



I Just Became a General Counsel:

What Do I Do Next?



BY MARK ROELLIG



Congratulations

The announcement has been made: You are the company's new general counsel. Step one — go home, open the champagne and celebrate. But, the next morning, you wake up a little groggy and wonder, what do I do next?

Over the years, I have been fortunate enough to have several lawyers who have worked with me assume general counsel positions at other companies. Having gone through the transition to becoming a new general counsel four times, I have been asked by these individuals and have received calls from other colleagues for my advice on what they should do as they start their first job as general counsel.

In addition, I have “watched from afar” circumstances where individuals have worked so hard and sacrificed so much for the opportunity to become general counsel, and then have it all crumble before them. While some new general counsel are readily accepted, earn the respect of the organization and place themselves on a trajectory of adding significant value to the business, other new general counsel can inadvertently take actions from which they never recover, resulting in a miserable experience of failed professional relationships, being avoided, and unable to garner trust or access to key information. These unfortunates have begun a slow but inevitable spiral to separation.

The purpose of this article is to provide my thoughts on how you should focus your time during the first 90 days “in office,” to best position yourself for success in the months and years ahead. Generally, within this short period of time, you are either heading toward a great career or the beginning of the end. Take this period seriously. My suggestions have worked for me over the years, but every department size, situation and culture is different. Some may work for you, while others may not. Timelines may be different, and customized approaches for your particular situation should allow you to achieve even better results. Regardless, the next 90 days are probably the most important of your career to date.

One more general comment: While these lessons have been gleaned largely as general counsel, they can be applied beyond that role to other leadership positions in an in-house law organization. In fact, they apply beyond law, and I have successfully employed many of these actions in assuming other C-level leadership responsibilities in large corporations, such as the lead for human resources, corporate marketing, public relations, government relations and public policy.

Preparing for the first day

You actually should begin to gather the information you need to be successful in your new position even before you are offered the job. In preparing for the interview process, you should navigate through the company’s website, review the bios of the key executives, and read the 10K and proxy. Then, during the interview process, your lists of questions for your new boss, the CEO, the leadership team and members of the law department should include: Why are they going outside for this position? What can make the law department better? What works particularly well in the department, and what does not? What would they like to see changed in the legal organization? And what keeps them awake at night? You will also want to ask the CEO and CFO at some point during your dialogue if there are any significant legal issues that require immediate attention.¹ Make sure you carefully document these conversations. Not that you should take notes during the interview, but you do want to be able to remember what you have heard after the meetings. In particular, listen carefully to what the CEO tells you — these points will likely be the focus of your immediate attention.



MARK ROELLIG is executive vice president and general counsel, Massachusetts Mutual Life Insurance Company (MassMutual), and is responsible for all the legal, corporate secretarial, regulatory and governmental affairs of the company. Before joining MassMutual in 2005, Roellig served as general counsel and secretary to the following three public companies prior to their sale/mergers: Fisher Scientific International Inc., Storage Technology Corporation (StorageTek) and US WEST, Inc. He received his bachelor’s degree in applied mathematics from the University of Michigan, his law degree from George Washington University, and his MBA from the University of Washington. He can be contacted at mroellig49@massmutual.com.

Have the company gather information

Now that you have landed the job, finished the champagne, woken up and become human again, what do you do next? Your most important priority should probably be to learn more about the company. You should go over the material you studied and obtained during your interview process and begin to dive deeper, with help from the company. Make sure you review any analysts’ presentations listed on the company’s investor relations webpage. Read the bylaws, the corporate governance guidelines, committee charters

and other relevant information on the governance page. In addition, ask the investor relations team to provide you with any analyst reports on the company, its key competitors or the industry in general. This is an effective way to quickly get up to speed on the key issues facing the company and the industry. If you haven’t already done so, go back to recent analyst or earnings calls and listen to the recordings. This will also help you become aware of what the CEO, CFO and the analyst are focusing on for the company, and because you invariably will be asked in the future to review your CEO’s or CFO’s prepared remarks for Wall Street or other investors, you must be ready.

You must learn and understand the company’s strategy. Ask for background information that can assist you in learning this. It may be in material presented in a board strategy session; it could be in material the investor relations team has generated; or there may be a strategy lead or organization that can provide you this information.

If the company is willing to share them with you before you start, you should read the past year of board and committee minutes. You should also review all the presentations to the board and the committees over the last year. If you can’t get them in advance, you will want them on your desk the day you arrive.²

Learn about the law department

You will want to start more in-depth learning about the results, structure, skills and quality of the law department. Ask the human resources contact to provide you with bios or resumes of all the lawyers in the organization. You also need the organizational charts for the company and the legal function, the performance appraisals and succession material for the attorneys in the department, and the law department compensation information. Finally, ask for a copy of any presentations relating to the law department made to the board or senior management, and your depart-

ment's budget and actual spend, not only for the current year, but the past two years as well. Focusing on the areas and geographical location of spend and the use of outside counsel will help you understand the areas of significant legal activities and may give you insight into what areas are being managed well.⁵

Help from your assistant

You may have an assistant assigned to you prior to your first day. If not, you should ask your contact in the human resources department to provide someone who can assist you in preparing for your first day. You should contact this person, introduce yourself and make sure that you have all the items you will need in your office on day one — computer, office phone, cell phone, etc.

Often, your assistant will be the assistant of the departing general counsel — on balance, this usually is a good thing, although, depending upon the circumstances, you may have to evaluate the challenges of divided loyalties. Your predecessor's assistant will know the company and department well and can help guide you through the "unwritten rules," such as parking, expense reports and the dress code. He will probably know the assistants of all the top executives and will have real insight on how

to work with the CEO, the other leaders, the board and your team. Assuming you plan for at least some period of time to work with your predecessor's assistant, you will want to gain that person's trust and respect. This starts during your introductory call, before your first day, during which you are "chatty," friendly, and talk about yourself and how you work best. If possible, you want to calm your assistant's fears, indicate that you do not plan to bring on a new assistant, and that you sincerely need and appreciate the help. At Fisher Scientific, my office was right across from the CEO's, and we both generally kept our doors open. I was "coached" by my assistant, the assistant of the prior general counsel, to never just enter the CEO's office or knock on the open door. The appropriate practice was to "hover" in front of the open door and be asked to enter. If I had never known this, I would have probably irritated my new boss and gotten off on the wrong foot within the first week.

Also, request that your assistant flag and advise you immediately of any concerns or questions they see with your compliance related to any policies of which you may not be aware (memorialize this request in a memorandum — you simply cannot afford to get "hung up" in this area). My experience is that you are generally better off to assume the

Stability in a Sea of Uncertainty

With a Meritas Law Firm, You're on Solid Ground

Next door or halfway around the world, Meritas law firms are carefully qualified, offering you partner-led service, local knowledge, local rates — and peace of mind.

170 full-service, independent law firms

7,000 experienced lawyers

Local representation in **70** countries

Call or connect online today

+1 (612) 339-8680 or www.meritas.org



incumbent assistant than to take the risk of the two of you learning together — or to bring along your current assistant, which is a huge mistake.

The assistant should provide you with materials on the department (there may have been a strategy offsite or objectives drafted for the department), which can be helpful for you to read in advance of your first day.⁴ This person should arrange all your meetings for the first two weeks. You will want to meet with the entire legal organization on your first day. An in-person, “town hall” format usually is preferable and needs to be scheduled, but may not be practical for everyone in the department. Those who cannot attend in person can be included by phone or videoconference. Finally, your assistant can help schedule your initial meetings with your CEO, any “board counsel,” your direct reports, key business C-level clients and your budget coordinator. You will also want assistance in including events, such as all board meetings, leadership team meetings, analyst call dates, etc., on your schedule.

The critical first day: You only have one chance to make a first impression

Meet with the CEO

On the first day, you will want to meet with your boss, the CEO, for an hour, if possible. After the normal pleasantries, the focus should be on her expectations of you and the legal organization. You need to ensure clarity on both short- and long-term expectations. You will want to ask about key objectives, metrics and any important projects or short-term issues on which you need to quickly get up to speed. You should discuss the law department, asking about strengths, weaknesses and areas where you should focus. You should ask about her views of any individuals she has worked with in the department — in particular, you must find out quickly and tactfully who, if anyone, is immune from any restructuring decisions you may make. You should ask about her communication-style preference (i.e., email, voice mail, memos, meetings, etc.). You should discuss her expectations of you with respect to the board, and obtain an overview of her impression of the board members and their areas of interest or concern.

Toward the end of the meeting, you should indicate what your plans are for the day and the next several weeks: Show you have a plan and know what you are doing — because you do. This leaves you with the ability to sum things up with the questions “What, in your view, are my most important areas of focus?” and “What would success look like to you, for me, in the next 90 days?” As you close this meeting, schedule your next meeting or conversation, and ask whether weekly or monthly one-on-one meetings

would be valuable for the two of you, as you commence your work.⁵

I had been working with the CEO of Fisher for about three months when he told me that he would appreciate that I meet with him simply to tell him of the projects I was working on, even though they did not need his input, decision or involvement. I kicked myself for not having asked him earlier how he wanted me to communicate and meet with him. It would have been so easy to do.

Your first team meeting

On the first day, you will want to have your initial meeting with your new organization — the entire legal organization (lawyers, paralegals, assistants and others).⁶ The purpose of this meeting is to inform the team you are pleased to join them (if true, you want to let them know you have heard many positive things about the team during your interviews with the CEO and other leaders of the company); introduce yourself; provide them with your background, experiences and areas of legal expertise; outline the key attributes you value; indicate what your areas of focus will be for the next two months; and reveal how folks can best interact with you.

As mentioned previously, I see value in getting the entire team together for this meeting. It helps set the appropriate mindset: We are all one team. However, if there are many different locations, the team is small or you feel the culture of the company is not consistent with such a meeting, smaller group meetings may allow for a better creation of a team feeling and allow for more interaction. The important thing is that you communicate early and in person, if possible. I heard from one high-performing attorney at a major corporation that had just hired a new general counsel how disappointed she was that she had not met the new general counsel. You do not want the high-performers disappointed — you want them energized.

After you have covered your introduction, background and experience, the attributes you value and expect are the most critical part of this meeting. In discussing attributes, the focus should be on what type of department you intend to build. For me, important values are a team that is performance-driven, results-oriented, partners with the business, strategic, proactive, creative, hardworking, responsive to clients and diverse. Your priorities may very well be different. Make it clear that you expect the team to always comply with the law and regulations, act ethically, and value fellow employees. For example, with respect to illegal or unethical actions, harassment, or inappropriate behavior in the workplace, I do not tolerate it or allow “three strikes.” I advise them that the entire team is getting their first two strikes now. In addition, you want to make clear that you value inclusion and diversity, in all respects,

PEOPLE WHO MAKE GREAT COMPANIES WORK



Exuberant, pragmatic, inspiring. That's Art and Dorothy Oberto. For nearly seven decades, they have built a family business into one of the nation's iconic food companies. Their focus on happy customers, enthusiastic employees and quality meat products has made "Oh Boy! Oberto" synonymous with branded excellence. When asked what drives their enduring entrepreneurial spirit, Dorothy says, "Life is an adventure! We just keep moving onward and forward." Adds Art, "I'm a builder who's never satisfied. If you want to get ahead in the world, you have to take the world with you."

Perkins Coie: Legal Counsel to Great Companies like Oberto Sausage Company.

Perkins
Coie
attorneys at law

ANCHORAGE • BEIJING • BELLEVUE • BOISE • CHICAGO • DALLAS • DENVER • LOS ANGELES • MADISON • NEW YORK
PALO ALTO • PHOENIX • PORTLAND • SAN DIEGO • SAN FRANCISCO • SEATTLE • SHANGHAI • TAIPEI • WASHINGTON, D.C.

CONTACT: 800.586.8441 Perkins Coie LLP ATTORNEY ADVERTISING

www.perkinscoie.com

You do not want the high-performers disappointed — you want them energized.

and you want to create an environment where creativity and ideas can be generated from anyone, anytime. As my CEO at StorageTek used to say, “When smart people ask stupid questions — listen.” The best ideas will come from those closest to the issues, and not from you. You will need the help of all of the team — when functioning well, they should be telling you what to do.

In this meeting, I also cover my view of use and protection of the company’s assets: We treat them more dearly than our own. Giving some examples of areas of spending that in the past you found odd or inappropriate will alert them to your “cost-conscious” focus. You also will want to indicate your plans, with whom you will be meeting and what the department can do to help you. Be frank about your leadership style and how the team can best interact with you. I am very up front that I am an introvert and that people should understand it is a challenge for me to affirmatively go out and engage or to be “warm and fuzzy,” but they should not misread that. Finally, I tell them a little about myself, my family, how I spend my free time and what I like to do. This helps open you up to the organization and allows a basis for interaction with those who are not as focused on just the work. Ask for questions. There are unlikely to be any, and that is fine for a meeting like this — it is more of a soliloquy than a “meeting.”

The very busy first two weeks

During your first two weeks on the job, you want to meet with many people inside and outside the company. Advance scheduling of these meetings is critical. The overall objective will be to learn as much as you can as you also begin to develop relationships and trust, and determine who your future allies may be. As with all meetings, be very cautious about what you say, and what you write or email. You have no clue in whom you can confide. Rest assured, there is someone out there who, for whatever reason, is not happy with your arrival and will not want you to succeed. To do what I thought would assist my new team, at US WEST, I sent an email to all the attorneys I was now leading to advise them that the new general counsel would be visiting us the next day, and it might not be a good day to “sleep in.” Much to my chagrin, it was forwarded anonymously

to the CEO with a disparaging comment about the type of culture I was creating.

Meet board counsel

If the board or the company has an outside attorney with whom they have worked closely, you will want to meet that person within the first two weeks. You must make this board counsel your friend as soon as possible. For this reason, this meeting may be best conducted over a dinner and not in a group setting. This counsel can either tremendously assist you in the successful transition with the CEO and the board, or sink you fast if you get off on the wrong foot. In all likelihood, they will have significantly more cachet with the CEO and the board than you will, for at least six months to a year. The good news is that this counsel has every incentive to make you like him and to help you (unless they were a candidate for your job — you need to know that, and if so, be very careful). So you probably have one friend and semi-confidant from day one. Ask all your questions about the CEO, the board, the leadership team, the company and your organization. Assume everything you ask will go back to that group.

Meet leaders in your department

You will need to meet with your new direct reports. Schedule, generally in your office, three-hour meetings for each — although the meetings will probably take between two and three hours. Prior to each meeting, you should review their resume and bio. The purpose of these meetings is to ask each person seven questions.

The first question, which will probably take at least half the time is: What are you working on? That person should describe for you the major projects in which he is engaged. This allows you to learn and quickly get up to speed on the major legal issues in the department and the company. Some individuals may not have significant or large matters they are working on — with these, ask them to “bucketize” their time. What type of issues — in percentages — do they spend their time on during any given week? (Usually, you will set up follow-up meetings with these attorneys or outside counsel on important issues discussed in this segment.)

The second question is: What are your objectives? Make sure you ask this after the first question — you will often be surprised at how unrelated an individual’s objectives are to what they are working on day-in and day-out.

The third and fourth questions are about the people: Who are the “stars” a layer or two down in the organization? You need to identify these folks quickly. Usually, you will hear the same name(s) from multiple people, and that will give you more confidence that the person is indeed a star. The fourth question gets a little more challenging.



CALIFORNIA EMPLOYMENT LAW FOR BUSINESS

**proven
strategic
practical
collaborative
cost effective
trial ready**

For over a decade, Miller Law Group has devoted its practice exclusively to representing business in all aspects of California employment law and related litigation.

Our women-owned firm represents start-ups to Fortune 500s from a wide range of industries, including retail, restaurants, telecommunications, manufacturing, health care, finance, oil, and high tech.



You do not want the team to think you are asking them to disparage others, but you need to find out if there are any “people issues” in the department — maybe someone who does not display appropriate behavior, is impossible to work with, withholds information, etc. Do your best on this one, but you are really trying to ensure that you don’t get surprised early in your tenure with an employment issue within your new department. You must assume that the fact that you are asking this question will quickly leak to your next meetings, but you still need to ask it. At one company, as the general counsel was going through meetings similar to these, he kept hearing that although one attorney was an extremely good attorney and her clients loved her, the attorney was rough on her team. The general counsel also found out there had been repeated investigations and “findings” relating to these issues. Within the first month, the general counsel, not the lawyer’s supervisor, terminated this employee. This action could not have made clearer who was in charge, and what would not be accepted, even if that individual were an excellent attorney.

The fifth question is one to which you must very carefully listen to the answers: What can we do better? The answers will not only provide you with ideas to help you and the department, but will also indicate whether the person has ideas or can think about, accept and drive change. This will often be a tough question for your new direct reports, because if something should have been changed, then you need to know why it hasn’t happened yet. Also, the answers will help you learn who can drive change, what may not be going so well in the department, and what issues your predecessor ignored or could not solve.

Close the meeting with the sixth and seventh questions: What advice do you have for me, and what can I do to help you?⁷

Try to avoid, during the first two weeks or the first 60 days, having any “personal” interaction with your direct reports or members of your department. Business lunches are fine, but getting together with spouses or families can make later decisions even more difficult or clouded by the significant impact such decisions may have on these non-employees. Try to avoid the requests to get together with you and your family to show you the new location, introduce you to friends and have spouses assist in activities like “house hunting.” You really want to make any restructuring decisions with only business factors in mind.

Meet other executives

You will also want to begin meeting with your key C-level executives. The goal of these meetings is not just to learn, but also to take the first step in building “relationships” that will be critical for your success. Meet for about an hour in their offices — not your own. You will see cues

in their offices that will allow you to “connect” and interact better (sailing, skiing, pet or family pictures and knick-knacks). Here, you can socialize and accept the “house hunting” assistance. These relationships will likely be the most critical ones to your long-term success in the new organization. They can help you navigate through the new culture and explain to you how to interact with your new boss. Generally, they will want you to be successful, and you want to stress with them you are there to help them to advance the business and legally meet their objectives. Those who interviewed you probably supported your selection, so they have already “bought in” to believing you will be good. Since they want confirmation of their excellent selection decision, they will likely help you.

You need to know about their objectives and challenges, what the legal organization can do to help them and how you personally can best partner with them. The focus should also be on what the legal organization does well and what it can do better, and on a discussion on their views of individuals on your new team. In addition, these individuals can help inform you about the culture of the company, indicate how effectively the leadership team works together, advise you how the company executives communicate with the CEO and each other, and how problems are analyzed and decisions are made. Make it clear you want and appreciate their help — people like being asked to help.⁸ Schedule times to continue your interactions with these executives. Beginning from your initial interactions, and over time, you want to understand, in addition to their business objectives, your peers’ values, goals and interests. Knowing these three areas will allow you to communicate and interact with them better. Rest assured, the CEO will ask these individuals how you are doing.

Meet the stars — they will give you the best ideas

You will next want to meet with any other key members of the law department and the stars — the strong performing individuals whom your direct reports and others have identified. You need to meet with these stars very quickly, as they will be the ones who will generally benefit the most by any change. They will want to meet you, will be honest and will have the most ideas for improvements. These are individuals who it may be best to meet with in a social setting, but take a pad of paper — their ideas will fill it. These stars are also likely candidates for your new leadership team — if you choose them, they will be incredibly loyal to you for catapulting them out of oblivion, and they will be respected by others because they were viewed as stars.

