, SEC Litig. Rel. No. 21162 (July 31, 2009), *available at* http://www.sec.gov/litigation/litreleases/2009/lr21162.htm.

against Urban by the SEC Enforcement Division.[55] Commentators have observed that, despite the positive outcome for Urban, this decision may have significant ramifications for general counsel in the future:

> While this decision was certainly good news for Urban, it may not be good news for legal and compliance employees in the securities industry. While the ALJ did find that Urban, by acting reasonably, did not violate the supervision provisions, the judge also found that notwithstanding his lack of authority to hire or fire employees, Urban was, in fact, the supervisor of the rogue broker.
>
> While not unexpected, this finding represents a significant extension of SEC precedent and significantly increases the real risk that members of the legal or compliance department of a financial services firm could be subject to liability for supervision deficiencies.
>
> . . . .
>
> Given the holding in this case, what should legal and compliance personnel do?
>
> . . . .
>
> The Urban opinion makes it more likely that legal and compliance personnel will be found to be supervisors and subject to potential liability.
>
> While the opinion may be an overreach, legal and compliance officials should take steps to minimize the likelihood that they will be found to be supervisors. Legal and compliance officials should also take steps to document their conduct so that a later finding of reasonableness can be supported.[56]

At least one SEC Commissioner has echoed the concerns expressed by some commentators about the potential liability risks for legal personnel after the Urban decision. In a speech in February 2012, Commissioner Daniel M. Gallagher discussed "failure-to-supervise" liability and, in particular, the Urban case. He stated that "robust engagement on the part of legal and compliance personnel raises the specter that such personnel could be deemed to be 'supervisors' subject to liability for violations of law by the employees they are held to be supervising."[57] But he also persuasively cautioned against applications of failure-to-supervise liability that would create incentives for legal and compliance personnel to engage less in activities that enhance the effectiveness of their legal and compliance roles, in order to reduce their risk of liability. Commissioner Gallagher said:

> A compliance officer or in-house attorney who stays ensconced in a dark corner of the firm drafting policies and sending out memoranda, but never interacting with the individuals governed by those policies or the recipients of those memos, risks diminished effectiveness or even irrelevance; but such a person would reduce his

55. *In re* Urban, Admin. Proc. File No. 3-13655 (Sept. 8, 2010), *available at* www.sec.gov/litigation/admin/2012/34-66259.pdf.

56. William E. White & Heather J. Pellegrino, *Legal, Compliance Employees on the Hook After Urban*, Law360.com (Oct. 4, 2010, 1:01 PM EST), http://www.law360.com/securities/articles/196841.

57. Daniel M. Gallagher, SEC Commissioner, Remarks at "The SEC Speaks in 2012" (Feb. 24, 2012) (transcript available at http://www.sec.gov/news/speech/2012/spch022412dmg.htm).

> or her potential liability as a supervisor. On the other hand, the more engaged a firm's legal counsel or compliance personnel become—the more they bring their expertise to bear in addressing important, real-world compliance issues and in providing real-time advice for concrete problems the firms and their employees face—the more likely they are to be deemed to be playing a supervisory role. Thus, the Commission's position on supervisory liability for legal and compliance personnel may have had the perverse effect of increasing the risk of supervisory liability in direct proportion to the intensity of their engagement in legal and compliance activities.
>
> Simply put, the Commission and, in the case of broker-dealers, the SROs, need to provide a framework that encourages in-house legal and compliance officers to depart, when necessary, from the safety of black and white categorizations of who is and who is not a supervisor. We need these folks to jump into crises, into thorny regulatory issues, and into operational and other issues that will be best resolved with the benefit of sage regulatory counseling. Our system of oversight for regulated entities such as broker-dealers and investment advisers is one of shared responsibility, in which the Commission oversees the firms that, in turn, oversee their associated persons . . . .
>
> Any understanding of the issue must begin with the fact that broker-dealer or investment adviser compliance and legal personnel are, by default, *not* supervisors but rather *providers of support* for the firm's other employees. We're not talking about widget factories here—the business of regulated entities inherently involves regulatory issues at every turn. Almost every facet of broker-dealer and investment adviser "business" issues are also regulatory issues, and accordingly the Commission and the SROs should want legal and compliance in the discussion about most issues. . . .
>
> . . . .
>
> The Commission's ability to impose sanctions for failures to supervise is a powerful tool to compel a broker-dealer or investment adviser's managers and executives to proactively monitor subordinate employees' compliance with laws and regulations. Those high-level personnel clearly fall within the ambit of the Commission's failure-to-supervise authority, a fact of which such high-level personnel are well aware. Failure-to-supervise liability can therefore act as a key incentive for a firm's management to carry out their responsibilities properly. We must strive to ensure, however, that the fear of failure-to-supervise liability never deters legal and compliance personnel from carrying out their own critical responsibilities. Such a result could only be described as perverse.[58]

So what lies ahead? To be sure, the SEC (and the DOJ) have recently escalated the rhetoric about scrutinizing the conduct of lawyers, including general counsel. Such rhetoric, qua rhetoric, can certainly have a deterrent effect. But to what extent is this escalation of the rhetoric a real concern, as distinct from mere bluster? And to what extent is that rhetoric tempered by their understanding of the critical role that lawyers, including general counsel, play in keeping companies on the right track, for the benefit of investors and the public?

