



Monday, October 20
11:00 am-12:30 pm

107 Financial Services General Counsel Roundtable

David R. Allgood

Executive Vice President and General Counsel
Royal Bank of Canada

Michele S. Gatto

Executive Vice President, Corporate Services, and General Counsel
National Life Group

Patricia R. Hatler

Executive Vice President and Chief Legal and Governance Officer
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Paul Matecki

Senior Vice President and General Counsel
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Faculty Biographies

David R. Allgood

David R. Allgood is executive vice-president and general counsel for Royal Bank of Canada in the company's Toronto office.

Mr. Allgood has held his current position for several years, and originally joined RBC as senior vice-president, corporate taxation. Formerly, he was a partner in the law firm of Osler, Hoskin & Harcourt. His practice was restricted to taxation with a focus on the income tax aspects of corporate finance, including developing both debt and equity financings, mergers and acquisitions, reorganizations and structuring joint ventures, and infrastructure projects.

Mr. Allgood is the 2008 recipient of the Global Counsel Award for Regulatory (Financial Services) Individual of the Year.

Mr. Allgood is a director of the ACC, the chair of the dean's advisory committee for Queen's University Law School, and a trustee of the Bloorview Sick Kids Rehab Hospital.

Mr. Allgood holds a BA and LLB from Queen's University.

Michele S. Gatto

Michele S. Gatto is the executive vice president of corporate services and general counsel for National Life Group in Montpelier, VT. As a member of the executive management team, Ms. Gatto is responsible for the corporate services division, which includes: the law department, mutual fund compliance, market conduct and compliance, policy and business forms management, and human resources.

Prior to joining National Life Group, Ms. Gatto was vice president, general counsel and corporate secretary of Massachusetts Casualty Insurance Company (MCIC), a subsidiary of Sun Life Financial. Ms. Gatto has also served as vice president, assistant general counsel, assistant secretary, and assistant treasurer for The Paul Revere Corporation.

Ms. Gatto currently serves on the board of directors of Vermont Mutual Insurance Group, the board of trustees of Saint Michael's College, the Board of Directors and the executive committee of the ACC, the board of governors and president-elect of the Association of Life Insurance Counsel, and the advisory councils of both the New England Legal Foundation and the Graduate School of Management at Clark University.

Ms. Gatto received her BA from Indiana University of Pennsylvania, and also holds a MBA from Clark University, a JD from Western New England College School of Law, and a MA from Youngstown State University.

Patricia Hatler

Patricia Hatler is the executive vice president and chief legal and governance officer for Nationwide Mutual Insurance Company in Columbus, OH.

Prior to joining Nationwide, Ms. Hatler served as general counsel and corporate secretary for Independence Blue Cross in Philadelphia. Her legal career also includes service with Dechert, Price and Rhoads in Philadelphia; Fulbright and Jaworski in Houston; and Stinson, Mag and Fizzel in Kansas City.

Ms. Hatler is a member of the Columbus Bar Association's Conference of Corporate General Counsel and serves on the Executive Committee and Board of the ACC. She also is a director on the boards of the United Way of Central Ohio, the Columbus College of Art and Design, and the Kents Hill School.

Ms. Hatler received her BA from Duke University and is a graduate of the University of Virginia School of Law.

Michael Solender

Michael Solender is the executive vice president and chief legal officer of Washington Mutual in Seattle. He serves on the company's executive committee and supervises the 600-person legal, compliance, government and industry relations, and regulatory relations departments.

Prior to joining Washington Mutual, Mr. Solender served as general counsel of The Bear Stearns Companies Inc. where he was the chief legal officer of the public company and its principal broker-dealer subsidiary, and supervised the 500-person legal and compliance department. Before joining Bear Stearns, Mr. Solender was a partner at the Washington, DC-based law firm of Arnold & Porter, specializing in litigation and regulatory matters.

Mr. Solender serves on the board of Visitors of Columbia College; the executive committee of the Yale Law School Association; and the advisory committee of the Yale Law School Center for the Study of Corporate Law. Mr. Solender has also previously served on board of directors of the Lawyer's Alliance for New York; the Lincoln Center for the Performing Arts' Counsel's Council; and the executive committee (and as secretary) of the New York American Inn of Court.

Mr. Solender received his BA summa cum laude from Columbia University, where he was a member of Phi Beta Kappa. He is a graduate of Yale Law School, where he was also a senior editor of the Yale Law Journal.

Role of the General Counsel

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The purpose of this InfoPAKSM is to provide some definition of the role, scope and nature of the duties of a general counsel in a post-Enron, Sarbanes-Oxley world. By noting some of the issues that arise in the ordinary course of an in-house counsel's practice, this InfoPAK will help general counsel provide high-quality representation for their corporate client. This InfoPAK should not be construed as legal advice or legal opinion on specific facts or representative of the views of ACC or any of its lawyers unless so stated. This InfoPAK is not intended as a definitive statement on the subject of general counsels but a resource that provides practical information for the reader. We hope that you find this material useful. Thank you for contacting the Association of Corporate Counsel.

ACC wishes to acknowledge the following for their contribution to the development of this InfoPAK:

Ellen R. Dunkin, *General Counsel*, Risk and Insurance Management Society, Inc.

James A. Woehlke, *Legal Counsel*, New York State Society of CPAs

&

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I. Introduction: Function of General Counsel

A. General Overview

The role of the general counsel (GC) in a corporation¹ depends on a number of factors about the client, such as the size of the company, the industry where it operates, even the states or countries where it operates. A manufacturing company needs different things from its general counsel than a service company and large companies may make more demands on their general counsels than small ones. Despite the differences in the client, the duties of a general counsel are consistent: deliver the highest possible level of legal services to the client.

Previous experience as a private practitioner of law may not necessarily be good training for a position as general counsel, since the work lives of general counsel and private practitioners are very different. For one thing, the general counsel of a corporation provides service to only one major client—the corporation—so business development and strategies to avoid client conflicts are practically nonexistent issues. A general counsel who serves only one corporate client gets to know that client in depth which allows the lawyer with a sense of business strategy to provide not only legal help but also business advice. The work of a general counsel is generally determined by the special needs of the client.

Following are tasks that many general counsels are called upon to complete:

- Ensure that the corporation has an adequate compliance program in place
- Design the Structure of the In-House Legal Department
- Control Legal Costs
- Identify and Assess Risk and Risk Management Programs
- Design a Crisis Management Program
- Conduct Oversight of Outside Counsel
- Manage Litigation
- Develop & Maintain Good Working Relationships with Senior Management
- Review the Corporation's Licensing Practices
- Keep Informed of the Requirements of a Multi-Jurisdictional Practice
- Establish A Record Retention Policy²

As a result of increased government regulation, among other things, general counsel are being asked with increasing frequency to participate directly in corporate management. Whether a corporation wants to organize itself in such a way that all the advice formerly provided by consultants³ is now provided in-house or because senior management feels comfortable involving the general counsel in all major business decisions from the outset, general counsel are increasingly being asked to play a dual role of legal advocate and corporate adviser. Considering the

growing complexity of modern corporations, the general counsel's most important role is often that of a manager of a major set of risks faced by the company.⁴

A general counsel has to be more than just a legal technician who tries to guess which business strategies will pass muster with the courts. A good general counsel brings more than just good lawyering to the job; the general counsel adds value to the business; accordingly, a good general counsel provides high-quality service at the most reasonable cost in a user-friendly way while scrupulously maintaining an unassailable record for integrity and ethical behavior. Is it any wonder that the jobs are so difficult to fill?

Additional Resources:

- Benjamin W. Heineman, Jr., *The Ideal of the 'Lawyer Statesman'*, ACC Docket 22, no. 5 (May 2004), available at www.acca.com/protected/pubs/docket/may04/ideal.pdf
- *Ask the General Counsel - Small and Large Department Practitioners Respond to Questions about Client Service, Compensation, and More*, ACCA Docket 14, no. 1 (January/February 1996), available at <http://www.acca.com/protected/pubs/docket/jf96/gencounsel.html>
- *An Interview with Richard H. Weise*, ACCA Docket 13, no. 4 (July/August 1995), available at <http://www.acca.com/protected/pubs/docket/ja95/AnInterv.html>
- *Role of the General Counsel*, ACCA Docket 14, no. 5, (September/October 1996), available at <http://www.acca.com/protected/pubs/docket/so96/gencounsel.html>

B. Road Map to This InfoPAK

The purpose of Part I of this InfoPAK is to give a general overview of the different functions of a general counsel; where the subject requires a more in-depth analysis, additional resources are cited.

In Part II, the ethical considerations that a general counsel must address are outlined. As the rules of professional conduct differ from state to state, the analysis is based on the ABA Model Rules of Professional Conduct (2003) ("Model Rules"). Part III focuses on corporate compliance and security. Part IV covers record retention policies, including information on how to establish such a policy for a company that currently has none. Part V considers the types of reporting relationships for a general counsel that insures independence, flexibility, and accountability. Part VI describes the internal structure of a legal department with a discussion of the advantages and disadvantages of a centralized and decentralized organization. Part VII offers methods that a general counsel can use to control costs. Parts VIII and IX cover risk identification and crisis management.