Other meetings and actions

Meet early with those individuals who were in the law department at one point, but transitioned to another



Precision. Speed. Value.
E-discovery that hits the mark.

WilmerHale clients demand innovative and efficient solutions to their e-discovery challenges. Our unique document review strategy puts today's foremost predictive coding technology in the hands of the smartest lawyers in the profession. The result? Superior accuracy. Exceptional value. A quantum leap in efficiency. WilmerHale DiscoverySolutions. **Revolutionizing e-discovery.**



WILMERHALE® 

Discovery**Solutions**

Checklists

Preparation prior to job offer

Information from public documents

- Navigate through the company's website.
- Review the bios of key executives.
- Read key SEC filings — the 10K and proxy.

Information from interviews

- Why are you going outside for this position?
- What can make the law department better?
- What works particularly well in the law department, and what does not?
- What would they like to see changed in the law department?
- Are there any significant legal/regulatory/governance issues that require immediate attention?
- What keeps you awake at night?

Preparation after job offer

- Review analysts' presentations listed on the company's investor relations webpage.
- Read the bylaws, the corporate governance guidelines, committee charters and other relevant information on the governance page.
- Obtain analyst reports on the industry in general, the company and key competitors.
- Listen to analyst and earnings calls.
- Review strategy material.
- Read board and committee minutes from the past year.
- Review presentations to the board and the committees over the past year.
- Obtain bios/resumes of all the lawyers in the law department.
- Obtain organizational charts for the company and law department.
- Obtain law department compensation information.

- Obtain the performance appraisals and succession material for law department.
- Obtain presentations relating to the law department made to the board or senior management.
- Obtain the law department's budget and actual spend, for the current and past two years.

Action items for your assistant

Obtain the information you need for "preparation after job offer."

Items for day one

- Computer
- Phone
- Cell phone
- Key company policies

Events to schedule

- One-hour in-person Town Hall — provide for phone or videoconference for nonattendees
- One-hour initial meeting with your CEO
- Meeting/dinner with board counsel (this can occur before you formally start)
- Three-hour meetings with each of your direct reports
- One-hour meetings with key business C-level peers/clients
- One-hour meeting with your budget coordinator

To put on calendar

- Board and committee meetings
- Leadership team meetings
- Analyst call dates
- Annual meeting date
- Other key dates or items

Agenda for meeting with the CEO

- Clarity on both short- and long-term expectations
- Objectives, metrics and any important projects or short-term issues to quickly get up to speed

- Strengths/weaknesses of law department
- Areas where you should focus in law department
- Views of individuals in the law department (try to find out if anyone is "immune")
- What are the most important roles in the law department?
- Communication style and preference (email, voice mail, memos, meetings, etc.)
- Expectations with respect to the board
- Impression of the board members and their areas of interest or concern
- How does the company communicate with the board?
- What are my most important areas of focus?
- Your plans for the day and the next several weeks
- Would weekly or monthly one-on-one meetings be valuable?
- What would success for me look like in 90 days?
- Schedule next meeting or conversation.

Agenda for first team meeting

Indicate you are pleased to join the team

- If true, advise the team you heard many very positive things about them as you interviewed with the CEO and leadership team.

Introduce yourself

- Background
- Experiences
- Expertise

The attributes you value

- Performance-driven
- Results-oriented
- Partners with the business
- Strategic
- Proactive
- Creative

- Hardworking
- Responsive to clients
- Inclusive
- Diverse

Expectations

- Always comply with the law/regulations
- Act ethically
- Value for fellow employees
- Value inclusion and diversity — in all respects
- How we treat the company's assets

Other items

- Areas of focus for the next two months
- How best to interact with you
- The personal you

Questions for meetings

Direct reports

- What are you working on, or how do you “bucketize” time?
- What are your objectives?
- Who are the “stars” in the organization?
- Are there any “people issues” in the law department?
- What can we do better?
- What advice do you have for me?
- What can I do to help you?

Other executives

- What are your objectives and challenges?
- What can the law department do to help you?
- How can we best partner together?
- What does the law department do well?
- What can the law department do better?
- What are the most important roles in the law department?
- What are your views of individuals in the law department?
- What is and what do I need to know about the culture of the company?

- How do the company executives communicate with the CEO?
- How do the company executives communicate with each other?
- How effective is the leadership team at working together?
- How are the company's problems analyzed and decisions made?
- Are there any “unwritten rules” or practices I should be aware of?
- You want and appreciate their help.

Additional information you need and actions to take

Meetings

- Meet the stars.
- Meet others who were in the law department.
- Meet other important individuals identified in initial direct-report and peer meetings.
- Meet with the outside counsel working on your key legal matters.
- Meet with your predecessor.

Other information

- Were there internal candidates for the general counsel position? Why were they not chosen?
- Benchmark information on how other in entities in your industry, of similar size and presence, structure their law departments and their internal and external costs.
- Meet with general counsel of key board members.
- Eliminate any obvious wasteful spending.
- Create “trial balloons” on structure and potential leaders.
- Reach out for feedback.
- Schedule time to wander around the office.

Actions for new legal leadership team

- Agree and be aligned on values that drive employment, performance and compensation decisions.
- Agree on how will you work to develop a law department strategy with specific objectives.
- Agree on when and why you get together.
- Launch a series of task forces.
- Create a plan to evaluate and make decisions about additional structure and staffing.
- Have ongoing communications with the entire team.

Agendas for ongoing meetings with the CEO and business leaders

- Outline your agenda and your priorities.
- Summarize actions taken and results achieved.
- Ask for their priorities.
- Find out if your priorities are aligned with theirs.
- Seek feedback on your and your team's performance.
- Ask for assistance in recognizing and rewarding the performance of high achievers in your organization.

If you find any area of cost or spend that you think makes absolutely no sense, and are informed as you go through your meetings that this is a consistent view, stop it in the first 60 days.

leadership position in the company. These folks will know the players, will be happy to provide their insights and can provide extremely beneficial non-biased information.

You need to meet with your budget coordinator to fully understand your department's budget and areas of spend (internal and external), year-to-date spend and forecasted full-year spend. Compare this to past years' results and benchmark data. This can provide you with a high-level of insight into areas that may or may not be led well.

If you find any area of cost or spend that you think makes absolutely no sense, and are informed as you go through your meetings that this is a consistent view, stop it in the first 60 days. This will make it clear that the culture will not be one of waste, and you will immediately make changes to eliminate it. At MassMutual, I closed a "library" rather early, and we all moved to online research. And for me, having assistants transcribe dictation is "verboden" — I stop it immediately. This reduces costs, increases efficiency and the assistants will love you.

Finally, schedule time to just walk around and meet with members of your team unannounced. For those who are introverts, this will not come naturally; for others, it will. This provides some insight into the work ethic and culture of the team, what work is going on in the office, who is and is not doing the work, and helps improve morale when folks realize that the boss is interested in them and their work.

Other information you need

There are two other areas of information you want to gather through your series of meetings. First, you want to know what your organization and the company view as the most important roles in your department. This information will be important as you decide where you want to allocate your organization's best talent. It may be solicited from the CEO, members of the legal team or your new peers.

Second, you need to know whether there were internal candidates for the general counsel position and why they were not chosen. You need to find out if someone is "fester-ing," or hoping you fail, and what the company was looking for in the general counsel position that they felt was lacking in the previous team. This information may come from the CEO, the human resources organization, a search firm that placed you, members of the legal team or your new peers. Keep in mind, some of your new peers may have supported an internal candidate, so you need to be careful how you solicit this information from them — it may be better to phrase your questions as such: Why did the company feel it was necessary to go outside for this position, as compared to focusing on particular members of your new team?⁹

At one company I joined as general counsel, I was able to ascertain rather quickly that one of my new subordi-nates was the CEO's preferred general counsel, but the board pushed to hire me. This information was critical for me to understand that I needed to be extremely care-ful as to how I interacted with this attorney. Over time, I garnered his respect, trust and friendship, which resulted in improving my relationship with the CEO. That gave me even more flexibility on making tough decisions, because, of course, the CEO would often ask this individual how I was doing and whether we were we doing the right things. (This may not always be the best way to interact with an internal candidate for your position; it is very dependent upon the personalities.)

The first 60 days — race to structure

After the first two weeks, you will continue to learn about the company and the business, complete the meet-ings that could not be scheduled earlier, and conduct follow-on activities and meetings based upon what you have learned and are learning. In addition, you will want to obtain external information and data to assist you in your future decisions. At the end of this data-gathering process, you will want to make any decision on changes to the orga-nization's structure and your direct report team.

Obtain external perspectives

As you learn about the industry, the company and your organization, you will want to be accumulating benchmark information on how other entities in your industry, of similar size and presence, structure their law departments and their internal and external costs. The ACC CLO Think Tanks, General Counsel Roundtable, the Conference Board and other associations can help you here. In addition, it can be very valuable to meet with the general counsel of your key board members' current or former employers. These general counsel can give you great insight into what that board member is looking for and expects from their



more *Value.*

Business sense or legal savvy?

Why not both?

Legal input is but one of dozens of factors involved in a company's day-to-day decisions. When business goals and legal issues overlap, input from counsel who understand the interplay between your practices, the law and the regulatory environment can be one of the most valuable competitive advantages at your disposal.

Let's *Accomplish* more.[™] Together.

DINSMORE & SHOHL LLP • LEGAL COUNSEL • dinsmore.com

CHARLESTON • CINCINNATI • COLUMBUS • DAYTON • FRANKFORT • LEXINGTON
LOUISVILLE • MORGANTOWN • PITTSBURGH • WASHINGTON, D.C. • WHEELING

THIS IS AN ADVERTISEMENT. ©2011 Dinsmore & Shohl LLP. All rights reserved.

Dinsmôre

general counsel. Finally, there is no downside in attempting to meet the general counsel of other major corporations in the area — but that can be done over the first six months. Just call their offices, tell their assistants who you are, and set up a lunch or meeting.

You will want to meet with the outside counsel working on your key legal matters. These individuals will not only help you get up to speed on the key legal issues that the company is facing, but will also be able to explain the qualities of your attorneys with whom they interact. They will be very happy to meet with you, in particular on substantive issues. Be careful making any quick changes to the outside counsel the company has retained historically. Almost all law firms have excellent attorneys. Just because the attorneys with whom you previously worked with at firms X and Y are great, you should not assume the attorneys at firm Z, who currently work with members of your new law department, are not as good. Often, the outside counsel with whom your team is currently working know the company and its issues well, and interact well with your team's working styles. There is no reason to disrupt that relationship without careful analysis — well beyond your first 60 days.

Decide structure and staffing

With all the data you have gathered from all the sources mentioned above, you should be in a position to determine the structure and staffing of your new organization. On restructuring, keep in mind that the structure should follow the needs of the business. What is the optimal structure for provisioning legal services based upon the company strategy, and business and legal needs? It depends. That is why it is so critical that you have been learning and understand the company's strategy, business objectives and, most importantly, legal activities. You can't structure and staff effectively until you know where you are going (strategy, structure, staffing). Centralization or decentralization and different structures can all be effective based upon the business needs and culture. The input you have received from the CEO, board counsel, your peers and the stars will probably help you the most in thinking about this restructuring. Your direct reports will be personally affected and will more likely have biased views of how to organize.

While at US WEST, our strategy was to "integrate" our products and services (landline, cell, DSL, VDSL and directory), and to ensure we had consistent regulatory positions across 14 states and the federal jurisdiction. Thus, a centralized law department was necessary and best. At MassMutual, part of the company strategy is to have and incubate strategic business investments separate from the life insurance business. To advance this strategy and create

the "separate" cultures, it makes sense to have a decentralized legal team for those investments.

Only after deciding on a structure can you populate the positions. Almost always, improvements can be made in both areas. Your predecessor's decisions were not necessarily wrong — they were probably right at the time made. But the company, strategy and people have changed, and your predecessor generally has not evolved the organization to accommodate these changes, or she may have found it too difficult to execute the necessary changes. We all have our "dogs" — issues on our desks or in our departments that we avoid for months or years, and the next person addresses them in their first 60 days. You probably left a few at your old company or firm, too. Finally, there are times — rarely — where the structure and people are just what you want, and it is time to charge forward.

If the law department has more than 50 attorneys, you should be able to find all the talent you need to populate your direct report team from within the organization. There are several consequences associated with these promotions. First, remember that if you promote one person, it may result in two or three promotions if done from within. Second, it also sends the message that you value your new team. Third, if you go outside and bring in an attorney or attorneys from your past life, you will be criticized for "cronyism." Just because other attorneys were successful in a different firm or culture is not a guarantee of success in your new company. To surround yourself with folks you have worked with in the past, even if you think they are better than anyone on your team, will cause the entire organization to believe that the culture is not a performance-driven meritocracy. Even leaving a box empty or filling it with an external search usually sends a better message to your organization than hiring someone you know from your past. Plus, populating your team with individuals who bring an external perspective can be very valuable. Having said all this, other Fortune 100 general counsel have argued with me that if you need to fill a critical position, in particular during a "time of war," depending upon your incumbent talent pool, it may be best upgrade with someone you know who will provide a known expertise and loyalty. If you do this, you should proceed cautiously, understanding and addressing the risks, including that even among your new team, you will have created an immediate disparity of relationships.

Keep an eye on diversity — in all respects. Only a diverse team will give you the different perspectives you will need to be successful. It also helps establish a visible culture of opportunities based on performance, not on other factors. After six months or a year in the position, you can introduce folks you have worked with in the past, but be cautious bringing these individuals into the group

LEGAL COUNSEL.

FROM A FRESH ANGLE.

From the merger of Edwards Angell Palmer & Dodge and Wildman, Harrold, Allen & Dixon comes Edwards Wildman Palmer LLP—an international law firm dedicated to bringing a new way of thinking about your business into practice.

Edwards Wildman lawyers are known for their strength in private equity, venture capital, corporate and finance transactions, complex litigation, insurance and reinsurance, and intellectual property. We work with enterprises of all sizes, from nearly every industry, across three continents—helping clients see their legal challenges differently, and turning obstacles into opportunities for powerful business growth.

Let us be a forceful advocate for your business.
Learn more about Edwards Wildman at edwardswildman.com.

EDWARDS
WILDMAN



BOSTON • CHICAGO • FT LAUDERDALE • HARTFORD • LONDON • LOS ANGELES • MADISON NJ • NEW YORK • NEWPORT BEACH
PROVIDENCE • STAMFORD • TOKYO • WASHINGTON DC • WEST PALM BEACH • HONG KONG (associated office)

©2012 Edwards Wildman Palmer LLP and Edwards Wildman Palmer UK LLP. ATTORNEY ADVERTISING. Prior results do not guarantee a similar outcome.

because, regardless of what you do, they will be viewed as your “friends” and hurt your objective to reward results from within.

As you continue to think about staffing, you want to proceed in careful, quiet ways to see what your peers, the stars or even your direct reports think about various legal department structures, and the ability and potential of certain individuals to assume leadership positions. Your decisions will be a clear reflection on you, and you don’t want to be surprised that somebody who is superlative in a meeting with you is viewed as a jerk by the rest of the organization.

Don’t ignore the past

A comment here on predecessors, earlier decisions, processes or plans: It may be easy or correct to be critical or say negative things about the earlier organization or how it operated, or to immediately implement a program or process that was very successful for you in the past. There is very little upside in these actions and there can be a significant downside. I heard about one new general counsel who told one of his new attorneys, who was a star, at the beginning their first phone conversation, “We’ll need to teach you how to be a business-focused lawyer.” The star immediately felt devalued and unappreciated for all of the excellent business-focused work he had done for his clients. When I was at US WEST, after hearing a new executive summarize to the board all the mistakes of his predecessor, one of the board members, who was the vice chair at Ford, commented that at Ford they called such blaming “FUFA” — “f***** up former administration.” He said he wanted to hear about future plans rather than all the FUFA.

You want the team focusing on the future and not on the past. In addition, you will often need individuals who had relationships with the past or with past decisions, to affirmatively support your changes and feel comfortable doing so. There are often very good reasons for the decisions of the past. You will do better to understand and learn from them, than to immediately reject them. Also, keep in mind that a program or process that worked for you in the past may not work well with the new company or its culture. To make a change, you will need understanding and buy-in from your team. Finally, numerous references to “the way we did it at [your old entity]” is inconsistent with the objective of building a best-in-class organization, which takes the best of all ideas and continuously improves on them. When I was a lawyer at US WEST, we had a new general counsel join us from NCR (as an aside, he taught me 95 percent of what I know about leadership). However, he referred so much to the way they did things at NCR that the running joke was we

had turned into “NCR WEST.” It was not well received by folks who rightly believed several of the ways they were doing things were already best-in-class, and should not be immediately rejected because it wasn’t the way NCR did them.

Finally, if it is appropriate, based upon the circumstance under which you assumed your position, you probably should meet with your predecessor in the first 60 days. There is no reason to take the criticism that you changed X without any input from the person who made the decision, and there will always be people who liked your predecessor. They will value the fact that you showed respect to that person. Remember, you too will be a predecessor someday.

“Socialize” and obtain support for your decisions

Within 60 days, you want to come back to the CEO with any recommendations you have for any changes in the department. In all likelihood, this will be your best opportunity for the next five years. Be bold — address problems now — and do what is right. After 60 days, you will know the names of the spouses, children and pets of your direct reports, which will make it much harder to do any restructuring. These will be the most important decisions you will likely make in the first 90 days. Trust your instincts and your impressions. One general counsel of a Fortune 100 company, who was formerly involved in a leadership position in humanitarian response, traveled to Macedonia to assess the international humanitarian community’s state of readiness for the spread of the Balkan crisis. Because of his limited time on location after being on the ground for only eight hours, he rather apologetically shared his impressions with a senior United Nations official. The general counsel found the official’s response insightful and memorable: “Your first impressions are likely to be your best impressions; after that, everyone is trying to confuse you with their perspectives and their interests.”

Make sure that the CEO understands and supports any changes you are recommending. After the CEO meeting, you should talk with your peers in key leadership positions — although you probably should have had ongoing conversations with them about thoughts for your organization and focus. You want to make sure they know what you are doing and why, but because your success will depend on your team, this is more of an “advising” conversation than a consulting one. If any of these executives are “losing their attorney,” or are going to be working with new individuals, different from those they liked and trusted in the past, you need to explain the rationale for your changes. I failed to do this on occasion, and once, it caused tension with one of our top executives. I had to scramble to develop a consulting arrangement for an attorney who was leaving the

business in order to create a softer landing. But remember, this needs to be your team, and as one general counsel I worked for aptly said, “Just ‘cause the clients like X, doesn’t mean X is a good attorney.”

Don’t forget the legal work

Of course, you must do all of the above at the same time you are engrossed in learning about the legal and business issues, handling significant legal matters, interacting with your inside and outside counsel on the topics that require your immediate attention, making legal decisions and preparing for board meetings. Don’t neglect these activities and be sure to do them exceptionally well. Be positive, engaged and energetic. No one said that this job was going to be simple, but those activities should come easier from your past experiences and abilities. Frankly, it may be advantageous if you are commuting long-distance to the job for the first several months, as it allows for 16-hour days and airplane reading. Being a general counsel, or any C-level executive, in corporate America is not easy or for the faint-of-heart.

