



108 Lunch & Program: Becoming an Effective Business Partner

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To: Participants of “Staying One Step Ahead: Important Considerations for Corporate Counsel”
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Subject: Wearing Two Hats: Liability and Insurance Issues Facing Corporate Counsel

MEMORANDUM

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Introduction

... Should we say that this corporate lawyer wears two hats? Too superficial. Serves two masters? A bit exaggerated. Is a jack-of-all-trades but a master of none? Harsh and unnecessary. Perhaps, then, he or she simply has a split personality ... I prefer anatomy and geography. The general counsel has one foot planted firmly in the shifting, treacherous terrain of the law, and the other planted just as firmly in the oozing swamp of business. The result is always challenging. Every general counsel teeters one way and then the other in an endless effort to remain standing. The natural response would be to bring one’s feet together more securely in one world or the other.¹

The aim of this paper is to assist those who maintain a foothold in each of the legal and business worlds. This paper explores the boundary between legal and business advice provided by in-house counsel, and analyzes the potential liability and insurance ramifications associated with these two kinds of advice.

This paper is organized in three parts. Part I examines the evolving and expanding role of modern in-house counsel. Part II canvasses the liability and insurance issues that arise out of this expanding role, taking note of potential gaps in insurance coverage. Part III considers how in-house counsel can distinguish, both in law and in practice, between legal and non-legal roles, and includes a cautionary tale.

This paper provides a general discussion, and is not a source of legal advice. If a legal opinion or other expert advice on a particular insurance policy or situation is required, the services of a competent professional should be sought.

PART I: The Multiple Roles of In-House Counsel

I. In-House Counsel as Legal Advisor

Much of this paper deals with the issues that arise when in-house counsel do more than provide legal advice. However, before launching into these issues it is worth noting that even when corporate counsel focuses solely on providing legal advice, liability and controversy can arise.

Moonlighting, or doing work outside of and in addition to one’s job, is a familiar example of this. Moonlighting in the in-house context is not limited to taking on fee-for-service work from parties completely unrelated to the corporate client. Doing personal work for employees of the corporation who do not have authority to instruct counsel would probably also be moonlighting. Moonlighting is a problem in part because the moonlighting activity may be

¹ Deborah MacNair, “The Role of the Federal Public Sector Lawyer: From Polyester to Silk”, 50 U.N.B. L.J. 125, at p.128, citing an article by Timothy P. Terrell.

uninsured, especially if corporate counsel does not carry professional liability insurance (something that is discussed below).

When the personal work is done for a director or officer, the water becomes murkier, as both insurance and conflict of interest issues arise. The *Rules of Professional Conduct*² make it clear that in-house counsel is acting for the organization and not any of the individuals involved with that organization, including the shareholders, officers, directors and employees. While obviously the organization can only instruct the lawyer through these people, the lawyer must ensure that he or she is serving the interests of the organization. This does not preclude joint retainers in which the lawyer also represents a director or officer, for example, but corporate counsel should consider possible conflicts of interest and, where necessary, inform an individual that he or she must retain independent counsel.

II. Why Give Non-Legal Advice?

Turning to the main focus of this paper, it is worth asking at the outset: why provide non-legal advice at all? Focussing exclusively on legal advice would keep corporate counsel squarely within her professional expertise, and would simplify insurance and other issues. Yet, few in-house counsel, and perhaps no general counsel, are choosing to adopt such a focus. One author sets out four roles typically occupied by the modern general counsel:

- (1) Legal advisor 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 corporation.³

While 2, 3 and 4 will not apply to most in-house counsel who are not general counsel, many of these corporate lawyers will be managers and will provide business advice within the corporation.

² Law Society of Upper Canada, *Rules of Professional Conduct*, Commentary to Rule 2.02, concerning quality of service, and in particular to Rule 2.02(1.1), concerning organizational clients [Rules].

³ See Deborah A. DeMott, "Colloquium: Ethics in Corporate Representation: The Discrete Roles of General Counsel," 74 *Fordham L. Rev.* 955, at pp.957-958 [DeMott].

1. Professional Duty and the Nature of the Corporate Client

This provision of business advice may be an explicit or implicit job requirement for some, but it does not flow from a professional duty. Sometimes, when representing an unsophisticated client, for example on an investment deal, a lawyer will owe a professional duty to provide some minimal amount of basic business advice to steer the client away from the most disastrous schemes. The existence of this obligation generally depends on the nature of the relationship between the lawyer and the client, the scope of the retainer and the sophistication of the client in business matters.⁴ For most in-house counsel, the corporate client has directors and officers who are selected for their business acumen. It therefore follows that corporate counsel are under no professional obligation to provide business advice, let alone make business decisions.

2. The Expanding Role of In-House Counsel

Although the provision of business advice by in-house counsel is not a professional requirement, it has increasingly become a job requirement. A survey of CEO's in 1993 revealed that even in those days, top management looked to corporate counsel to take an active role as members of the management team.⁵

Added to this, during the 1990s and continuing today, larger corporations have been shifting more and more work from outside law and accounting firms to in-house counsel, partly in an effort to control outside legal fees. As a result, corporate counsel are increasingly involved in all aspects of the business and assume "quasi-legal" roles.⁶

Interestingly, the current power and responsibility enjoyed by in-house counsel is reminiscent of what it was in the late nineteenth century through to the 1930s. During that time general counsel were often among the three most highly paid individuals in a corporation. Through the 1940s and onwards, the status of general counsel diminished as large law firms took over increasingly more corporate legal work, and marketing and finance people displaced general counsel as top contenders for CEO.⁷ The last several decades have seen an increase in the power, responsibility, income and prestige of in-house and especially general counsel.

As Anna K. Fung, Q.C., Senior Counsel to Terasen Inc., puts it:

When we went through law school, we were all cautioned that lawyers must never stray to providing business advice if we were to maintain our independence and professionalism as lawyers. As all of us who have since chosen to take on the role of corporate

⁴ See Stephen M. Grant and Linda R. Rothstein, *Lawyer's Professional Liability*, 2nd ed. (Toronto: Butterworths Canada Limited, 1998), at pp.122-123 [Grant and Rothstein].

⁵ See Joyce Borden-Reed, "CEO's Expect Counsel to be Informed Contributors," 3 *Can. Corp. Counsel* 35; November/December 1993.

⁶ Amy Weiss, "In-house Counsel Beware: Wearing the Business Hat Could Mean Losing the Privilege", 11 *Geo. J. Legal Ethics* 393.

⁷ See *DeMott*, above, for a discussion of the history of corporate legal departments.

counsel now know, while we may have been initially hired to provide legal advice and handle the corporation's myriad of legal problems, inevitably as the employer's level of trust with us grows, we are expected to do much more than be legal technicians. In today's business environment, most corporate counsel are hired to carry out at least one or more of a multitude of business roles: risk manager; human resource manager; educator; lobbyist; compliance officer; privacy officer; corporate secretary; director; and ethics officer.⁸

The Law Society of Upper Canada has also recognized the value that lawyers can add outside of their legal expertise:

In addition to opinions on legal questions, the lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, policy, or social implications involved in the question or the course the client should choose. In many instances, the lawyers' experience will be such that the lawyers' views on non-legal matters will be a real benefit to the client.⁹

While corporate lawyers (both in-house and outside) are likely to gain business experience that is unrelated to their legal training, it is also likely that a lawyer's training will itself provide valuable insight and structure to business decision-making. For example, in-house counsel can play a crucial risk-management role in the corporation's business decisions. For this, they must "think like managers."¹⁰ To accomplish this, corporate counsel must resist the urge to eliminate risk, and become experts in calculating, mitigating and managing risk. This, in turn, may even mean managing the CEO. Participants at a Canadian Corporate Counsel Association session discussed the necessity of helping CEO's who shoot from the hip to avoid making costly mistakes. In-house counsel may be more acutely aware of the risks facing the company, and may be in the best position to perform this role of "elephant keeping."¹¹

3. The Opportunity for Proactive Guidance

While providing non-legal advice may not be required by the profession, it may help corporate counsel further the profession's values. Corporate counsel are frequently asked not only for advice on the best business approach, but also for advice on the moral or social implications of certain company decisions. As Gavin MacKenzie puts it, "corporate lawyers are sometimes treated as the company's conscience".¹² Of course, lawyers do not have a monopoly

⁸ Anna K. Fung, Q.C., "CCCA 17th Annual Meeting, August 14, 2005, Vancouver, B.C., Workshop No. 203 – Corporate Counsel Ethics," at p.8.

⁹ *Rules*, above, Commentary to Rule 2.01(1).

¹⁰ R. Marc Mercier and Riccardo C. Trecoce, "Juggling Professional Duty and Client Loyalty: The Art of Corporate Counselling," 3 *Can. Corp. Counsel* 81; April/May 1994, at p.85.

¹¹ See Oliver Bertin, "Managing Risk at Heart of GC Role," 24 *Lawyers Wkly.* No.48 6(2), at p.6.

¹² Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, loose-leaf, (Toronto: Carswell, 1993) at p.20-6 [MacKenzie].

on the ability to tell right from wrong, but given the nature of legal education, the good character requirement for entry into the profession, and the ongoing adherence to ethical standards, it is natural for corporate clients to look to their lawyers for ethical guidance.

This role for corporate lawyers is also recognized by the Law Society of Upper Canada in the *Rules of Professional Conduct*:

These rules recognize that lawyers as legal advisers to organizations are in an essential position to encourage organizations to comply with the law and to advise it is in the organizations' and the public's interest that organizations do not violate the law. Lawyers acting for organizations are often in the position to advise the executive officers of the organization not only about the technicalities of the law but about the public relations and public policy concerns that motivated the government or regulator to enact the law. Moreover, lawyers for organizations, particularly in-house counsel, may guide organizations to act in ways that are legal, ethical, reputable, and consistent with the organization's responsibilities to its constituents and to the public.¹³

In other words, up-the-ladder reporting and whistle-blowing, though featured heavily in the media, are not the only ways or the best ways for corporate counsel to influence corporate conduct. In-house lawyers have a more proactive role to play. In developing policies, codes of conduct and in establishing ethical standards, in-house counsel should raise their sights above the bare minimum of legal compliance.¹⁴

Finally, job requirements and professional considerations aside, providing sound business advice may help further the career of in-house counsel. A corporate lawyer has the opportunity to learn the whole business, and general counsel in particular will often have direct access to the CEO and the board members, who may see a lawyer's willingness and ability in the business arena as a sign that she is ready for higher management positions.