Part X discusses some principles of litigation that are important to a general coun-

sel. Finally, Parts XI covers outside counsel relations and sample job descriptions are included in part XII.

II. The Corporation as a Client

The primary role of the general counsel is to provide legal services to the corporation, not to the corporation's officers and directors. At times the corporation and its officers and directors will have conflicting interests a general counsel must be able to distinguish between the best interests of the corporation and the best interests of the officers and to communicate this duty effectively to the affected parties. The ABA Model Rules of Professional Conduct provide a good starting point for this discussion:

- Model Rule 1.1: a general counsel must represent the client competently.
- Model Rule 1.2: a general counsel cannot assist fraud
- Model Rule 1.6: disclosure of otherwise confidential information is allowed in certain circumstances in which harm to third parties will result from crime or fraud and in which lawyer's services have been used in furtherance of crime or fraud.
- Model Rule: 1.7: without a waiver, a general counsel cannot represent a client in situations where a concurrent conflict of interest exists.
- Model Rule 1.13: The organization is the client, which means that a general counsel may report potential or actual violations of law that are reasonably likely to be imputed to the organization and that are reasonably certain to result in substantial injury to the organization if the highest authority within the organization fails or refuses to act.
- Model Rule 2.1: a general counsel must exercise independent professional judgment.⁵
- Under SEC Rule 205⁶, a general counsel must report evidence of wrongdoing up the chain of command and receive "appropriate" response; may, but need not, report out.

These rules are discussed in more detail below.

A. The Duty to the Client

Normally, a lawyer can readily identify his or her client. This task, however, is often complicated for a general counsel whose primary client is the corporation. A corporation can only speak through individuals employed by or acting on behalf of the corporation⁷ but these agents are not the client to whom the lawyer owes his duties.

1. Corporate Affiliates

In answering the question "Who's the client" one needs to determine whether

the general counsel has been hired to represent only one member of a corporate family, such as a subsidiary, or whether he represents all members of the corporate family.

Corporate managers customarily think of a corporation as unified, that is, all affiliated parts fit together as one entity with each affiliate entitled to corporate counsel's representation and loyalty.⁸ In many situations, particularly where all subsidiaries are wholly owned by the corporate parent, a general counsel may represent the home office and all subsidiaries.⁹ However, when the ownership is less than identical or when one of the affiliates is in the kind of legal trouble that threatens the parent (such as bankruptcy), unified representation can be difficult.¹⁰

To avoid a situation where a general counsel's representation of a subsidiary is directly at odds with the best interests of the parent, the corporation's intentions should be made abundantly clear at the outset of the general counsel's employment.

2. What happens when corporate management wants to take actions that are not in the corporation's best interests, according to the general counsel?

Problems arise when a general counsel believes that a certain course of action that management has selected for the corporation is not in the best interest of the corporation or might even result in serious adverse consequences for the company; even greater problems arise when the general counsel learns that a senior executive wants to take actions that further his own interests but harm the corporation. In both situations, a general counsel is required to take steps that protect the corporation, the general counsel's client.

The ABA Model Rules of Professional Conduct are helpful on this point. Rule 1.13(a) provides that "a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Model Rule 1.13 (b) specifies that a lawyer for an organization who "knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization and that is likely to result in substantial injury to the organization" must "proceed as is reasonably necessary [to protect] the best interests of the organization", not the people involved in the bad acts.

Rule 1.13 requires a high degree of certainty, so if there is a question with reasonable arguments on both sides, Rule 1.13 may not apply.

a. Violation of a Duty to the Entity

Corporate fiduciaries are ordinarily considered to owe two duties to the corporation – the duty of loyalty and the duty of care.

■ Duty of Loyalty

The duty of loyalty is generally defined as a duty of the corporate fiduciary not to consider interests other than the best interests of the corporation in making a business decision.¹¹ Thus, certain self-dealing and the usurpation of corporate opportunities is prohibited.

■ Duty of Care

Corporate fiduciaries also have to act in good faith, with due care (i.e., care that a reasonably prudent person in a like position would exercise under similar circumstances), and in the best interest of the corporation. Unlike the duty of loyalty, the duty of care is process-oriented. Under the business judgment rule there is a presumption that the corporate management acted in this manner, unless there is no rational business purpose at all. The general counsel ordinarily has to accept such decisions even if the utility or prudence of the action taken is doubtful. "Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province."¹²

b. Violation of Law

The Model Rules do not define "violation of law" but it is probable that the term can be interpreted as meaning scienter-based wrongs, criminal, civil, or regulatory. However, it is not likely that the term includes the violation of every law or regulation.

For more information see:

- John K. Villa, *Corporate Counsel Guidelines*, vol. 1 § 3.07 (2003 ed.)

c. Level of Certainty Required

For Model Rule 1.13(b) to be invoked, a lawyer has to know that the action in question is a violation of a law or a duty owed to the corporation. According to the preamble of the Model Rules that means "actual knowledge of the facts in question."

d. "Likely to Result in Substantial Injury to the Organization"

Model Rule 1.13 and the accompanying commentary do not provide a definition for the term "substantial injury." However, as "substantial" is described as "a material matter of clear and weighty importance" in the terminology section at the beginning of the Model Rules, general counsel could consider looking to securities law or even accounting principles for an idea of what that term means.¹³

e. How should the GC respond?

In the event that all the requirements of Rule 1.13(b) are met, the general counsel shall proceed as is reasonably necessary in the best interest of the corporation. Among other things he should consider the seriousness and consequences of the violation, the scope and nature of the lawyer's representation, the responsibility in the corporation and the apparent motivation of the person involved, and the organization's policies concerning such matters.¹⁴ Depending on this analysis the general counsel may decide to (1) ask for reconsideration of the matter, (2) advise

that a separate legal opinion be obtained and presented to appropriate person in the entity, or (3) refer the matter to a higher authority in the organization.¹⁵ If the highest authority of the corporation insists on the action, or refuses to act—that is, if senior management insists on going forward with a bad act that is clearly a violation of the law and is likely to result in substantial injury to the corporation—the general counsel may resign in accordance with Model Rule 1.16.

For a detailed description of the ethical implications, see:

- *Attorney-Client Privilege*, ACC InfoPAK, (March 2006), available at www.acca.com/infopaks/attclient.html
- *In-house Ethics*, ACC InfoPAK, (March 2004), available at www.acca.com/infopaks/ethics.html
- ACC's In-house case law data bank located in the Virtual Library, available at www.acca.com/resources/vl.php
- Mary C. Daly, *Avoiding the Ethical Pitfall of Misidentifying the Organizational Client*, 1319/Corp 721

For additional discussion of the topic of reporting up the corporate ladder and the obligations imposed by the Sarbanes-Oxley Act, see:

- *In-house Counsel Ethics*, ACC InfoPAK, (March 2004), available at www.acca.com/infopaks/ethics.html
- John K. Villa, *Investigative Attorneys and the Reporting Obligations under the SEC's Professional Conduct Rules*, ACC Docket 22, no. 4 (April 2004), available at www.acca.com/protected/pubs/docket/apr04/ethics.pdf

Additional resources:

- Ronald D. Rotunda, *The Lawyer's Deskbook On Professional Responsibility*, 2002-2003 Edition
- Brian Moline, *Ethical Traps for the Organization Lawyer: Interplay between KRPC 1.6, 1.13, 1.7 and 1.11*, 72-Apr J. Kan. B.A. 20

3. Contest for Control of the Corporation by Takeover

Generally speaking, the duties of the general counsel are no different in times of corporate control contests than in normal times although control contests introduce an additional level of complexity and anxiety in the general counsel's day-to-day activities.¹⁶ The natural tension among the corporate constituencies in times of control contests, and the all-too-human tendency among senior executives to be blinded by the potential for a personal financial windfall in the event of a takeover, makes it even more difficult for the general counsel to keep executives focused on the best interest of the corporation.

Unless counsel concludes that management is breaching a duty to the corporation by opposing the takeover, corporate counsel must accept management's view of what is the company's best interest. In the rare case where corporate counsel is persuaded that management is pursuing only its own self-interest in opposing a

takeover, corporate counsel should apply Model Rule 1.13 which ultimately could require counsel to challenge management's decision by going to the board of directors or even the independent directors.¹⁷

4. Derivative Litigation

If the company decides against pursuing the question might arise whether the general counsel or any other member of the legal department may represent the corporation and/or named defendants (typically corporate directors and officers accused of wrongdoing) as the ultimate recovery in a derivative action filed by the shareholders would go to the corporation.¹⁸

To answer this question, one has to follow the analysis of what is in the best interest of the corporation. Where appropriate corporate representatives have decided on the corporation's best interests, corporate counsel is generally not required or even permitted to substitute his judgment on that point. If the corporation has decided against pursuing a derivative demand, then counsel can accept that pursuit of such a demand is not in the corporation's best interests. For that reason, corporate counsel, subject to several qualifications discussed below, would ordinarily be permitted to represent the corporation in a derivative action.

For more information on this topic see:

- John K. Villa, *Corporate Counsel Guidelines*, § 3.10 (2003 ed.)