58. *Id.*

It remains to be seen what will happen to general counsel and other in-house counsel at the hands of the SEC Enforcement Division in the "new reality." One certainly should not dismiss offhand the SEC rhetoric about lawyers being in the crosshairs. The SEC has, for decades, taken the position that lawyers, as well as accountants, are expected to act as gatekeepers. But, traditionally, the Commission has been cautious about bringing actions against lawyers, except for such misconduct as hard-core 1933 Act violations involving intentionally false drafting and financial participation in fraud, as well as more recent hard-core fraudulent activities (such as willful false reporting, obstruction, or false documentation such as the option backdating cases). The question going forward is whether a sea change is afoot.

It does appear that the SEC may focus the crosshairs on certain types of conduct. For example, Director Khuzami has been focused on two "new" areas: first, litigation wrongdoing (such as non-willful but improper document production, tampering with or improperly coaching witnesses, false privilege claims); and second, failure to "report up" properly under Sarbanes-Oxley section 307 and SEC Rule 205, although no "reporting up" cases have yet been publicly filed.

In the current climate, which includes significant public and media pressure to pursue corporate executives, it seems likely that a few "reporting up" or "litigation wrongdoing" cases will be brought against general counsel. The media, and some federal judges and politicians, have raised questions about why law enforcers should not be more focused on punishing individual officers rather than seeking fines, penalties, and sanctions against the corporate entities (with the resultant collateral damage to investors).[59] Also, the SEC has other powerful tools (such as Rule 102(e), suspending the ability to practice before the Commission) that could be used against general counsel.

Assuming the SEC and DOJ decide to move forward with using the "control person" and "failure of supervision" theories to bring cases against general counsel and other lawyers, the aiding and abetting doctrine likely will be a primary weapon. Dodd-Frank amended the 1933 Securities Act, strengthening the powers of the Commission, by enhancing "aiding and abetting" liability exposure. Under Dodd-Frank, the Commission need show only: (i) a violation, (ii) intentional or reckless gatekeeper conduct, and (iii) substantial assistance. These amendments include the provision that "any person that *knowingly or recklessly provides substantial assistance* to another person in violation of the Act, or of any rule or regulation issued under the Act, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided."[60] The focus going forward will be on the terms "knowingly or recklessly" and "substantial assistance."

59. *See, e.g.*, Michael S. Schmidt & Edward Wyatt, *Fraud Cases Often Spare Individuals*, N.Y. TIMES, Aug. 8, 2012, at B1, B4 ("[C]ritics [argue] . . . that the practice of settling fraud cases with companies while not charging any employees might be giving executives an incentive to push the limits of the law.").

60. 15 U.S.C. § 77o(b) (2006 & Supp. IV 2010).

Traditionally, the SEC must prove: (i) a securities law violation by a primary wrongdoer, (ii) knowledge of the violation by the alleged aider and abettor, and (iii) that the latter "substantially assisted" the primary action. But now "a showing that the alleged aider and abettor acted recklessly, i.e., in a way which was highly unreasonable and was an extreme departure from the standards of ordinary care" is sufficient to satisfy the intent requirement.[61] In short, "[a]n egregious refusal to see the obvious, or to investigate the doubtful, could give rise to an inference of recklessness."[62] Although these provisions expand the "aiding and abetting" powers of the SEC, they do not create a private right of action.

B. Prosecution

In 2002, the Justice Department established its Corporate Crime Task Force. A spike in the number of general counsel subject to criminal prosecution for securities-law-related crimes followed.[63] Still, some have said that "[g]eneral counsel are not typically primary targets for prosecutors—CEOs, CFOs and board members carry brighter bull's-eyes."[64]

But when the general counsel is implicated in a criminal prosecution, "even if the general counsel is innocent, the formal implication of wrongdoing is so toxic that the company can rarely allow the lawyer to stay on."[65] And even if the general counsel remains in the position while the charges are pending, real practical problems arise from the need to distance the general counsel—whose roles and functions in the company are multifaceted—from anything related to the investigation or prosecution.[66]

There is some concern that certain prosecutions of in-house lawyers have lowered the bar with respect to what conduct by in-house counsel will be pursued as criminal conduct. In 2007, a Chicago jury convicted an in-house lawyer at Hollinger International Inc. of fraud in conjunction with former chairman Conrad Black's conviction for fraud.[67] The lawyer had drafted noncompete documents in connection with the sale of Hollinger publications that channeled

61. White & Case LLP, *Expansion of SEC Enforcement Powers*, Lexology.com (July 28, 2010), http://www.lexology.com/library/detail.aspx?g=897d492e-e391-4378-b34d-5d2864fa4b08.