III. Pitfalls of Giving Non-Legal Advice, Other Than Liability

There is a consensus that "the ethical duties of [in-]house counsel and outside counsel seldom, if ever, differ."¹⁵ Both must consider potential conflicts of interest, the extent to which they can work for employees of their clients, and other issues. Some believe, however, that corporate counsel may be more susceptible to erosion of their independence.¹⁶ The more involved with the client's goals and the more loyal corporate counsel becomes, so the story goes,

¹³ *Rules*, above, Commentary to Rule 2.02 (5.2).

¹⁴ See Arthur B. James, "The CEO must engage counsel as a force in corporate policy," 3 *Can. Corp. Counsel* 37; November/December 1993.

¹⁵ *MacKenzie*, above, at p.20-1.

¹⁶ Discussed in *MacKenzie*, above, at p.20-1.

the greater the potential for a lawyer to lose her objectivity. This is exacerbated by the reliance of most in-house lawyers on the corporation for their livelihoods and successful careers. This has led some to argue that in-house counsel who are involved in strategic planning should not also be the lawyers who evaluate the resulting plans; outside counsel should be retained.¹⁷

Others view this concern as overblown. One author cites a Canadian study from 1986 and 1987 in which one-third of in-house counsel identified more with the legal profession than with their organization, one-third identified more with their organization, and the final third were ambivalent. This is hardly a picture of unchecked loyalty to the corporate client. The author in question is of the view that a similar survey of outside counsel would produce similar results.¹⁸

There is no need to settle this debate here. Suffice to say that when giving any advice, legal or otherwise, “[a] lawyer should be wary of bold and confident assurances to the client, especially when the lawyer’s employment may depend upon advising in a particular way.”¹⁹

PART II: Liability and Insurance Issues

Various potential liabilities attach to the different hats worn by corporate lawyers. A corporate lawyer can be increasingly sure that whatever she does at work, potential liability accompanies her. Whether she has insurance to match this liability is another matter, and an open question. There are four types of insurance on which the corporate lawyer might try to rely for coverage, all of which are considered in this Part:

1. Professional liability errors and omissions (E&O) insurance. This may include insurance offered by a law society (e.g. LPIC, now known as LAWPRO), and excess insurance.
2. Professional liability E&O insurance that is specially tailored to in-house counsel.
3. Directors and officers (D&O) insurance.
4. The corporation’s general liability insurance (CGL).

In reality, if corporate counsel is to be covered for all job activity, including legal and non-legal advice, this will only be accomplished through some combination of these different policy types. The question is whether most corporate counsel are fully covered without gaps, and whether this is even possible.

¹⁷ See Joseph Auerbach, “Can Inside Counsel Wear Two Hats,” *Harvard Bus. Rev.*, September-October, 1984, at p.80.

¹⁸ *MacKenzie*, above, at pp.20-2 and 20-4. See also Mercier and Trecoce “Juggling Professional Duties and Client Loyalty: The Art of Corporate Counselling – Part 2,” 3 *Can. Corp. Counsel* 100; June/July 1994, at p.100.

¹⁹ *Rules*, above, Commentary to Rule 2.01(1).

I. Insurance for Legal Advice

1. Professional E&O

Each provincial law society insures its members against negligently giving or failing to give legal advice. Ontario’s regime, LAWPRO, is administered by the Law Society of Upper Canada’s insurance company, the Lawyers Professional Indemnity Company (LPIC). In some provinces, in-house counsel are specifically and entirely excluded from coverage, and until January 1, 1997 in Ontario, in-house lawyers were covered but not for claims brought by their employers. Now corporate lawyers can be covered for claims by their employers for professional services.²⁰ However, while coverage is mandatory for members in private practice, in-house counsel can be exempted if they provide legal advice only to their sole employer.²¹ In-house lawyers who do a limited amount of fee-for-service work outside of their in-house practice may qualify for a part-time discount.

Were in-house counsel to obtain professional liability insurance, practically speaking, corporate clients would end up paying the premiums. Corporate clients may be willing to indemnify their in-house lawyers in order to eliminate this cost. Such indemnities and the employment contracts they accompany must be drafted with care. If the agreement between in-house counsel and corporate client resembles a fee-for-service agreement (i.e. if it resembles agreements made between lawyers in private practice and their clients), an indemnity might be caught by s.22 of the *Solicitors Act*.²² This section renders void any provision in a fee-for-service agreement between solicitor and client that seeks to eliminate the solicitor’s liability for negligence. However, indemnification of a lawyer in a master-servant relationship is expressly excepted from this prohibition.²³

2. Employed Lawyers Professional Liability Insurance

Several insurers provide professional liability insurance aimed specifically at in-house counsel. For a number of years Chubb has teamed up with the Association of Corporate Counsel (formerly the American Corporate Counsel Association) to offer Employed Lawyers Professional liability insurance. More recently, this insurance has become available in Canada. Insurers currently offering this type of insurance include Chubb, AIG, ACE INA, Arch, and Lloyd’s syndicates.²⁴ The ACC provides the following rationale for the provision of such insurance: “[a]s cost-conscious companies seek to have in-house counsel perform services traditionally delegated to law firms, corporate attorneys face increasing liability exposures, especially to non-client third parties.”²⁵

²⁰ See *Grant and Rothstein*, above.

²¹ *Pro bono* practice is also covered, provided that it meets certain requirements.

²² R.S.O. 1990, c.S.15 [Solicitors Act].

²³ See Joseph M. Steiner, “Professional Liability of Corporate Counsel,” 2 *Can. Corp. Counsel* 113; July/August 1993, and the *Solicitors Act*, above.

²⁴ Chubb marketing materials, provided by Matthew Davies, Canadian Manager - Professional & Media Liability Chubb Specialty Insurance, Chubb Insurance Company of Canada (Toronto), November 10, 2006.

²⁵ Association of Corporate Counsel website: <http://www.acca.com/>.

This is E&O coverage for legal malpractice. It is intended to provide coverage where standard lawyers' E&O coverage falls short or where the lawyer has obtained an exemption. It does not cover non-legal decision-making or advice. A representative at Chubb points to the following main distinctions between commercial market employed lawyers insurance and LAWPRO insurance for in-house counsel:²⁶

1. Employed lawyers insurance covers the lawyer regardless of where she is called to the bar and regardless of where she is practicing. For example, in-house counsel employed by an Ontario company would be covered for filing at the NASDAQ and appearing before the SEC.
2. Employed lawyers insurance takes into account indemnities. If in-house counsel is not indemnified due to financial impairment of the corporate employer, the lawyer pays the deductible and receives the benefit of the policy. If in-house counsel is indemnified, the employer pays the deductible and receives the benefit.
3. Employed lawyers insurance provides coverage up to \$5,000,000, compared with LAWPRO in-house coverage of \$250,000. LAWPRO provides an option to increase coverage to \$1,000,000 per claim / \$2,000,000 aggregate. Of course, excess insurance can be bought in other markets regardless of whether the lawyer is covered by LAWPRO or employed lawyers insurance.
4. Employed lawyers insurance coverage can be expanded to apply to consultants contracting with a company's legal department, paralegals, and certain other non-lawyers.
5. Employed lawyers coverage is somewhat more expensive than LAWPRO coverage.

3. CGL

As a rule, in-house counsel will not be able to rely on the corporate client's CGL policy for professional liability coverage. The intent of the CGL is to "carve off" this area of liability.²⁷ As one commentator explains:

Commercial liability policies are not intended to provide coverage for professional liability. Insurance in respect to professional liability is available separately from underwriters who specialize in

²⁶ Conversation with Matthew Davies, Canadian Manager - Professional & Media Liability Chubb Specialty Insurance, Chubb Insurance Company of Canada (Toronto), November 10, 2006.

²⁷ Heather A. Sanderson, Robert D.G. Emblem and J. Lyle Woodley, *Commercial General Liability Insurance*, (Toronto: Butterworths Canada Limited, 2000), at p.71 [Sanderson, Emblem and Woodley].

that market, often at the substantially higher premium than that associated with the ordinary commercial risk.²⁸

While only some CGL policies explicitly exclude coverage for professional services (typically through an endorsement), most or all exclude this coverage through the interaction of several restrictions in the policy. Chief among these is the restriction to coverage for bodily injury and damage to property. This effectively excludes traditional professional negligence claims, which are claims for economic loss. Although a CGL will generally provide cover for professional negligence where the claim is for bodily injury, this will be of little comfort when the claim is for the cost of redoing the lawyer's work or undoing a mistake with economic consequences, which will almost always be the case for in-house counsel faced with a suit.

II. Insurance for Non-Legal Advice

1. Professional E&O

Professional E&O policies contain wording that define the professional services covered. Depending on the wording, these definitions themselves may effectively exclude non-legal advice and decision-making.²⁹ These policies also typically exclude claims arising out of the insured's activities as an officer or a director.³⁰ As an indication of the narrow nature of these policies, "lawyers acting as executors, administrators, trustees, personal representatives, committees, guardians and patent or trademark agents will be covered by their professional liability policy only if they can establish that the services are in keeping with those usually provided by a solicitor."³¹ Furthermore:

²⁸ Gordon Hilliker, Q.C., *Liability Insurance Law in Canada*, 4th ed., (Toronto: LexisNexis Canada Inc., 2006), at p.200 [Hilliker], citing the decision in *Foundation of Can. Engineering Corp Ltd. v. Can. Indemnity Co.*, [1978] 1 S.C.R. 84, [1977] 2 W.W.R. 75 as authority for this point.

²⁹ According to Lysyk and Sossin, the definition of "professional services" is similar across the policies of the professional indemnity insurers in Canada: "The Ontario policy defines it as "the practice of the Law of Canada, its provinces and territories" which were or ought to have been performed "in the insured's capacity as a lawyer." The definition in the CLIA policies refers to "services normally provided or supervised by a lawyer within the scope of a usual lawyer-client relationship...and incidental services that are substantially related to service normally provided or supervised by a lawyer." The CLIA policy specifically states that professional services do not include "ancillary" activities. These are defined as activities of a "quasi-legal or non-legal nature, such as financial, investment and accounting services, brokerage services, real estate development and appraisals. The Courts have suggested that a "professional service" is one that involves "both a mental or intellectual exercise within a recognized discipline and appreciation of special skill, knowledge and training to the particular function." See: The late Justice Kenneth Lysyk (D. 2003), Lorne Sossin, and Jeffrey G. Hoskins, General Editors, *Barristers & Solicitors in Practice*, loose-leaf, (Toronto: LexisNexis Canada Inc., 2006), at p.14.7 [Lysyk and Sossin]. The authors quote from *Chemetics International Limited v. Commercial Union Assurance Co. of Canada* (1981), 31 B.C.L.R. 273 at 286 (S.C.); aff'd. (1984) 55 B.C.L.R. 60 (C.A.). Lysyk and Sossin note (at page 14.7) that the question of whether a professional service was rendered by a lawyer in a given situation is a question of fact. This involves looking beyond the title of the job and examining the activity carried out by the person in question.