5. Dual Representation of Corporation and one or more Directors, Officers, Employees, or Agents.

Paragraph (c) of Rule 1.13 recognizes that the general counsel may also represent the constituencies of the corporation – the officers, directors, employees, and shareholders of the corporation— provided consent, necessary under to Rule 1.7, has been given.

However, the general counsel should always be aware of potential conflicts of interests that could prevent him from rendering unbiased legal services. For example, suppose a corporate officer (director or employee) contacts you and begins to discuss his or her own personal involvement in corporate activity.

Here the general counsel should consider the following:

- If there is any reasonable prospect that the officer might believe that corporate counsel personally represents him, then the corporate counsel should preface the discussion with a reminder that she represents only the company.
- Is the conduct being described by the corporate officer, director, employee or agent adverse to the best interests of the corporation?

If this is so, the discussion should be halted and the individual warned that

- the corporation's interests are adverse to those of the individual;

- counsel does not represent him and is obliged to disclose to the corporation everything that the individual says;
- the corporation alone can decide whether to disclose to third parties (including the government) what is being disclosed here; and
- the individual should consider hiring separate counsel although corporate counsel should not suggest that there is any prospect that the corporation will pay for that separate lawyer.

If, after receiving this warning--preferably in the presence of a credible witness who can later substantiate precisely what was said-- the employee chooses to disclose more information, then counsel may and should use the information.

The same warnings should also be given in the situation that the officer describes own personal conduct in the course of employment which may lead to corporate liability to third parties, or that may result in claims by other employees against the individual and the company, then the discussion should be halted and the individual given the same warning as above except that corporate counsel may leave open the possibility that the corporation will pay for separate counsel for the individual. If the corporate employee begins describing his own personal conduct that is not directly related to his job but does reflect on his fitness as a corporate employee, personal criminal conduct or serious medical problems, then the discussion should be halted and the individual told that corporate counsel will be required to share the information with the corporate employer which may lead to personnel action including termination from employment. Thus, the individual must seek separate counsel and likely pay that lawyer personally.¹⁹

B. Confidentiality

Generally, lawyers are under a duty of confidentiality to their clients. This is expressed in Model Rule 1.6. The precise definition of that rule, however, varies rather extensively from state to state. The general counsel, thus, should be familiar with the exact standard under the applicable law.

In general, a general counsel must keep confidential all information relating to the representation of the client except such disclosures expressly permitted by the rules of professional conduct. In recent times, the question of whether ethical duties arise when the general counsel learns that the corporate client is engaged in material wrongdoing has become even more significant. The permissive behavior also varies from state to state, and might be altered by federal regulations.

For more information also see:

- Scott W. Williams, *Keeping Secrets 'In-House': Different Approaches to Client Confidentiality for General Counsel*, 1 J. Legal Advoc. & Prac. 78
- *In-house Counsel Ethics*, ACC InfoPAK (March 2006), available at www.acca.com/infopaks/ethics.html

- *In-house Counsel Standards under Sarbanes-Oxley*, ACC InfoPAK (June 2006), available at www.acca.com/infopaks/sarbanes.html

C. Client-Centeredness

The competent representation of the corporation demands a far greater understanding of the business of the corporation than would be required of an outside counsel who is engaged in a limited engagement. This, however, also places the general counsel in the unique position to render more than mere legal service. In order to be fully knowledgeable about a company's business and therefore of maximum service to the client, the general counsel should study the following information:

1. **General operations;**
2. **Sales and income history;**
3. **Location of facilities;**
4. **Description of products, Standard Industrial Classification (SIC) Codes;**
5. **Manufacturing/distribution, transaction description and documents;**
6. **Principal suppliers, purchasing relations;**
7. **Principal customers;**
8. **Principal competitors;**
9. **Sales and marketing programs;**
10. **Labor agreements;**
11. **Environmental considerations; and**
12. **Pending litigation and administrative proceedings.**²⁰

For more information on this topic see:

- D.C. Toedt III & Robert R. Robinson, *Things (and counting) that I'm Glad I Knew – or Wish I'd known – During My First Year as General Counsel*, ACCA Docket 19, no. 10 (November/December 2001), available at www.acca.com/protected/pubs/docket/nd01/250things1.php

A corporation's business units main complaints about the law department can be summed up by the four Ds: Distant, Diffident, Detached, and Darned Expensive.²¹ The solution to this lies in understanding the needs of your client. A good way to do this is by conducting regular client surveys.

For information on how to conduct client surveys see:

- *Client Surveys*, ACC InfoPAK, (June 2004), available at www.acca.com/infopaks/clientsurv.html.
- Michele S. Gatto, *SWOT & Beyond: How to make your Law Department Effective*, ACC Docket 21, no. 9 (October 2003), available at www.acca.com/protected/pubs/docket/on03/swot.pdf.

Other ACC Resources:

- John H. Ogden, *Synchronizing Business and Legal Priorities – A Powerful Tool*, ACCA Docket 18, no. 9 (October 2000), available at www.acca.com/protected/pubs/docket/on00/synch.html
- Jay W. Lewis, *Applying Production Principles to In-house Counseling*, ACCA Docket 15, no. 2 (March/April 1997), available at www.acca.com/protected/pubs/docket/ma97/inhouse.html
- Thomas F. McCaffery, III, *Designing a Business Process for the In-house Corporate Legal Function*, ACCA Docket 16, no. 4 (July/August 1998), available at www.acca.com/protected/pubs/docket/ja98/bpr.html

III. Corporate Compliance and Security

A. Ethical Duties

1. Non-legal business activities

As the role has changed over the past decades from handling primarily routine legal matters to providing full-scale legal services, and increasingly being involved in major business decisions, the general counsel has to understand how the rules of ethics apply to non-legal business advice to the corporate client.²² Pursuant to Model Rule 8.4, a lawyer is prohibited from engaging in behavior which reflects moral turpitude or fraud even if he is not acting in a professional capacity.²³ Most of the rules of professional conduct only apply to professional conduct, i.e., to services that are part of an attorney-client relationship. So what happens if the general counsel performs business functions in addition to providing legal services? In this case, Model Rule 5.7 states that “[a] lawyer shall be subject to the Rules of Professional Conduct with respect to the provisions of law-related services . . . if the law-related services are provided by the lawyer in circumstances that are not distinct from the lawyer’s provision of legal services to clients”

“Law-related services” are defined as “services that might reasonably be performed

in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a non-lawyer.”²⁴ Some examples of law-related services are described in Comment 9 to Model Rule 5.7 and include “providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.” Thus, for the general counsel to show that his behavior is not covered by the rules of professional conduct he has to show that: (1) he does not provide any legal services to the client, or (2) if he provides some legal services to the corporate client, the conduct is not “law-related” service as defined above, or (3) that even if the services are law related, under the special circumstances, the services are distinct from the lawyer’s provision of legal services to the client.²⁵

2. GC’s Role as Legal Advisor

Pursuant to Model Rule 1.13, one of the primary roles of the general counsel is to step in when he learns that a corporate officer is engaged in action that is a violation of an obligation to the organization or a violation of a law that reasonably might be imputed to the organization and that is likely to result in substantial injury to the organization. But what should the general counsel do if he believes that a management decision, which was made in good faith, is not in the best interest of the corporation?

Under these circumstances, a general counsel has no duty to pass judgment on whether the business decision is negligent or erroneous. The commentary to Model Rule 1.13 clearly indicates that second-guessing the business judgment of management is ordinarily not required. Furthermore, a corporate lawyer would likely not have the knowledge, experience, and training to conclude with the requisite level of certainty that a business judgment by a properly authorized corporate officer was clearly wrong, let alone grossly negligent or reckless.²⁶

Affirmative Duty to Offer Advice:

Pursuant to Model Rule 2.1, the general counsel is under no affirmative duty to offer advice, unless asked by the client.²⁷ There is, however, an exception to Model Rule 2.1 when the general counsel knows that certain conduct will cause a substantial adverse legal consequence.

For more detailed analysis of this topic see:

- *In-house Counsel Ethics*, ACC InfoPAK, (March 2004), available at www.acca.com/infopaks/ethics.html

3. GC as Advocate

Generally, Model Rules 3.1 through 3.7 impose ethical limitations on a lawyer’s

conduct as an advocate. While these rules apply to a general counsel who has entered an appearance in a case, they also apply if a general counsel is actively involved in the preparation of the defense.²⁸ Moreover, even where a general counsel merely monitors the litigation, the general counsel is still bound by Model Rule 8.4 which requires the general counsel to take some remedial action if she learns that the company's outside litigation counsel is acting unethically. For this reason, the decision as to whether a general counsel is an "advocate" subject to Model Rules 3.1 through 3.7 may carry little practical significance.²⁹

Further, the general counsel can be held accountable for another lawyer's violation of the Rules of Professional Conduct if the general counsel has direct supervisory authority over that lawyer.³⁰ In this case, the general counsel is required to make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.³¹

For information on the role of the business advisor and legal advocate, see:

- *A Company's First General Counsel*, ACC InfoPAK, (June 2006), available at <http://www.acca.com/infopaks/firstgc.html>

4. GC as Director

No direct or indirect prohibition in the ethical rules prevents a lawyer from serving as a director.³² In fact, having the general counsel serve on the board of directors is advantageous to a corporation. However, this arrangement also presents a major ethical challenge involving the potential for a conflict of interest. For instance, a general counsel might be called upon to advise the corporation in a particular matter which involves actions of the directors. Because conflicts of interest can arise in these situations, the general counsel should consider the frequency with which such situations may occur, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation obtaining legal advice from another lawyer in such situations. If the general counsel comes to the conclusion that there is a risk that the dual role will compromise the lawyer's independent judgment, the general counsel should refrain from serving on the board.³³ In any case, the general counsel should inform the other members of the board about the potential conflict and the possibility that certain attorney-client privileges might be waived.