Reach out for feedback

It is worth noting that you will probably receive little to no feedback on how you are doing during your first 60 days. You will be driving blind and quite possibly making repairs and course corrections as you rocket down the road. Your best sources for feedback will be board counsel, maybe some of your peers, and possibly the search firm that placed you. Keep in contact with the search firm. They will have sources back into the company, maybe the CEO or the human resources organization. Ask them to make contacts for you and provide you feedback on how it is going. They are your friends and will also have every incentive to ensure your success.

Days 60–90: You are only as good as your team

Communicate and establish the culture

It is time to communicate again. You need to advise the company and your department on how it will be structured going forward, and its key areas of focus to support and advance the company’s strategies. The communication to the department is best done in person in a “town hall” or similar setting, with the ability for those who cannot attend to listen in.

In this meeting, or in any announcements for that matter, you need to specifically and directly tie back to the attributes you outlined. That is, you should explain why your choice of X is consistent with an organization that will be performance-driven, results-focused, partners with the business, strategic, proactive, creative, hardworking,

ACC Extras on... I Just Became a General Counsel

ACC Docket

- Transition Lessons for Taking Your First In-house Vows (Nov. 2010). www.acc.com/docket/vows_nov10

InfoPAKSM

- Compliance Officer and General Counsel: Benefits and Pitfalls of Combining Roles (Sept. 2010). www.acc.com/infopaks/co&gc_sep10

Webcast

- Leading Today’s Dynamic Legal Department: Managing and Motivating Your Team to Build Tomorrow’s Leaders (Sept. 2011). www.acc.com/webcast/building-leaders_sep11

Surveys

- 2011 ACC CLO Survey Executive Summary (Nov. 2011). www.acc.com/survey/CLO-summary_nov11
- 2011 CLO Survey (Oct. 2011). www.acc.com/survey/CLO_oct11

ACC Online

- Community — Chief Legal Officers. www.acc.com/community/clo/index.cfm

ACC has more material on this subject on our website. Visit www.acc.com, where you can browse our resources by practice area or search by keyword.

responsive to clients, ethical and diverse team players. You can change a culture more easily and quickly than you think. Change is not about what you say or the charts you put up, but rather the actions that you and your team take that are consistent with those words and charts. The actions employees watch most are whom you hire, whom you reward, whom you promote and, yes, whom you terminate. Employees watch their leaders like hawks; if you want a hard-working and cost efficient-culture, you must be on the job, in the office, working long days and not wasting the company’s resources in visible areas — office furnishings, travel, etc.

Actions for the legal leadership team

Now it is time to pull together your new direct report team and begin the focus on the future. You are transition-

ing from your solitary “lonely” work, to building a high-performing leadership team, completing the structure and staffing for the rest of the department, and establishing the future direction for the entire legal organization.

Often, the first meeting of your new leadership team is best conducted at an offsite location where, for a full day, you will not be interrupted by the issues *du jour*. Your attention should be directed to at least the following six areas. First and foremost, you will want agreement on the attributes or values of the department. During your first day, you outlined what attributes you valued for individuals in the department. Now, you need to ensure the team is aligned on these values (they should be; you chose them) and refine them as is appropriate. Over time, the culture of a company or a division becomes the collective values of its leadership. Thus, you all must agree on, be aligned with and communicate the values that will drive your future employment, performance and compensation decisions.

Second, and very importantly, you will want agreement on how you will work to develop a law department strategy with concrete specific objectives to support and advance the business. Most likely, the other departments in the company will be metrics-driven; you will earn their respect by defining and tracking law department metrics to show the value added to the business or areas that need legal focus.

Third, you will need to agree on when and why you get together. During the first several months, you probably should get together at least every other week, as you need the team’s input, feedback and assistance in learning and addressing the legal issues of the company. Over time, the purpose of your meetings will likely evolve to more of a focus on the metrics and driving execution of the legal strategy and the team’s underlying objectives.

Fourth, you will want to launch a series of activities on areas of concern or improvement that you identified from your meetings. Often, this is best done by creating task forces made up of high-potential individuals — those stars in the department. Creating these task forces allows you to see how strong these high-potential people are — or aren’t — and shows that you have been listening and are driving continuous improvement. In the past, I have put teams together to look at areas such as creating our strategic long-range plan, outside counsel management, technology improvement and use, pro bono activities and improving diversity.

Fifth, you will want each of your new direct reports to look at their organizations and conduct a similar analysis to what you have just completed. This should preferably be completed in no more than 30 days. Counsel and drive them to “be bold,” as their chances for significant change

and improvement do not come often, and it will get more difficult to make these changes if they are not part of the initial transformation. Now is the best time for your team to “size” the entire department right. Evaluate the benchmark data and ensure that when fully populated, the organization is below benchmark, or otherwise structured, to allow for future expansion with high-quality employees who meet your attributes, values and diversity goals. If the level of talent to fill certain positions currently does not reside in the organization, do not hesitate to leave positions open to be filled later. As your team completes staffing decisions, again, communicate and make clear why the decisions or changes support the company’s strategy, help advance the business objectives and are consistent with the department’s values.¹⁰

Sixth, keep in mind that during at least the first year, the entire department will want to know what is going on and how it impacts them. Your team should think about and develop ongoing communication processes with the entire organization. You may want to consider items like monthly step-level meetings, weekly brief all-hands updates, calls to review priorities, frequent voice messages or emails to the entire team on projects or priorities, quarterly offsites, annual offsites, or dashboards of key priorities (align them all around the common view of priorities and responsibilities).


Remember that your results will only be as good as the strength of the individuals on your team, the alignment on priorities that advance the business and their successes. Now is absolutely the best time for you and your direct reports to choose and empower the team that will make the company — and you — very successful.

After 90 days — focus on the future

At this point, you are well on the way to establishing your department’s culture. Now, focus on the continuing legal work, the strategic provision of legal services to advance the business, efficient deployment of legal resources and further improving your department. You are now working together with your leadership team; this team is running a well-structured law department, will tell you what you should be doing, and will help you in your future tasks and accomplishments. Make sure that it is a good one. Their success is your success, and your success is theirs. You are inextricably tied together.

Don’t forget to continue to interact with the business. You should be meeting at least monthly with the CEO and your peers to make sure they know your agenda, and that you learn their priorities, ensure alignment of priorities, seek feedback on your and your team’s performance, and obtain their assistance in recognizing and rewarding the performance of high achievers in your organization.¹¹

This advice may sound “formulaic” or easy. But, writing it is much easier than executing. While I was drafting this article, it became apparent that at times I have not followed my own advice — but in almost every circumstance where I did not, I wish I had. Nonetheless, this approach must be directionally correct; I have been privileged to lead four efficient and excellent law departments, which were or are very strategic, have obtained significant positive results for the company, and were or are all highly respected and viewed as “leaders” by the board, the CEO, senior management and the workforce. In addition, several attorneys who have been members of our teams have moved on to become successful general counsel of public and private companies.

You have a great job. Your team and department will get great results. You will learn a lot and love it. See how many future general counsel you can find and develop — that is a very important part of your job. Again, congratulations — and if you worked for me, know that I am extremely proud of you. 

Have a comment on this article? Visit ACC's blog at www.inhouseaccess.com/articles/acc-docket.

NOTES

- 1 See Checklists, Preparation Prior to Job Offer.
- 2 See Checklists, Preparation After Job Offer.
- 3 See Checklists, Preparation After Job Offer.
- 4 See Checklists, Action Items for Your Assistant.
- 5 See Checklists, Agenda for Meeting with CEO.
- 6 See Checklists, Agenda for First Team Meeting.
- 7 See Checklists, Questions for Meetings.
- 8 See Checklists, Questions for Meetings.
- 9 See Checklists, Additional Information You Need and Actions to Take.
- 10 See Checklists, Actions for New Legal Leadership Team.
- 11 See Checklists, Agendas for Ongoing Meetings with CEO and Business Leaders.

Pulling Your HAIR OUT Managing Contracts?

Managing Contracts & Commitals Just Got Easier

Contract Insight™ Contract Management Software

Free Trial:

- Manage & Search Important Contract Data
- Easily Report & Search
- Quickly Create & Author Contracts from Your Standard Templates
- Automate Workflow Task Approvals with E-mail Alerts
- Early Warning Tickler E-mail Alerts & Notifications
- Used by Hundreds of Leading Companies with thousands of users

Four versions to choose from:

- Enterprise Hosted
- Enterprise Deployed
- Express Online
- Desktop Edition



Start today at www.CobbleStoneSystems.com or call 866-330-0056

CobbleStone Systems
Leaders in Contract Management Software!





SO YOU WANT TO BE A GENERAL COUNSEL? HOW TO MAXIMIZE YOUR CHANCES

BY MARK ROELLIG AND DAVID M. LOVE III

Many attorneys spend their formative years in law firms or in governmental posts and then move to an in-house position. As they advance in their in-house careers, some conclude that they would like to take on more challenges and responsibilities, including leading an entire legal organization. To the extent that these challenges and responsibilities are not likely to be provided in their current enterprise, external opportunities may be more attractive. Unfortunately for many, in all the years they worked in private, government or corporate practice, they neither acquired the skills and attributes, nor came to understand the process, that would allow them the chance to become a general counsel.

The particular needs, relationships and experiences of the enterprise usually drive internal general counsel selections. In the absence of an executive search, internal candidates rarely go through a process that is similar to an external search. Therefore, the intent of this article is not to address how to be successful in advancing to the general counsel position at your current enterprise, but to focus on how to be successful at external opportunities. Nonetheless, depending on how the selection for an internal general counsel position occurs, many of the recommendations in this article may apply to those selections too.

The attributes you need to be a successful general counsel

People often argue that leadership and judgment are innate. However, the attributes that companies look for in the general counsel position are a combination of both instinctive and learned, and qualities that people regard as innate can often be developed with practice. We have divided our discussion of these attributes into three areas: the first two areas cover the skills that may be more instinctive or experiential, and the third area illustrates the skills that you can and will need to learn, both legal and non-legal.

Judgment, judgment, judgment

The most important attribute sought in or expected of a strong general counsel candidate is good and tested judgment. This quality involves the sophistication to properly evaluate and weigh multiple inputs and impacts of any particular decision or course of action. Unfortunately, judgment is something that is hard to teach. But it may be practiced, and you can learn from experience — good and bad. Also, the processes used for good decision-making can be enhanced, and there are leadership programs that can help you acquire this skill. As Will Rogers said, “Good judgment comes from experience, and a lot of that comes from bad judgment.” Hopefully, we acquire judgment from continuously tackling one tough situation after another.

It is extremely valuable for a general counsel to have experience, both in dealing hands-on with complicated, messy matters that require consideration of compliance, litigation, business processes, etc., and in leading complex, cross-functional teams and assignments. These experiences forge the skills you need to serve as general counsel. However, to paraphrase Peggy Noonan, you must be careful not to confuse “good brains” with “good judgment.” Therefore, being a smart and experienced technical lawyer does not necessarily equate to having good judgment.

The non-legal expertise you need to be a successful general counsel

It is imperative that general counsel have first-class communications skills. These skills are not all instinctive. Learning and practicing communication skills can improve performance considerably. The general counsel must be able to adapt communications to the audience and simplify complex legal matters as necessary. You must be able to put in plain words to business folks, with varying degrees of



MARK ROELLIG is executive vice president and general counsel, Massachusetts Mutual Life Insurance Company (MassMutual), and is responsible for all the legal, corporate secretarial, regulatory and governmental affairs of the company. Before joining MassMutual in 2005, Roellig served as general counsel and secretary to the following three public companies prior to their sale/mergers: Fisher Scientific International Inc., Storage Technology Corporation (StorageTek) and US WEST, Inc. He received his bachelor's degree in applied mathematics from the University of Michigan, his law degree from George Washington University, and his MBA from the University of Washington. He can be contacted at mroellig49@massmutual.com.



DAVID M. LOVE III leads Spencer Stuart's Dallas office and is a lawyer and member of Spencer Stuart's Legal Search Practice. He has 14 years of executive search experience and focuses on general counsel, other senior in-house lawyers and compliance-related roles. Love can be contacted at dlove@spencerstuart.com.

interest in legal sophistry, the pros and cons of various legal alternatives. The converse is necessary too: You must be able to clearly explain and translate business objectives to other legal experts.

A general counsel regularly interacts with many diverse constituencies, so it is valuable to cultivate gravitas and executive presence. You must be effective in presenting and communicating with large and small audiences, significant decision makers, boards and employees. Lacking direct authority, you must have the presence, speech and substance to engender confidence and credibility with the board, CEO and other business leaders. The general counsel must come across as confident but also thoughtful. CEOs and search firms find this skill hard to define, but they know it when they see it.

A skill that may be difficult to learn is the ability to be strategic, to anticipate issues and estimate risks, including safety, security, reputational, regulatory and legal. As General Colin Powell said, you need to be able “to see around corners.” Rather than focusing on the task at hand and providing the answer to a specific legal question, a general counsel thinks in a different way that considers the surrounding legal and regulatory environment and how to deliver the best results for the business. CEOs and executive teams don't want their general counsel calling balls and strikes — they need help winning the game. An effective general counsel is creative in identifying proactive solutions to eliminate or mitigate risks and advance the business. A non-strategic lawyer will make decisions too early or too late in the process and miss potential solutions. Identifying and preserving opportunities and options are key strategic traits.

A general counsel must also be a leader and a visionary. If you create sincere and sustainable passion around a compelling vision, team members will readily follow. You must inspire others to act and to do the right things. A “command and control” style rarely works long term or inspires top-level, consistent performance. Finally, you must have the highest ethics and integrity. You will be making decisions where right and wrong are not always clear. Never do anything that gives even the slightest appearance of impropriety, much less something that is actually illegal or unethical.

Despite the way the general counsel role may have been perceived years ago, this position is not an opportunity to

move into semi-retirement. Although you might, but not always, have more control over your schedule, most general counsel work as long and as hard as the partners with whom they interact with at the most grinding law firms. The ability to sustain long hours under high pressure on a broad range of matters, and to act decisively with limited facts, is crucial.

Many significant general counsel positions now require in-house experience. This is because the skills taught in law school, or developed and then marketed by law firms, are only a small part of the broad skills that are now expected from in-house counsel and especially general counsel. In particular, the relationships and the business aspects of how to operate in a complex and matrixed corporate environment, and manage legal issues through an internal legal department, are critical skills for a general counsel.

The ability to develop relationships is important. You will need to create associations of confidence, trust and respect with colleagues, the CEO and the board of directors. These relationships are built or destroyed based on your track record under fire. The process involved in developing these relationships requires interpersonal savvy, the ability to read your audience — their goals, objectives, values and interests — and the ability to tactfully modulate your approach to the different groups and individuals. Experience in understanding and interacting with these constituencies is something you generally do not acquire in outside practice.

The general counsel is just one individual, and depending upon the issue, must assemble legal teams of internal and external resources effectively. Thus, the ability to attract, select, develop, direct, motivate and drive performance from highly diverse teams is critical. This is true regardless of whether the general counsel is the only lawyer at the firm or is leading a team of hundreds. Effective mentoring, talent grooming, internal development and succession planning are some of the most important skills of a general counsel, as is determining what resources are necessary. What should be the correct mix of staff, paralegals and attorneys in-house? What should be their types and levels of expertise? How should they be organized, and where should they be located? How are they trained and developed?

General counsel also manage external resources. How should your team be augmented by experts or external counsel, from what types of firms and on what fee basis? Once retained, how should they be managed? There are no vendor or “partner” management courses in law school, but some general counsel manage law firms with billings in the millions of dollars. Most of these skills can be learned from in-house experience. In addition, there are many programs that teach leadership and best practices in in-house man-

agement. Such groups as the General Counsel Roundtable, for example, offer those programs.

To be an effective general counsel, experience in the financial management of a corporate department, including assessing the cost and allocation of resources, is necessary. Because many business leaders, especially the CFO, focuses on the financial and operational performance of the legal group, the general counsel must understand budgeting, forecasting, and the key drivers and levers of costs. Also, a keen awareness of concepts such as return on investment and break-even analysis will help you convey the value of various legal projects and investments and ease the minds of your business counterparts.

Running a corporation generally entails an understanding of and the ability to work effectively with many staff and operational functions. Because the general counsel is usually a member of the executive leadership team, you must comprehend the strategies and business activities of the company. An understanding of business and key business concepts (i.e., finance, accounting, statistics, marketing, etc.) is a requirement. The ability to contribute broadly to a host of non-legal business matters and to be conversant in discussing them with investment bankers, senior leadership, the CEO and the board are critical. Increasingly, general counsel pursue MBA degrees, and those who don't have earned on-the-job experience; have an undergraduate degree in business; or have taken classes and workshops on key business and financial concepts.

The world is becoming more global and diverse. The need to understand and to be sensitive to cultural differences is important to most businesses' success. To be effective, the general counsel needs to have broad perspectives to attract diverse talent, and to understand internal and external customers and the various relationships of global laws and regulations. The capability to assemble geographically dispersed legal teams (internal and external) to address legal or regulatory challenges is imperative. Experience operating across geographic boundaries, possessing international legal knowledge or having had an international assignment can be valuable. Consequently, many general counsels have worked abroad.

Many CEOs prefer that their general counsel have specific industry expertise, especially where the skills are not easily transferable, such as in financial services, life sciences or other highly regulated fields. This is hard to substitute and really can only be developed by being in-house in a particular industry. Choose an industry that resonates with your interests.

Finally, most companies want someone who “reaches to touch the stars.” In other words, a candidate who always wants to do things better, aspires to understand the business (maybe even run a business) and attain

something higher. It is this drive not only to be successful, but to be a leader in all you do that will be attractive to selection committees.

The technical legal expertise you need to be a successful general counsel

A general counsel needs to have broad legal subject matter expertise. Only on rare occasions, and usually only if there is a unique need or crisis, will an enterprise look to hire a general counsel with narrow expertise. The most valuable areas of law include:

- *corporate and securities;*
- *corporate governance;*
- *litigation (especially class-actions and investigations);*
- *risk and dispute management;*
- *compliance;*
- *labor and employment; and*
- *executive compensation.*

If you want to become a general counsel, pursue opportunities to gain experience in these legal areas. If you are in-house, rotating through these areas of legal responsibility can be extremely valuable. A good general counsel who is working to strengthen the team and to develop successors should provide these opportunities. Even if you are not provided these chances, you are responsible for your career and should ask for and seek out such challenges. In addition, there are many legal programs that offer training in these practice areas.

In this complex, regulated world, experience interacting adroitly with regulatory agencies is valuable. Understanding compliance and effectively working your way through significant and dangerous government inquiries and investigations are increasingly important. In addition, if the laws or regulations are not favorable to the enterprise, management will want them changed — so legislative or government affairs experience can be valuable. At a company that is involved in public policy issues or is regulated, experience working and negotiating with regulators and government officials is critical. Often, CEOs specifically seek a general counsel with regulatory or legislative expertise in the subject areas that affect their companies.

For the general counsel of a public company, it is important to have expertise in SEC reporting and disclosure — this is a must. In addition, it is valuable to have experience working with investors, including activist investors, public company requirements and rules of company governance and executive compensation.