62. *Id.*; *see also* Ira Teinowitz, *Dodd-Frank Changes Standard on Aiding and Abetting*, The Deal (Apr. 13, 2012), http://www.thedeal.com/magazine/ID/045968/commentary/doddfrank-changes-standard-on-aiding-and-abetting.php ("The Private Securities Litigation Reform Act of 1995 created the aiding and abetting standard by empowering the SEC to pursue securities claims against third parties who have a business relationship with a company that engaged in fraudulent activity and who have had knowledge of the fraud. Previously, claims against third parties were left to private litigation."). *Cf.* SEC v. U.S. Envtl., Inc., 155 F.3d 107 (2d Cir. 1998); SEC v. McNulty, 137 F.3d 732 (2d Cir. 1998).

63. Villa, *supra* note 37, at 105.

64. Steven Andersen, *Nightmare Scenario*, Inside Couns., Feb. 2009, at 40, 40.

65. *Id.*

66. *Id.*

67. Michael Orey, *In-House Attorneys, Watch Your Step*, Bus. Week (Aug. 6, 2007), http://www.businessweek.com/stories/2007-08-05/in-house-attorneys-watch-your-step.

millions of dollars to Black and others. The lawyer was charged as a participant in the fraud, but not with helping conceive the fraud or receiving any benefit from the payments. "Essentially, [the lawyer] . . . was charged as an enabler of deals he knew were crooked."[68]

More recent prosecutorial activity may reflect an uptick in the pursuit of obstruction of justice charges.[69] In November 2010, the Department of Justice filed an indictment against Lauren Stevens, a former vice president and associate general counsel at GlaxoSmithKline.[70] Stevens was the point person on an FDA investigation in 2002 of off-label marketing of Wellbutrin SR. The DOJ indictment alleged that Stevens "signed and sent letters denying that Glaxo had marketed Wellbutrin for off-label use despite knowing the company paid physicians to promote the drug in talks that included information on unapproved uses" and that she "withheld documents showing as much despite telling the FDA she had produced all relevant information."[71] Ms. Stevens had consulted both in-house and outside counsel, who had reviewed the relevant documents and advised with respect to the response to the FDA.[72] Nevertheless, the indictment charged Stevens with obstruction of an official proceeding, concealing and falsifying documents to influence a federal agency, and making false statements to the FDA.[73]

The case against Stevens dissolved with a directed verdict of not guilty by Judge Titus of the United States District Court for the District of Maryland in May 2011, who commented ruefully about the "enormous potential for abuse in allowing prosecution of an attorney for giving legal advice."[74] Judge Titus later commented that it was the first time in more than seven years on the bench that he had acquitted a defendant before the defense even presented its case.[75] In addition to the concerns articulated by the judge in dismissing the charges, other observers of the case have criticized the Department of Justice for wasting prosecutorial resources by being too aggressive against in-house

68. *Id.*

69. Melissa Maleske, *Criminal Advocacy*, INSIDE COUNS., Jan. 2011, at 16, 18.

70. *Id.* at 16.

71. *Id.* at 17.

72. *Id.* at 18; David Voreacos & Jeff Feeley, *Ex-Glaxo Lawyer Wins Acquittal from Federal Judge at Obstruction Trial*, BLOOMBERG.COM (May 10, 2011, 4:01 PM CST), http://www.bloomberg.com/news/2011-05-10/former-glaxo-lawyer-wins-acquittal-by-judge-at-maryland-obstruction-trial.html; *see also* Martha Neil, *Ex-Glaxo Lawyer's Defense in Criminal Case Raises Tricky Privilege Issues for Company, Experts Say*, ABA J. (Nov. 11, 2010, 12:17 PM CST), http://www.abajournal.com/news/article/ex-glaxo_lawyers_defense_in_criminal_case_raises_tricky_privilege_issues_fo/ ("retired in-house lawyer's announced intent to rely on claimed legal advice from outside counsel in defending against criminal accusations of wrongdoing concerning her work at GlaxoSmithKline raises tricky privilege issues for the company, experts say").

73. Maleske, *supra* note 69, at 18.

74. Mundy & Kendall, *supra* note 48, at B1.

75. *Id.*; Scott Hensley, *Federal Judge Acquits Ex-Glaxo Lawyer Before Defense Even Starts*, NPR.ORG (May 10, 2011, 4:55 PM), http://www.npr.org/blogs/health/2011/05/10/136177349/federal-judge-acquits-ex-glaxo-lawyer-before-defense-even-starts.

lawyers.[76] In any event, the case raises important issues about the line between aggressive advocacy and obstruction.[77]

The question going forward is whether the DOJ was chastened by its embarrassing loss in the Lauren Stevens case. Perhaps not. According to a media report in June 2012:

> [S]ince Judge Titus' decision to toss their case on May 10, 2011, prosecutors have not backed away from their decision to bring the controversial charges, saying they would do so again if they could and would bring more prosecutions if they encountered similar facts in the future.
>
> "The government stands by its decision to prosecute this matter and we remain committed to vigorously investigating allegations of wrongdoing in the area of health care fraud," said Christina Sterling, a spokeswoman for the U.S. attorney's office in Massachusetts. "There have been no personnel or policy changes as a result of Judge Titus' decision to acquit Ms. Stevens prior to jury deliberations."
>
> That stance, first asserted by the lead prosecutor in the case, Assistant U.S. Attorney Sara Miron Bloom, during an American Bar Association conference in Miami in March, stunned many defense attorneys who had figured Judge Titus' decision and criticisms would have prompted the U.S. Attorney's Office and the U.S. Department of Justice to reassess their approach to such prosecutions.
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> . . . .
>
> "The DOJ's refusal to admit they're wrong is mind-boggling," said Amar Sarwal, vice president and chief legal strategist of the Association of Corporate Counsel. "What the government was trying to do here was criminalize the practice of law."
>
> . . . .
>
> The increased pressure on corporate counsel is the result of a conscious decision by the DOJ and the U.S. Securities and Exchange Commission to start going after attorneys and other so-called corporate gatekeepers who they believe facilitated or covered up fraud and other white collar crimes or disrupted government investigations, attorneys said.
>
> In separate recent speeches, SEC Enforcement Director Robert Khuzami and Manhattan U.S. Attorney Preet Bharara both warned attorneys that they were in the

76. *See Commentary on Court Dismissal of Indictment Against Former VP and Associate General Counsel of GlaxoSmithKline*, WHITE COLLAR CRIME PROF BLOG (Mar. 25, 2011), http://lawprofessors.typepad.com/whitecollarcrime_blog/2011/03/court-dismisses-indictment-against-former-vp-associate-general-counsel-of-glaxosmithkline.html ("But what is more questionable here is that the government thinks that specific intent should not be required here. Should you really prosecute someone who may not have had the specific intent to do these alleged acts? Will this achieve the deterrence from criminality that we desire? Irrespective of whether one accepts the government's claim that advice of counsel is an affirmative defense or the defense and court position that it negates the mens rea, is prosecution of this alleged conduct the way we want to spend valuable tax dollars?").

77. *Id.*; *see also* Sue Reisinger, *New Docs in Case of Ex-Glaxo In-House Counsel Lauren Stevens Reveal Other Lawyers' Roles*, CORP. COUNS. (Mar. 18 2011), http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202486806785; Tom Schoenberg, *Ex-Glaxo Lawyer 'Went Too Far,' U.S. Says at Opening of Obstruction Trial*, BLOOMBERG.COM (Apr. 27, 2011, 12:47 PM CST), http://www.bloomberg.com/news/2011-04-27/ex-glaxo-lawyer-went-too-far-u-s-says-at-opening-of-obstruction-trial.html.

> crosshairs and they should do what they could to root out malfeasance at the companies they represented.[78]

Such charges may signal targeting of lawyers who are more tangentially involved than those who typically have been prosecuted.[79] Some commentators believe that this "sets disturbingly high expectations for in-house attorneys when it comes to recognizing when transactions are being used for corrupt purposes," particularly because transactions like the special-purpose entities used by Enron and the noncompete deals at issue in the Hollinger case "can serve legitimate ends."[80] Thus, prosecution of a lawyer for drafting documents that effectuated such transactions may criminalize mere negligence "for failing to ask questions" of the client.[81] Michele Coleman Mayes, former General Counsel of The Allstate Corporation, has said that the current environment establishes nearly a strict liability regime for general counsel: "If you are a GC, you may now be held accountable for failing to stop the misconduct even if you had no role in the wrongdoing."[82]

As with SEC enforcement actions, the involvement of outside counsel may have the potential to mitigate the risk of criminal prosecution.[83] But it is not an absolute shield. In the case of the indictment of Lauren Stevens at GlaxoSmithKline, Ms. Stevens had vetted the situation with outside counsel, who had reviewed the relevant documents and advised with respect to the decision.[84] Also, history reveals instances where both in-house counsel and outside counsel have been targeted. One noteworthy case where an in-house lawyer was charged and convicted (although the conviction was overturned on appeal) is the AIG-Gen Re prosecution.[85]

Aside from worrying about personal exposure to an increased risk of criminal prosecution, the spike in criminal prosecutions against corporations and their officers means that general counsel need to be more familiar with criminal law and procedure than in the past. As Charles Matthews, then-general counsel of Exxon Mobil, has put it:

> "If a general counsel is not familiar with criminal procedure and criminal law and how it affects business nowadays, they are behind the eight-ball because so many of our laws today have a criminal component. There is more emphasis by the government on using that side of the law than the civil side than there was even five years ago. As to things that used to be handled as a civil issue, you have a lot of

78. Ian Thoms, *Feds Ignore Lessons of GSK Obstruction Case, Attys Say*, LAW360.COM (June 8, 2012, 6:41 PM EST), http://www.law360.com/legalindustry/articles/343834/feds-ignore-lessons-of-gsk-obstruction-case-attys-say.