³⁰ See *Hilliker*, above, at p.298. See also Alan I. Bossin, "In-House Counsel Facing Increasing Liability Risks," 4 Can. Corp. Counsel 67; March 1995 [Bossin].

³¹ *Lysyk and Sossin*, above, at p.14.8.

Professional liability or error and omission policies are typically geared to indemnify against the financial cost of undoing an error in judgment, not the cost attendant upon the occurrence of property damage or bodily injury. It is common for these policies to plainly exclude property damage and bodily injury or such risks are intended to be borne by a CGL.³²

Thus in some cases, E&O policies complement D&O and CGL policies without much overlap.

2. D&O

As the name suggests, directors and officers policies are designed to insure the small number of people who sit at the top of the management structure of a corporation. In practice, the corporation will pay for the insurance.

The wording of the policy itself will set out who qualifies as an officer or director. In many corporations the general counsel is a corporate officer and appointed to the board of directors by virtue of her office.³³ Importantly, however, in-house counsel who are not general counsel will usually not be directors or officers. A person's job title may not be determinative. The courts have held that the question of who is an "officer" will depend on the context.³⁴ In some cases employees who are neither directors nor officers may be insured.

In-house counsel, and especially general counsel, would be well advised to be covered by a D&O policy if possible. They will be in good company:

[I]t has become increasingly common for companies to purchase [D&O] insurance. In view of a number of well known cases in recent years where directors and officers have been sued, it is not surprising for the demand for such insurance has grown. Indeed, as a practical matter, it will be increasingly difficult for companies to attract qualified individuals to sit on their boards without procuring D&O insurance.³⁵

D&O insurance provides, of course, incomplete coverage for in-house counsel. Even when a general counsel is a director, not all of her decisions will be covered by D&O insurance because "[c]overage for directors and officers is limited to wrongful acts committed by them while acting solely in the capacity of director or officer"³⁶ and certain legal services provided may not qualify as management decisions.³⁷

³² Sanderson, *Emblem and Woodley*, above, at p.93.

³³ See *DeMott*, above, at p.967.

³⁴ See the discussion in *Sanderson, Emblem and Woodley*, above, at p.114.

³⁵ *Sanderson, Emblem and Woodley*, above, at p.111.

³⁶ *Hilliker*, above, at p.279.

³⁷ See *Bossin*, above.

III. Special Liability Issues for In-House Counsel

1. The SEC and the OSC: Targeting In-House Counsel Both as Principals and as Gatekeepers

In a speech in Pebble Beach, California on April 28, 2005, Giovanni P. Prezioso, General Counsel to the U.S. Securities and Exchange Commission (SEC), drew a distinction between corporate counsel as principals and corporate counsel as gatekeepers.³⁸ As principals, corporate counsel (and general counsel in particular) can be sanctioned by the SEC for committing an act or omission that, if done by another person, could give rise to sanctions. For example, the SEC will not hesitate to punish a lawyer who engages in insider trading. Her status as a lawyer cannot shield her from enforcement action.

In addition to this, the SEC will also target lawyers as gatekeepers, as a way of providing leverage to enforcement efforts. The SEC's strategy in this regard is to keep companies honest by keeping their general counsel (and legal department) honest. As one reporter puts it, "agencies such as the SEC are sending a message that they will prosecute those lawyers [who] are essentially too creative with legal advice."³⁹

A recent example of this strategy is the Google case. On January 13, 2005, the SEC charged Google for failing to register stock options issued to employees prior to an initial public offering. This did not result in any harm to the recipients of the IPO. Google's general counsel, who was of the view that Google was exempt from the requirements in question, was the only individual charged. He and Google settled the charges without admitting or denying the findings, and also settled a related civil action.⁴⁰

Through the Google case, the SEC has sent the following messages:

- (i) no violations of law are minor, and the cost of violating the securities laws cannot be measured simply by civil litigation costs;
- (ii) the quality of legal advice and diligence of the lawyer will be factors in an enforcement review if the SEC staff believes the advice was wrong; and
- (iii) lawyers who chart risky legal strategies for their corporate clients without fully describing those risks to directors approving transactions may be deemed to have made the business decisions themselves rather than merely to have rendered advice.⁴¹

³⁸ This speech is reproduced in Dennis O. Garris, et al, Co-Chairs, *Gatekeepers Under Scrutiny: What Attorneys, Accountants and Directors Need to Know Now*, (New York: Practising Law Institute, 2005) at p.543 [Garris].

³⁹ Jacquie McNish, "Next up for Prosecutors: Corporate Lawyers," *Globe and Mail*, September 27, 2006, at p.B14.

⁴⁰ See Dixie L. Johnson, "SEC v. The Lawyers: The Google Chapter," in *Garris*, above, at p.759.

⁴¹ *Garris*, above, at p.761.

This last point is particularly relevant to the discussion in this paper. When seeking the board's approval, Google's counsel apparently failed to disclose to the board the legal risks of the proposed course of action. As one author explains, this precedent requires in-house counsel to balance the pros and cons of disclosure to the board:

[B]y positioning himself as the only person who knew the risks, in the SEC's eyes, he seems to have stepped out of his lawyering role, essentially making the decision for the company. The Google order suggests that, if a lawyer seeks board approval for a transaction he or she knows carries a significant risk of being deemed in violation of the law if it were ever reviewed, the lawyer should communicate that risk clearly to the board. Taken to an extreme, the case could be read to suggest that every lawyer seeking board approval for anything risks personal responsibility for the board's approval if the lawyer does not fully describe all of the underlying legal analysis and every potential risk accompanying the approval. Yet, lawyers who cannot serve as a useful filter when providing legal analysis to the board will generally be viewed as unhelpful. To be valuable to directors, lawyers must provide sufficient information and analysis to enable them to make good decisions. Particularly if a legal strategy is risky, Google suggests that inside counsel should err on the side of providing more information to directors so that their decision can be fully informed.⁴²

The SEC's policy is probably fairly effective. By pursuing gatekeepers the SEC may be able to achieve more compliance than by pursuing every wrongdoer. We might expect the Ontario Securities Commission (OSC) to pursue a similar strategy. This avenue is open to it. In *Wilder v. Ontario (Securities Commission)*⁴³ a lawyer was reprimanded for deliberately misleading the OSC in a report of due diligence results. The lawyer and the law society tried to argue that the law society has exclusive jurisdiction over the discipline of lawyers. The Ontario Court of Appeal decided in favour of the Securities Commission, holding that nothing in the *Law Society Act* immunizes a lawyer from proceedings before the Commission solely because she is acting in a professional capacity. While this case involved a lawyer in private practice, the court referred to lawyers generally, and so this decision would apply equally to in-house counsel.

2. The Spectre of Dual Liability

Lawyers who are also directors have additional concerns. Courts will not generally question the judgement of directors so long as they act in good faith and do not breach fiduciary obligations or statutory duties. Courts recognize that they are not well-equipped to evaluate business decisions. However, a director who is also a lawyer will be held to a higher standard because of her professional expertise. Thus, a general counsel who sits as a director can be held responsible both as a professional and as a director, the latter responsibility involving a higher

⁴² *Garris*, above, at pp.762-763.

⁴³ (2001), 197 D.L.R. (4th) 193.

standard of care than that of her non-lawyer colleagues on the board. This is not unique to in-house counsel; it applies to any lawyer-director.⁴⁴

PART III: How to Know, What to Do, and What Not to Do

I. The Line Between Legal and Non-Legal Roles

Prezioso provides a useful guide to determining when a lawyer is giving business advice or legal advice:

In thinking about whether a lawyer has crossed the line – becoming more of a decision-maker or counselling a course of conduct, rather [than] acting as a legal advisor – a key indicator, not surprisingly, will be the extent to which the lawyer in fact gave anyone else at the company legal “advice” on the relevant issue. If the lawyer provides the CEO with a balanced legal view and the CEO then disregards the implications of that view, there may be legitimate questions about the lawyer's obligations as a professional. In such a case though, rarely will the lawyer be viewed as primarily, or even secondarily, liable under the securities laws absent further participation in the misconduct. On the other hand, if a lawyer makes a legal judgment about an issue that cannot fairly be viewed as immaterial and fails to inform anyone else at the company of the potential legal risks – in other words, if the lawyer doesn't advise anybody about anything – it will be much more difficult to argue that the lawyer played a purely advisory role. Rather, the lawyer's continuing participation in the activity without providing advice to others may, in some cases, constitute part of a course of conduct that effectively makes the ultimate business decision for the company.⁴⁵

Also of potential relevance is the distinction made in some American cases between administrative acts and professional acts.⁴⁶ In one case, a psychiatric hospital decided to save money on its window screens. A psychiatric patient jumped to her death through one of the windows. It was alleged that the hospital was negligent both in supervising the patient and in deciding how to protect the windows. The Texas Court of Appeal held that the decision over how to protect the windows was an administrative, business decision, and not a professional decision. This meant that the exclusion in the CGL policy for professional services did not apply, and the hospital was insured for that decision. In contrast, if the hospital was negligent in supervising the patient, this would not be covered by the insurance. In another case, a veterinarian was bitten by a cat on two occasions, causing the employee to prolong a sick leave.

⁴⁴ For a discussion of the dual liability issue, see Vern Krishna, “Liability of Professionals in Business Decisions,” 14 Can. Current Tax 124; August 2004.

⁴⁵ *Garris*, above, at p.546.

⁴⁶ This is discussed in *Sanderson, Emblem and Woodley*, above, at p.103.

It was held that the decision not to provide certain protective gloves, and the decision to ask an employee to return to work early from sick leave, were business decisions and not decisions relating to the veterinarian's profession. Thus the veterinarian's professional malpractice policy did not cover the alleged negligence. Although these cases did not concern lawyers, they can provide an instructive analogy.

A number of cases consider the question of when a lawyer is acting in her capacity as a lawyer. Although these generally involve outside counsel, the principles involved could be applied in the in-house context. In *Ross v. American Home Assurance Co.*,⁴⁷ the plaintiff lawyer Ross had been sued by a client over misrepresentations Ross allegedly made as to the anticipated market performance of stocks the client purchased in a company of which Ross was a director. The defendant insurer provided D&O coverage to the company. The court held, partly because the company was not named in the pleadings, that the plaintiff in the original proceedings (the client) did not intend to sue Ross as director, and thus no D&O coverage was available. Although this decision was fairly specific to the pleadings, it is a useful reminder that, at least at the pleadings stage, insurance claimants can affect whether a lawyer is sued in her role as lawyer or in another role, and this in turn will influence an insurer's stance on coverage.