Depending on the company and business, merger and acquisition expertise, or experience in the areas of protec-

tion and management of intellectual property and privacy, may be necessary.

Finally, more general counsel roles include responsibilities for government affairs, compliance or internal audit. Therefore, depending upon the position, experience in these areas may be more or less critical, but should work to obtain education and experience in them.

Get yourself known by the search firms

If you want to be a general counsel, you should take measures to become known by all of the major executive search firms. In addition, there are many other firms with national practices and industry, regional or international expertise. Target the ones that may have the right search opportunity for you.

The way to initiate and develop a relationship with a search firm, if one has not reached out to you on a search, is generally best accomplished with a warm introduction (i.e., make a connection through someone known by the search consultant). If that is not readily available, send a resume, and a brief cover note with your goals, compensation history and restrictions (e.g., geography), if any. Long, name-dropping introductions are yellow or red flags and generally are summarily deleted. Email communication is preferred. Do not press for meetings or repeatedly pester the search firm with calls or emails. There is always a shortage of well-qualified candidates. If the search firm has something that might be a fit, a representative will call you. Be sure not to argue your qualifications for an assignment for which objectively you are not qualified.

While you may know or hear about top search consultants, consider meeting with their associates as well. Often these associates are tasked with collecting information on candidates, and can serve advocate for you with the principal recruiter. When they reach out to you, treat them well. Search firms track their communications carefully. Rude or non-responsive behavior is duly noted.

Even if you're happy in your current role, return calls from search firms. (Your company may well be the next M&A target.) If you are able to, make worthwhile candidate referrals. The firm can keep your recommendations confidential.

Keep in mind that in the current world of social media, search firms and internal human resources teams will use online references, such as LinkedIn, Facebook, etc., for sourcing particular positions or investigating someone. Spend time on your profile; add a picture and references. A discreet "less is more" approach is best, unless you are hoping to work in social media. You want to come across as someone who appears happily employed with succinct experience information and a page that is not bedazzled (excessive activity, status updates and recommendations

all smell of desperation). Remember that what you publicly disclose on such sites reflects your judgment.

Share your compensation information with the search firm when asked for it. Every executive on every executive search shares his or her compensation in full. While some search firms will accept a range of compensation targets at the beginning of a relationship, rather than fixed numbers, refusing to provide the information and detail when asked reveals you as naïve and a rookie, and you will be identified as such. Be careful and accurate about your compensation (i.e., base, target bonus, most recent actual bonus, LTIP and other equity or value). Some companies will ask for W-2s at the last minute. Know your unvested equity position. If you mislead the search firm or its client on this information or other matters, any offer will be pulled, and the search firm will never contact you again.

Keep the search firm apprised of other searches you may be involved with. It does not need to know the specific opportunity, but it's not helpful if you surprise the firm with this information when its client has invited you back for a second round or is about to make an offer.

Here is the bottom line: As you are waiting for that call, concentrate on doing great and innovative things in your current role. Display that you know how to get things done. Develop a resume that shows a string of significant accomplishments — hopefully in a broad range of individual and leadership competencies. Convince potential new employers that they need you to bring that expertise and similar significant results to their enterprises. A background or resume of responsibilities is insufficient; detail what you have done to add significant value to the business. If you help produce results, search firms will find you.

Build your network of those who see opportunities

General counsel often receive those “Do you know anybody who might be interested?” calls, so it is helpful to develop relationships with as many general counsel as you can. If you are focusing on a particular industry, those are the ones you should find. Try to meet these executives at events or at places where they may be speakers. Look for opportunities to speak on panels with general counsel. Generally, you can figure out who the general counsel thought leaders are in a particular industry, and they are not necessarily those who are on the “panel circuit.”

Law firm partners often see general counsel opportunities in their early stages. The outside counsel who works closely with boards often will become aware that the board or the CEO has decided to look for a new general counsel. In fact, depending upon the circumstances, they may recommend to the board the need for a new general counsel or an improved internal legal function. The individuals who

Outline of Key Attributes and Skills to Be a General Counsel

Attributes

- Judgment
- Deal with complex, significant matters that cut across legal and related areas
- Leadership
- Use of legal strategically
- Anticipate legal issues and risks
- Visionary
- Ability to inspire others
- Hard working
- Decisive
- Impeccable ethics and integrity
- Gravitas
- Reach for the stars

Non-Legal Business Expertise

- Industry expertise
- Accomplishment that advances the business
- Ability to develop relationships
- Political savvy and tact
- Ability to assemble and lead diverse teams that perform
- Ability to select and develop talent and manage performance
- Identification and development of successors
- Ability to retain and manage external resources
- Legal budgeting, forecasting and controlling costs
- Business and financial acumen
- Communication skills
- International experience

Legal and Technical Expertise

- Overall broad legal knowledge
- Ability to develop legal strategy and objectives
- Corporate and securities law
- Corporate governance
- Litigation (especially class actions and investigations)
- Risk and dispute management
- Labor and employment
- Executive compensation
- Government investigations
- SEC disclosure and reporting — if publicly traded
- Unique legal expertise — industry dependant (e.g., M&A, IP)
- Regulatory
- Legislative
- Compliance

ACC Extras on... How to Be a General Counsel

ACC Docket

- General Counsel Roundtable Discussion: CLO's Role as Strategic Leader, Trusted Advisor & Problem Solver (Jan. 2011). www.acc.com/docket/roundtable_jan11
- Recruiting, Retaining and Developing Top In-house Talent (July 2009). www.acc.com/docket/recruit&retain_jul09

InfoPAKsSM

- Role of the General Counsel (Sept. 2009). www.acc.com/infopaks/role-gc_sep09
- Recruiting & Retaining In-House Counsel (Aug. 2008). www.acc.com/infopaks/recruit&retain_aug08

Leading Practice Profile

- The Role of the General Counsel in Europe: Leading Practices in Law Department Management (Sept. 2009). www.acc.com/lpp/gc-euro_sep09

Presentation

- Leadership at the Company Level (Oct. 2010). www.acc.com/leadership-co-level_oct10

ACC has more material on this subject on our website. Visit www.acc.com, where you can browse our resources by practice area or search by keyword.

are “in the know” on these opportunities are often the marquee corporate counsel at the most prestigious law firms. Find a way to get to know them, and make your expertise and abilities known, as well as what you are seeking in your next opportunity. They will not accept any “cold calls” from junior people they don’t know, so try to get assigned to work with them on projects or issues where they can observe your abilities and potential, or make contact at events or on panels. Obviously, it is in their best interest to place someone in the position who already has a connection with their firm — otherwise, a new general counsel creates the risk of a change in the firm relationship, which can have a multi-million dollar impact. If these individuals become aware of a search, ask about the best way to get your name in the mix. This is a time when a call from them to the board or the CEO may be valuable, even if you are then referred to the search firm. The law firm may then be your best resource to find out more about the company, its needs

and the key decision makers, and it can help you strategize with you how to best work through the process.

Develop a network of people who know you, your abilities, your creativity, your great results and who are willing to be advocates for opportunities for you. Take a strategic and disciplined approach to developing this network. Evaluate the important relationships you have and the ones you need to develop and strengthen, then take systematic steps to maintain, track and build these relationships. Sharing thoughts or articles of interest can be beneficial. The key is not to be intrusive or overly political, but to be on their radar screen when the next opportunity arises.

The process to identify candidates

Many general counsel positions are filled by attorneys from outside of enterprise. Notice of opportunities for these positions can come from different directions. Even if a business is using one approach, such as a search firm, it doesn’t mean that another approach, such as your network, won’t help get you in the mix. However, most significant general counsel placements rely on retained executive search firms.

If the enterprise is using a search firm to identify and vet candidates, you should understand that process. Foremost, throughout this entire process, remember you are not the search firm’s client. Its client is the entity that has engaged the firm for the search.

The normal search process will take four to six months from the engagement of the search firm (from your perspective, assume four months). First, search firm representatives will meet with the client organization to obtain a deep understanding of the position specifications. Second, they will develop a document that summarizes these requirements and then refine it with their client. Next, they will begin sourcing candidates, so by the time you are contacted, it is possible the search has been underway for several weeks.

The search firm representative (often not from the top recruiter, but one of the associates) may ask if you know anyone who might be interested in or appropriate for a position such as X. In many cases, they’re inquiring whether you would be interested. If you are, the consultant will discuss the position in more detail and request your current resume. Depending upon the nature of the search, it may be confidential (the incumbent may not even know it is happening), and you will answer questions in the abstract as the search firm looks to narrow its list of viable candidates. If you appear to be a fit, the consultant will provide you with a position description that usually outlines the position and its requirements.

Assume you will have to relocate. If you cannot, advise the search consultant at the onset. Also, keep in mind that if you are unwilling to relocate, your opportunities will be extremely limited.

The search consultant may then interview you, in person or virtually. The only real exception to this step is if the search firm already knows you well, or you were recently presented as a candidate on another assignment the firm was handling. The search firm will then take the results of its conversations, interviews and preliminary reference comments, and share these with the client to determine which candidates will be invited for interviews. Most companies want to see a diverse slate — in fact, many require it. If you are selected to meet with the client, you should expect two to three site visits with the company. In addition, many companies conduct third-party assessments as part of their selection process, so don't be offended. The depth of the assessment can vary from a short online personality test, to interviews by behavioral experts, to a full day of testing, a role-play and structured interviews.

Don't be upset if the process appears to move slowly. There are a lot of moving parts and a lot of schedules to juggle. And don't assume that a lot of extraneous things are happening — the CEO could simply be out of the country for two weeks. Don't press the search firm or appear desperate. Stay cool and realize there are many fluid factors outside of your control — some of which may work to your benefit and some to your detriment. If you are the right candidate, it will work out.

First interviews sometimes can be with many potential candidates. Mention contacts in the company if you have them. If you have a senior contact with the company, you should mention it at the first stage. Search firms are rewarded if they provide a selected candidate that stays. If they have one that already has a link to the company, it makes their lives easier.

Once you are in the mix (i.e., you have had a conversation with the search firm), don't try to go around the search firm or the process. You will irritate the search firm if you contact people at the company, and you will also irritate the CEO if you contact board members or others outside of the enterprise. These acts are acceptable prior to getting the call from the search firm, but after you get the call, let the process work — that is why companies retain search firms. If you feel a need or desire to talk to someone you know at the company, you may want to discuss this with the search consultant and seek his or her input. Remember, your actions reflect your judgment.

You need to “ace” the interview

In the interview, be ready to discuss the competencies and skills of a general counsel outlined above. Try to describe examples of situations in which you displayed an attribute and provided value to your client. Look for examples in which you strategically advanced or assisted the business.

Your first critical interview will likely be with the search firm. Here, in addition to walking clearly and con-

The depth of the assessment can vary from a short online personality test, to interviews by behavioral experts, to a full day of testing, a role-play and structured interviews.

cisely through your resume, display gravitas and executive presence. Be prepared — the consultants will go through your entire work history (e.g., job, gaps in your resume, family, moves, etc.). Be succinct, then give more explanation if asked.

You should also be proactive in evaluating the position's appeal for you. Ask the search consultant why the search is being conducted and request details about the position of the job within the organization, the title and some of the basics to help you determine whether you want to go proceed.

Your second set of interviews will be with the client. Be prepared. Develop an understanding of what critics and competitors think about the company. Study the company's public filings and financial statements. Review analyst reports and listen to the company's last webcast conference. Read the annual report, press releases and marketing materials. Research executive compensation. Navigate the company's web site. Read industry blogs and articles. Review the bios of executives you will meet, looking for similar interests. Be prepared to tailor your conversation and think on your feet. Be respectful, demonstrate interest and energy, but do not appear obsequious.

The interview with the CEO is different from all the others. He or she will be looking for a good personality. In many cases, a CEO not only seeks a chief legal officer but also a consigliere — a trusted advisor and business partner.

Finalists often meet with one or more board members. They will ensure that you understand governance and its best practices, and that you can assist them in meeting the requirements for their “business judgment,” including carefully and properly documenting the input, deliberations and actions taken by the board. They will test for experience in dealing with challenging ethical issues and ensure that you know when to raise concerns or risks.

Throughout the process, ask thoughtful questions. You will be graded not only on the questions you answer but the questions you ask. As you meet with the CEO and

Understand the law department structure (centralized/decentralized) and how it is viewed or aligned within the business.

board members, you want to determine their expectations for the next general counsel: “You would be pleased if I accomplished what in my first year?” You also need to find out the attributes they view as critical — what makes a successful general counsel at that business? It is also valuable to understand the ethical culture — is the CEO looking for a general counsel who provides legal/risk analysis only or a “lawyer-guardian” type?

Understand the law department structure (centralized/decentralized) and how it is viewed or aligned within the business. Inquire how the organization defines success and the metrics it uses in evaluating performance. Asking questions that will help you figure out why the enterprise is conducting a search — what is missing in the current group? Try to identify what the law department can do to improve, what company leadership would like to see changed and whether the culture will make you thrive or fail (a discussion regarding key success factors). You also may have questions regarding the high-level strategy of the company and whether there are any significant legal issues that need immediate attention.

Do not ask all interviewers the same generic questions — tailor them to the individual.

Do not take notes during the interview because it can be distracting. However, you may want to have notes prepared on questions to ask, and as soon as you exit your interviews, write down everything you can recall while the details are fresh in your mind. There is nothing worse than getting the job and then asking again some of the same basic questions answered during your interviews.

There are also questions you should not ask. Don’t ask about the typical work week, the vacation policy or travel commitments. You can learn about this through other avenues. Finally, do not discuss or ask about compensation: Wait until the company wants you before you get into the specifics of any compensation and its compensation plans.

You also will have questions that you shouldn’t ask company representatives; the search firm may be able to help.

For example, it is valuable to know if there are any internal candidates. For your longevity, you may want to know the CEO’s current standing with the shareholders and the board (this may require some background checking and review of the company’s performance relative to “street” expectations). Evaluate the CEO’s tenure and experience. Finally, try to determine if there are any concerns regarding the ethics of the CEO or the CFO.

After the interviews, share your candid feedback with the search firm (e.g., “I felt I clicked with the CEO, but there was something amiss during my meeting with the CFO. I sensed a ‘competitive tinge’ in the air.”). Ask for candid feedback (e.g., “How did I do?” “How was I perceived?”). Don’t accept fluff. You took the time to travel and meet with the company. You deserve to know how you did, and if you are going to have further interviews, it allows you to address things that you missed or areas where you were misunderstood. Search firm performance in this area is inconsistent, but you should ask.

In talking with the search consultant, be forthright about your interest level. If you feel tentative, say so at the outset. Many great placements have occurred with candidates who initially were not interested. However, in meetings with the company, there is no real benefit in being tentative, and if you aren’t invited back, be a grown-up and realize that it simply wasn’t the right opportunity. Read the tea leaves. Trust your gut. If you meet the search firm’s client and don’t sense a good chemistry fit, tell the search consultant. You will be respected for your candor and sophistication. The search firm can also counsel its client on its perceived conduct so it can get matters back on track with you or other candidates.

There is no reason to follow up with the company after the interviews. There is no real benefit in thank-you notes at this level — unless following up on a specific ask or interest (e.g., we discussed an article on X, and I indicated I would send you a copy of the attached). Your communication with the search firm is your feedback. If you do send a thank-you note or any follow-up correspondence, make sure it is short, cogent and grammatically perfect.

Unless you have mutually agreed that it makes sense for you to pursue other opportunities, don’t advise your current employer that you are out interviewing. Despite what they say, many executives see it as a lack of loyalty or begin to view you as a “short timer” and will assign opportunities, promotions or compensation and bonuses to others. Nonetheless, be prepared to answer the pointed questions from your bosses if they say that they have heard you have been interviewing and want to discuss it with you. And, unless approved by the company, never use company resources or time to engage in pursuing your personal external opportunities.

Enhance the chances of an offer

So what can you do if you really want the position and you enjoyed the interviews? Not much. Back-channel communications with the board or other management, as discussed above, can backfire. Your only real opportunity to shine will be your references. Keep in mind that the CEO will want to hear from other CEOs you have worked with, if possible; also, board references are often helpful. Try to choose and tailor any reference to the particular position. Make sure your references have your resume, know the key points you want them to stress and the specific examples of your performance in these areas (concrete examples are better than something vague like, “She is proactive”).

Most companies will require a background check and usually a drug test as a condition of any offer. Make sure your resume is completely accurate. You may need to become a member of the bar in the jurisdiction where you will be practicing (most states allow for an in-house counsel admission for corporate practice). Therefore, depending upon where you are licensed and how long you have been practicing, you may want to consider the necessary steps to getting this accomplished.

Great news — you got the offer! Now what?

Before you get an offer, make sure that the company has your current compensation data. If you feel you are getting close to this point in the process, prepare a complete summary of your compensation and equity position. Nothing is worse than getting an offer that you immediately say just won't work — everyone gets upset.


You should read the proxy to get a sense of the executive compensation programs and plans, especially for the previous general counsel, if you can find it in the proxy). Figure out the title structure and make sure you clearly understand where the position fits and to whom it reports. Understand that you may not immediately step into the same compensation level as the previous general counsel. Each situation is unique.

Carefully consider whether you are being offered a contract. Generally, having a contract is in your best interest, but it is increasingly rare. If other executives lack contracts, you will too. For large companies that don't provide contracts, often provisions in company plans address the significant issues, such as severance or changes of control. Discuss these areas and gain comfort with your protections. Also, you will want to comprehend the indemnification provisions and D&O coverage. Learn how any vested or unvested equity is handled with respect to change of control or termination. Finally, understand the provisions relating to eligibility for plans (retirement, pension, 401(k) vesting, etc.). Accepting a position at age 57, when it takes ten years to become eligible for retirement, requires careful thought.

For a significant position, you may be well advised to seek assistance from a third party compensation consultant or attorney to help you evaluate and provide input on the offer. These professionals can ask the company human resources team some of the tough questions regarding plans or compensation. It takes you out of the mix — you want the position and can't wait to start — and it allows someone else to figure out the specifics, advise you and possibly even negotiate for you.

Finally, if you think you will accept a counteroffer from your employer, tell the search firm early. If you do accept a counter from your company, the search firm likely will not call you again. Think about this carefully early in the process and before you get to the offer stage.

Best job in corporate America

Being a general counsel may be one of the best jobs in corporate America. It is not without risk and can be complex and challenging, but when properly performed, it offers you the opportunity to have a significant influence and impact on a business. It should attract the “best and brightest.” Don't miss out on the opportunity because you failed to understand the skills and competencies you need to develop during your career, or because you did not understand and effectively work through the selection and hiring processes. 

Have a comment on this article? Visit ACC's blog at www.inhouseaccess.com/articles/acc-docket.

Reprinted with permission of the authors and the Association of Corporate Counsel as it originally appeared: Mark Roellig and David M. Love III, “So You Want to Be a General Counsel? How to Maximize Your Chances,” ACC Docket volume 30, issue 1 (January/February 2012): 72–83. Copyright © 2012, the Association of Corporate Counsel. All rights reserved. If you are interested in joining ACC, please go to www.acc.com, call 202.293.4103 x360, or email membership@acc.com.

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.

Jörg Thierfelder of Egon Zehnder 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 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 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 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.