79. Orey, *supra* note 67.

80. *Id.*

81. *Id.*

82. Mikulka, *supra* note 53, at 73 (quoting Michele Mayes).

83. Villa, *supra* note 37, at 106.

84. Maleske, *supra* note 69, at 18.

85. *See* David Voreacos, *Gen Re, AIG Defendants May Win Dismissal of Fraud Cases*, BLOOMBERG.COM (June 23, 2012, 1:01 AM CST), http://www.bloomberg.com/news/2012-06-22/gen-re-aig-defendants-seek-to-avoid-fraud-retrial.html.

> people now wanting to make them criminal. That is an unfortunate development for general counsel, but something that general counsel must ensure that they are well versed in, because it is a critical part of what they have to advise management and the board about."[86]

When considering "on your watch" prosecution, the potential application of the *Park* doctrine should also be considered. Under that doctrine, named for the United States Supreme Court's 1975 decision in *United States v. Park*,[87] a "Responsible Corporate Officer" (RCO) can be held liable under certain statutes (such as the Food, Drug and Cosmetic Act) even if that officer did not personally commit or enable a wrongful act, and did not even have knowledge of it.

This gives enormous power to the government in certain contexts, but that power can be checked for defendants with good counsel. In writing about the *Park* doctrine in 2011, Gregory L. Poe of the Washington, DC, Bar observed:

> Prominent agency officials have announced intentions to exercise their authority more aggressively than ever in cases that may implicate the RCO doctrine. . . .
>
> Anyone defending an individual in an investigation implicating the FDCA must be acutely sensitive to the potential risks and consequences for individual officers in advising the client and recommending potential courses of action. . . .
>
> . . . .
>
> The RCO doctrine, practically speaking, also gives enormous leverage to civil enforcement agencies. . . .
>
> There is room for a constitutional challenge to the RCO doctrine. The pressure for negotiated resolutions faced by individuals in FDCA criminal investigations, and the tremendous leverage that the government exercises in driving such resolutions, were foreign to *Dotterweich* and *Park*. . . .
>
> Especially given the leverage afforded to the government by the RCO doctrine, it is unlikely that the Department of Justice will expose itself to constitutional litigation over the RCO doctrine in federal court against a well-represented corporate executive before a jury subject to a burden of proof beyond a reasonable doubt under the Federal Rules of Evidence.[88]

Nevertheless, some general counsel remain concerned that in some circumstances a CLO could be prosecuted as an RCO, as noted in a recent general counsel roundtable:

> The Park Doctrine, for example, allows for the criminal prosecution of executives—not because they participated in a criminal event—but because they failed to prevent it, even if they were ignorant of it or affirmatively intended to pre-

86. INDISPENSABLE COUNSEL, *supra* note 5, at 209 (quoting Charles Matthews, then General Counsel, Exxon Mobil Corporation).

87. 421 U.S. 658 (1975); *see also* United States v. Dotterweich, 320 U.S. 277 (1943).

88. *The Responsible Corporate Officer Doctrine: Defending Individuals in FDCA Cases,* FED. CRIM. PRAC. BLOG (Apr. 4, 2011), http://blog.gpoelaw.com/wp-content/uploads/The-Responsible-Corporate-Officer-Doctrine-ABA-Paper.pdf.

vent it. Such "prosecution of innocence" prevents people with productive careers from contributing to American business—all because a rogue employee broke the rules.[89]

C. Fiduciary Duty Liability and Other Civil Litigation

The general counsel, like all corporate officers, owes fiduciary duties of care and loyalty to the corporation.[90] As a general matter, those fiduciary duties are essentially the same as the duties owed by directors.[91] But there have not been a large number of decisions of the Delaware courts explicating the parameters of officers' fiduciary duties.[92]

There is, however, one notable difference between the personal liability exposure of directors compared to that of officers, including general counsel. In Delaware and many other states, directors have statutory protection from exposure to personal liability for violating the duty of care, but not the duty of loyalty, if the certificate of incorporation so provides, as many do.[93] There is usually no such statutory protection for officers when they are acting in their roles as officers.[94] That dichotomy would apply to general counsel, who, as officers, would remain exposed to potential personal liability for duty of care as well as duty of loyalty violations for any acts committed in their roles as officers. If they are also directors and are sued for acts committed as directors, they will likely be protected from due care liability like other directors.

In one recent situation, a former Proskauer partner named Tom Sjoblom has been targeted in investor suits and a suit by a receiver for the estate of Sjoblom's former client, R. Allen Stanford, who was charged with running a $7 billion Ponzi scheme.[95] The claim against Sjoblom in the suits "is that he either knew Stanford was breaking securities laws and chose to ignore it, or that he know-

89. *See, e.g.*, *What's Keeping U.S. Corporate Counsel Up at Night? LCJ's General Counsel's Roundtable Examines Regulation Post Dodd-Frank*, Metro. Corp. Couns., Jan. 2012, at 1, 45.