In the American case of *H.M. Smith v. Travellers Co.*,⁴⁸ the insured lawyer convinced the client to provide money to the lawyer to invest. When the client sued him, the lawyer asserted that his E&O insurance provided coverage, but the court decided for the insurer, holding that because the investment did not require legal skill or legal training, the lawyer was not acting in his capacity as a lawyer. Under the American test, a lawyer retained for non-legal services will be held not to have been acting in her capacity as a lawyer, even if the work in question did involve some use of her legal training and knowledge of the law.

In the Canadian case *Hazelwood v. Travellers Indemnity Co. of Canada*,⁴⁹ the plaintiff lawyer had been involved in receiving and disbursing money on behalf of investors. Following the defrauding of the syndicate on behalf of whom the lawyer was acting, the lawyer made good the loss and sought indemnification from his insurer. The British Columbia Supreme Court held that the lawyer could not be indemnified because he was acting as a broker or commission agent and not as a lawyer. The court noted that the plaintiff lawyer had received a fee which "far exceed(ed) that which he could have taxed for solicitor's services."⁵⁰ The court also noted that the solicitor had been paid as a percentage of the monthly interest payable to his clients from the investment. This is not the manner in which legal fees are normally calculated.

*Brumer v. Gunn*⁵¹ stands for the proposition that a solicitor who holds herself out as competent to give investment advice must meet the standard of a reasonably competent investment counsellor. This can be stated more generally: if a solicitor provides advice of a non-legal nature, the solicitor must ensure that he or she possesses the necessary competence to do so.

⁴⁷ (1999) O.J. no. 1558 (S.C.J.), aff'd [1999] O.J. no. 4262 (C.A.).

⁴⁸ 343 F. Supp. 605 (U.S. Dist. Ct., 1972).

⁴⁹ [1978] 1 W.W.R. 93 (B.C.S.C.), aff'd [1979] 2 W.W.R. 271 (C.A.).

⁵⁰ *Grant and Rothstein*, above, at p.201, citing the court.

⁵¹ [1983] 1 W.W.R. 424 (Man. Q.B.).

In-house counsel who serve as corporate secretaries should consider the various tasks that make up that role and ask which of these are legal in nature:

Functions [of a corporate secretary] include: the issuing of notices or directors' and shareholders' meetings; the preparation of agenda and supporting documentation for meetings, including forms of proxy and circulars; attendance at meetings of directors and shareholders and the taking of minutes; maintaining the minute book, shareholder registers, and other corporate records; and the preparation of resolutions and similar corporate documentation. Bearing these functions in mind, it is clearly difficult to situate the point in which the satisfaction and the duties of the office of corporate secretary amounts to the delivery of professional legal services. This difficulty is compounded when the role of corporate secretary is performed by corporate counsel.⁵²

In *Kerr v. Law Profession Indemnity Co.*,⁵³ Kerr was a solicitor insured by the insurer. He was also secretary of the corporation. As solicitor, he would be covered by E&O insurance, but as corporate secretary, he would not be covered. As the court put it at paragraph 17:

[P]ut simply, if the claims of breach of duty made against the appellant are linked, as they are by the amendments, to his retainer as NBS's corporate solicitor, quite apart from his appointment as NBS's corporate secretary, LPIC will have to indemnify the appellants, up to policy limits, if those claims are established.

In *Toronto Dominion Bank v. Leigh Instrument Limited (Trustee of)*,⁵⁴ Winkler J. of the General Division had to consider whether the bank's senior vice president, general counsel and secretary was acting as a lawyer or as an officer when he sent a memo to the bank's branches. The court found that the particular document in question was a statement of corporate policy, and not legal advice. As a corollary, the document was circulated by the lawyer in his capacity as a business executive rather than as a solicitor. The court went on to find that the document was not intended to be treated as confidential and was not privileged.

Winkler J. acknowledged the "deep roots" of solicitor and client privilege in the British common law, but also noted its limits, citing the following passage by the Supreme Court of Canada in *Solosky v. The Queen*:⁵⁵

There are exceptions to the privilege. The privilege does not apply to communications in which legal advice is neither sought nor

⁵² Carolyn Stanegna, "The Lawyer as Corporate Secretary", 4 Can. Corp. Counsel 17; 1994.

⁵³ [1994] O.J. no. 2, 22 C.C.L.I. (2d) 28 (Gen. Div.), rev'd, (1995) O.J. no. 2823, [1995] I.L.R. 1-3250 (C.A.).

⁵⁴ (1997), 32 O.R. (3d) 575 (Gen. Div. [Commercial List]) [Toronto Dominion].

⁵⁵ [1980] 1 S.C.R. 821, at p. 835.

offered, that is to say, where the lawyer is not contacted in his professional capacity.

Winkler J. noted that privilege will apply to communications between an in-house lawyer and the corporation, provided that the usual criteria for a finding of privilege are met. As part of this, he emphasized, a finding of privilege depends on a finding that the lawyer was acting as a lawyer:

The law on this point is clear. In order for a communication from an in-house lawyer to attract solicitor-client privilege, it must have been made while he or she was acting in their capacity as such.⁵⁶

Practically speaking, this means that communications will be privileged “if they concern the employee’s function as a lawyer,” and not “if the lawyer is performing a business or other function.”⁵⁷

Read broadly, *Toronto Dominion* reflects the current trend of eroding privilege. In-house counsel recently surveyed by the ACC expressed pessimism regarding this trend. They felt that “privilege protection most likely will not exist when they need it most.”⁵⁸ More specifically, *Toronto Dominion* sheds light on the distinction between the legal and non-legal roles of in-house counsel. In this case the general counsel performed several executive roles in addition to his role as legal advisor. The court found that the document in question was “a statement of corporate policy concerning business risks associated with comfort letters and their consequent acceptability to the Bank as security.” Factors that led to this conclusion were the fact that the general counsel could not say who drafted the document, or even whether it was drafted by a lawyer, and the title of the document was “Head Office Circular,” in contrast to a typical legal memorandum.⁵⁹

II. The HP Scandal

The recent Hewlett Packard (HP) scandal illustrates some of these issues. On October 4th 2006 the California Attorney General brought criminal charges against several high-level people at Hewlett-Packard, including former chair Patricia Dunn and Kevin Hunsaker, a former corporate counsel. The former general counsel to whom Hunsaker reported, Anne Baskins, has not been charged.

By way of background, starting in 2005, information regarding high level decisions at HP was being leaked to the media. The chair asked the legal department to find out who was leaking the information. Baskins assigned Hunsaker to investigate. He did so, by hiring outside investigators and engaging in improper investigative techniques. One of these was a tactic known

⁵⁶ *Toronto Dominion*, above, at para.25.

⁵⁷ *Toronto Dominion*, above, at para.25, citing Saunders J. in *Mutual Life Assurance Co. of Canada v. Canada (Deputy Attorney General)* (1988), 28 C.P.C. (2d) 101 (Ont. H.C.) at 104.

⁵⁸ Sandra Rubin, “Privilege under assault: Auditors and regulators are both knocking on the door. What to do?” National Post, November 1, 2006, p.FP8 [Rubin], citing Stephen Cannon, ACC’s privilege counsel, who oversaw the survey.

⁵⁹ *Toronto Dominion*, above, at para.26.

as “pretexting,” in which an investigator falsely assumes the identify of a person in order to obtain telephone records.⁶⁰

Importantly, at one point Hunsaker is said to have asked the private investigator he had hired what methods he was using to obtain phone records. The private investigator explained, and in response, Hunsaker allegedly replied: “I shouldn’t have asked.”⁶¹ The details of the scandal were made public following the resignation of a board member (not the person responsible for the leaks) who objected to the investigation.

Numerous issues arise out of this situation. Among them is the question of to what extent Hunsaker acted as a legal advisor. As a legal advisor, he should have fully ascertained the nature of the investigative methods being used, examined their legality, and reported their associated risks to the directors or officers of the company. Had he felt that he had become too involved in the investigation to remain objective, he could have sought an opinion from respected outside counsel. Instead, he allegedly adopted a “don’t ask, don’t tell” policy, and approved the activity of the outside investigators. Based on this, he was acting more like a decision-maker than a legal advisor.

III. Recommended Practices

While line-drawing can be a difficult exercise, the practices recommended by commentators to in-house counsel tie into one main goal: carefully and clearly distinguishing legal from non-legal advice. In fact, the *Rules of Professional Conduct* make this a requirement. With regard to non-legal advice, “[t]he lawyer who expresses views on such matters should, where and to the extent necessary, point out any lack of experience or other qualifications in the particular field and should clearly distinguish legal advice from other advice.”⁶² This distinction can be aided by using different letterhead for legal advice, and by keeping legal files (whether hardcopy or electronic) separate from non-legal files, even when they pertain to the same matter. The deliberate mental movement between legal and non-legal analysis of the same issue (which can be reinforced by the physical act of putting away one folder and opening another) can help in-house counsel discipline her thinking processes and always be sure whether she is speaking as a lawyer or in another role.

Conclusion

The line between legal and non-legal roles was at issue in *Toronto Dominion*, and, with more serious consequences, in the HP scandal. Both these cases illustrate the risk of in-house counsel wearing multiple hats, and raise again the question of whether in-house counsel should bring their feet together more securely in either the legal world or the business world. Indeed, this appears to be the path chosen in many parts of Europe:

⁶⁰ See Henry E. Hockeimer Jr., “HP Scandal Shows “Don’t Ask, Don’t Tell” Policy is Not a Good One,” Legal Intelligencer, October 13, 2006, available at www.law.com [Hockeimer].

⁶¹ *Hockeimer*, above.

⁶² See *Rules*, above, Commentary to Rule 2.01(1).

In many countries – including the vast majority in the European Union – in-house counsel don't have the right to claim solicitor-client privilege. The privilege rests with the outside counsel. As general counsel, they are not eligible to be members of the bar.⁶³

In-house counsel in North America are charting a different course, one that leads to greater risks, and quite possibly greater rewards. It is only logical that in the evolution of the role of in-house counsel, increases in influence and prestige are being matched by increases in responsibility and assumption of risk. Successful in-house counsel will resist the natural urge to bring their feet together, but will foster an understanding within themselves and their organization about the different roles they perform, and will keep a sharp eye on the boundaries between those roles.

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⁶³ Rubin, above.

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From Lawyer to Business Partner

By Veta T. Richardson

Career Advancement in Corporate Law Departments

THE ROLE OF corporate law departments has evolved from being primarily an intermediary between the company and its law firms to being a full-service legal team involved in every major business decision. Historically, corporate law departments focused on handling routine legal matters while more complex legal issues were managed by outside law firms.