Jörg Thierfelder
Egon Zehnder, Hamburg

Connect with us

- Find a consultant >
- Your Career >

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. Moreover, 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.

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 RISK MANAGEMENT

 FOLLOW THIS TOPIC

Related Topics: [BOARDS](#) | [LEADERSHIP](#)

Comments

Leave a Comment

✓ **JOIN THE CONVERSATION**

POSTING GUIDELINES

We hope the conversations that take place on HBR.org will be energetic, constructive, and thought-provoking. To comment, readers must sign in or register. And to ensure the quality of the discussion, our moderating team will review all comments and may edit them for clarity, length, and relevance. Comments that are overly promotional, mean-spirited, or off-topic may be deleted per the moderators' judgment. All postings become the property of Harvard Business Publishing.

THE DISCRETE ROLES OF GENERAL COUNSEL

Deborah A. DeMott*

INTRODUCTION

It has long been evident that a lawyer who serves as an organization's chief legal officer or general counsel typically occupies multiple roles within the organization. This Article focuses on the position of general counsel within a publicly held business corporation when the general counsel is an employee-officer of the corporation charged with overall responsibility for how the corporation's legal matters are handled.¹ So situated, a general counsel's roles include furnishing legal advice to the corporation's board of directors, chief executive officer ("CEO"), and other senior executives. But a contemporary general counsel often occupies other roles as well, each complex and interlinked in several ways. These linkages may be beneficial to a corporation and to society more generally. Positioned as an officer within a corporation, a general counsel who is an influential member of the corporation's senior management can help to shape its activities and policies in highly desirable directions, exercising influence that may extend well beyond the bare bones of ensuring legal compliance.² A general counsel also may be uniquely well positioned to

* David F. Cavers Professor of Law, Duke University School of Law.

1. The position covered by this Article does not encompass "general counsel" who are responsible only for divisions within corporations or nonemployee officers who are members of law firms and designated by corporations as their "general counsel." For an example of the latter, see Robert L. Nelson, *Partners with Power: The Social Transformation of the Large Law Firm* 57 (1988) (discussing AT&T). This Article also excludes the situation of law firms that serve as clients' general counsel. On this arrangement, see Susan P. Shapiro, *Tangled Loyalties: Conflict of Interest in Legal Practice* 36 (2002). Throughout this Article, I use the term "role" somewhat loosely and without any precise correspondence to concepts of legal capacity. On the importance of this distinction, see James S. Coleman, *Foundations of Social Theory* 541 (1990).

2. On general counsel's potential influence, see, e.g., Michele M. Hedges, *General Counsel and the Shifting Sea of Change*, in *Enron: Corporate Fiascos and Their Implications* 539, 540 (Nancy B. Rapoport & Bala G. Dharan eds., 2004) (noting that "[g]eneral counsel are uniquely positioned to affect the legal well-being of their corporate clients and the professional agenda of the state and local bars"). For specific examples of the exercise of influence by general counsel, see David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 *Stan. L. Rev.* 1915, 1939-40 (2005) (describing instances of initiatives championed by a black general counsel, including reducing employment discrimination within the corporation and enabling the provision of affordable AIDS drugs in South Africa). Black general counsel also have "pressed [law] firms to recruit at historically black law schools and to attend minority job fairs in order to increase the number of black applicants that they see." *Id.* at 1938.

champion a transformation of the organizational culture that shapes how the corporation addresses its relationships with law and regulation.³

Nonetheless, a general counsel's position often has been characterized as ambiguous—a characterization that suggests that not all occupants of the position succeed in balancing its multiple roles in either a professionally or socially satisfactory manner.⁴ More generally, 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. Indeed, some general counsel appear to have erred fundamentally by misidentifying their clients as the individual members of the corporation's senior management rather than the corporate organization as a whole,⁵ an error shared by members of senior management themselves.⁶

Several incidents over the past few years illustrate circumstances—including tensions among general counsel's roles—that may undermine the effectiveness with which a general counsel fulfills the reasonable expectations engendered by undertaking such roles. Although the prospect of tensions among a general counsel's roles is not a newly observed phenomenon, recent events heighten both the significance of these tensions and the importance of resolving them carefully. The most visible events are criminal indictments, guilty pleas, and trials,⁷ as well as civil proceedings in which a general counsel is a defendant.⁸ For example, the Securities and Exchange Commission ("SEC") initiated thirty enforcement proceedings against lawyers, predominantly in-house counsel, in the past three years.⁹

3. For a recent example, see Lynnley Browning, *How an Accounting Firm Went From Resistance to Resignation*, N.Y. Times, Aug. 28, 2005, at A1. Senate hearings focused on tax-shelter products created and marketed by KPMG. The ensuing staff report, initiation of a grand jury inquiry, and an opinion from a federal judge suggesting that KPMG had obstructed justice all proceeded the recognition that "KPMG needed more help." *Id.* The firm hired a former federal judge as its vice chairman of legal affairs and positioned him over the incumbent general counsel. *Id.* The vice chairman then "set about cleaning house, firing about a dozen partners and effectively taking over the firm's legal department." *Id.* KPMG then settled with the Justice Department on terms that required a payment of \$456 million and acceptance of an outside monitor of its operations. *Id.* KPMG as a firm was not indicted. *Id.*

4. See, e.g., Geoffrey C. Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 Emory L.J. 1011, 1011 (1997) (stating that "the role of corporate counsel entails intrinsic ambiguities that must be worked through in the ordinary course of a day's work with far greater frequency than in most other practice settings"); Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, in *Lawyers' Ideals/Lawyers' Practices* 177, 207 (Robert L. Nelson et al. eds., 1992) ("[C]orporate counsel occupy an ambiguous position both within the legal profession and within their employing organization.").

5. Model Rules of Prof'l Conduct R. 1.13 (2002); Restatement (Third) of the Law Governing Lawyers § 96 (2000).

6. Sally R. Weaver, *Ethical Dilemmas of Corporate Counsel: A Structural and Contextual Analysis*, 46 Emory L.J. 1023, 1028 (1997).

7. See *infra* text accompanying notes 97-99.

8. See *infra* text accompanying note 96.

9. Michael Bobelian, *GCs No Longer Above Scrutiny: Company Lawyers, Not Just CEOs, Increasingly in SEC's Crosshairs*, Conn. L. Trib., Feb. 14, 2005, at 3. Private plaintiffs also may pursue claims against general counsel stemming from securities and

To be sure, individual foibles may explain some incidents, but that possibility does not foreclose the value of broader inquiry into a general counsel's position.

This Article begins with a brief history of the evolution of general counsel's position within large corporations. This history illustrates sharp fluctuations over time in the organizational power and professional status of general counsel and in the functions that general counsel have performed. Scholars using sophisticated social science methodologies have yet to investigate the environment and performance of general counsel to the extent that social scientists have explored law firms and relationships between clients and external counsel.¹⁰ Nonetheless, this Article argues that implications for general counsel may stem from the more fully developed body of social science inquiry into law firms and their partners. In particular, this body of work suggests that general counsel's position has a paradoxical quality: While a lawyer who serves as general counsel of a large corporation holds the clearly defined power associated with a hierarchical position in a large bureaucratic organization, the position itself is ambiguous in many ways that may prove troubling.

The Article then specifies four roles typically occupied by general counsel before examining tensions among them. These roles include: (1) legal adviser within the corporation to its constituents in an individual professional capacity; (2) officer of the corporation and member of the senior executive team; (3) administrator of the corporation's internal (or "in-house") legal department; and (4) agent of the corporation in dealings with third parties, including external (or "outside") counsel retained by the

common-law fraud. *See, e.g.*, *JP Morgan Chase Bank v. Winnick*, No. 03 Civ. 8535, 2005 WL 2000107 (S.D.N.Y. Aug. 16, 2005) (denying a general counsel's motion for summary judgment against lenders' claims that counsel aided and abetted management's fraud to permit the corporation to draw funds from a credit facility on the basis of false statements of compliance with the credit agreement).

10. Two exceptions are noteworthy. *See* Hugh P. Gunz & Sally P. Gunz, *The Lawyer's Response to Organizational Professional Conflict: An Empirical Study of the Ethical Decision Making of In-House Counsel*, 39 *Am. Bus. L.J.* 241 (2002); Robert L. Nelson & Laura Beth Nielson, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 *Law & Soc'y Rev.* 457 (2000). Nelson and Nielson conducted in-depth interviews with corporate counsel plus an in-depth case study of relationships between in-house lawyers and nonlegal executives in a large industrial company in the mid-1990s to determine how in-house lawyers construct or understand their own roles. Based on their titles, about one-quarter of the study's respondents were members of senior management. As Nelson and Nielson's title suggests, in-house lawyers police their clients' behavior in addition to providing advice. Increasingly, in-house lawyers also place themselves in an "entrepreneurial" role in which law is conceived and marketed internally as a source of profit for the client. *Id.* at 466. The study conducted by Gunz and Gunz obtained the responses of senior in-house lawyers to a set of cases describing ethical dilemmas, assessing in part the extent to which responses were more or less "lawyerly" or "organizational." Gunz & Gunz, *supra*, at 272. The study found, among other things, that in-house lawyers' responses to situations of ethical conflict may be differentiated into advising and observing. *Id.* at 275.

corporation.¹¹ Although earlier accounts of the position of general counsel did not tend to single out these latter two roles as distinct ones, this Article uses a selection of recent events to demonstrate their significance and their interrelationships with general counsel's other roles.

The Article concludes by examining recent developments and prospects for further change that may reshape the general counsel position. The relationships that underlie the general counsel's power are under stress from a variety of directions, suggesting that further evolution is inevitable.

I. GENERAL COUNSEL'S POSITION

Unsurprisingly, the position of general counsel within large U.S. corporations has evolved over time. Three facets of its evolution are noteworthy: (1) general counsel's relationships with members of senior management, (2) general counsel's relationships with outside counsel, and (3) typical pathways for a general counsel's career. Each facet bears on general counsel's professional status as well as counsel's position within a corporation's hierarchy. The present position of general counsel is reminiscent in some but not all respects of circumstances from the late nineteenth century through the 1930s. As "both business and legal advisers," counsel then "were held in high repute and their sage counsel was regularly sought" by members of senior management.¹² Consistent with their status, general counsel were paid approximately sixty-five percent of the CEO's remuneration and usually were among a corporation's three most highly compensated individuals.¹³ General counsel often assumed critical roles in arranging solutions to the financing challenges that confronted businesses in need of investment capital in an era when capital markets were less developed in depth and size.¹⁴ In the post-Civil War

11. For a statement of functions performed by general counsel, see 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, 1061-62 (1997). By the early 1980s, general counsel performed distinct functions: "They managed and reviewed the legal services provided to corporate clients by outside counsel; they regularly supplied routine legal services and, on some occasions, directly handled complex transactions and even litigation; they counseled clients and their constituents on regulatory requirements; and they created compliance programs." *Id.*

12. Carl D. Liggio, Sr., *A Look at the Role of Corporate Counsel: Back to the Future—Or Is It the Past?*, 44 Ariz. L. Rev. 621, 621 (2002).

13. *Id.*

14. "For a generation after the Civil War to be general counsel of a railroad was to hold the most widely esteemed sign of professional success." James Willard Hurst, *The Growth of American Law: The Law Makers* 297 (1950). Corporate finance and mergers and acquisitions work for railroads were key to "a whole new field of corporate counseling." *Id.* at 298. Lawyers more generally became "familiar figure[s] on boards of directors; first the railroad general counsel, and then the lawyer for the investment banker led the way." *Id.* at 342. The prominence of lawyers in railroad financing work and in their relationships with railroad clients may be attributed to the novel legal solutions required to enable railroads to raise the large amounts required for construction from numerous investors through debt financing. Diffused owners of bonds or other debt securities would find it costly and difficult to monitor and enforce compliance with the bonds' terms. The solution was a

period, judges were lured from federal and state courts by the attractions of serving as general counsel to railroads.¹⁵

By the 1940s general counsel's status and position had diminished noticeably as large law firms became dominant in corporate representation. The general counsel's position became that of a "relatively minor management figure, stereotypically, a lawyer from the corporation's principal outside law firm who had not quite made the grade as partner."¹⁶ General counsel's responsibilities were limited to handling routine matters of corporate housekeeping and (unsurprisingly) to serving as liaison between members of management and counsel's former law firm.¹⁷ Service as senior management's trusted adviser or as a monitor of how well outside counsel performed fell outside of the general counsel's portfolio.

How this shift might best be explained is open to question. Developments stemming from the law firm sector of the profession are one possible explanation, in particular, the success with which law firms' leadership articulated an ideal of professional independence that was inconsistent with an employment relationship with a single client.¹⁸ As the ethic that embodied the capacity for professional independence exclusively within law firms became dominant, law firms competed successfully to attract and retain the most talented young lawyers.¹⁹ Alternatively, a distinct, but not inconsistent explanation emphasizes the value that perceived independence from the client brings to a lawyer's work, whether as an advocate in litigation or as an intermediary in transactional work.²⁰ It is also possible that changes in the demographics of senior corporate management explain the diminished status of general counsel. In the earlier era, a higher percentage of CEOs were lawyers who had been promoted internally from the law department.²¹ By the 1940s, "[t]he new wunderkinds of the business community were marketing and finance

sophisticated and lawyerly one, a trust indenture. A trust indenture represents a contract between the railroad and a trustee who was charged with administering payments and enforcing compliance with the indenture terms on behalf of holders of the bonds issued by the railroad. As Professor William Bratton explains the solution,

Railroad entrepreneurs were forced to sell mortgage notes to many persons, since no one person was willing or able to furnish all of the funds to be raised. These bonds had to be made marketable and tradeable while simultaneously carrying a lien against the mortgaged property. Each of the widely dispersed holders of the bonds had to be given the security of a mortgage on the railroad's assets without at the same time being granted an individual fractional interest in the collateral. The solution was to convey the mortgaged assets, under a trust indenture, to someone as trustee for the equal and ratable benefit of each of the holders.

William W. Bratton, *Corporate Finance: Cases and Materials* 176 (5th ed. 2003).

15. Hurst, *supra* note 14, at 297-98.

16. Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 *Stan. L. Rev.* 277, 277 (1985).

17. *Id.*

18. Nelson, *supra* note 1, at 56.

19. *Id.*

20. *Id.*

21. Carl D. Liggio, *The Changing Role of Corporate Counsel*, 46 *Emory L.J.* 1201, 1202 (1997).

types—the MBAs. With their ascendancy, the role that the corporate counsel played began to diminish.”²² Thus diminished, the position lacked allure for the enterprising.

By the 1970s, the general counsel’s position in many large corporations grew in stature and scope of responsibility. Staffing for internal law departments increased, as did the range of matters handled internally.²³ General counsel joined senior management near or at the top of the corporate hierarchy.²⁴ General counsel also exercised much more discretion in delegating work to outside law firms and became active in monitoring its execution,²⁵ thereby becoming a powerful and centralized intermediary among the corporation, its management, and its outside counsel. Moreover, the career path leading to the general counsel position shifted, as partners from major law firms and other prominent lawyers acceded to the position.²⁶ The ratio between the salary of the CEO and the general counsel improved.²⁷

The increased cost of legal services, itself a consequence of increases in regulation and in the size, scope, and complexity of business operations, helps to explain the extent to which large corporations internalized legal work.²⁸ Yet, cost pressures, standing alone, do not explain the enhanced prominence of general counsel as a member of senior management. That is, large corporations might reduce the cost of legal services by internalizing the legal function without enhancing the management power of general counsel outside the confines of the law department itself, just as corporations internalize other important functions in a department headed by an administrator who is not a member of senior management. One explanation for general counsel’s enhanced managerial stature is the nature of the advisory services that general counsel may provide: Other members of senior management may come to expect general counsel’s involvement in high-level strategic decisions as an adviser with intimate knowledge of the corporation and its business, able to bring to bear business insight in addition to legal skill.²⁹ Consistent with general counsel’s expanded position within a corporation, the character of the legal work done by

22. Liggio, *supra* note 12, at 621.

23. See Chayes & Chayes, *supra* note 16, at 277 (reporting that as of 1985, “antitrust, tax, securities, patent, acquisitions, and even litigation are coming inside,” joining the more traditional internal categories of “[c]ommercial, corporate, personnel/labor, and property law”).

24. *Id.*

25. Nelson, *supra* note 1, at 57-58.

26. See, e.g., *id.* at 57; Larry Smith, Inside/Outside: How Businesses Buy Legal Services 216-17 (2001) (observing that by the late 1980s, “in-house practice began . . . to attract a higher caliber of practitioner,” including “prominent partners at law firms [from] all over the country”).

27. Liggio, *supra* note 21, at 1206.

28. Nelson, *supra* note 1, at 56-57.

29. Daly, *supra* note 11, at 1060-61; Weaver, *supra* note 6, at 1027 (stating that general counsel “can enhance their value to their client and their power within the organization when they are perceived as ‘adding value’ beyond traditional legal advice”).

general counsel and other in-house lawyers may be, to some degree, proactive as opposed to purely reactive because the lawyers' involvement could occur at an earlier phase of any given transaction.³⁰

Why the present position of general counsel might hold appeal for talented and enterprising lawyers with other attractive opportunities³¹ also warrants examination, especially when considered against the long-established perception that "[t]he large law firm sits atop the pyramid of prestige and power within the American legal profession."³² That is, the phenomenon of the general counsel's position might be explained, not solely by factors related to corporate desire for a particular method of obtaining legal services, but also by factors relevant to the supply side—those lawyers who may serve as general counsel. This inquiry would benefit greatly from social science study, an enterprise beyond the scope of both this Article and the competence of its author.

Notwithstanding this limitation, some possible explanations for the competitive appeal of general counsel's position merit articulation and brief discussion. These are: (1) the fit between the general counsel's position and an individual lawyer's talents (the "fit" hypothesis), (2) the prospect that service as general counsel may furnish a good launching pad into other positions within senior management (the "launching pad" hypothesis), (3) the position's anticipated economic rewards (the "economic rewards" hypothesis), and (4) the contrast with partnership in a large law firm (the "law firm contrast" hypothesis). Each hypothesis carries somewhat different implications for the appeal of service as a general counsel.

The "fit" hypothesis reflects the likelihood that legal training does not exhaust an individual's capacity to develop additional skills and to function well in a high-level business environment in which high-stakes decisions are made, as well as the likelihood that legal skill may complement, if not enhance, these aspects of business decision making. The fit between any general counsel's strengths and any corporation's need is not necessarily constant over time; as the corporation's circumstances evolve in response to growth and other factors, so may its need for different counsel. In some circumstances, which most obviously include the wake of scandal and extensive legal and regulatory difficulties, the corporation may require a

30. Chayes & Chayes, *supra* note 16, at 281.

31. In contrast, for entry-level positions, one corporate counsel observes that [w]hen interviewing law students, it has become apparent that any corporation is at a disadvantage We are unable to offer the lure of partnership and associated financial rewards. Moreover, we must overcome a strong bias against corporate law departments. Most law students of the caliber we seek are conditioned to believe that the best graduates go to major business law firms. We thus must stress that in all respects, other than partnership compensation, we are similar to the competition and offer other compensating rewards.

Robert L. Bordon, *The Organization and Staffing of an In-House Counsel Office in Order to Handle Litigation Directly*, in *The Corporate Litigator* 78, 79 (Francis J. Burke, Jr. & Michael L. Goldblatt eds., 1989).