For more discussion and practical advice on the issue of participation on the board of directors and its ethical implications, the following sources might be helpful:

- ABA Formal Opinion No. 98-410: "Lawyer Serving as Director of Client Corporation" (February 27, 1998).
- Felix J. Bronstein, *The Lawyer as Director of the Corporate Client in the Wake of Sarbanes-Oxley*, 23 J.L. & Com. 53
- James D. Cox, *The Paradoxical Corporate and Securities Law Implications of Counsel Serving on the Client's Board*, 80 Wash. U. L.Q. 541 (2002).

- Patrick W. Straub, Note, *ABA Task Force Misses the Mark: Attorneys Should Not Be Discouraged From Serving on Their Corporate Clients' Board of Directors*, 25 Del. J. Corp. L. 261 (2000).
- Bethany Smith, *Sitting on vs. Sitting In On Your Client's Board of Directors*, 15 Geo. J. Legal Ethics 597

5. General Counsel as Media Liaison

Often the general counsel will be called upon to act as a media liaison. Here the general counsel should consider Model Rules 3.6 and 1.6 which discuss contacts with the press.

- (1) The general counsel is allowed to reveal information publicly only after first consulting the client.³⁴
- (2) General counsel must determine whether public disclosure would violate ethics rules by prejudicing an adjudicative proceeding. Where a lawyer participated in an investigation or litigation, extrajudicial statements are prohibited where there is substantial likelihood of materially prejudicing the proceeding. Objective information about the proceeding is permitted.

A general counsel may also reply to publicity not initiated by himself or his client, which has had an undue prejudicial effect on a client's rights.

Additional Resources:

- Bath A. Wilkinson & Steven H. Schulman, *When Talk is Not Cheap: Communications with the Media, the Government and Other Parties in High Profile White Collar Criminal Cases*, 39 Am. Crim. L. Rev. 203.

6. Conflict of Law

If the general counsel is practicing in two or more states, the question arises as to which state's ethical rules will govern his conduct.³⁵ In most situations no conflict will arise because the majority of states have adopted a version of either the ABA's Model Rules of Professional Conduct or the Model Code of Professional Responsibility. However, in some instances, the differences among the adopted versions are rather significant.³⁶

When dealing with conflict of law issues, the general counsel has to carefully review the rules applicable in the state where he is licensed and where he offers legal advice because the rule governing conflict (Model Rule 8.5) differs in some states. Generally, the general counsel must determine whether the conduct in question is connected to a court proceeding in a state where he is admitted to practice. If this question is answered in the affirmative, the rules of the jurisdiction in which the court sits will govern.³⁷ However, if these rules do not provide a basis for the decision and the lawyer is admitted in only one state, then the rules of the state where the lawyer is licensed will apply.³⁸ If the lawyer is permitted to practice in more than one state, the ethics rules of the state in which the lawyer "principally

practices³⁷ apply unless the conduct has an effect in another jurisdiction in which the lawyer is licensed.³⁹ Note, however, that some states maintain that a lawyer is subject to the rules of a state in which he practices, even if he is not licensed to practice in that state.

Where the practice of law in a foreign country is concerned, the rules of the forum in which the involved court sits will govern.

- In any international litigation where a team of lawyers or investigators from several countries are working in a joint effort, the lawyers in the forum country should provide guidelines for handling documents and other evidence, contacting witnesses, and the like. At a minimum, all counsel and investigators must abide by those rules.
- Lawyers must also continue to abide by the ethical norms of their own jurisdictions. For an example, even if the forum country did not have clear rules requiring the preservation of important evidence before it is formally requested by an opposing party, American counsel may not destroy such evidence without facing sanctions or possible disciplinary actions by local bar associations.⁴⁰

7. Individual Rights and Liabilities of Corporate Counsel

Employment Rights:

Formerly, in regard to employment rights, corporate counsel were likened to private lawyers. Thus, when corporate counsel were forced to resign employment for ethical reasons, they were afforded no legal recourse and were treated (when without contract) as “at-will” employees. However, recent case law has shifted this view and tends to treat corporate counsel more like a special class of employees with enhanced duties of confidentiality. This theory brings with it a considerable softening of the rule that lawyers who resign for ethical reasons are without legal recourse. Under this theory, corporate counsel can bring a wide range of employment based claims based upon federal anti-discrimination laws and even contract principles provided that adequate precautions are implemented to avoid disclosure of corporate client confidences.⁴¹

Other rules concerning employment that are generally recognized include:

- A client may discharge an attorney at any time, with or without cause.
- Model Rule 1.16(a) requires that lawyers resign or withdraw if their clients intend to commit certain illegal acts or cause the lawyers to act illegally or unethically.

The difficult question that follows is whether in-house counsel should be afforded the same rights as other employees, or should the client be able to fire his employee/attorney at any time, with or without cause? Will in-house counsel be viewed as “second class” attorneys if they are afforded the right to sue for wrongful discharge?⁴²

*Balla v. Gambro, Inc.*⁴³ involved a general counsel of dialysis equipment distributor, who sued his employer for wrongful discharge, complaining that he had learned of major defects in machines that would put users at risk of poisoning. The general counsel advised his superiors to reject the shipment. The company officials, however, accepted the shipment for sale to a customer. The general counsel, then, confronted the company president and told him that he would do whatever necessary to stop the sale of dialyzers.⁴⁴ After being fired two weeks later, the general counsel reported facts to the FDA. The *Balla* court held that a client may discharge his attorney at any time, with or without cause, and indicated that this rule applies to in-house and outside counsel. Thus, in-house attorneys do not have a claim under the tort of retaliatory discharge. The court reasoned that employers might further limit their communication with their in-house counsel if these attorneys are granted a right to sue their employers for retaliatory discharge and that this should be prevented.⁴⁵

In a similar case, the court in *General Dynamics* disagreed with the *Balla* court's reasoning, arguing that *Balla* presented an anachronistic model of an attorney's place and role in contemporary society and an inverted view of the consequences of the in-house attorney's essential professional role.⁴⁶ Despite this holding, a different result might have been found if the discharge was based on discrimination.⁴⁷

Case Bibliography:

- Damian E. Okasinski, *In-house Counsel's Right to Maintain Action for Wrongful Discharge*, 16 A.L.R. 239.

Articles:

- John K. Villa, *An Overview of Employment Rights of Corporate Counsel*, ACCA Docket 18, no. 2 (February 2000), available at <http://www.acca.com/protected/pubs/docket/fm00/rights.html>
- H. Lowell Brown, *Ethical Professionalism and At-will Employment: Remedies for Corporate Counsel when Corporate Objectives and Counsel's Ethical Duties Collide*, 10 Geo. J. L. E. 1.

For information on Whistle-Blower Protection Statutes, see:

- John K. Villa, *Corporate Counsel Guidelines*, Vol. 2 § 6.11 (2003).
- *In-house Counsel Standards Under Sarbanes-Oxley*, ACC InfoPAK (June 2006), available at www.acca.com/infopaks/sarbanes.html
- *In-house Counsel Ethics*, ACC InfoPAK (March 2006), available at www.acca.com/infopaks/ethics.html

Liability:

Sarbanes-Oxley and SEC Regulations impose obligations on the general counsel that could give rise to liability in the event of a failure to comply. These include:⁴⁸

- Document retention programs: Necessary to stave off obstruction of justice charges under 18 U.S.C. §1519; 1512(c)(1) and (2). Most importantly, a corporation which does not have a document retention policy and then throws

its hands up when prosecutors or the SEC come looking for documents risks an obstruction of justice charge. Not only does the Sarbanes-Oxley Act impose a requirement that corporations implement a document retention program and effectively administer it, in-house counsel may be looking at sanctions for violating Model Rules of Professional Conduct 3.4.

- Reporting up requirements: The SEC Rules implementing provisions of Sarbanes-Oxley require that an attorney practicing before the SEC must report material violations of securities laws and breaches of fiduciary duties to a supervisory attorney, the CLO or CEO of the issuer, and if the response is not appropriate in the view of the reporting attorney, the reporting attorney must bring the matter to the board of directors or a designated committee of outside directors.
- Breach of fiduciary duty: In-house counsel who also serve in business capacities, such as general counsel, run the risk of being held liable for breach of fiduciary duty rather than plain old malpractice.⁴⁹
- Obligation to implement a corporate code of conduct. Amendments to the Federal Sentencing Guidelines in §82B.1 created a guideline entitled "Effective Compliance and Ethics Program." Not only is the establishment of an internal safeguard to prevent and detect criminal conduct within corporations required, but it can serve as a mitigating factor which can reduce an organization's fine punishment in the event of a criminal conviction. The guidelines also require that one individual at a high level of the organization have day-to-day responsibility for overseeing compliance with the internal ethics program, and precludes a reduction in the base offense level for organizations which do not have such programs.
- Director and officer liability: In-house counsel are increasingly exposed to legal malpractice claims. As corporations bring more work in-house, the exposure to legal malpractice claims expands. These malpractice claims typically arise, not from in-house counsel's "client," but rather from third parties or from statutory agents, such as bankruptcy trustees or the FDIC, who take over after the client fails. Although in-house counsel who also hold the position of a director or officer sometimes are protected by director and officer liability insurance, many policies have an exclusion for legal advice. This can expose in-house counsel to personal liability and may place them in the precarious position of having no coverage for many of their acts.