90. *See* Guth v. Loft, 5 A.2d 503, 510 (Del. 1939) (officers and directors owe fiduciary duties to the corporations they serve).

91. *See* Gantler v. Stephens, 965 A.2d 695, 709 (Del. 2009) ("[T]he fiduciary duties of officers are the same as those of directors."); Hampshire Grp., Ltd. v. Kuttner, No. 3607-VCS, 2010 WL 2739995, at *11 (Del. Ch. July 12, 2010) ("As a general matter, our Supreme Court has found that the duties of corporate officers are similar to those of corporate directors. Generally, like directors, [officers are] expected to pursue the best interests of the company in good faith (i.e., to fulfill their duty of loyalty) and to use the amount of care that a reasonably prudent person would use in similar circumstances (i.e., to fulfill their duty of care).").

92. Lyman P.Q. Johnson & Robert V. Ricca, *(Not) Advising Corporate Officers About Fiduciary Duties*, 42 Wake Forest L. Rev. 663, 665–66 (2007).

93. *See*, *e.g.*, Del. Code Ann. tit. 8, § 102(b)(7) (2011) ("[T]he certificate of incorporation may . . . contain . . . (7) A provision eliminating the personal liability of a director . . . for breach of fiduciary duty as a director, provided that such a provision shall not eliminate or limit the liability of a director: (i) For breach of the director's duty of loyalty to the corporation; (ii) for acts or omissions not in good faith [and for certain other violations] . . . .").

94. This is generally true, but some state statutes, such as that of Louisiana, do provide protection to officers. *E.g.*, La. Rev. Stat. Ann. § 12:24(C)(4) (2010).

95. Brian Baxter, *Stanford Trial Drags Former Proskauer, Chadbourne Partner Back Into Spotlight*, Am Law Daily (Feb. 8, 2012, 8:00 PM), http://amlawdaily.typepad.com/amlawdaily/2012/02/tom-sjoblom.html.

ingly misled SEC investigators until he and Proskauer made a 'noisy withdrawal' and dropped Stanford as a client in February 2009, disavowing all prior statements made on the disgraced financier's behalf."[96] In-house counsel may want to heed this case because, even though Sjoblom was outside counsel, he was advising on issues that often fall within the purview of an in-house lawyer.

Nothing about the economic crisis should inherently have heightened general counsel's risk of liability for breaches of fiduciary duty. But because the crisis that led to SOX and Dodd-Frank and the new reality has increased scrutiny and public attention on corporations and corporate executives, general counsel may be targeted in fiduciary duty litigation.[97]

Conclusion

The current scrutiny of general counsel is driven by many dynamics. Of course, new laws, such as SOX and Dodd-Frank, are major drivers. But general counsel should be attuned to other factors, including attitudes of regulators, because these dynamics, which potentially put in-house lawyers at risk, may be driven more by what regulators may perceive as the "right" thing, rather than the proscriptions of new laws and regulations. Finally, politics and the mainstream media, as well as the proliferation of social media, put corporate lawyers in the klieg lights.

The lessons from the past targeting of general counsel and the current rhetoric about future trouble are ominous. Of course the general counsel must be the persuasive counselor at all times and must be wary of the potential for personal peril. Now, however, the crystal ball is cloudy.

As in many endeavors, one should hope for the best and prepare for the worst.

96. *Id.*

97. Consider *World Health Alternatives, Inc. v. McDonald*, 385 B.R. 576 (Bankr. D. Del. 2008), in which the United States Bankruptcy Court for the District of Delaware held that the duty of oversight as articulated with respect to directors in *Caremark*, *Stone*, and *ATR-Kim Eng Financial Corp. v. Araneta*, No. 489-N, 2006 WL 3783520 (Del. Ch. Dec. 21, 2006), also applies to officers who are not directors. In *Araneta*, the Delaware Court of Chancery held two defendants who were officers and directors of a company liable for breach of fiduciary duty for failing to stop the company's majority stockholders and fellow director from making self-interested transfers of the company's assets. 2006 WL 3783520, at *1.

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Inside counsel rising: Expectations and obstacles, as power and status grows

July 2016 | First Focus

Ben W. Heineman, Jr. was General Electric's senior vice president-general counsel from 1987-2003 and then SVP-Law and Public Affairs until his retirement in 2006. Currently a senior fellow at Harvard's schools of law and government and lecturer at Yale Law School, he is the author of the new Ankerwycke book, "The Inside Counsel Revolution: Resolving the Partner-Guardian Tension."

He wrote the book "to advance a sustained argument about what it means to be a great corporation and what it means to be a great lawyer."

"With increasing attention being paid to the role of general counsel, I wanted to write a much more detailed and extensive account of the transformation that would serve as a benchmark for people to consider moving forward," Heineman wrote.

YourABA asked Heineman for details on how the role of general counsel has changed, the partner-guardian tension, the role of law firms in the revolution and more.