32. Nelson, *supra* note 1, at 1.

general counsel with a very specific combination of abilities and credibility.³³

The “launching pad” hypothesis, more susceptible to testing through quantitative measures than the “fit” hypothesis appears to be, would be supported by evidence that general counsel move into other management positions, including that of CEO,³⁴ and perhaps also by evidence that general counsel simultaneously hold other offices.³⁵ The “launching pad” hypothesis also buttresses one explanation for why general counsel may serve on a corporation’s board of directors. Fellow board members’ familiarity with counsel’s abilities as a board colleague may enhance counsel’s position as a candidate for the CEO’s position should it become vacant.³⁶ To be sure, in some circumstances, external observers may interpret the appointment of general counsel as CEO as a recognition by the corporation’s directors that its legal problems are especially grave.³⁷ Situated within the corporation, general counsel may be especially well positioned to take the requisite actions as the CEO when large changes in corporate culture are required. An intriguing question is the length of tenure of CEOs appointed in such circumstances.³⁸ This metric might

33. See *supra* note 3 (discussing the circumstances under which accounting firm KPMG appointed a former federal judge as vice chairman for legal affairs); see also text accompanying *infra* notes 88-95 (discussing the circumstances leading to the appointment of a new general counsel by Wal-Mart Stores, Inc., and by Morgan Stanley Inc.).

34. See Daly, *supra* note 11, at 1073; Susanna M. Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, 68 Tenn. L. Rev. 179, 206 & n.109 (2001) (reporting that “[m]any lawyers actively seek to join the ranks of senior management and leave the legal department altogether” and that “[s]tudies have revealed that in recent years, there has been a 100% increase in the number of CEOs who began their careers as lawyers”). However, not all in-house lawyers aspire to leave the legal department. See Nelson & Nielson, *supra* note 10, at 485 (reporting that “only a few” in-house lawyers interviewed “seemed seriously to entertain the possibility of shifting to a business job”).

35. It is not unusual for general counsel to also serve as a corporation’s secretary and to carry a vice-presidential title. See Kim, *supra* note 34, at 200 & n.82.

36. See *id.* at 224 (noting that a “general counsel who makes a strong impression on the board increases the likelihood that the board will elevate the general counsel to the chief position”).

37. See Michael E. Porter et al., *Seven Surprises for New CEOs*, Harv. Bus. Rev., Oct. 2004, at 62, 68 (reporting that a chief executive officer (“CEO”) “with a legal background recounted how the markets reacted negatively to his appointment, on the assumption that the only reason to make a lawyer CEO was that the company was facing deeper asbestos-litigation problems than previously acknowledged”).

38. For example, Citigroup’s CEO, formerly its long-term general counsel, took over in 2003 following a series of serious legal and regulatory problems, including the loss of Citigroup’s private banking license in Japan. See Monica Langley, *Behind Citigroup Departures: A Culture Shift by CEO Prince*, Wall St. J., Aug. 24, 2005, at A1. Acting to implement a new internal focus on controls and ethics, the new CEO has “hired lawyers for [many] top positions,” stating that his objectives included “clearing the decks of problems and rolling out a new ethics model. These aren’t center-of-the-plate issues for [the prior CEO, now Chairman], but I think they are exactly what the company needed. The times we’re in required the kinds of things I’m working on.” *Id.* Citigroup’s CEO “is giving himself plenty of time. He says he hopes to run Citigroup for 10 years.” *Id.* When a corporation’s situation requires a new CEO with a particular kind of legal credibility, other candidates may be more attractive than the incumbent general counsel. See, e.g., Ian

illuminate whether, in the circumstances in which a CEO's position requires a general counsel's background and skills, the CEO's role is better defined as a shorter-term turn-around assignment with a specifically legal orientation, as opposed to a longer-term engagement with a broader business focus.

The "economic rewards" hypothesis likewise lends itself to quantitative measures, in particular by comparing the anticipated value of the compensation packages of general counsel with the anticipated value of partnership in a large law firm.³⁹ It may be significant that a general counsel's compensation package often includes components not otherwise available, such as stock options and other forms of compensation based on an employer's equity securities.⁴⁰

The "law firm contrast" hypothesis has dimensions beyond a comparison of anticipated economic rewards. The most important are contrasts between the relevant organizational structures and the circumstances that determine an individual actor's position and power within them. The internal structure of corporate law departments has been characterized as an attempt to mimic or "to resemble the law firm in the day-to-day structure of its work."⁴¹ Junior lawyers learn from their seniors, while all focus on performing tasks that require the exercise of judgment to resolve often

McDonald, *After Spitzer Probe, Marsh CEO Tries Corporate Triage*, Wall St. J., Aug. 29, 2005, at A1 (reporting circumstances leading to service as CEO of the insurance brokerage firm by a lawyer with extensive law-enforcement background but no prior experience in insurance industry).

39. One study found the median total cash compensation of a chief legal officer to be \$370,000 in 2003, an increase of nine percent over the prior year. See Alexi Oreskovic, *General Counsel Compensation in the Crosshairs?*, Legal Intelligencer, June 30, 2004, available at 6/30/2004 TLI S7 (Westlaw) (reporting a study by Altman Weil Inc.). Reportedly, at some companies the CEO has sole responsibility for determining the general counsel's compensation, while at others the board's compensation committee acts on the basis of a recommendation made by the CEO. *Id.*

40. To be sure, some individual lawyers and law firms make equity investments in their clients. For comprehensive treatment of this practice and its implications, see John S. Dzienkowski & Robert J. Peroni, *The Decline in Lawyer Independence: Lawyer Equity Investments in Clients*, 81 Tex. L. Rev. 405 (2002). On the use of equity-based compensation for in-house counsel, the authors report that

corporations offer stock or stock options as compensation or bonuses, and they often make the corporate stock a central feature of the employee retirement plan.

This trend has been justified as both a recruitment device for getting highly qualified lawyers to move in house from private law firms and an effective incentive method of compensation based on the corporate client's financial performance.

Id. at 517. One study, now somewhat dated, reports that over seventy percent of senior in-house lawyers receive stock options in some form. See Nancy J. Moore, *Conflicts of Interest for In-House Counsel: Issues Emerging from the Expanding Role of the Attorney-Employee*, 39 S. Tex. L. Rev. 497, 538 (1998) (discussing a 1985 study).

41. Eve Spangler, *Lawyers for Hire: Salaried Professionals at Work* 88 (1986); see Nelson & Trubek, *supra* note 4, at 208 (stating that corporate counsel "maintain the appearances and internal rhythms of a law firm: They look and act like lawyers, they have their own law offices within their corporations, and these offices are managed by lawyers").

complex problems.⁴² These patterns of work typify a collegial organization, one conventionally associated with work that requires professional expertise and cooperation among peers.⁴³ The power within a collegial organization to control other actors stems from resource dependencies among them and from often-fragile arrangements for power sharing. In contrast, in bureaucratic organizations, power is associated with defined positions and its exercise is often less complex than in a collegial organization.⁴⁴ A corporate law department might be characterized as a "collegial pocket" within a larger and more bureaucratic corporate organization.⁴⁵

Within the collegial pocket that a corporate law department may represent, general counsel's position is defined with a degree of hierarchical clarity carrying authority that is not associated with the position of a partner in a law firm, however powerful that partner might be. An individual partner's power in the law firm context stems from the partner's ability to "find" or attract and retain clients,⁴⁶ plus the ability to enlist the allegiance of other lawyers in the firm to work on client matters.⁴⁷ Thus, the power derived from a finder's status is contingent on the finder's intra-firm relationships. Moreover, law firms at least attempt to define and impose firm-wide values on all partners and to limit partners' discretion in many ways, in particular by developing practices to reduce the risk of defection by partner-"finders" and the teams of lawyers who work on their client matters. Power within the polycentric context of a law firm is diffused, and authority may be fuzzy, in contrast to the unclouded hierarchical position of the general counsel in relation to the remainder of the law department.⁴⁸ Although holding authority defined with such a degree of clarity can be

42. Spangler, *supra* note 41, at 89 ("Like law firm lawyers . . . in-house attorneys may devote a substantial portion of their work to delicate and complex legal tasks in a context of loosely structured supervision.").

43. See Emmanuel Lazega, *The Collegial Phenomenon: The Social Mechanisms of Cooperation among Peers in a Corporate Law Partnership* 2 (2001).

44. *Id.* at 3.

45. See *id.* at 4, 51 (using the terminology "collegial pocket"). Nelson and Trubek characterize most law departments as "collegial enclaves within the corporation." Nelson & Trubek, *supra* note 4, at 208.

46. Lazega, *supra* note 43, at 13; Nelson, *supra* note 1, at 70-73.

47. Lazega, *supra* note 43, at 192-98.

48. "'What we have here,' declares the general counsel of a mixed industrial corporation, 'I call a benevolent dictatorship. Clearly a law department reflects the personality of the vice president or the general counsel more so than a law firm.'" Spangler, *supra* note 41, at 75. The author comments, "To the extent that general counsel have near-dictatorial powers, committees and other vehicles for staff participation have little importance in law department governance." *Id.* Even when a general counsel's powers are not "near-dictatorial" or are not exercised as if they were, general counsel's power has a clarity and stability that an individual partner in a contemporary law firm would only rarely possess. See Smith, *supra* note 26, at 216-17. Compared with partnership in a law firm, a general counsel's position provides "the opportunity to run a more hierarchical organization and pursue global business goals without having to vet every decision with committees of argumentative lawyers, each one having his or her own separate clientele, practice area focus, and personal agenda." *Id.*

attractive, in the case of general counsel, the clarity of positionally defined authority inextricably accompanies a position—that of general counsel—that is itself ambiguous.

II. DISTINCTIVE ROLES OF GENERAL COUNSEL

Each of the roles presently occupied by general counsel is complex. Each role, moreover, is at least potentially in tension with counsel's other roles. This part specifies each of the roles and identifies some of the tensions that may arise among them. Part III then uses this typology of roles and tensions as a framework for discussing a few actual conflicts of general counsel in the recent past.

A. *Legal Adviser to Corporation and Its Constituents*

The specifics of a general counsel's role as an individual legal adviser vary considerably depending on, among other factors, the size of the corporation and its in-house legal department, as well as on the complexity and nature of the legal and regulatory questions that the corporation must address.⁴⁹ Although some delegation of work to subordinates within the legal department is inevitable,⁵⁰ a general counsel bears ultimate responsibility for "all legal matters affecting the corporation."⁵¹ Acting individually, a general counsel furnishes advice to senior management on major transactions or other situations.⁵² The general counsel's individual advisory role also encompasses discerning trends in the law and projecting their impact on the corporation.⁵³ Under normal circumstances, the general counsel also furnishes legal advice to the corporation's board of directors.⁵⁴

Lurking behind these generalities are a number of difficulties concerning a general counsel's individual advisory role. For starters, counsel's responsibility for the corporation's legal compliance may be at odds with counsel's role as an adviser. Although this also may be true for all lawyers to some degree, for general counsel the dissonance may become especially pressing.⁵⁵ For example, if general counsel has direct charge over implementing corporate compliance programs, as opposed to involvement in designing compliance programs and serving an educative role within the

49. See Carole Basri & Irving Kagan, *Corporate Legal Departments* § 2-2 (3d ed. 2004).

50. *Id.* § 2-3.

51. Kim, *supra* note 34, at 200.

52. Liggio, *supra* note 21, at 1208.

53. *Id.* at 1208-09. This role may merge into participation in the corporation's strategic planning process and thus into functioning as a business adviser, if not necessarily a business decision maker. *Id.* at 1209-10.

54. Basri & Kagan, *supra* note 49, § 2-4.

55. Nelson and Nielson report that in-house lawyers generally differentiate between their roles as "cops" and "counsel": In the "cop" role, lawyers focus on "policing the conduct of their business clients," while the "counsel" role entails providing advice on legal questions but also "implies a broader relationship with business actors that affords counsel an opportunity to make suggestions based on business, ethical, and situational concerns." Nelson & Nielson, *supra* note 10, at 463-65.

corporation with respect to these requirements, counsel's position as the corporation's top compliance officer may conflict with counsel's responsibility to defend corporate actions when they are challenged.⁵⁶

More generally, like any lawyer, general counsel's professional duties require appropriate responses when counsel learns of legally problematic conduct by the corporate client's constituents. But situated within the corporation, general counsel—whether directly or through subordinate members of the legal department—is exposed to “the informal, back-channel information that flows around the company water cooler”⁵⁷ and other settings in which information is transmitted informally within any organization. Outside counsel, in contrast, is sheltered from such information, at least initially when outside counsel learns facts that have been distilled by the client.⁵⁸ Somewhat paradoxically, general counsel's embedded position within a corporation, which underlies counsel's ability to function proactively,⁵⁹ also places counsel in an environment rich with information that may require uncomfortable choices. This also may be an environment that rewards alacrity over accuracy, thereby creating a greater risk for error.⁶⁰

A further complication stems from the fact that not all general counsel are as fully functional as advisers as descriptions of the general counsel's present position might suggest because counsel may be unaware of major ongoing developments. Although many reasons may keep general counsel out of informational loops that operate at the senior management level, one structural explanation is the ability of other members of senior management to exclude general counsel from any particular loop. Consider in this light the well-known facts of *Smith v. Van Gorkom*,⁶¹ a case known for its controversial imposition of individual liability on negligent directors. The corporation's long-serving CEO/Chairman, having determined that the

56. James F. Kelley, *The Role of the General Counsel*, 46 Emory L.J. 1197, 1199 (1997) (observing that “[i]f the general counsel is thought of as primarily a compliance officer rather than an advocate for the corporation, he may have abdicated the role that his client most needs, although the client may not always realize it”). For more extensive treatment, see Nelson & Nielson, *supra* note 10.

57. Hazard, *supra* note 4, at 1019.

58. *Id.* Access to informal informational channels also presents the challenge of determining whether what is learned is reliable. To be sure, difficulties for counsel arise when a client's distillation of “facts” proves unreliable, whether counsel is situated within or outside the client's organization.

59. See Chayes & Chayes, *supra* note 16, at 281.

60. It has been said of in-house lawyers generally:

After a while on the job, inside lawyers “get it.” They recognize that their duty is to give the best possible answer they can, but also that the answer is more valuable at a 50% level of certainty today than a week from today at 90%. . . .

“Getting it” from a business rather than a legal standpoint is what the in-house marketing chore is all about. In-house lawyers have the time and opportunity to convince the client that they know their job is to move business forward rather than impose the delaying concerns that outside counsel are obligated to impose.

Smith, *supra* note 26, at 247.

61. 488 A.2d 858 (Del. 1985).

company should be sold to a particular third party through a cash merger transaction, pressed ahead toward board approval of the transaction over the opposition of some members of the company's senior management. Prior to the board meeting, the CEO/Chairman retained outside counsel to advise on legal aspects of the transaction. However, the CEO/Chairman did not consult with either the corporation's incumbent general counsel or his predecessor, who by that time had become a vice president and also served as a director.⁶² Why the CEO/Chairman was so reticent with the corporation's present and prior general counsels is not evident from the court's opinion, but his ability to exclude them from the informational loop concerning the merger is striking.

B. Corporate Officer and Member of Senior Management Team

The bare bones of general counsel's position as a corporate officer normally would be defined in the corporation's bylaws.⁶³ Although general counsel would, as a corporate officer, be appointed to office by the board of directors, in a large corporation the general counsel generally reports to the CEO⁶⁴ and the CEO has a substantial if not exclusive role in choosing the general counsel.⁶⁵ General counsel's portfolio of responsibilities may include nonlegal functions, including the corporate secretarial, human resources, and governmental affairs functions.⁶⁶ Beyond formally defined authority and responsibilities, as discussed above general counsel may also participate in formulations of corporate strategy at the highest levels of the management hierarchy.⁶⁷

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

62. *Id.* at 867.

63. For sample by-law language, see Basri & Kagan, *supra* note 49, § 2-4 ("The corporation may have a general counsel who shall be appointed by resolution of the board of directors and who shall have general supervision of all matters of a legal nature concerning the corporation.").

64. *Id.* § 2-2.

65. The American Bar Association's Task Force on Corporate Responsibility recommended in 2003 that, as a good governance practice, a public company's board of directors has responsibility for approving the "selection, retention, and compensation" of the general counsel and that general counsel meet "regularly and in executive session with a committee of independent directors to communicate concerns regarding legal compliance matters." See E. Norman Veasey, *Separate and Continuing Counsel for Independent Directors: An Idea Whose Time Has Not Come as a General Practice*, 59 Bus. Law. 1413, 1415-16 (2004) (citing Am. Bar Ass'n House of Delegates, Report No. 119C (2003), reprinted in Am. Bar Ass'n, *Report of the Bar Association Task Force on Corporate Responsibility*, 59 Bus. Law. 145 (2003)). For further discussion of enhanced relationships between general counsel and the board of directors, see *infra* text accompanying notes 138-39.

66. Basri & Kagan, *supra* note 49, § 2-3.

67. See *supra* text accompanying notes 24, 29-30.

professional norms so require.⁶⁸ General counsel's position may be more complex in this respect. If counsel's past remuneration has been generous, accumulated wealth may enable counsel to be bolder, risking the economic consequences of withdrawal (i.e., resignation) or termination by the corporation.⁶⁹ General counsel's withdrawal also may send a louder signal to audiences both internal and external to the corporation. On the other hand, to the extent general counsel is socialized as a member of the senior management team, general counsel may be reluctant to jeopardize ongoing membership in the team and inclusion in its informational loops, which underlie effective power within the corporation. The impact of such socialization on a general counsel may run stronger and deeper than the impact that socialization into a corporate employer may carry for subordinate members of the legal department.⁷⁰ This is so both because the stakes associated with general counsel's position are higher and because the bonds of personal loyalty between general counsel and other members of the senior management team may bind more tightly than the more impersonal ties between a subordinate lawyer and a corporate employer.

More generally, to the extent general counsel participates at an early stage in shaping major transactions and corporate policy, counsel's ability to bring detached, professional judgment to bear in assessing their legality may be compromised, especially when the question of legality is tinged in shades of gray as opposed to black and white.⁷¹ An executive who participates in formulating strategic corporate decisions is likely to view the

68. See, e.g., Dzienkowski & Peroni, *supra* note 40, at 518.

69. For discussion of the policy considerations that shape the debate over in-house lawyers' rights to assert wrongful discharge claims, see Susan R. Martyn & Lawrence J. Fox, *Traversing the Ethical Minefield: Problems, Law, and Professional Responsibility* 413-17 (2004).

70. Nelson & Trubek, *supra* note 4, at 208 (noting that legal departments "attract and socialize lawyers into a business ideology").