Over the last decade or so, corporate law departments have undergone an evolution. The law department of the 21st century has increasingly aligned its management structure and goals to match the strategic objectives of the corporation. The result has been a more seamless integration of lawyers with the business team.

Veta T. Richardson, "From Lawyer to Business Partner: Career Advancement in Corporate Law Departments," *ACC Docket* 22, no. 2 (February 2004): 70-75. Copyright © 2004 Veta T. Richardson and the Association of Corporate Counsel. All rights reserved.



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Similarly, the role of the general counsel has changed. In a recent survey, CEOs of Fortune 500 companies were solicited regarding their views on the role of the general counsel.¹ All of the respondents agreed that the general counsel must "direct the legal team to outstanding results." Law departments were viewed not as "back-water" service functions, but as critical partners in all business decisions.

General counsel likewise view themselves as part of the senior business team, and the role of their law departments is to facilitate the attainment of business goals within the boundaries of the law. For many attorneys who came in-house from law firms, this role represented a major shift in the way that they looked at practicing law, a shift from being the content expert—providing "pure" legal advice—to articulating the legal context, tradeoffs, and risks for making particular business decisions. The most successful in-house lawyers make the transition from "pure lawyer" to business partner.

CONTINUALLY REASSESS AND CLARIFY YOUR PROFESSIONAL GOALS IN RELATION TO YOUR PERSONAL NEEDS, VALUES, AND PRIORITIES. THEN GO FOR IT WITHOUT REGRET!

In December 2001, the American Corporate Counsel Association ("ACCA") (now known as the Association of Corporate Counsel ("ACC")) published the first national demographic survey of roughly 65,000 attorneys working in corporate law departments. The demographic profile of the ACCA in-house survey is consistent with the overall gender and race composition of the profession: roughly 30 percent of the in-house attorneys are women, and 12.5 percent are people of color. The ACCA survey also indicated, however, that women and

minority attorneys were disproportionately represented in lower-level staff attorney positions. Similarly, a study by Catalyst, Inc., titled *Women in Law: Making the Case*,² found that women working in-house had longer tenure and lower titles than men. A variety of other sources, including the Minority Corporate Counsel Association ("MCCA"), have documented various career obstacles that women and people of color have experienced in corporate law departments.

MCCA

Based in Washington, DC, the Minority Corporate Counsel Association ("MCCA") is a privately funded 501(c)(3) nonprofit association that focuses exclusively on diversity issues in corporate law departments and the law firms that they retain. In addition to publishing a magazine and offering educational programs, MCCA has developed a body of knowledge on diversity best practices and the changing demographics within the in-house community. In-house counsel may obtain a free copy of *From Lawyer to Business Partner* by emailing a request to shawnboynes@mcca.com or visiting www.MCCA.com.

Given the mixed picture of progress for both women and minorities in corporate law departments, MCCA teamed with Catalyst to complete a series of interviews with leading general counsel and conduct focus groups in several geographic areas. The charge was to solicit candid perspectives regarding what it takes for lawyers to move up the corporate ladder. The findings were intended to provide valuable information designed to empower in-house counsel to better manage their careers and pursue their professional objectives, particularly in-house women.

MCCA combined Catalyst's findings with the results of two independent surveys of the views of Fortune 500 CEOs and general counsel. The result is *From Lawyer to Business Partner: Career Advancement in Corporate Law Departments*, a report published by MCCA under its multiyear research initiative, Creating Pathways to Diversity.[®] See the sidebar on page 73 for highlights of those findings.

A key finding of *From Lawyer to Business Partner* is that, in order for in-house counsel to develop the leadership currency to advance their careers, they must be willing to take the following actions:

- **Take risks.** Risk-taking forces one to rely upon inner strengths, learn new skills, and broaden experiences. Whether it's taking stretch assignments or a new role in an unfamiliar area of the law/business, learning to work outside of one's comfort zone is a key to leadership. No one ascends to the top by always playing it safe.
- **Take credit.** Recognition of your personal contributions is critical to your visibility within the department and is a key to advancement. For many women, standing in the spotlight to receive praise for contributions is a behavior that is especially uncomfortable. For women who shy away from recognition, preferring instead to let the team take credit (even for their own contribu-

tions), MCCA says, get over it. Within the cultural norms of their departments, women must learn how to toot their own horns.

- **Take stock.** Think about what's important to you and how you define yourself and success. Avoid being influenced by others' definition of success, or you may pursue it in ways that are out of step with who and what you are, and you will end up feeling out of balance. Be clear about your wants/needs, your values, your priorities. Continually reassess and clarify your professional goals in relation to your personal needs, values, and priorities. Then go for it without regret! The research also found that in-house women in particular were less adept at incorporating the above career strategies. This fact likely contributes to why their careers have not progressed at the pace of those of their male counterparts and why, despite strong representation in-house, women tend to have longer tenure but lower titles.

RESEARCH FINDINGS

In addition to advising that in-house women need to focus more on taking stock, taking risks, and taking credit, several other key findings resulted from research by the Minority Corporate Counsel Association ("MCCA"):

- The most common route to the general counsel position has been moving in-house from an associate or partner position in a law firm.
- The primary reasons for moving in-house were to seek better work/life balance, to avoid the business development pressures in a law firm environment, and to have a more active role in the decisions of clients.
- Success in-house comes from understanding the business and functioning as a business partner to clients.
- Unlike in law firms, advancement in-house is not linear but the result of developing relationships with business people across the organization and increasing the sphere of influence through time.
- Risk-taking is a key personal strategy for attorneys seeking to develop their "leadership currency."
- Mentors played an important role in helping attorneys to navigate the corporate environment.
- Although attorneys have more control over their time than in a law firm environment, the changing role of the general counsel results in increased demands on accessibility and time.
- Women were more likely to have made work/life tradeoffs, such as delaying children or marriage, and to reflect on what they had forgone, although both women and men general counsel with children were equally likely to have a stay-at-home spouse.
- Women attorneys working in-house are seeking to create their own definition of success, which includes a meaningful role at home and at work.
- General counsel must be prepared to lead increasingly diverse legal teams, and this diversity entails promoting the inclusion of talented and involved women and minorities from their primary law firms, not simply tokens for client calls.

NOTE

1. Creating Pathways to Diversity®, *From Lawyer to Business Partner: Career Advancement in Corporate Law Departments*, © MCCA, 2005, is available from the MCCA website at www.mcca.com/site/data/researchprograms/RosePathways/index.html or by emailing shawnbaynes@mcca.com for a hard copy.

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- Peter M. Phillipps, "Small Law Departments Can Achieve Sustainable Diversity," *ACCA Docket* 19, no. 6 (June 2001): 40-57, available on ACCA OnlineSM at www.acca.com/protected/pubs/docket/jj01/achieve1.php.
- *Pipeline to Diversity*, at www.acca.com/practice/diversity.php.
- Gloria Santona, "McDonald's Legal Department Takes Law to the Street," *ACCA Docket* 20, no. 8 (September 2002): 96-105, available on ACCA OnlineSM at www.acca.com/protected/pubs/docket/so02/mcdonalds2.php.

ON PAPER:

- Catalyst, Inc., *Women in Law: Making the Case* (call Catalyst, 212.514.7600, to buy the report).

If you like the resources listed here, visit ACC's Virtual LibrarySM on ACCA OnlineSM at www.acca.com/resources/vl.php. Our library is stocked with information provided by ACC members and others. If you have questions or need assistance in accessing this information, please contact Staff Attorney and Legal Resources Manager Karen Palmer at 202.293.4103, ext. 342, or palmer@acca.com. If you have resources, including redacted documents, that you are willing to share, email electronic documents to Managing Attorney Jim Merklinger@mercklinger@acca.com.

For lawyers of color, an additional key finding was the important role that their parents had played as their first and perhaps most influential mentors. Whether their parents had business backgrounds did not really matter. What mattered was that the lawyers of color had their parents to turn to in order to understand and deal with issues of race in society. Interestingly, none of the white women participants talked about having been similarly prepared by their parents regarding gender issues. In fact, many of the women reported feeling sorely ill-prepared to address the challenges that they encountered in the business world and were caught somewhat off-guard by their early brushes with gender stereotyping and discrimination. Thus, for women and people of color, an important lesson is the importance of having a range of mentors to help guide one's professional growth, including how to address the challenges posed by being part of a minority gender or race.

Based upon the above findings and others, MCCA prepared the list in the sidebar on page xx to help minority and women attorneys.

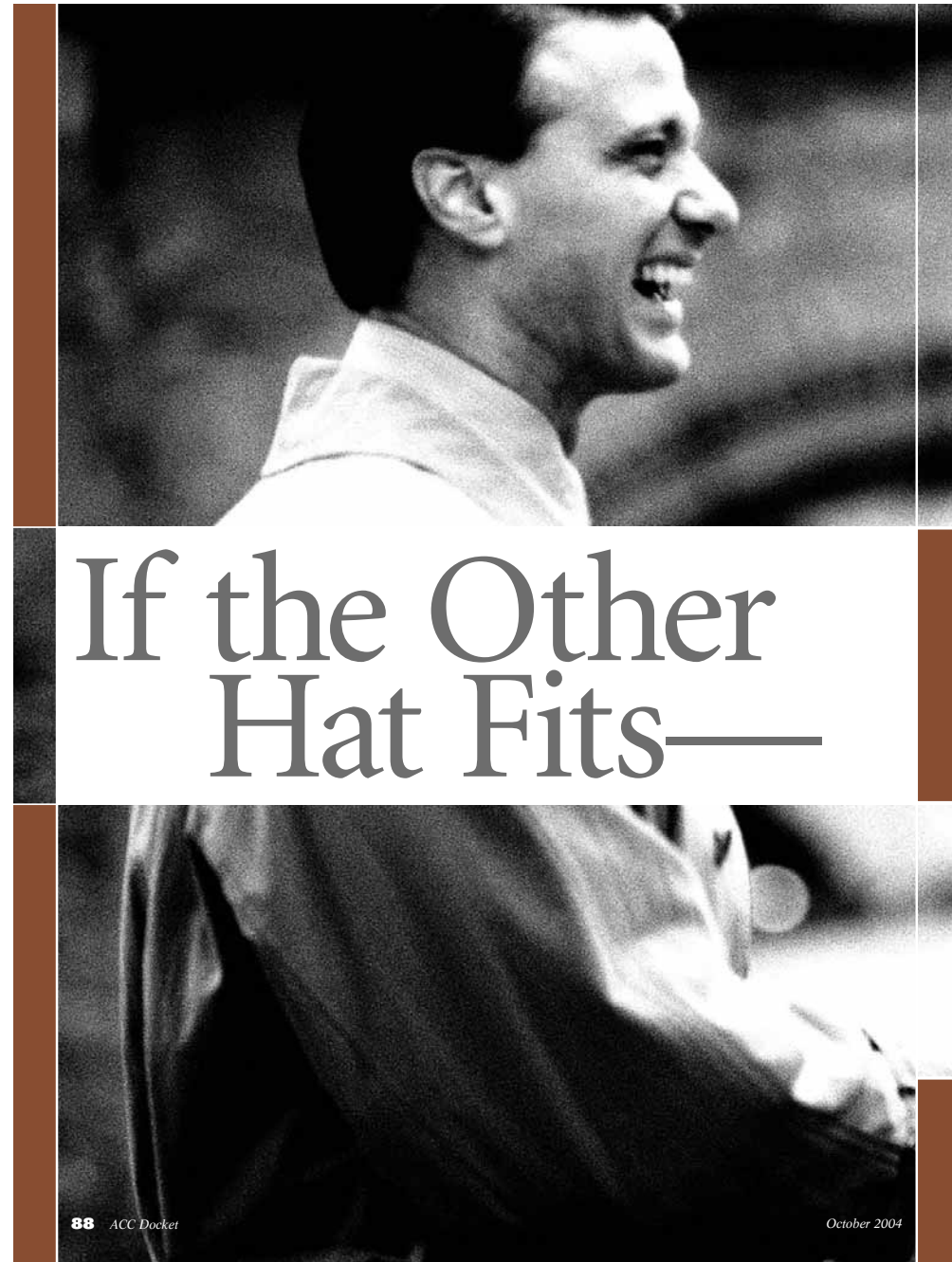
It is an exciting and challenging time for in-house counsel. The job has evolved, and the expectations have changed. These days, the pipeline to general counsel is full of high-potential women and minorities. The goal of MCCA's report is to help all in-house counsel meet their fullest potential by shedding light on what it takes to advance in today's competitive corporate law department and to empower in-house counsel to use this wisdom to define their unique career paths. ■