Malpractice Insurance:

When considering whether the purchase malpractice insurance, general counsel should think about the following points:

- The company may not be in existence to indemnify counsel.
- The company is in an industry where failure frequently results in suits against directors, officers, and lawyers.
- The company is in a highly volatile market spawning shareholder litigation;
- The company is involved in joint ventures.
- The general counsel often gives legal advice to third parties such as corporate

insiders, pro bono clients, or others.

- The general counsel's malpractice coverage may overlap with directors' and officers' liability insurance. Such overlapping often provokes disputes between the carriers that paralyzes both carriers as they invoke the "other insurance" clauses in order to decline coverage.⁵⁰

8. Post Enron: Expanded Ethics Role of General Counsel under the Sarbanes-Oxley Act

Seeking to rein in corporate abuses that came to light in the recent corporate scandals, Congress drafted the provisions of the Sarbanes-Oxley Act of 2002.⁵¹ The purpose of this legislation is to curb executives' behavior and to make them more accountable to investors.⁵² The act also regulates corporate governance by setting minimum standards of professional conduct and requiring the Securities and Exchange Commission ("SEC") to issue new standards for attorneys.⁵³ Pursuant to this requirement, the SEC adopted 17 C.F.R. pt. 205 ("SEC Rules"),⁵⁴ which prescribe standards of professional conduct for all attorneys who appear and practice before the SEC in the representation of public company issuers.

Under SEC Rule 205, lawyers are required to report evidence of a material violation of an applicable federal or state securities law, or a material breach of a fiduciary duty, to either a supervisory attorney, or the company's chief legal counsel, or chief executive officer. The CEO or general counsel, not the reporting attorney, must conduct an inquiry. When the attorney chooses to report such evidence directly to the CEO or general counsel, he or she must assess whether the officer responded appropriately. If the attorney does not believe the response was appropriate, he or she must report the violation up to the issuer's audit or other independent committee or to the full board of directors.

A reporting attorney who receives an appropriate and timely response will have satisfied the obligations under the rules. The rules do not impose a separate duty on the reporting attorney to investigate the evidence of a material violation. However, an attorney who has reported the matter all the way "up the ladder" and has not received an appropriate response must explain his or her reasons for this belief to either the CEO, general counsel, Board of Directors, audit or independent committee.

ACC Resources:

- *In-house Counsel Ethics*, ACC InfoPAK (March 2006), available at www.acca.com/infopaks/ethics.html
- *In-house Counsel Standards Under Sarbanes-Oxley*, ACC InfoPAK (June 2006), available at www.acca.com/infopaks/sarbanes.html
- John K. Villa, "A First Look at the Final Sarbanes-Oxley Regulations Governing Corporate Counsel," ACCA Docket 21, no. 4 (April 2003), available at <http://www.acca.com/protected/pubs/docket/am03/ethics1.php>

Additional Resources:

- Terry F. Moritz & Robert M. Oberlies, *Up the Ladder and Beyond: Attorney Conduct and Reporting Duties with Respect to Issuers, Auditors and the Commission under SEC Implementing Rules to the Sarbanes-Oxley Act of 2002*, 1402 PLI/Corp 307.
- Karl A. Groskaufmanis, Climbing "Up the Ladder": *Corporate Counsel and the SEC's Reporting Requirement for Lawyers*, 89 Cornell L. Rev. 511.
- Susan D. Carle, Jeffrey D. Bauman, Arthur D. Burger, Susan Hackett & Sheldon Krantz, *The Evolving Legal and Ethical Role of the Corporate Attorney after the Sarbanes-Oxley Act of 2002, Panel Three: Ethical Dilemmas Associated With the Corporate Attorney's New Role*, 52 Am. U. L. Rev. 655.
- *After Sarbanes-Oxley: A Panel Discussion on Law and Legal Ethics in the Corporate Scandal*, 17 Geo. J. Legal Ethics 67.
- Thomas D. Morgan, *Sarbanes-Oxley: A Complication, Not a Contribution to Improve Corporate Lawyers' Professional Conduct*, 17 Geo. J. Legal Ethics 1.

9. GC Licensing and Multi-jurisdictional Practice (MJP)

As the number of U.S. companies operating in more states and countries increases, so does the need for legal services that cross state and national borders. Thus, the question arises whether a general counsel, licensed in one state, may also give legal advice in other jurisdictions without breaking the prohibition against unauthorized practice of law (UPL). Unfortunately, no uniform answer exists, as state laws and local bar associations' interpretations differ on this issue.⁵⁵ Some states' rules provide serious consequences, including disciplinary action, loss of the attorney-client privilege, and possible prosecution for a misdemeanor, if an attorney is not licensed in the state in which he or she is practicing.

See ACC's MJP web page at <http://www.acc.com/php/cms/index.php?id=229> for detailed information for your state.

ACC Resources:

- Carol A. Needham, *Multijurisdictional Practices and In-house Counsel: UPL Developments*, ACCA Docket vol. 18, no. 3 (March 2000), available at www.acca.com/protected/pubs/docket/ma00/mjp.html
- *Busted! Unauthorized Practice in the Corporate Setting*, ACCA Docket 17, no. 5 (September/October 1999), available at www.acca.com/protected/pubs/docket/so99/busted.html

Additional Resources:

- Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: The Art of Making Change*, 44 Ariz. L. Rev. 685.
- Charles W. Wolfram, *Sneaking Around In The Legal Profession: Interjurisdictional Unauthorized Practice By Transactional Lawyers*, 36 S. Tex. L. Rev. 665.

10. Examples of GC Violations

Generally, a general counsel may be liable to his own client if he fails to exercise the competence and diligence normally exercised by attorneys in similar circumstances.⁵⁶ If there is any message that has been delivered over the past three years, it is that honesty is the best policy. As Andrew Weissmann, head of the Justice Department's Enron Task Force said: "Your constituencies are owed complete candor, if you violate that trust you will be brought to account."⁵⁷ Examples:⁵⁸

Bruce Hill of Inso Corporation was charged by the SEC in 2002 as participating in a fraudulent revenue recognition scheme. Hill, together with his colleagues, were charged with violating the antifraud, periodic reporting, books and records, and internal accounting controls provisions of the federal securities laws, in connection with a 1998 material overstatement of earnings. Among the charges were allegations that Hill knowingly withheld information with respect to financial transaction deficiencies from Inso's CFO, fully aware that the information would have voided Inso's ability to recognize income for the transaction. Hill's role, as transaction draftsman, thus changed from advisor to principal perpetuating the fraud. Inso restated its financial results in March 1999, after conducting an internal investigation. Hill was demoted, and later left Inso in 2000.

As opposed to the complicated accounting schemes at Enron, WorldCom took a simpler approach—it just lied. Specifically, WorldCom deleted hundreds of millions of dollars in expenses and inappropriately capitalized hundreds of millions of dollars of other expenses and losses. Most observers feel that WorldCom General Counsel Michael Salsbury was kept in the dark about the illegal accounting. Salsbury also received praise for guiding WorldCom through its settlements with the SEC. However, the bankruptcy judge handling the WorldCom case felt that he did not do enough to keep the board of directors apprised of certain transactions. Salsbury resigned on June 10, 2003, and is currently under no public criminal investigation.

B. Forms – Compliance Plans and Policies for your Company

An effective compliance program sets forth the operational methods that a company uses to ensure its activities adhere to legal requirements and broader company values.⁵⁹ If correctly implemented, corporate compliance programs can help to prevent public harm and corporate injury resulting from corporate offenses and misconduct. They can also reduce the penalties for offenses that occur despite the programs. Once compliance programs are established, the company must devote the necessary resources to ensure that the standards set are met. The great risk is that these programs might be deemed non-effective due to lack of enforcement.⁶⁰

Companies should implement written policies and procedures for all general corporate risk areas, including:

- Antitrust,
- Benefits,
- Competitive Behavior,
- Conflicts of Interest,
- E-mails, Employment,
- Environmental,
- Export Controls,
- False and Deceptive Advertising,
- Foreign Corrupt Practices Act,
- Fraud and Theft,
- Fraudulent Financial Reporting,
- Gifts and Gratuities,
- Government Contracting,
- Insider Trading,
- Lobbying, Political Contributions and Other Political Activities,
- New Business "Alliances,"
- Procurement of Goods/Services,
- Records Management,
- Protection,
- Security/Wiretapping,
- Privacy of Communications,
- Sexual Harassment,
- Subcontractors and Contract Labor,
- Tax,
- Workplace Safety, and
- U.S. Patriot Act.⁶¹

For in-depth advice on how to establish disclosure controls and procedures in compliance with Sarbanes-Oxley, see:

- *Corporate Compliance*, ACCA InfoPAK (October 2004), available at <http://www.acca.com/infopaks/compliance.html>
- Drinker Biddle & Reath LLP, *Disclosure Controls and Procedures*, October 30, 2002, available at <http://www.acca.com/protected/article/corpresp/disclosure.pdf>
- Susan Hackett, *It's Private Companies' Turn to Dance the Sarbox Shuffle*, ACCA (August 2003), http://www.acca.com/public/article/corpresp/sarbox_shuffle.pdf

Effective compliance training can help your corporate client reduce the risk of criminal and civil liability. Review useful information on establishing and implementing an effective compliance program for your client. Also learn how to navigate the United States Sentencing Guidelines Homepage (www.ussc.gov).