71. "Typically, the loyalties of the general counsel are to the company. 'I always feel I have one hat, and this is: I am a corporate officer who is a lawyer' is the way one general counsel described the balance he maintains between business and professional commitments." Spangler, *supra* note 41, at 74. Conflicts for general counsel may arise "more subtly and with greater frequency" than is the case for outside counsel. Robert C. Kahrl & Anthony T. Jacono, "*Rush to Riches*": *The Rules of Ethics and Greed Control in the Dot.Com World*, 2 Minn. Intell. Prop. Rev. 51, 58 (2001) (discussing specifics in the case of start-up companies). The authors comment,

When the CEO of NewCo instructs Counsel to execute a business plan, Counsel feels a natural compulsion to assist the CEO in executing the plan, even if the legality of certain steps in the plan might otherwise trouble him. Counsel may feel a more powerful compulsion than an outside counsel, who is not so dependent on the personal goodwill of the CEO for his family's immediate sustenance. The CEO's influence over Counsel's status at NewCo, and the inherent compulsion that Counsel feels to align himself to the goals of the CEO, may be analogous to the conflict of interest that Counsel feels when he is two weeks away from turning his five percent equity into five million dollars. If Counsel feels any propensity whatsoever to act against his independent professional advice, regardless of whether an actual conflict ever materializes, the Counsel is in the same situation as an equity-holding attorney who is advising his client on going public.

Id. at 58-59.

steps necessary to implement them differently than would a more subsidiary actor within the organization.⁷² Even if a general counsel's role as a lawyer always distances counsel somewhat from other members of the senior management team, counsel's ongoing associations with them may sway counsel's loyalties away from the corporation and toward more personalized loyalties focused on the agents who comprise the corporate senior management team.⁷³ Additionally, as a member of the senior management team, counsel may tend to address legal questions in a manner that pays allegiance to the wisdom of executive-level commitments and perspectives, even in the absence of explicit instructions from other members of the team.⁷⁴

C. Administrator of the Internal Legal Department

A general counsel functions as the top administrator of the corporation's internal legal department. This position entails overall responsibility for managing the department's budget, establishing and implementing

72. The point parallels the distinction between "executive" and "subsidiary" intentions. See Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* 87 (2000). Kutz defines "executive intention" as "an intention whose content is an activity or outcome conceived as a whole, and which plays a characteristic role in generating, commanding, or determining other intentions and mental states in order to achieve that total outcome" and "subsidiary intention" as "an intention generated and rationalized by an executive intention, whose content is the achievement of a part of the total outcome or activity." *Id.* at 96. A participant in a group acts from an "executive perspective" when that participant believes that "what we do is up to me." *Id.*

73. On the likelihood that a lawyer's ties of personal loyalty to individual agents may create dissonance with the lawyer's duty of loyalty to the client organization, see Shapiro, *supra* note 1, at 104-05. Shapiro notes also that "abrogating that personal loyalty in favor of institutional loyalty sometimes threatens the ongoing business relationship between the corporation and the law firm that is controlled by the agent." *Id.* at 105. The threat and its consequence of compromised loyalty appear greater when the relationship is that between general counsel and other members of senior management, as opposed to the "business relationship" between a corporation and its outside counsel. The risks are enhanced to the degree that general counsel identifies the CEO or the senior management team as counsel's client. Even proponents of the movement toward strong general counsel occasionally appear to characterize counsel's relationship with the CEO as that of attorney and client. For an example, see Liggio, *supra* note 12, at 634 (arguing that greater complexity in business intensifies the need for knowledge of the client, which is not so readily available to outside counsel, which will "put a greater stress on the need for inside counsel who sit at the right hand of the master"). The language that in-house lawyers and corporate constituents use to characterize their relationship may have some bearing on how loyalties are aligned. For example, corporate counsel repeatedly characterize business units and managers within the corporation as their "clients," verbal slippage that may mirror situational reality. On this usage, see Nelson & Nielson, *supra* note 10, at 463.

74. For discussion of this point in connection with government lawyers, see W. Bradley Wendel, *Professionalism as Interpretation*, 99 Nw. U. L. Rev. 1167, 1229 (2005) (discussing how Justice Department lawyers who prepared a legal analysis of restraints on torture were advised that the administration sought "forward-leaning" advice, which was interpreted to mean that "[l]awyers were expected to take risks, think outside the box, and in effect approach the law from an adversarial point of view, rather than as a set of legitimate reasons upon which to act").

departmental policies, and recruiting and supervising subordinate lawyers.⁷⁵ Structuring a law department requires decisions about two basic organizational questions: (1) how extensive a hierarchy will the department use internally, and (2) to what degree will the department operate in a centralized as opposed to a decentralized fashion.

Most law departments typically use hierarchical internal structures, with multiple reporting levels between the general counsel and the lowest level of staff lawyer.⁷⁶ This structure also is associated with promotion and compensation practices that require attaining a supervisory position to vault over career and salary ceilings.⁷⁷ More recently, some law departments reconfigured into organizational structures with fewer titles and hierarchical levels and with compensation based more on professional responsibility than on the number of subordinates.⁷⁸

Most law departments also are centralized to some degree, with legal matters coming to the department from the managers of sites at which the corporation operates. On the other hand, a pattern of geographically dispersed corporate operations tends to be associated with more decentralization in the law department, in which lawyers are assigned to the location of operating units.⁷⁹ Centralized operations are simpler to control and have greater potential to develop richer professional cultures through interchanges among lawyers. In decentralized law departments, lawyers in closer physical proximity to the operational managers may have better rapport with those managers and with the specifics of the businesses they manage.⁸⁰

Regardless of how a law department is structured, a general counsel risks some degree of remoteness from the substance of the department's work. If the department is large, administrative matters may consume much of general counsel's time and energy. The risk of remoteness is enhanced to the degree the legal function is decentralized unless general counsel devises structures and practices that facilitate monitoring and other forms of control over work done by lawyers in the department.

D. *Agent of the Corporation in Dealings with Third Parties*

Acting to some degree as the corporation's agent is integral to the position of general counsel. Within a law department, the general counsel serves as the corporation's agent in dealings with junior members of the department. General counsel also serve as corporate agents in dealings with third parties external to the corporation. The most prominent instance is the role of general counsel in connection with relationships between the corporation and outside counsel. Prior to the reinvigoration of general

75. See Basri & Kagan, *supra* note 49, § 2-3.

76. *Id.* § 2-6; Spangler, *supra* note 41, at 76.

77. Spangler, *supra* note 41, at 82.

78. Basri & Kagan, *supra* note 49, §§ 2-6 to 2-7.

79. *Id.* § 2-11.

80. *Id.*

counsel's position in the 1970s, a general counsel served as a liaison between the corporation's principal outside law firm and managers within the corporation.⁸¹ Since then, relationships between general counsel and outside law firms have been more fluid, as many counsel "shopped around" for representation on specific matters.⁸² Many general counsel developed the practice of running "beauty contests" at which multiple law firms might be interviewed prior to committing the corporation to a particular engagement.⁸³ Others designated particular law firms as the corporation's preferred sources for outside legal work, paying close attention to costs.⁸⁴

The prominence of general counsel's more discretionary role carries many consequences for relationships between corporate clients and law firms. For example, prominent counsel might join forces to mount a collective campaign for change in law firms' practices. Recently, general counsel of eight major corporations began meeting and exchanging information with the objective of improving delivery of legal services.⁸⁵

81. See *supra* text accompanying note 17.

82. See Basri & Kagan, *supra* note 49, §§ 15-2 to 15-3. General counsels' success in consolidating authority to approve the retention of outside counsel led to their characterization as corporate "purchasing agents." See Robert Eli Rosen, "We're All Consultants Now": *How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services*, 44 Ariz. L. Rev. 637, 668 (2002). More broadly, general counsel have been characterized as "primary agents of change" in the market for legal services, because internalizing into the general counsel position the diagnostic and referral functions theretofore performed by outside counsel eliminated informational asymmetries between lawyers and their corporate clients. See Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 Stan. L. Rev. 313, 381-82 (1985). Professor Ronald Gilson links the elimination of informational asymmetries to a reduction in the ability of outside counsel to serve as reputational intermediaries on behalf of clients. See Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 Md. L. Rev. 869, 902-03 (1990). Contemporary general counsel, as knowledgeable purchasers of legal services, dramatically reduce the costs to a corporate client of switching counsel. *Id.* at 902-03. Thus, switching costs underlie lawyers' market power and ability to act as credible gatekeepers. *Id.* at 901. Inside counsel may not be good prospects to serve gatekeeping functions because their "reference group . . . may be other members of corporate management rather than other lawyers." *Id.* at 915. A subsequent empirical study finds an ongoing but somewhat declining market for service as a reputational intermediary. See Karl S. Okamoto, *Reputation and the Value of Lawyers*, 74 Or. L. Rev. 15 (1995).

83. See Shapiro, *supra* note 1, at 182-83. A law firm that is unsuccessful in the wake of a beauty contest may find itself conflicted out of representing an adverse party. This prospect leads to "convoluted pas de deux" between firms and their prospective clients so that the firm may "gather sufficient information about a new matter without obtaining confidences that will trigger conflicts of interest." *Id.* at 287. Shapiro cautions against overgeneralization on the basis of lawyers' accounts of their strategies to learn enough but not too much. Some protective mechanisms may have formal existence but be disregarded in practice. *Id.*

84. For an example, see Smith, *supra* note 26, at 206 (describing how general counsel of Caterpillar Inc., consistent with "'good tight management,'" pays slightly over one-half the national median in total legal costs and uses a small number of outside domestic law firms).

85. See Susan Beck, *Clients Unite!*, Am. Law., July 2005, at 22 (noting that these general counsels' concerns are not focused solely on fee reduction but also on efficient

General counsel also might press for information from law firms that may reflect idiosyncratic concerns.⁸⁶ More broadly, the diffusion of corporate work among multiple law firms limits the breadth of any one firm's knowledge of the client, empowering general counsel in dealings with firms but reducing the capacity of any one firm to bring judgment to bear when more comprehensive insight into the corporation may be desirable.⁸⁷

However focused, general counsel's role as an agent of the corporation may be in some tension with counsel's other roles. As explored more fully in Part III, counsel's affinity for other members of senior management, like counsel's own involvement in managerial decisions, may bias the decisions that general counsel makes in retaining outside counsel and in interacting with outside counsel and other third parties, including representatives of governmental authorities. And, to the extent general counsel's position within the corporation is tied, at least in some respect, to the size of the legal department, that fact may shape—not necessarily consciously—general counsel's perspective on retaining outside counsel.

Another indication of the breadth and significance of general counsel's role as an external agent of the corporation is the close attention paid to changes in counsel when former counsel has been prominently associated with a particular approach to litigated matters or to dealings with regulators. The approach implicates actions taken by general counsel individually as well as actions taken by retained counsel. Indeed, so well known may general counsel's commitment be to a given approach that more specific instructions to retained counsel may prove unnecessary. General counsel's commitment may persist despite adverse outcomes that might call the wisdom of counsel's approach into question. But allegiances between general counsel and other members of senior management, in particular the CEO, may inhibit change.

Wal-Mart Stores, Inc., for example, had “a long history of refusing to negotiate with plaintiffs,” whether private or governmental, and regardless

provision of services and asserting that these counsels also need to be “mindful of antitrust constraints”).

86. See Tamara Loomis, *Full Disclosure*, Am. Law., July 2005, at 29 (noting the requirement that firms seeking fee increases from E.I. du Pont de Nemours & Co. disclose whether partners working on Du Pont matters are equity partners in the law firm and that such inquiry is not customary among corporate clients).

87. For discussion of this phenomenon and its consequences in the context of securities disclosure, see Restoring Trust in America's Business Institutions 214-18 (Margaret M. Blair & William W. Bratton eds., 2005). One experienced lawyer characterizes the development as the “fractionalization of corporate representation.” *Id.* (quoting John Villa, Esq.). Another lawyer reports a relatively recent reversion

to the days . . . when outside counsel acted as the general counsel, in effect, for large corporations. Now we are seeing corporations turning to their outside counsel more for advice on ethics issues. . . . [T]hat's the role that lawyers have traditionally played. Certainly when outside lawyers were acting as general counsel they were really the conscience of the CEO.

Id. (quoting Paul Saunders, Esq.).

of the circumstances.⁸⁸ Recognized as “part of the corporate culture,” the company’s litigation stance was associated with its long-term general counsel, as was the company’s policy of “scrimping on legal costs.”⁸⁹ These policies both changed when the company hired more in-house lawyers with experience at other companies, followed, in 2001, by the insertion of a newly hired vice president for legal and corporate affairs between the CEO and the general counsel. An assistant general counsel with prior experience in government and as a plaintiff’s-side class-action litigator soon replaced the retiring general counsel.⁹⁰

More recently, and in the midst of turmoil at the senior management level, Morgan Stanley Inc. hired a senior partner of a prominent New York City law firm to oversee the firm’s legal department and governmental affairs unit, subordinating the company’s general counsel who had previously reported directly to the CEO.⁹¹ The company, distinct within its industry for its “combative approach to legal issues,” had suffered some noteworthy litigation losses and was reproved by the SEC Chairman when Morgan Stanley’s CEO stated publicly that retail investors should not be concerned about investment analysis tainted by conflict of interest.⁹² The company’s general counsel himself, while negotiating with the SEC to settle the stock-analysis charges, told regulators they had been “‘asleep at the wheel.’”⁹³ Soon after general counsel’s retirement⁹⁴ and the board’s

88. Catherine Aman & Gary Young, *Wal-Mart Shifting Litigation Strategy*, Nat’l L.J., Sept. 30, 2002, at A29.

89. *Id.*

90. *Id.*

91. Susanne Craig, *How Morgan Stanley Botched a Big Case by Fumbling Emails*, Wall St. J., May 16, 2005, at A1.

92. *Id.* Morgan Stanley suffered a \$1.45 billion jury verdict in a fraud case brought in Florida state court by Ronald Perelman stemming from Mr. Perelman’s sale of a camping gear company, Coleman, to Sunbeam in a transaction in which Morgan Stanley represented Sunbeam. See Timothy L. O’Brien, *The Man With the Golden Slingshot; How a Corporate Raider Became an Unlikely Giant Slayer*, N.Y. Times, June 5, 2005, § 3, at 1.

93. Craig, *supra* note 91, at A1.

94. Susanne Craig, *For Morgan Stanley, Difficult Task Lies Ahead*, Wall St. J., June 6, 2005, at C1. The general counsel’s retirement was characterized as creating an opportunity for Morgan Stanley “to bring in a high-profile outsider,” focusing the company on “luring a high-level former regulator who could burnish Morgan Stanley’s legal reputation.” *Id.* The company’s outgoing general counsel, a “long-time” friend of the company’s soon-to-exit CEO, came to the company in 1999 from a Chicago law firm. *Id.* He “established a hard-nosed legal reputation, reflecting his background as a fierce litigator.” *Id.* This style “sometimes didn’t serve him on Wall Street, where companies often opt to quietly settle cases rather than fight with regulators.” *Id.* However, the general counsel’s downfall is attributed more to the Perelman case, see *supra* note 92, than to difficult relations with regulators. “Morgan Stanley’s legal team . . . so badly botched the discovery process . . . that the trial judge became infuriated. The judge entered a default judgment, saying the jury had to assume that Morgan Stanley had defrauded Mr. Perelman . . .” Craig, *supra*, at C6. Morgan Stanley was represented by the general counsel’s former law firm as lead outside counsel. Following the judge’s grant of the partial default judgment, Morgan Stanley’s general counsel appeared in court to tell the judge that he had decided to fire the firm. See O’Brien, *supra* note 92, at 1. The judge refused to grant Morgan Stanley a six-month continuance to find new lawyers, “calling it a ‘ruse’ Morgan designed to buy itself time, a

appointment of a new CEO, a new general counsel followed. His background as a regulator and general counsel in another large financial services firm underscored a commitment by Morgan Stanley, at its most senior level, to making major changes in how the company would deal with legal and regulatory matters.⁹⁵

III. RECENT ILLUSTRATIONS OF TENSIONS AMONG ROLES

Recent incidents involving the predicaments of general counsel illustrate that the tensions among counsel's various roles are not always surmounted successfully. These incidents include two civil trials alleging breaches of fiduciary duty in which general counsel—in both cases also directors of their client—were named as defendants;⁹⁶ at least three trials of general counsel on criminal charges, leading to two convictions⁹⁷ and one acquittal;⁹⁸ and several guilty pleas by general counsel to securities fraud and other charges.⁹⁹ The aftermath of Enron's collapse led to a bankruptcy

characterization Morgan disputes but one with which Mr. Perelman agrees." *Id.* The judge subsequently made it clear that the law firm was not acting as "sort of the lone renegade who perpetrated what is almost a fraud on the court It was Morgan Stanley." *Id.*

95. See Ann Davis, *Mack Recruits Lynch for Top Legal Post at Morgan Stanley*, Wall St. J., July 19, 2005, at C1. The subsequent resignation of Morgan Stanley's advertising agency from its \$80 million annual creative account is an additional indication of the depth of change at Morgan Stanley directed toward reorienting the company's external persona. See Stuart Elliott, *Burnett Decides to Resign From Morgan Stanley Account*, N.Y. Times, Aug. 12, 2005, at C5. A spokeswoman for the agency attributed its resignation to unelaborated "recent changes at Morgan Stanley." *Id.* Inside Morgan Stanley, the chief marketing officer left following the CEO's exit. *Id.*

96. See *Pereira v. Farace*, 413 F.3d 330 (2d Cir. 2005) (vacating judgment in which general counsel, inter alia, was found to have devised a plan to disguise a share redemption by the corporation as a purchase by its controlling shareholder); *In re the Walt Disney Co. Derivative Litig.*, No. Civ.A. 15452, 2005 WL 2056651, at *48 (Del. Ch. Aug. 9, 2005) (finding that directors were not subject to liability for breach of an employment contract in connection with the termination of the corporate President's employment, where the corporation's General Counsel, Chief of Corporate Operations, and Executive Vice President for Law and Human Resources served on the board of directors).

97. See *United States v. Brown*, 338 F. Supp. 2d 552, 561 (M.D. Pa. 2004) (finding that, where Rite Aid Corp.'s general counsel was found guilty on ten counts of fraud, conspiracy, and related offenses, in which counsel "orchestrated, organized and led the extensive obstructive conduct designed to cover up the accounting fraud," an enhanced sentence was warranted and that counsel's age (seventy-six) and health problems did not warrant a downward departure in sentencing); Richard M. Strassberg et al., *Lawyers on Trial*, N.Y. L.J., July 18, 2005, at 9 (reporting the conviction of former general counsel of Inso Corp. on a perjury charge stemming from the preparation of documents to facilitate a scheme to create the appearance of greater sales).

98. See Anthony Lin, *Defense Strategy Pays Off for Belnick*, Legal Times, July 19, 2004, at 3 (reporting the acquittal of general counsel of Tyco, Inc., on charges of grand larceny in excess of \$30 million from Tyco, in which the successful defense depicted general counsel as an "honest lawyer and outsider at Tyco who failed to establish a rapport with Kozlowski [Tyco's CEO] and encountered active hostility from other Tyco executives and members of the board of directors"). A civil suit remained pending against counsel. See Anthony Lin, *A Cautionary Tale*, Corp. Counsel, Sept. 2004, at 78.