NOTES

1. Heidrick & Struggles International, Inc., and Minority Corporate Counsel Association, "The Fortune 500 CEO Survey on General Counsels" (2000) ("MCCA CEO Survey"), at www.mcca.com/site/data/AboutMCCA/#CEO.
2. For more than 40 years, Catalyst has served as a leading resource for women business executives. Catalyst, Inc., *Women in Law: Making the Case* (call Catalyst, 212.514.7600, to buy the report). Creating Pathways to Diversity®, *From Lawyer to Business Partner: Career Advancement in Corporate Law Departments*, © MCCA, 2005, is available from the MCCA website at www.mcca.com/site/data/researchprograms/RosePathways/index.html or by emailing shawnboynes@mcca.com for a hard copy.

MCCA's TOP 10 RECOMMENDATIONS TO GUIDE THE CAREERS OF IN-HOUSE COUNSEL

1. Develop solid substantive legal ability and develop a reputation for being an outstanding lawyer.
2. Be honest with yourself about your strengths and shortcomings and be clear about your personal and professional priorities.
3. Understand the business of your employer so that you have the ability to identify how you can fill a critical need, contribute additional value, and effectively communicate legal issues to nonlawyer business teams using their language, not your own legal jargon.
4. Be visible within your company and in your industry. In addition to not being shy about discussing your contributions, invest time getting to know your colleagues by developing your relationships with those in the law department, as well as the business units.
5. Don't simply play it safe: take appropriate risks with a view to those that will improve your skill set, demonstrate "out-of-the-box" approaches, and distinguish you as a leader.
6. Cultivate solid mentoring relationships with people who can help you guide your career and who will offer you sage advice.
7. Learn the art of effective time management, prioritizing, and delegating in order to refocus your expenditure of time and resources on value-added work.
8. Develop solid support bases at work and at home to help you maintain a healthy work/life balance that is in keeping with your personal values.
9. Avoid letting others' expectations define your definition of success and don't hesitate to shift your goals or priorities as your own needs and expectations evolve.
10. Develop leadership skills with sensitivity to the fact that the diversity of those whom you lead can be a key asset to your organization but that you must cultivate your ability to manage across differences and build a high-performing team.



If the Other Hat Fits—

You are at a meeting where your clients are discussing a business proposal. Because you are unfamiliar with the background, you ask a few clarifying questions. During this process you suggest a variation of the proposal which better achieves the business objectives which you helped to clarify, all with less risk. The meeting ends with an agreement that your clients will meet again in a few days to review the modified proposal.

BY PETER CONNOR

Wear it

A Guide to Effective Business Partnering

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ACC Docket 89



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You haven't, as yet, offered any legal advice. But you have helped your clients achieve an optimal business outcome for the company.

For those who have been in-house for a while, this scenario probably sounds familiar. It is my observation, from over 20 years of practise in the United States, Asia, and Europe, that the vast majority of in-house counsel now regularly engage in business partnering—whether or not they are fully aware of it.

There are, of course, many different ways in which in-house lawyers regularly provide business counsel, in addition to legal advice, to clients. A sample of these activities are included in "Business Partnering Examples," p. 97. You may refer to these activities as business counseling, wearing the other hat, being a trusted advisor, or being a team member. I like to use the expression "business partnering" because, when we wear this other hat, the advice we are providing is primarily, if not exclusively, of a business nature. In this capacity, we are partnering with our clients, helping them to achieve their business objectives.

Business partnering is not to be confused with providing pragmatic, commercial, or business-oriented legal advice. This is something all in-house lawyers aspire to do, but does not necessarily involve giving business advice.

At this point its important to make a crucial distinction with significant consequences for business partnering.

Some in-house counsel assume a dual role, such as legal counsel *and* compliance officer or government relations manager. In such a case the counsel must, of necessity, make business decisions involving that other role. As a result, the challenges of business partnering (for example, avoiding conflicts and maintaining independence/privilege) become more acute.¹

The vast majority of in-house counsel have one, and only one, role—that of legal counsel. An in-house

counsel serving solely in this capacity never has to make any business decisions. Instead they can confine business partnering activities to advising their clients who are responsible for making the decision. Thinking of business partnering in this way provides some useful parameters within which to safely engage in it, and, importantly, avoiding the landmines that lay in store for those with dual roles.

This article is targeted at lawyers with just the one role, not those with dual roles.

Most of the commentary on business partnering focuses on the problems encountered when lawyers engage in business partnering.² In this era of high profile corporate collapses and Sarbanes-Oxley regulation, it is an understatement to say that in-house counsel must pay extra attention to a wide range of legal and ethical requirements when providing legal or business advice.³ While it might seem tempting to simply retreat into the safety zone of wearing only our lawyer's hat, such an option is unrealistic in light of today's global corporate environment. Senior management in most companies now expect their in-house counsel to not only spot legal and ethical issues, but also to speak up if a business proposal is flawed in concept or implementation. Failing to offer such business advice won't get you fired, but it will limit your value to your clients, especially when compared with another lawyer that speaks up on business issues. In practice, legal and business issues are often inextricably linked, making it difficult, if not impossible, to avoid offering some form of business advice in the course of providing legal counsel.

This article will briefly touch on some of the challenges and benefits of business partnering. By highlighting the importance of business partnering—both to in-house counsel and to clients—and offering practical tips for those who want to develop business partnering as a valuable service offering to clients, this article will provide you with the tools you need to navigate this largely uncharted terrain.

These tools will be extremely helpful to those lawyers new to an in-house role and new to managing others. But even experienced lawyers, with whom I have discussed these ideas, have told me they benefited from thinking, in many cases for the first time, about business partnering as a separate and distinct part of their roles. They say that these ideas provide a useful framework for business partnering—something that many of them do on a frequent basis.

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THE IMPORTANCE OF BUSINESS PARTNERING FOR IN-HOUSE COUNSEL

For counsel new to the in-house environment, incorporating business partnering into your work style from the beginning will pay career-long dividends. Even for those more experienced lawyers that regularly engage in business partnering, it is still useful to remind ourselves why we do so, in the hope that it might encourage others to follow suit.

Client's Perspective

First, let's consider business partnering from the client's perspective. Do clients want their in-house counsel to step outside the legal counsel role and consider the business aspect of the company's operations? Not surprisingly, the answer to that question depends on how you ask it. In my experience, if you simply ask your clients what they want from the legal department, the answer is invariably something wryly simplistic like "Get the contracts done quickly and keep me out of jail!" On the other hand, if you preface that question with a description of a situation where you, or another lawyer, has provided some really helpful business advice, you are likely to elicit an enthusiastic response of "Absolutely!" This suggests that as in-house counsel, we don't do enough to make our clients recognise the value of our business partnering contributions.

Lawyer's Perspective

Business partnering is important from the perspective of in-house counsel for many reasons, including the following:

- In many cases it is the primary reason why a lawyer moves into an in-house position in the first place.
- The opportunity to engage in business partnering may also be why many lawyers stay in-house rather than join a law firm.
- It facilitates the discharge of our primary responsibility—to provide legal and ethical advice. A client is much more likely to bring to you a business proposal in its formative stages, giving you a chance to provide relevant legal input, if you have demonstrated a willingness to contribute to the process and an ability to offer practical business advice.
- We already do it anyway, so we should openly acknowledge it as part of our service offering.

When we engage in business partnering we often do so subconsciously, and that is why we tend to overlook its importance. Analyse your recent client interactions and ask yourself what portion of your advice was of a purely legal nature. The results may surprise you.

- Lawyers can be extremely good at business partnering, because it plays to our strengths.⁴ We have, during our education and work experience, developed a unique range of skills that are ideally suited to business partnering—many of which our clients may not necessarily possess. These skills include the ability to objectively analyse a complex situation and to propose creative alternative solutions to business problems.
- In-house counsel are in a special position in the company to offer business advice because we have unique insights into how the company really operates, we cultivate and maintain a wide range of contacts, we possess broad access to corporate information—and we are free of the burden of a corporate-imposed sales goals!
- It can make our jobs that much more fulfilling if we are fully engaged in, and can contribute to, business discussions of our clients rather than just chiming in with opinions on legal issues.

BUSINESS PARTNERING: THE CHALLENGES

Most lawyers understand the importance of business partnering but have one or more concerns that they see as standing in the way.

The extent to which any of these challenges will impact you in your endeavour to practise business partnering will vary depending on your circumstances. In most cases, they can be managed—using common sense, judgement, and diplomacy—and won't prevent you from business partnering.