See also:

- Joseph C. Hutchison, *The Acid Test for Your Compliance Program*, ACC Docket (April 2006).
- Dinah Seiver, *Setting Up a Compliance Department from Scratch*, ACC Docket 23, no. 9 (October 2005), available at www.acca.com/protected/pubs/docket/oct05/scratch.pdf
- Teresa Kennedy, Seth M. Cohen, and Charles A. Riepenhoff, Jr., *About That Compliance Thing... Creating and Evaluating Effective Compliance Programs*, ACC Docket 22, no. 10 (November/December 2004), available at www.acca.com/protected/pubs/docket/nd04/compliancething.pdf
- Sol Glasner, Hanna Hasl-Kelchner, Paul J. Laskow, Drew McKay, *Implementing Compliance Programs for the Small Law Department*, ACCA 2001 Annual Meeting, available at <http://www.acca.com/infopaks/sld.html>
- Albert C. Peters II, Meredith B. Stone, and Richard S. Veys, *Moving Beyond Litigation Management: Putting Your Stamp on Company Activities*, ACCA 2002 Annual Meeting, available at <http://www.acca.com/education2k2/am/cm/702.pdf>
- Kathleen D. Long and Albert C. Peters, II, *Establishing and Conducting In-House Training Programs*, ACCA 1999 Annual Meeting, available at <http://www.acca.com/education99/cm99/pdf/809.pdf>

Establish a business code of conduct for your client. Review best practices in the field:

- *Leading Practices in Codes of Business Conduct and Ethics: What Companies are Doing*, ACCA Best Practices Profiles, (August 2003), available at http://www.acca.com/protected/article/ethics/lead_ethics.pdf
- "Intelsat Ltd. Group Code of Business Conduct and Ethics," available at <http://www.acca.com/protected/policy/conduct/intelsat.pdf>
- "XYZ Corporation Code of Conduct," available at <http://www.acca.com/protected/legres/conduct/model.html>
- "Business Code of Contact: Sample Policy from NEC," available at: <http://www.acca.com/protected/policy/conduct/nec.pdf>
- Standards of Business Conduct," Olin Corporation, available at: <http://www.acca.com/protected/forms/conduct/olinstandards.pdf>
- "Business Code of Conduct: Post Sarbanes-Oxley," available at: <http://www.acca.com/protected/forms/conduct/code.pdf>
- Dwight Howes, "Corporate Compliance and Ethics Program Checklist," available at: <http://www.acca.com/protected/reference/compliance/ethicscheck.pdf>

Are you interested in establishing an e-learning solution to compliance training? If yes, gain expert insight on the purpose of the training and tips on how to create a compliance training intranet site.

- Philip P. Crowley, "Online Compliance Training: Lessons from the Front Lines," ACCA Docket 19, no. 9, (October 2001), available at <http://www.acca.com/protected/pubs/docket/on01/online1.php>

IV. Record Retention and Management Policies

A. Overview

All companies produce vast amounts of documents every single day, most of which have no use to the company after they have been prepared, used, and executed. While some documents can constitute a liability to a corporation, others can protect the corporation by providing it with useful evidence against an adverse party or with needed information in case of an emergency.⁶² For example, the Securities and Exchange Commission has issued a regulation, pursuant to § 802 of the Sarbanes-Oxley Act, requiring firms that perform audits on public companies to preserve all records relevant to the audit, including electronic records created, sent or received in connection with the audit. The records must be preserved for seven years after the audit is completed.⁶³

Executives from all levels agree that record retention and management policies are probably the one part of corporate governance that is uniformly neglected. Seventy-six percent of corporate counsel indicated that their company has a records policy; however, only eighteen percent said the policy is actually enforced.⁶⁴

In order to defend a company against potential liability, an efficient document retention policy is critical.

A company should follow the three steps below when establishing a retention plan:

- (1) Understand the record situation at your company;
- (2) Develop simple and clear policies, procedures, and retention schedules; and
- (3) Apply the program systematically and non-selectively in the normal course of business.⁶⁵

In order to develop the best retention plan possible, a company must first become familiar with its document situation. A company should establish categories for the different types of documents used, e.g. routine correspondence, documents pertaining to intellectual property, letters establishing credit, or contracts. Next, a company must evaluate the statutory and/or regulatory requirements that apply to each type of document used. These retention rules typically vary from one year to permanent retention, pursuant to the contents of the document. A company must then develop retention cycles for these documents in compliance with the regulations. Finally, the company should incorporate the retention program into the normal course of business.

B. Requirements of Corporate Records Management Programs

There are five basic requirements for corporate records management programs, which when consistently applied will help a company mitigate risks, reduce costs and improve access to needed records.

1. Retain Records Long Enough to Meet Requirements

Records should be retained long enough to meet regulatory and "valid" business requirements. In most industries, only about 60 percent of records types must be retained under regulatory requirements; the rest default to accepted industry standards. To do this, a company must know what record types it has and how long each must be kept. Counsel should also understand the company's current IT systems, and should consult with IT personnel on how to implement a complete system-wide hold if necessary under regulatory requirements.⁶⁶

2. Locate Records Quickly and Effectively

Companies need to be able to quickly locate records, regardless of physical location or media. Regulating authorities who believe that a corporation has ready access to its records can quickly conclude that failure to produce records on demand amounts to corporate malfeasance.

3. Protect Records When They Are Subject to Litigation or Examination

Companies must be able to enact precise, immediate and documented hold orders on records subject to investigation, litigation or audit. This requires that companies be able to immediately identify the relevant records, notify the records' owners, and protect the records from the regular destruction process.

4. Destroy Obsolete Records

Companies should systematically destroy records once the appropriate retention requirements and protection needs have been satisfied. Over-retention can be dangerous for the following reasons:⁶⁷

- Legal adversaries know how to effectively use obsolete records against their targets.
- Each unnecessary record represents a potential unnecessary production cost.
- Each unnecessary record represents a potential "smoking gun" in litigation.
- Each unnecessary record complicates media migration and content management costs, volumes and complexities.

5. Appropriately Tag Records According to Non-Retention Requirements

In addition to retaining records for the appropriate length of time, companies

must also adhere to obligations that are unrelated to retention. These include:

- Rapid discovery obligations implied by Sarbanes-Oxley, SEC actions and similar measures.
- Privacy obligations under HIPAA during records' lifecycle of use and retention.
- Secure destruction obligations that necessitate ensuring that records are properly, completely and irreversibly destroyed when retention obligations have been met.

C. Establish a Defensible Policy

The next step after understanding the requirements of a corporate records program is learning how to meet them. A company that has successfully collected the following information can rapidly develop policy documentation.⁶⁸

1. Know What Types of Records Are Generated and Retained

Without knowing what record types are held, there is nothing to apply retention requirements, size records-related systems and maintenance against. If a company does not have this information captured, the records management program is not complete, thereby hindering a company's ability to meet their legal, regulatory or cost objectives.

2. Know Who Owns and Controls Each Record Type

The official owner of each record type must be identified, as well as convenience users and custodial relationships, such as vendors who provide corporate benefits management, payroll processing, or background checks.

3. Know Where the Records Are Located

Records are often retained redundantly across departments and media throughout a company. It is important to know where records are located geographically, as well as on what media and on which applications. This will help ensure that requirements and records practices are applied consistently across the organization, regardless of the systems or vendors used.

4. Know When Records Can Be Destroyed

Once records have been retained long enough to meet a regulatory or valid business requirement, they start to become a liability and should be disposed of in a consistent manner. Determining the correct retention requirement goes beyond regulations. It includes a careful evaluation of business/risk decisions, tax needs, operational needs, and the consideration of accepted industry standards.

For more information on understanding State and Federal Requirements and devising a Record Retention Policy for your company, see:

- *Record Retention*, ACC InfoPAK, (July 2006), available at www.acca.com/info-paks/retent06.html.