99. See Alison Frankel, *GCs in Trouble: Collateral Damage*, Corp. Counsel, Dec. 2004, at 28 (reporting a guilty plea by the former general counsel of Computer Associates International, Inc., to counts of conspiracy to commit securities fraud and obstruct justice);

examiner's close scrutiny of conduct by its lawyers, including its general counsel.¹⁰⁰ Moreover, the SEC has recently brought an unprecedented number of enforcement actions against corporate counsel.¹⁰¹ As a consequence, some general counsel reportedly feel that their positions have been "sullied" within the legal profession more generally.¹⁰² Compared to rank-and-file lawyers in their departments, general counsel report working more hours in response to greater scrutiny on the part of regulators, shareholders, and directors, while rank-and-file lawyers report feeling "more useful than before, more vital to the smooth operation of their companies."¹⁰³ Tellingly, legal periodicals publish articles that explicitly offer advice to general counsel on lessons to be learned from their colleagues' plights and that identify patterns of conduct that may lead to legal transgressions.¹⁰⁴

Two incidents are especially revealing of how potential tensions among general counsel's roles may prove problematic: (1) the criminal misconduct of Franklin C. Brown, former general counsel of the drugstore chain Rite Aid, and (2) the performance of James V. Derrick, Jr. as general counsel of Enron. Each story is unique, of course, but each has elements with reflections elsewhere.

A. Misdirected and Excessive Loyalty

Franklin C. Brown's story illustrates, among other things, tensions among a general counsel's roles as a senior officer, as the company's chief legal adviser, and as its agent in dealings with third parties. In 1965, following three years as a solo practitioner, Mr. Brown was hired to join Rite Aid by its founder.¹⁰⁵ He felt "an overwhelming sense of loyalty to the company" over the years, staying on after Rite Aid went public in 1968

Mark Harrington, *Ex-Symbol Exec Pleads Guilty to Fraud*, *Newsday*, Feb. 18, 2005, at A63 (reporting prior guilty plea by company's former executive vice president/general counsel); Strassberg et al., *supra* note 97 (reporting guilty pleas by former general counsel of U.S. Wireless, Inc. to charges of mail fraud and money laundering stemming from a scheme to use shell corporations to embezzle from the company and by former general counsel of Katun Corp. to charges of wire and computer-related fraud stemming from a scheme to defraud airlines); *see also Ex-Hollinger Executive Pleads Not Guilty to Fraud Charges*, *N.Y. Times*, Aug. 25, 2005, at C1 (reporting not guilty plea of former general counsel of Hollinger International to five counts of mail fraud and two counts of wire fraud stemming from the alleged diversion of \$32 million from the company).

100. *See infra* text accompanying notes 121-40.

101. *See supra* note 9 and accompanying text.

102. *See* Ashby Jones, *Under the Scope*, *Corp. Counsel*, Dec. 2004, at 80 (reporting the results of a quality of life survey in which 405 respondents self identified as general counsels; forty-nine percent of general counsel and forty-three percent of rank-and-file respondents answered "yes" to the question whether recent corporate scandals "'tarnished the legal community's image of Fortune 500 general counsel'").

103. *Id.* at 78.

104. *See* Strassberg et al., *supra* note 97; *see also* Nicholas Adele & Talea Miller, *Life After Scandal*, *Corp. Legal Times*, June 2005, at 42 (recounting the present professional whereabouts of general counsel of companies involved in recent scandals).

105. Eriq Gardner, *The Ties that Bind*, *Corp. Counsel*, Oct. 2003, at 17-18.

when many other newly rich executives departed.¹⁰⁶ Mr. Brown's personal loyalties shifted to the founder's son who became Rite Aid's CEO in 1995. According to Mr. Brown's defense counsel, "the history of their relationship since [the son] was a kid" was that the son "got his neck in incredible situations" from which Mr. Brown rescued him.¹⁰⁷ Rite Aid reported disappointingly low earnings in March 1999, leading to the filing of class action suits¹⁰⁸ and, a bit later, a restatement of three years' pretax earnings¹⁰⁹ in an amount that, at the time, set a record.¹¹⁰ The founder's son, the then-CEO, resigned, as had Rite Aid's chief financial officer ("CFO") somewhat earlier. Rite Aid's audit committee, having retained its own counsel and a forensic accountant, commenced an investigation, which led to the discovery of facts suggesting "conduct which appeared to constitute serious breaches of their fiduciary duties" by the CEO and CFO.¹¹¹

Mr. Brown and Rite Aid's now-former CEO were indicted for conduct in connection with Rite Aid's internal investigation and a related investigation by the SEC. The Federal Bureau of Investigation ("FBI") also commenced an investigation and persuaded Rite Aid's former president to tape conversations he would have with Mr. Brown and the former CEO.¹¹² In their conversations, the three agreed to backdate letters and to take other measures in an attempt to conceal fraudulent accounting practices.¹¹³ Mr. Brown, additionally, paid his secretary \$25,000 in exchange for altering documents.¹¹⁴ By this time, Mr. Brown had retired but still made repeated visits to Rite Aid's office. He told the former president and the former CEO that he was "putting himself 'totally on the line for you guys.'"¹¹⁵ As it happens, Mr. Brown was the only Rite Aid officer to go to trial, as all others made plea agreements, several agreeing to testify against Mr. Brown.¹¹⁶ Following his conviction, Mr. Brown was sentenced to ten years in prison despite his age (seventy-six) and medical problems.¹¹⁷

It would be a mistake to dismiss Mr. Brown's story as simply a vignette about a sadly misguided individual. Solidarity between a general counsel

106. *Id.*

107. *Id.*

108. *See In re Rite Aid Corp. Sec. Litig.*, 139 F. Supp. 2d 649, 652 (E.D. Pa. 2001).

109. *Id.* at 653. Rite Aid's restatements amounted to a total of \$1.6 billion. *See* Gardner, *supra* note 105, at 17.

110. Gardner, *supra* note 105, at 17.

111. *In re Rite Aid*, 139 F. Supp. 2d at 654.

112. *United States v. Grass*, 239 F. Supp. 2d 535 (M.D. Pa. 2003) (denying defendants' motion to suppress tapes of conversations with the former president).

113. *See* Strassberg et al, *supra* note 97, at 9.

114. *Id.*

115. Gardner, *supra* note 105, at 17.

116. *Id.*

117. Strassberg et al., *supra* note 97, at 9; *see also* *United States v. Brown*, 338 F. Supp. 2d 552, 561 (M.D. Pa. 2004) (augmenting Brown's sentence due to his leadership role in orchestrating the cover-up, denying downward departure on the basis of the defendant's age and physical condition, and noting that nothing prevents defendant from "receiving appropriate medical care through the Bureau of Prisons").

and other members of senior management can compromise counsel's service as a legal adviser and as the company's agent in its dealings with third parties—in Mr. Brown's case the squads of internal and external investigators who focused on Rite Aid. In a similar vein, if arguably less blatantly so, Computer Associates' general counsel faced obstruction of justice charges stemming from his "coaching" of the company's employees who were to be questioned by outside counsel and government investigators.¹¹⁸ A key concern appears to have been the counsel's dissuading the employees from revealing the company's practice—well-known within at least some circles of the company—of using a "35-day month" system of keeping the company's books open at the end of fiscal periods to create the appearance that it had met revenue and earnings estimates.¹¹⁹ Indeed, the indictment alleged that the general counsel and CFO lied to outside counsel retained to conduct an internal investigation, knowing and intending that their false representations would be transmitted by outside counsel to the FBI, the SEC, and the U.S. Attorney's office.¹²⁰

B. Decentralization, Distance, and Mismatched Expertise

James V. Derrick, Jr. was the Senior Vice President and General Counsel of Enron Corp. until he became its Executive Vice President and General Counsel in July 1999.¹²¹ Mr. Derrick's position placed him at the top of a large and decentralized structure within the corporation. Enron had a large in-house legal department, staffed by approximately 250 lawyers.¹²² A mix of in-house and outside lawyers worked on transactions, with outside firms chosen "based upon the level of expertise within the law firm and [the firm's] availability."¹²³ Although Enron had designated Vinson & Elkins as its "preferred outside law firm," Mr. Derrick was "interested in giving work to a lot of different firms"¹²⁴ and the company used "hundreds of outside law firms."¹²⁵ Each of Enron's business units had its own legal department headed by a general counsel, who reported to the head of that

118. Strassberg et al., *supra* note 97, at 12.

119. *Id.*

120. Frankel, *supra* note 99, at 29.

121. See *In re Enron Corp.*, No. MDL-1446, Civ.A. H-01-3624, 2003 WL 21418157, at *13 (S.D. Tex. Apr. 24, 2003). Mr. Derrick left his partnership in Vinson & Elkins in 1991 to join Enron as General Counsel. See Final Report of Neal Batson, Court-Appointed Examiner, app. C, at 16 n.20, *In re Enron Corp.*, No. 01-16034 (Bankr. S.D.N.Y. Nov. 4, 2003), available at 2003 WL 21418157 [hereinafter Batson Report, Appendix C].

122. See Batson Report, Appendix C, *supra* note 121, at *9.

123. *Id.*

124. Ellen Joan Pollock, *Limited Partners: Lawyers for Enron Faulted Its Deals, Didn't Force Issue*, Wall St. J., May 22, 2002, at A1. Overall, by 1997, as Enron ventured into legally problematic partnership deals, its relationship with Vinson & Elkins was weakening. *Id.* But Enron continued to use Vinson & Elkins for a wide range of matters. See Batson Report, Appendix C, *supra* note 121, at *10.

125. Batson Report, Appendix C, *supra* note 121, at *9 (quoting sworn statement of Enron's Vice President and Associate General Counsel).

unit as well as to Mr. Derrick.¹²⁶ All SEC-related matters were the responsibility of an Associate General Counsel situated within the legal department who reported directly to Mr. Derrick.¹²⁷

Decentralized structures present major challenges to assuring, among other matters, consistency and quality of work. For example, lawyers embedded within business units who report to the unit head may function with less professional independence than lawyers who report to general counsel.¹²⁸ Ongoing exchanges among senior lawyers in supervisory positions may facilitate overall coherence. General counsel of Enron's major business units met weekly in Mr. Derrick's office, constituting a "forum for attorneys to raise issues and concerns, as well as a time to communicate the activities of each group."¹²⁹ But this forum did not reveal any of the legal concerns regarding Enron's use of special purpose entities ("SPEs") according to Mr. Derrick's testimony before Enron's court-appointed bankruptcy examiner.¹³⁰

Mr. Derrick's understanding of his own role, when coupled with his individual professional expertise, may help explain why so much about Enron's SPE transactions remained unknown for so long by so many. Mr. Derrick "viewed his principal role as that of administrator of the law department, relying on the general counsel of each business unit to manage the attorneys and transactions within that business unit. . . . [H]e did not become substantively involved in any of Enron's business transactions unless a specific issue was brought to his attention."¹³¹ When SPE-related issues did come to Mr. Derrick's attention, he "did not fully analyze the issue but rather accepted the conclusions of others without probing or testing them."¹³² Similarly, Mr. Derrick did not focus closely on the conflict of interest issues posed by transactions in which Enron's CFO held a material financial interest, nor did he confirm that persons with delegated responsibility were adequately policing such transactions.¹³³

Mr. Derrick's professional background may help explain the limited and episodic character of his involvement in transactional questions. He lacked any background in accounting.¹³⁴ He was a litigator who assumed a substantial individual professional role in major litigation involving

126. *Id.*

127. *Id.*

128. Such, at least, was the perception of one general counsel in Nelson and Nielson's study. *See* Nelson & Nielson, *supra* note 10, at 471 (stating that one general counsel reports that it is his job "to protect [the] independence" of lawyers assigned to business units; whether lawyers report to him could be a "'resignation' kind of decision" for him).

129. Batson Report, Appendix C, *supra* note 121, at *9.

130. *Id.*

131. *Id.* at *6.

132. *Id.*

133. *Id.* at *6-7.

134. At least, the complaint in the securities fraud class action in which Mr. Derrick was named as a defendant did not allege that he had such a background. *See In re Enron Corp.*, No. MDL-1446, Civ.A. H-01-3624, 2003 WL 21418157, at *14 (S.D. Tex. Apr. 24, 2003).

Enron.¹³⁵ He attended meetings of Enron's board but his presentations to the board were generally limited to litigation matters. This focus and expertise did not match well with the nature and complexity of Enron's legal situation as its business evolved. Waiting for others to discover problematic issues proved an inadequate mechanism for assuring sufficient awareness at the top of the law department's hierarchy.

As it happens, Mr. Derrick was also a member of Enron's Management Committee from 1997 through 2000.¹³⁶ This body conducted the company's day-to-day business, approved significant transactions, and (coincidentally) waived compliance with Enron's conflict of interest policy to enable its CFO to hold equity interests in partnerships with which Enron dealt.¹³⁷ As General Counsel, Mr. Derrick also reviewed the final drafts of disclosures Enron made in securities filings concerning related party transactions. In 2003, Mr. Derrick was dismissed as a defendant from the securities fraud class action brought on behalf of purchasers of debt and equity securities. The court held that, although Mr. Derrick served on the Management Committee, the complaint did not allege sufficient knowledge on his part to constitute scienter comparable to that of his codefendants based on their "day-to-day, personal participation in the business operations of Enron."¹³⁸ His review of Enron's disclosures in securities filings was limited to discerning "obvious errors," as he relied on the law firm of Vinson & Elkins to assure substantive correctness and legal compliance.¹³⁹ However, Mr. Derrick's assumption about the extent to which Vinson & Elkins reviewed Enron's filings was not confirmed by the firm's billings.¹⁴⁰

One can, of course, derive many morals from the Enron saga in all its facets. Mr. Derrick's story illustrates the challenges that confront a general counsel—with a particular background and set of skills—in charge of a large and highly decentralized legal function in a corporation with rapidly evolving businesses and untrustworthy senior management. Additionally, the degree to which Enron's relationships with outside counsel were fragmented and under the control of managers within its business units undermined the prospect that general counsel could respond appropriately to the company's manifold legal challenges.¹⁴¹

135. *Id.*

136. *See id.* at *13.

137. *Id.* at *15.

138. *Id.*

139. *Id.* at *14. The organization within Vinson & Elkins also may have fragmented knowledge about the legal implications of transactions. Lawyers who worked on securities disclosure questions were in a separate department from the lawyers in the corporate finance transaction who worked on special purpose entities transactions themselves. *See* Batson Report, Appendix C, *supra* note 121, at *32.

140. *See* Batson Report, Appendix C, *supra* note 121, at *33.

141. As Professor Robert Gordon assesses the implications of Enron's structure, "[o]ne question for lawyers—as well as for senior managers and board members—is whether they can conscientiously and ethically do their jobs and exercise their functions as fiduciaries in organizations structured so as to diffuse responsibility and prevent their access to the big picture." Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After*

IV. PROSPECTS FOR CHANGE

It is likely that the position of general counsel will continue to evolve. In particular, the functions and relationships associated with the position may themselves be repositioned in significant ways. Ties between a corporation's directors and its general counsel may weaken, as may general counsel's ties to the CEO. The scope of the general counsel's portfolio may also contract in significant respects, as may the sway of a general counsel's power within and over relationships with outside counsel.

One likely source of weakening in relationships among general counsel and the corporation's directors is the use of independent outside counsel who are chosen and retained by audit committees comprised of independent directors to facilitate compliance with new requirements imposed by the Sarbanes-Oxley legislation, the SEC, and stock exchange listing rules. Once advised by independent counsel, independent directors on audit committees may prefer to establish an ongoing relationship with outside counsel.¹⁴² And then, unsurprisingly if not inevitably, outside directors as a group, separate from the audit committee, may perceive the value of ongoing independent representation.¹⁴³ Were these developments to occur, general counsel's advisory relationship to the board would be diluted, as would be general counsel's control over relationships between corporate constituents and outside counsel.

A separate relationship that may weaken is that between general counsel and the CEO. The American Bar Association's Corporate Governance Recommendations propose that the board of directors approve general counsel's "selection, retention, and compensation."¹⁴⁴ Strengthening the board's relationship with general counsel may weaken the bonds between the CEO and general counsel, as would instituting a practice of regular meetings between general counsel and a committee or other group of independent directors.¹⁴⁵

Enron, in *Enron: Corporate Fiascos and Their Implications*, *supra* note 2, at 763, 771. For a discussion of the moral bases for individual actors' accountability regarding participation in collective activities—including those of organizations—that are harmful to third parties, see Kutz, *supra* note 72, at 146-65.

142. See Geoffrey C. Hazard, Jr. & Edward B. Rock, *A New Player in the Boardroom: The Emergence of the Independent Directors' Counsel*, 59 Bus. Law. 1389, 1395-96 (2004).

143. See *id.*

144. See *supra* note 65.

145. Such a practice has been proposed. See Bevis Longstreth, Speech Before the American Law Institute: The Corporate Bar As It Appears to a Retired Practitioner (May 17, 2005), <http://www.ali.org/ali/AM05Longstreth.htm>. Mr. Longstreth recommends that, as a matter of best practice, all outside lawyers with a significant representation of a corporation meet at least twice a year with a committee of independent directors without the presence of management for "frank dialogue" about their work, legal issues confronted by the corporation, and interactions with management. *Id.* He suggests that the same practice apply to general counsel but notes that "[t]he productive tension exerted by this system of governance might not be as effective in the case of the General Counsel, whose reputational risks are distinctly more bundled up with management and the corporation, which is his sole client." *Id.* at 7.

Moreover, to the extent that a CEO seeks advice on difficult questions from counsel external to the corporation, the ties between the CEO and the general counsel loosen. One function usefully served by counsel is acting as the CEO's "conscience," as a sounding board and source of sound judgment on questions in which ethical issues often shade legal determinations. A CEO might believe that an adviser external to the corporation and its senior management echelons is best able to serve this function, bringing a greater measure of detachment to the exercise of judgment.¹⁴⁶

General counsel's portfolio of power and responsibility may also contract in other ways. In many large corporations, compliance responsibilities are allocated explicitly to a chief compliance officer and a compliance staff that is distinct from the legal department. Mutual funds, required by the SEC to appoint a chief compliance officer who reports directly to the board, have been cautioned against either housing the position within the legal department or having the officer report through general counsel.¹⁴⁷ To intertwine legal and compliance functions may jeopardize the privilege otherwise available to the corporation for communications with counsel because the privilege is inapplicable to routine compliance monitoring, itself subject to examination by the SEC.¹⁴⁸

CONCLUSION

All in all, the position of general counsel may prove less attractive than heretofore. The position's appeal to many appears tied to its ambiguity, while tensions among general counsel's diverse roles may become more difficult to resolve satisfactorily, prompting redefinition of the position. Moreover, the legal and reputational risks associated with service as a general counsel appear to have increased appreciably.

Separately, the relationships that enhance general counsel's power are under stress on several fronts. Ties among a general counsel, the board of directors, and outside counsel would weaken to the extent that the board establishes direct ongoing relationships with outside counsel. Ties between the general counsel and the CEO would also be diffused by high-level advisory relationships between the CEO and outside counsel, motivated by the CEO's desire for advice from a more detached source. The tensions among general counsel's roles help explain pressures toward clarification.

146. See Restoring Trust in America's Business Institutions, *supra* note 87, at 217-18.

147. See Lori A. Richards, Director, Office of Compliance Inspections and Examinations, U.S. Sec. & Exch. Comm'n, Speech by SEC Staff: The New Compliance Rule: An Opportunity for Change (June 28, 2004), www.sec.gov/news/speech/spch063004lar.htm (delivered at the Investment Company Institute/Independent Directors Council Mutual Fund Compliance Programs Conference).

148. *Id.*

Notes & Observations