You Don't Want To Do Your Client's Job

Some in-house counsel may be reluctant to take on the role of business partnering because they perceive it as an unwarranted and inappropriate expansion of their duties. This concern may take on many forms. Maybe you are concerned you don't have the necessary expertise, or that you will offend your client by treading on her turf, or maybe you're worried that you'll get trapped doing someone else's

work with insufficient time to discharge your primary responsibilities as legal counsel.

In reality, you have the tools you need to practice business partnering. If you think of business partnering as providing information and facilitating well-reasoned decisions by your clients, then you'll be relying on skills you've acquired as a lawyer and won't be trying to compete with any specialist skills that your clients may possess. In contrast, many of your clients lack those specialized skills that you have developed. This gives you in a unique perspective from which to add value in business discussions.

It is possible that a member of the management team may not take too kindly to you pointing out that their idea, in which they have invested substantial time and perhaps political goodwill, may not be best for the company. However, in most cases you can communicate your advice with diplomacy and discretion and not alienate such a client. For example, carefully picking the timing and method of imparting this input to the client—by delivering the information in private, rather than at a meeting attended by many of his colleagues—may lead to a better reception of that information. Rhetorical questions are often a better way to provide sensitive input rather than bald statements of opinion.

Depending on the significance of the decision to the company, if your input is rejected, you have a variety of options. You can accept that you have done all you can reasonably do and let the matter go, choose to enlist another client to take up your point, or in extreme cases, escalate the matter to higher officers in the corporation. The propriety of the course you take must be carefully evaluated, depending on the circumstances of each situation and an appreciation for whether this issue impacts the "big picture." In my experience, clients generally are only too pleased to have the benefit of any advice that enhances the quality of their proposal and thereby makes them look much better in the eyes of their superiors.

Practicing business partnering is a fluid, dynamic concept—there is no one right way to do it. "Steps in the Business Partnering Process," p. 100, depicts one view of the process of business partnering by lawyers. This approach assists in-house counsel to offer business advice without becoming trapped into doing a client's work. As the sidebar shows, there are a number of different stages at which lawyers

From this point on . . .
Explore information related to this topic.

- Alison B. Brotman, & John H. Ogden, "In-house Counsel: Managing the SPLIT Personality," *ACCA Docket* 13, no. 5 (May/June 1995), available at ACCA OnlineSM at www.acca.com/protected/pubs/docket/mj95/In-house.html.
- Justin Hansen, "Business Eye for the Legal Guy," *Australian Legal Business* (February 2004); 2.2:58-59, available at www.australianlegalbusiness.com.
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- Ron F. Pol, J. Justin Hansen & Richard I. Hansen, "Increase Legal Department Value: Establish a Goal Focus," *ACC Docket* 21, no. 9 (October 2003); 98-114, available on ACCA OnlineSM at www.acca.com/protected/pubs/docket/on03/value.pdf.
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- John H. Ogden, "Corporate Counsel Juggling Multiple Roles," *ACCA Docket* 10 (Fall 1992).
- R. Peter Fontaine, "Mending the Split Personality," *ACCA Docket* (September/October 1995), available on ACCA OnlineSM at www.acca.com/protected/pubs/docket/so95/Mending.html.
- Veta T. Richardson, "From Lawyer to Business Partner: Career Advancement in Corporate Law Departments," *ACC Docket* 22, no. 2 (February 2004); 70-75, available on ACCA OnlineSM at www.acca.com/protected/pubs/docket/feb04/partner.pdf.

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can engage in business partnering and add value to their client's business. The key is to remember that you can stop at any stage. If all you have time for is to identify a problem or spot an opportunity, then you've still been an effective business partner.

GENERALLY SPEAKING, IT'S TIME TO STOP, OR AT LEAST STEP BACK TO BECOME A TEAM MEMBER REPRESENTING THE LEGAL DEPARTMENT AS APPROPRIATE AND NECESSARY, WHEN YOU MOVE FROM THE STRATEGIC/ARCHITECTURAL PHASE INTO THE TACTICAL/IMPLEMENTATION PHASE.

How can you tell when its time to stop any business partnering activity? Obviously this depends on a number of factors, such as:

- The time you are devoting to it,
- Other demands on your time,
- Your manager's perspective,
- The strategic value of the initiative, and
- Alignment with the company's priorities.

Generally speaking, it's time to stop, or at least step back to become a team member representing the legal department as appropriate and necessary, when you move from the strategic/architectural phase into the tactical/implementation phase.

How should you extricate yourself when it is time to stop? By having regular service-level discussions with your key clients so that you will be able to evaluate, set, and modify realistic expectations not only about the provision of legal support, but also for business partnering activities. That way, there should be no surprises when you do clearly communicate to your clients that it's time for you to stop or step back, and it is their turn to take over.

What if Your Clients Discourages You?

It's true that some clients provide more opportunities to business partner than others. That said, it would be a mistake to wait for an invitation. Try whatever you can to be included in worthwhile senior management meetings, conference calls, and group email lists. If that doesn't work initially, how-

ever, look for other opportunities to learn more about, and provide input into, the business. Engage in corridor conversations with the more approachable members of the management team. Schedule one-on-one meetings with senior management and use that time to learn about business priorities. When you communicate with management, use business language instead of legalese. Finally, don't forget the executive administrators—they often hold the keys to many business partnering opportunities.

How Can You Possibly Find Time to Business Partner?

It is possible to engage in business partnering without taking up any extra time at all. After all, if you attend a meeting for a set period of time, it takes no longer to offer business input at that meeting, in addition to spotting legal issues. That said, it might be instructive to prioritise your time and examine if there is something that is more important, in terms of your personal, departmental, and corporate priorities, than a business partnering activity. Learning to prioritise tasks is crucial for business partnering. Using time management skills and implementing the most effective use of technology should allow you to devote some time to the most important business partnering activities on your list. Business partnering is an extremely flexible activity—the time you spend on it can be adjusted to suit your immediate circumstances. You can still make a valuable business partner contribution if you only have time to raise a single business issue for one of your clients to consider.

MAINTAINING PRIVILEGE

Lawyer-client privilege will not apply to any business counsel that you provide to your clients. However, the privilege may apply to any communication you have with your clients to the extent that it is for the purpose of obtaining or providing legal advice.

A potential problem arises in business partnering when you mix legal and business advice. In practical terms, the scale of this problem will depend on a number of factors, such as the extent to which your client has in the past, or is likely in the future, to need to exercise this privilege. As part of your general discussion about the type of service your

clients require and what you are able to offer, you should, from time to time, have a general discussion with your key clients about the topic of privilege and its relevance to your proposed business partnering activities.

My experience, in over 20 years of practice, is that my clients have never had to exercise a privilege claim, nor have they asked me to stop business partnering. That said, in addition to being aware of which hat you are wearing at any point in time, there are some specific steps you can take in order to preserve the privilege when you are providing legal and business advice. You may want to separate the legal advice from any written business input by including it in another document. As an extra precaution, you might consider engaging outside counsel so that they communicate the legal advice to your clients.

Conflicts and the Sarbanes-Oxley Act

In-house counsel have always had responsibilities to call out legal or ethical issues, even if that is difficult to do and may jeopardise working relationships with clients. This obligation is reinforced, and more clearly defined, as a result of § 307 of the Sarbanes-Oxley Act (15 U.S.C. §7245) and the new SEC Rule 205.⁵

The difficulty in discharging these responsibilities is particularly acute for lawyers with dual roles. However, this article is focused on the more typical situation where you have only one formal role—legal counsel. As such, you don't need to be making any business decisions; in fact I have suggested that you should think of business partnering only as helping others to make the decisions. If you stick to these boundaries, business partnering and integrating yourself with the management team should not pose significantly greater challenges to your objectivity and independence than when you are providing purely legal advice.

PRACTICAL STEPS

What can you do to develop business partnering? Let's consider this question first from your perspective as an individual contributor and, secondly, from the point of view of you as a manager in the legal department. For some, much of this will be intuitive; for others it will require a more conscious, structured, and active effort.

Your Hat Rack

A focus on the following areas can make you more effective at business partnering:

Business partnering skills. During your training, and especially during your practise of law, you have developed a broad range of skills that help your legal practise. These same skills will be of immense value to you while business partnering; in fact they may put you at an advantage as compared with your clients. For example, your ability to analyse complex situations, assess risk, identify root causes, spot crucial facts from a mass of information, clarify objectives, pay attention to detail, ask relevant questions, find creative alternative solutions, negotiate favourable outcomes, resolve disputes, and communicate clearly are all important skills for business partnering. Anything you can do to enhance these skills will improve your business partnering. If you need some help with these, ask your manager or another senior colleague whether they could offer some coaching.

Manage your time wisely. Refining your time management/prioritisation abilities is another general skill that cuts across your entire practise. Anything you can do to create time is going to give you more time to engage in value-added business partnering.

An alternative perspective. If we think of lawyers as car mechanics, then many of us spend most of our time rushing from one car to the next, attempting to fix the immediate problem—maybe replacing a punctured tire, a dirty spark plug, or a flat battery. At the end of each day we've serviced a lot of cars but, inevitably, they keep coming back in for repair. For example, how many times do we stop to ask ourselves, and our clients, why a problem arose in the first place, and what could be done to minimise its recurrence? Was it because of a lack of process, a flaw in an existing process, inadequate or poorly trained human resources, or system deficiencies? Helping to identify the root cause of a problem or situation—rather than just patching it—is a simple and effective way to help your clients achieve their business objectives. Identifying a problem before it

occurs or spotting an opportunity that your clients have not recognised is another way. The trick is to broaden your perspective. Don't confine yourself to legal issues—think about the business and actively look for ways to add value to the management team and to the company.

Expand your business knowledge. The better your business understanding, the more effective you will be at business partnering. To that end, it will be beneficial for you to gain an understanding of the following categories of information:

The industry in which your company operates. Read newsletters, analyst reports, journals, and magazines. Talk to your clients and to acquaintances who work with competitors to obtain an informed, well-rounded view of the competition and the business landscape. **A technical understanding of your company's products/services and how they are developed and used.** This information can be gleaned from your company's internal website and specialists in the company.

The state of the company's business. You should have a firm grasp of basic information about company revenue, net income, margins, trends, key market segments, major customers, important channel partners, distribution models, and crucial issues facing the business. Most importantly, however, you should understand the company's current business priorities—these should provide a hat rack for your business partnering activities. Again, much of this information should be available on your company's internal website or could be obtained from colleagues.

Key corporate policies and processes. An understanding of the policies that guide the company will not only allow you to help guide any business proposals in the right direction from the company's perspective, but will also facilitate an expeditious and consistent implementation of such policies.