Q: What are some of the key changes you have seen in the role of the general counsel?

Over the past 30-plus years, there has been an inside counsel revolution of increasing scope and power. General counsel and corporate law departments in top global companies have become far more sophisticated, capable and influential, transforming both business and law in two important ways.

First, the role of the general counsel inside the corporation has significantly grown in importance. The GC has often replaced the senior partner in a law firm as the primary counselor for the CEO and board of directors. The GC role has broad scope—beyond law—

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that includes performance, ethics, risk, governance and citizenship. The GC is a core member of top management, participating in decisions and actions not just about risks but also about opportunities, not just about law but also about business, not just about public policy but also about geopolitics. The GC is now often seen as having importance and stature comparable to the chief financial officer because the health of the corporation requires that it navigate complex and fast-changing law, regulation, litigation, public policy, politics, media and interest group pressures across the globe.

Second, the role of GC outside the corporation has also significantly grown in importance with a related, dramatic shift in power from outside law firms to inside law departments over both matters and money. Because corporate law departments are increasingly staffed by outstanding specialists and generalists, inside lawyers have taken on day-to-day management and strategic direction of major issues and major expenditures affecting the corporation – ranging from cross-border transactions to multi-front litigation to decisions about ethics to direction of public policy.

Q. Given this changed role for GCs and inside counsel, how should law departments think about allocation of outside resources and how does this affect law firms?

With respect to resource allocation, the GC must focus on productivity — on efficiency and effectiveness. This involves segmenting the corporation's work – from low complexity, low risk, lower margin at one end of the spectrum to high risk, high complexity, higher margin at the other. Then the inside law department must consider the alternative service providers: bringing high-value work inside to be closer to the businesses; hiring nonlaw firm lawyers for routine or peaking work; hiring nonlawyer vendors, often with technology platforms, to do basic work at a fraction of the law firm cost; hiring nonlegal experts for the array of issues inside lawyers face that go far beyond legal expertise.

And when corporate law departments do hire law firms they need to negotiate arrangements that address the fundamental conflict in goals and economic models. Like the corporation, corporate law departments must be continuously in quest of doing more with less. But law firms often have an Orwellian view of productivity – less with more: more hours, lawyers and revenues–in order to increase profits per partner. This primal tension has led GCs to seek alternatives to law firms, including bringing work inside.

Law firms must adjust to the new world of "segmentation" and "alternative service providers" by recognizing that different kinds of work will command lower or higher margins. Then they must

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reorganize the firm to have different cost structures that meet client demands for the lower complexity, lower risk, lower-margin work unless they are a super-elite firm that can operate solely in the high-complexity, high-risk, high-margin space.

Q: What are the four framing "practical ideals" that are fundamental for GCs?

First, corporations, especially global companies, should adopt as their mission the fusion of high performance with high integrity and sound risk management. High performance means strong, sustained economic growth through provision of superior goods and services, which in turn provide durable benefits for shareholders and other stakeholders upon whom the company's health depends. High integrity means robust adherence to the spirit and letter of formal rules, both legal and financial; voluntary adoption of binding global ethical standards that go beyond the mandatory rules; and employee commitment to core values of honesty, candor, fairness, trustworthiness and reliability. The core values of the company can only exist when the company commits to law and ethics and to making them operational throughout the company.

Second, the GC must be a lawyer-statesperson who is an outstanding technical expert, a wise counselor and an accountable leader and who has a major role assisting the corporation achieve that fundamental goal of high performance with high integrity. For the lawyer-statesperson, the first question is: "Is it legal?" But the ultimate question is: "Is it right?" As lawyer-statesperson, the GC must engage in robust debate on

- Major corporate initiatives of all shapes and sizes about the "ends" of that action, not just about "the means" for carrying it out
- "Purpose" not just "process"
- Consequences, not just acts
- The "right" role of business in society as seen through the lenses of performance, integrity and risk, not just what is "legal."

Third, the GC must assume a second aspirational role: partner to the board and business leaders and guardian of the corporation. Under appropriate conditions, being an effective partner on business and law establishes the trust and credibility that allows the GC to be an effective guardian. The fusion of the partner and guardian roles turns on deep GC integration in the corporation: being at major corporate decision-meetings (strategy, budget, deals, new products, new geographies, etc.) and being deeply involved in implementation of those decisions.

Finally, the CEO and top business leaders, including the GC, must ultimately be fiercely dedicated to creating, leading and maintaining a uniform performance with integrity culture across the globe. Culture is the shared principles (the values, the policies

and the attitudes) and the shared practices (the norms, systems and processes) that influence how people feel, think and behave, from the top of the corporation to the bottom. The GC has a special, critical role in the multiple, interrelated steps—the articulation of the aspirations and the implementation of the actions—so necessary to an authentic performance with integrity culture that binds together employees.

Q: What are some of the problems and dilemmas currently faced by general counsel who are trying to set the standard of meeting business objectives with high integrity?