- *Leading Practices in Information Management and Records Retention Programs: What Companies Are Doing*, available at www.acca.com/protected/article/records/lead_infomgmt.pdf
- Daniel I. Prywes & Robert M. Lindquist, *Make Sure Your Bytes Don't Bite: Develop a Plan*, available at www.acca.com/protected/article/retention/edocmanage.pdf.
- R. Corbett and V. Llewelyn, *eDiscovery: Managing Digital Data with a Smart Retention Policy*, ACCA Docket 19, no. 9 (October 2001) available at <http://www.acca.com/protected/pubs/docket/on01/ediscovery1.php>
- W. Hancock (ed.), *Guide to Records Retention*, (Business Laws Inc. 2001)
- M. Overly & C. Howell, *Document Retention in the Electronic Workplace*, (Pike & Fischer 2001)

For a discussion on how to avoid criminal liability by proper document maintenance, see:

- Michele Hedges C. E. Rhodes, Jr. & Mollie Harmon, *A Company's Need for a Document Management Policy – Avoiding Civil and Criminal Penalties in the 21st Century*, available at www.acca.com/protected/article/retention/needforpolicy.pdf.
- Carl D. Liggio, James G. Derouin & J. Edwin Dietel, *After the Storm: A Post-Enron Look at Document Retention Policies*, ACCA Docket 20, no. 8 (September 2002), available at www.acca.com/protected/pubs/docket/so02/storm1.php.
- *Corporate Chronicles: How to Do Records Management for Maximum Protection*, ACCA Docket 23, no. 6 (June 2005).

For information on how to improve your information management system by becoming more organized, efficient, and technologically compatible, see:

- David A. Munn, *Creating an Information Management System Using Outlook® Public Folders*, ACCA Docket 20, no. 1 (January 2002), available at www.acca.com/protected/pubs/docket/ja02/ims1.php.

Sample Retention Policies:

- Model Corporate Records Retention Plan, available at <http://www.acca.com/protected/forms/records/modelplan.html>
- Model Corporate Records Retention Guidelines, available at <http://www.acca.com/protected/forms/records/modelguide.html>
- Records Retention Policy, available at <http://www.acca.com/protected/forms/records/documentpolicy.pdf>
- Record Retention and Disposal Policy, available at <http://www.acca.com/protected/forms/records/disposalguide.pdf>
- Sample Records Retention Plan and Schedule, available at www.acca.com/protected/forms/records/retentionplan.pdf
- Retention Periods, available at <http://www.acca.com/protected/forms/records/retentionpolicy.pdf>

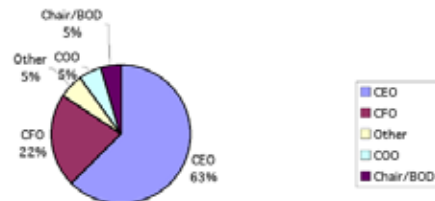
V. Reporting Structure

A. To Whom does the General Counsel Report?

To whom the general counsel reports bears greatly on the structure of the legal department and discloses much about the status of the legal functions within the company. This reporting chain also sends a message from the General Counsel's Office to both outside counsel and other corporate employees. Most general counsel report to: the board of directors, the CEO (or President), the Chief Financial Officer, or the Chief Operating Officer.

Studies have shown that the general counsel almost invariably reports to the top corporate officer.⁶⁹ This finding coincides with the fact that most general counsel also bear the responsibilities of corporate secretary.⁷⁰ Having the general counsel directly report to the top corporate officer provides several advantages. For instance, this gives the legal department more weight and allows the department to be more involved in the business planning of the company. On one hand, by allowing the legal team to be more involved in business decisions, the attorneys are better able to anticipate and prevent legal complications. On the other hand, too much involvement of the general counsel in business decisions can lead to ethical conflicts. See Section III-A-4: Role as Director for more information.

General Counsel Reporting Relationships



Source:
ACC Online Survey: *Who Does Your General Counsel Report To?* (April 2004), available at <http://www.acca.com/practice/stats.php>.

For more ACC InfoPAKs, please visit www.acca.com/vl/infopak

Compare with:

Duties of General Counsel	Percent With Such Duties ⁷¹
Reports directly to the President	47.9%
Reports directly to the CEO	76%
Reports directly to the Chairman of the Board	39.2%
Reports directly to other Senior Executives	16.5%

Source:

Altman Weil/ACC 2003 *Survey of Law Department Management Benchmarks Survey*, available at <http://www.altmanweil.com/products/surveys/lombs.cfm>

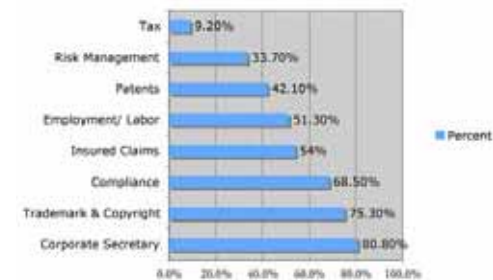
Additional Resources

- Teresa T. Kennedy, Eva M. Kripalani and Elinora S. Mantovani, *Achieving Balance: A Recipe for High-Quality Work Life for In-House Counsel*, ACC Docket 22, no. 2, (February 2004), available at www.acca.com/protected/pubs/docket/feb04/balance.pdf.
- Veta T. Richardson, *From Lawyer to Business Partner: Career Advancement in Corporate Law Department*, ACC Docket 22, no. 2, (February 2004), available at www.acca.com/protected/pubsdocket/feb04/partner.pdf.

B. Functions Reporting to the General Counsel

The most common function or department that reports to the General Counsel is the Corporate Secretary (see Diagram IV below). In addition to having other departments or functions report to the general counsel, there is also direct reporting from within the law department.

Functions Reporting to the General Counsel



Source:

Altman Weil/ACC 2003 *Survey of Law Department Management Benchmarks Survey*.

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VI. Internal Legal Department Structure

A. Different Models

One of the most visible distinctions of corporate legal departments is their internal structure. Until lately, most legal departments have been organized along corporate hierarchical lines, with several levels between the general counsel and staff attorneys.⁷² A great variety of titles are often used to differentiate attorneys by seniority and specialization. In fact, the Aspen Law & Business Directory of Corporate Counsel lists a staggering 5,558 different titles.⁷³ This number promoted a commentator to joke that it is easier in the corporate setting to reward a lawyer with a new title, rather than to give him a money raise.⁷⁴

Recently, companies have begun to adopt a “flattened” organizational style in their law department and to de-emphasize titles. This organizational model allows senior-level executives to become more involved in decision-making from the beginning and is especially important in the post-Enron environment, as too much structural complexity can cripple a department’s ability to respond quickly or effectively to a crisis or to new, strategic imperatives.⁷⁵

In general, legal departments can either be characterized as centralized, decentralized, or as a hybrid form thereof. The term “centralized” can refer to the geographical location of the lawyers, as well as to the reporting structure of the lawyers within the legal department. Thus, a legal department could be geographically decentralized but have a centralized reporting structure.⁷⁶

Each type of model has distinct advantages and disadvantages. The following chart is taken from the article Global Counsel Best Practice Indicators, Law Department Structures, and Reporting Lines: Responding to the Challenges of Globalization, Global Counsel (March 2003):⁷⁷

Department Type	Potential Advantages	Potential Disadvantages
Centralized; physically centralized, with practice groups organized according to area of law	<ul style="list-style-type: none"> - Limits duplication of effort - Enhances and develops legal expertise - Good for internal law department communication - Easier for general counsel to manage his team - Good for building shared vision and working practices - Helps the sharing of information and resources - Simplifies budgeting and cost control - Cheaper than decentralized model 	<ul style="list-style-type: none"> - Distant relationship with clients - Clients may not have a single point of contact - Lawyers are less likely to develop good knowledge of businesses
Centralized; physically centralized with practice groups mirroring business unit structures	<ul style="list-style-type: none"> - Develop good knowledge of business - Good for internal law department communication - Easier for general counsel to manage his team - Good for building shared vision and working practices - Helps the sharing of information and resources - Simplifies budgeting and cost control - Cheaper than decentralized model 	<ul style="list-style-type: none"> - Distant relationship with clients - Does not help to develop legal specializations
Centralized; physically centralized, but with practice groups for different geographical regions	<ul style="list-style-type: none"> - Good for internal law department communication - Easier for general counsel to manage his team - Good for building shared vision and working practices - Helps the sharing of information and resources - Simplifies budgeting and cost control - Cheaper than decentralized model 	<ul style="list-style-type: none"> - Distant relationship with clients - Less likely to develop good knowledge of businesses - Does not help to develop legal specializations

Centralized: lawyers geographically dispersed in business units, but with strong centralized reporting lines to general counsel	<ul style="list-style-type: none"> - Lawyers close to clients - Lawyers are members of the business team - Lawyers develop good knowledge of business - General counsel still has overall control of the team - Helps to build shared vision and working practices - Aids the sharing of information and resources 	<ul style="list-style-type: none"> - Physically distant from other in-house counsel - Potential objectivity issues - Lack of economies of scale - Potential for duplication of work and varying work practices
Regional: each region has a legal department, reporting to regional business head	<ul style="list-style-type: none"> - Lawyers close to clients in that region - Lawyers are members of the business team - Develop good knowledge of business 	<ul style="list-style-type: none"> - Potential objectivity issues - Lack of economies of scale - May increase use of external counsel at local level - Lack of overall coordinated strategy - Isolated from colleagues in main/ other legal departments - Varying work practices and duplication of work - Does not help to develop legal specializations - More difficult for general counsel to manage team - Does not aid sharing of information and resources
Decentralized: each business unit has a legal department, reporting to head of business unit	<ul style="list-style-type: none"> - Lawyers close to clients - Lawyers members of the business team - Develop good knowledge of business 	<ul style="list-style-type: none"> - Potential objectivity issues - May increase use of external counsel at local level - Lack of economies of scale - Lack of overall coordinated strategy - Isolated from colleagues in main/ other legal departments - Varying work practices and duplication of work - Does not help to develop legal specializations - More difficult for general counsel to manage team - Does not aid sharing of information and resources
Combination of any of the above: for example, decentralized - each business unit has a legal department; but lawyers are also members of virtual practice groups and advise the whole group in this area	<ul style="list-style-type: none"> - Depends on the combination chosen - (See relevant sections above) 	<ul style="list-style-type: none"> - Depends on the combination chosen - (See relevant sections above)

For additional information on this issue see:

- Carole Basri and Irving Kagan, Corporate Legal Departments, § 2:6 (PLI 2001).