Best business practises from within the company and outside. In-house counsel

BUSINESS PARTNERING EXAMPLES

Assisting clients to structure the business aspects of a deal. Almost every lawyer will readily recall a situation where, in addition to providing legal advice on a deal, they have also helped their clients to formulate the business proposal. It could have been, for example, simply clarifying objectives or it could have been suggesting alternative approaches. There are many ways to assist your clients.

Helping to solve a business problem/crisis. Even if there are no legal issues involved, lawyers can, for example, help to identify the root cause of the problem, develop strategic and tactical responses, and communicate or negotiate with internal and external parties.

Facilitating the implementation of a corporate policy or process. Compliance, export control, deal reviews, and other sales/operational issues are examples of areas where lawyers can help develop, or at least facilitate, effective implementation of a new policy or process. You can do this, for example, by providing practical insights to the corporate policy makers, and you can also help field executives understand and implement in a consistent and faithful manner.

Suggesting a new or improved business process, policy, or resource. Through our exposure to a broad range of operational issues, in-house counsel can often identify potential "fault lines" in the company's business and suggest how to fix these. Outline a new process, adjustments to an existing process, or the addition of business resources to plug a gap.

Providing strategic business counsel. Sometimes business executives are so focused on their immediate business unit (and in particular on meeting short term sales goals) that they may not have the time (or skills) to think strategically about the business in general—especially when the executives are in the field with limited support from corporate headquarters. Lawyers may be in a better position to take a strategic view of the whole business and to recommend a process for local management to conduct regular strategic reviews.

often interface with many different client groups within the company and have extensive external contacts. Draw on the experiences of these contacts to illustrate general principles when guiding your other clients. In other words, bringing to the attention of one group of clients something that was successfully accomplished by another group is often an effective tool for facilitating a resolution to a problem.

on corporate governance issues and a keen understanding of how the policies of his or her own corporation fare in light of those regulations.

Establishing and utilising networks. One of the best methods of acquiring the relevant business knowledge for business partnering is to develop and maintain a wide range of contacts both internal and external. Outside counsel, other members of the legal department, colleagues in management and other divisions, such as accounting, marketing and finance can all be essential partners in your quest to develop your business partnering skills. An extensive internal network within the legal department, and beyond, gives you the ability to put your clients in touch with others in the company who can help them—a simple, yet extremely effective business partner contribution. Membership in in-house counsel associations, such as ACC, your local Chapter, and corporate counsel sections of state and local bars, are a good place to start. Developing networks may come quite naturally for some, but if you aren't one of those people, it is worthwhile to hone those skills and start identifying and targeting key contacts now.

AN EXTENSIVE INTERNAL NETWORK WITHIN THE LEGAL DEPARTMENT, AND BEYOND, GIVES YOU THE ABILITY TO PUT YOUR CLIENTS IN TOUCH WITH OTHERS IN THE COMPANY WHO CAN HELP THEM—A SIMPLE, YET EXTREMELY EFFECTIVE BUSINESS PARTNER CONTRIBUTION.

Public policy issues. Government affairs is an area ripe for business partnering. If you understand the major public policy issues facing the company, there will undoubtedly be many opportunities for you to either help develop an appropriate company position on a particular issue in conjunction with a government relations department that is in place and/or to facilitate lobbying efforts. **Compliance agendas.** Whether you view this as part of your primary responsibility or not, you can help develop appropriate and effective compliance policies and facilitate their implementation in conjunction with your colleagues in other departments. By way of example, your interactions with a broad range of clients at different levels gives you a unique insight into how they think and act. You can use that insight to help develop some "bottom up" compliance strategies and tactics that will result in changed behaviour, rather than simply relying on top-down edicts from HQ. In today's era of Sarbanes-Oxley regulation, it is imperative that counsel have a handle

Seven Ways To Facilitate Business Partnering

As a manager, there are many ways to encourage business partnering and make it a positive and productive experience for the company and your staff. Even if you have not yet landed in a management spot, look for opportunities to push for some of the following suggestions to be put in place:



1. Make it part of the recruitment process.

Since the opportunity to business partner is a primary motivation for lawyers to move in-house, companies that offer such opportunities and tout this aspect in the recruitment process will be more attractive to applicants.



2. Declare it in the mission statement.

The most effective way to acknowledge the importance of business partnering to your company and your clients is to include it in your department's mission statement. A direct, affirmative declaration that in-house counsel is charged with "helping your

clients achieve their business objectives in a legal and ethical manner" is a good starting point.



3. *Advance business partnering as a departmental value proposition.* Clients value business partnering by in-house counsel, many in-house counsel practise it quite a bit already, and most corporate law departments—as a matter of basic efficiency—have aligned their management structure to effect a “seamless integration of lawyers with business team.”⁶ Yet it is a curious fact that legal departments are not generally renowned for business partnering as a part of the services offered. Instead of

perpetuating this misconception, promote your willingness to business partner with your clients and your past experience in this area. Don't sell short what your legal team has to offer a company—communicate business partnering accomplishments so that your clients clearly recognise that you do a lot more than “the contracts and keeping them out of jail.”



4. *Business partner training.* Your colleagues may be uncomfortable in taking on the role of business partner, and may need some guidance to improve their business partnering skills. If you're new to in-house, ask your department's

managers for individualised, “on the job training” and coaching sessions which focus on the tools of trade; such methods are extremely effective. In addition, group training sessions at which internal and external speakers discuss product attributes, best practices, and more general business issues/trends can go a long way towards bolstering everyone's confidence in their ability to provide significant business partner contributions. If you're a new manager, encourage your staff by offering this kind of professional development. If you're new to in-house and your manager isn't enthusiastic about this idea, offer to take charge of arranging the training.



5. *Corporate recognition.* Publicly recognising those who have made significant business partner contributions is also a positive reinforcer of business partnering. Learn what experienced managers know: Not only will this affirmation acknowledge a tradition of leadership from the company's perspective, it will also encourage all in-house counsel staff to step up to the plate.



6. *Acknowledge business partnering contributions in performance assessments.* Business partner contributions are often implicitly incorporated into performance reviews, especially in the form of client “testimonials.” Recognize the value of business partnering by making it explicit and acknowledge such contributions as a valuable aspect of in-house counsel's job.



7. *Career development.* Facilitating business partnering opportunities for your staff can be extremely useful for career development, especially in situations where there is limited scope for significant change in their day-to-day legal role. In extreme cases it may allow your staff to dip their toes in a business role, which may encourage any counsel who is considering leaving the company to stay and transfer to a strictly business role in another division. Retaining quality, experienced employees who have a vested interest in the company's success is always preferable to watching them walk out the door out of frustration due to lack of advancement opportunities.

WEARING THE OTHER HAT

Take the time to consider and develop the business partnering aspect of your role as in-house counsel. I'm certain you'll find, as I have, that this process will reveal crown jewels that, with a bit of polish, offers something of significant value to you, your department, and your company.

The opportunity for each of you to business partner will vary depending on many factors, such as the nature of your role and the size and nature of the business. But don't be too quick to conclude that your opportunity to business partner is extremely limited. There are considerable opportunities that will be revealed if you are open to the possibility, and if you make your willingness and experience in business partnering apparent to clients and colleagues.

Paying closer attention to business partnering need not, nor should not, adversely impact your primary responsibility as lawyers to the corporation, nor should it come at the expense of meeting your ethical and professional responsibilities. However, if the other hat fits, wear it with pride. You may be surprised at the reaction you receive from colleagues and clients. ■

NOTES

1. John H. Ogden, “Corporate Counsel Juggling Multiple Roles,” *ACCA Docket* 10 (Fall 1992).
2. The following articles highlight some of the issues involved in business partnering: Alison B. Brotman & John H. Ogden, “In-house Counsel: Managing the SPLIT Personality,” *ACCA Docket* 13, no. 5 (May/June 1995), available at www.acca.com/protected/pubs/doctet/mj95/; Steven N. Machtinger & Dana A. Welch, “In-house Ethical Conflicts: Recognising and Responding to Them,” *ACC Docket* 22, no. 2 (February 2004): 22-36, available at www.acca.com/protected/pubs/doctet/feb04/conflict.pdf.
3. Steven N. Machtinger & Dana A. Welch, “In-house Ethical Conflicts: Recognising and Responding to Them,” *ACC Docket* 22, no. 2 (February 2004): 22-36, available at www.acca.com/protected/pubs/doctet/feb04/conflict.pdf.
4. R. Peter Fontaine, “Mending the Split Personality,” *ACC Docket* 13, no. 5 (September/October 1995), available at www.acca.com/protected/pubs/doctet/so95/Mending.html.
5. 17 CFR Part 205.
6. Veta T. Richardson, “From Lawyer to Business Partner: Career Advancement in Corporate Law Departments,” *ACC Docket* 22, no. 2 (February 2004): 70-75, available at www.acca.com/protected/pubs/doctet/feb04/partner.pdf.

STEPS IN THE BUSINESS PARTNERING PROCESS

STEP 1: Identify the business issue, problem, opportunity, process, or resource deficiency.

If all you have time to do is to point out the problem or opportunity, then you have been an effective business partner (see “Business Partnering Examples,” p. 97). But you can add more value if you can progress to the following stages.

STEP 2: Suggest either a solution or a process to find a solution.

Sometimes a solution will be obvious and it's just a matter of pointing this out. If a solution is not so obvious, or the situation is complex and requires further deliberation, you can outline a possible process to follow and suggest which functions or individual executives should be involved.

STEP 3: Encourage clients to provide the necessary support.

It's one thing to be able to suggest what needs to be done, but your business partnering contribution is going to be of more value if you are able to influence your clients (especially senior management) to provide the necessary support for your suggestion. Your position of in-house counsel will provide a level of influence. Even greater levels of influence come as a result of developing your internal network and by establishing a track record of effective business partner accomplishments. If you don't currently have a sufficient

level of influence to support your idea, then try to enlist someone who does, and who is prepared to champion it.

STEP 4: Lead initial efforts to form a team and/or generate momentum.

Often it takes time to generate the kind of support that is needed for a particular project or idea that involves time, resources, and perhaps money. In the meantime it may be necessary for you to take charge and kick-start things. Obviously you would only do so if the idea is important enough, you can create the time for yourself, and your manager supports you doing it. This is clearly a more tricky stage than the previous three stages, but there will be occasions when it is appropriate for you to take this step. The key is to set realistic expectations through regular and clear communication with your clients and your manager. Generally, you should only be in this stage for a few weeks, not months.

STEP 5: Participate (only) as a member of the newly formed team.

If your proposal involved an ongoing effort, you should aim to move out of Step Four and into this stage as quickly as possible. Your ongoing involvement in the cross-functional team should be only to represent the legal department for as long as, and to the extent to which, that is necessary.