The GC faces obstacles that critics often cite when expressing doubts about whether she can possess the independence to be a true lawyer-statesperson and partner-guardian. These include:

- Negative business attitudes about lawyers
- Business leaders' lack of understanding about law and policy
- A leader's overbearing personality
- Group pressures to conform
- Inside lawyer fear of CEO retribution
- Problems of having only one client
- Lawyer concern about their compensation (either withdrawal of unvested benefits or lack of future increases).

Q: **What can a GC do to overcoming those obstacles?**

I do not believe that the choice for GC (and inside lawyers generally) is to go native as a "yes person" for business leaders and be legally and ethically compromised or to be a conservative, inveterate "naysayer" ultimately excluded from core corporate decisions and activity. The obstacles to the partner-guardian fusion can be overcome by many factors: the character, reputation and independence of the GC; an alliance with other top staff officers (Finance, HR, Compliance and Risk) who should share the performance with integrity objectives and who face the same partner-guardian tensions; and a close relationship with the board of directors, which should ask for private meetings with the GC and should oversee the GC's compensation and job status. Ultimately, the capacity to serve as partner to business leaders and guardian of the corporation turns on the attitudes of the CEO and the board.

Q: You recommend doing due diligence before accepting an inside counsel job. How should one go about this effectively?

Such diligence certainly involves a detailed inquiry into the personality and values and integrity record of the CEO. But, it should also involve an examination of whether the CEO and the board of directors are committed to a lawful, ethical company—and how that commitment is carried out. This involves, in theory, an

inquiry into the company's commitment to high performance with high integrity; into all the elements of the optimal Partner-Guardian fusion; and into the potential relationships with lawyers, senior officers and the board. It can also involve an examination of how fundamental principles and practices relating to performance, integrity and risk have worked on some of the key issues facing the corporation: emerging markets, government investigations, major pending litigation, acquisition due diligence and integration, crisis management, public policy and corporate citizenship.

Asking good, tough, sophisticated questions about the organization can help advance an applicant's candidacy because it reflects an understanding of how big corporations operate. Even more important, if offered the job, potential GCs can then ask for an opportunity to get a "better feel for the company" before accepting. They can get into more detail with key leaders in addition to the CEO (e.g., CFO, HR, Compliance and Risk leaders, selected business leaders, ombudsman, head of audit staff). It is also appropriate for the prospective GC to ask to speak to one or two members of the board (e.g., the head of audit or risk committee). The GC candidate can also run checks with people outside the corporation. Moreover, there is a significant amount of public material available that can inform the decision, including 10-Ks and 10-Qs, the annual, and quarterly SEC filings that list some of the company's most important liabilities and cases, albeit in a summary fashion. There is also something else that didn't exist when I started: Google.

Q: Beyond the core competencies lawyers need to practice effectively, you write that inside counsel need "complementary competencies" not taught at law school. Please elaborate on what these are, and how should law schools change to ensure that students are prepared with these complementary competencies?

As counselor and leader, the GC as lawyer-statesman must possess not just "core" legal competencies but also "complementary" competencies beyond law that include (but are hardly limited to): asking "what-ought–to-be" questions; generating robust options to answer that prescriptive question; having broad knowledge of competitors, competition and global markets; executing not just deciding; leading and building organizations; having financial and technical literacy; and, ultimately, being a great generalist to define – and solve – multi-dimensional problems with factors that go far beyond law.

To teach these complementary competencies, I believe we must dramatically change law school education. It must emphasize the roles of expert, counselor and leader. It must underscore the ethical responsibilities of lawyers, as professionals and as citizens,

to their own institution and its people; to their clients/stakeholders; to the rule of law and the administration of justice; and to the broader society. It must inculcate that broader set of capabilities that are so necessary to solving the broad problems law graduates will face because the accurate definition of those problems – and their solution – depends on many other factors and disciplines beyond law itself. Such a revised education would include courses and cases that look at a wide variety of legal, business and policy subjects and a broad range of societal problems from the perspective of a broad range of actors in the public, private and nonprofit sectors.

Q: As inside counsel at GE, you were fully integrated into the business. Is that now typical at the Fortune 100?

There are clear trends in that direction. For example, NYSE Governance Services just completed a research study that found that directors and officers believe the role of the GC is moving more toward that of strategic advisor; further, 97 percent of directors and officers say they expect the GC to be a member of the executive team by 2020.

These trends are very positive for the corporation, improving not just economic performance but also the corporation's response to vital "business in society" issues. The danger is that the GC and top management becomes too enamored of the GC's role as a businessperson. That evolving role is critical, but the core of the GC function is advancing corporate integrity: to determine what is law, and to help the corporation comply with that law; to identify salient ethical issues; to help the corporation establish global ethical standards; and to have major role in creating an overall corporate culture of integrity. Important as the partner role is for GCs, the guardian role is paramount. The goal is to fuse the partner and guardian roles, to resolve the partner-guardian tension.