B. Legal Recruitment and Staffing⁷⁸

Attracting qualified professionals and motivating them to give their best are top concerns for today's corporate legal departments. These offices must locate attorneys, paralegals, and administrative staff with the right expertise to address the changing array of legal issues that companies face. After a first-rate team is assembled, general counsel and supervisors must encourage them to strive for peak performance and to work effectively together to accomplish common goals. Despite a general counsel's best efforts, sometimes he will be faced with problem employees or other difficult situations. Knowing how to promptly and appropriately react allows a general counsel to minimize the impact of adverse circumstances to his staff.

1. Recruiting Top Talent

Before beginning the hiring process, a general counsel develop a comprehensive recruiting strategy. Developing a recruitment plan should include forecasting possible workload peaks and valleys, which will help determine the type of employee required -- full-time, part-time, or project -- or whether the company needs to a new hire at all. After creating a plan, the general counsel should prepare a job description and research compensation trends in the area.

2. Hiring the Best People

A well-prepared job description can help to evaluate the quality of the resumes received. After determining which candidates to interview, the job description can also assist in developing questions to ask during these meetings. Once a top candidate has been selected, his references should be checked thoroughly in accordance with the company's policies and/or procedures. Finally, after new hires are on board, a proper orientation should be scheduled so they can hit the ground running.

3. Providing Orientation

An employee's first few weeks on the job are especially formative. Therefore, it is essential to get new hires off to a solid start with a quality orientation. The best orientation programs are well-planned, ongoing processes tailored to the department's corporate culture and its unique employee base. The general counsel's objective should be to:

- Clearly define responsibilities of new hires;
- Educate new members on the department's overall mission and business practices;
- Provide an overview of policies and procedures, giving new hires a sense of the

prevailing culture at the company;

- Ensure new employees have the tools they need in order to be productive; and
- Engender a sense of camaraderie, collaboration and teamwork.

4. Motivating and Managing People

Sustaining the legal team's productivity levels and minimizing turnover requires that the general counsel effectively manage and inspire employees to give their very best. Providing a supportive work environment that offers open communication and honest feedback are among the best ways to elicit peak performance from legal staff.

Taking advantage of the following strategies can significantly increase employee productivity and satisfaction:

- Encourage creative decision making. Allow as much flexibility as possible in order to enhance business processes and achieve project objectives. While everyone assigned to a particular case or project shares the common goal of a successful outcome, the means to the end may not be the same for everyone. Recognizing this allows the general counsel to capitalize on the creativity of the workforce to improve best practices.
- Provide necessary information. Provide the legal team with the facts necessary to make informed decisions. Communicate openly about the department's big picture. Discuss information such as progress on cases and long-term strategies.
- Allow room for error. When people are challenged to become more resourceful and responsible – which inevitably entails risk taking – a certain amount of error will occur. Do not abandon empowerment strategies but, instead, assess what went wrong and incorporate changes that will prevent problems from reoccurring.

5. Handling Difficult Situations

Even the strongest companies can face difficult times that make staff reductions necessary. Moreover, managers who employ the best hiring strategies and supervisory styles are not immune from the problems presented by under-performing team members. How a general counsel deals with a variety of challenging workplace situations -- including layoffs and terminating employees -- will determine whether he is able to protect the company as well as the morale of the rest of the legal team.

For additional resources see:

- *Recruiting and Retaining In-House Staff*, ACC InfoPAK (May 2004), available at www.acca.com/infopaks/recruit.html
- Claire Hodgson, *Tales from the trenches: recruiting, keeping and motivating talent*, Global Counsel (October 2003), available at www.acca.com/protected/gc.php?key=20031117_23492
- Thomas L. Sager and Scott L. Winkelman, "Six Sigma: Positioning for Competitive Advantage," ACCA Docket 18, no. 1 (January 2001), available at [http://](http://www.acca.com/protected/pubs/docket/jf01/six.html)

For more ACC InfoPAKs, please visit www.acca.com/vl/infopak

www.acca.com/protected/pubs/docket/jf01/six.html

- Michele S. Gatto, "What Every Law Department Needs: A Performance Evaluation System That Works," ACCA Docket 18, no. 1 (January 2001), available at <http://www.acca.com/protected/pubs/docket/jf01/what.html>
- Jeffrey W. Carr and James Lovett, "Getting Closer to the Business: How to Foster Innovation and Value Through Culture and Philosophy," ACCA Docket 18, no. 1 (January 2001), available at <http://www.acca.com/protected/pubs/docket/jf01/getting.html>
- James K. Cowan Jr and Laura Effel, "Interviewing Job Applicants: Can I Ask This Question?," ACCA Docket 18, no. 3 (March 2001), available at <http://www.acca.com/protected/pubs/docket/ma01/interviewpage1.html>

Program Materials

- Marty Barrington, Michele S. Gatto and Phillip H. Rudolph, *The Care & Feeding of the Legal Department*, ACCA 2002 Annual Meeting, available at <http://www.acca.com/education2k2/am/cm/805.pdf>
- Michael Cunningham and Tracey J. Epstein, *Recruiting, Developing & Retaining Diverse Candidates*, ACCA 2002 Annual Meeting, available at www.acca.com/education2k2/am/cm/808.pdf
- Bruce J. Hector, Lori A. Middlehurst and Lori L. Siwik, *Recruiting, Hiring, and Retaining Employees*, ACCA 2001 Annual Meeting, available at <http://www.acca.com/education2k1/am/cm/104CD.pdf>
- Paulette Brown, Diane J. Geller, Michael J. Harrison, and Evett L. Simmons, *The employee manual: No policy is not good policy*, ACCA 2001 Annual Meeting, available at <http://www.acca.com/education2k1/am/cm/603CD.pdf>
- Jack O'Neil, Albert C. Peters, II, and Meredith B. Stone, *Teaching Contract Law to Non-Lawyers: Learn Training Methods that Really Work*, ACCA 2001 Annual Meeting, available at <http://www.acca.com/education2k1/am/cm/503.pdf>

C. Developing & Maintaining Good Working Relationships

Taking steps to maintain good working relationships is key to the development of quality staff.⁷⁹

For more information see:

- *Recruiting and Retaining In-House Staff*, ACC InfoPAK (May 2004), available at <http://www.acca.com/infopaks/recruit.html>
- Bruce J. Hector, Lori A. Middlehurst and Lori L. Siwik, *Recruiting, Hiring, and Retaining Employees*, ACCA 2001 Annual Meeting, available at <http://www.acca.com/education2k1/am/cm/104CD.pdf>
- *Achieving Diversity in Law Departments*, ACC InfoPAK, (September 2004), available at <http://www.acca.com/infopaks/infopaks/diversity.html>
- Peter M. Phillipps, "Small Law Departments can Achieve Sustainable Diversity," ACCA Docket 18, no. 6 (June 2001), available at <http://www.acca.com/protected/pubs/docket/jf01/achieve1.php>

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- Michael Cunningham and Tracey J. Epstein, *Recruiting, Developing & Retaining Diverse Candidates*, ACCA 2002 Annual Meeting, available at www.acca.com/education2k2/am/cm/808.pdf
- Joshua D. Rosenberg, *Interpersonal Dynamics: Helping Lawyers Learn the Skills and the Importance, or Human Relationships in the Practice of Law*, 58 U. Miami L. Rev. 1225.

VII. Controlling Legal Spending

A. Cost Control

One of the most cited functions of the general counsel is controlling costs in a corporation. For effective cost control strategies, consider the following three C's:⁸⁰

- (1) Communication
 - Discuss Cost Expectation
 - Use an Outside Counsel Retention Policy
 - Clarify Expectations about Bills
 - Insist on Budgets from Firms
 - Address Cost Overruns
- (2) Contemplation
 - Analyze Case Timing and Consequences
 - Create a Consortium of Co-participants
 - Evaluate Individual Benefits in a Consortium
 - Analyze Corporate Histories, Insurance, and Contracts
 - Bid Projects Selectively
 - Explore Creative Contingency and Bonus Arrangements
 - Investigate Alternatives to Opinions of Counsel
 - Analyze Firm Staffing and Rates
- (3) Capitalization
 - In-source Work
 - Produce and Protect Revenue
 - Explore Internship Programs
 - Get Tough with Lender's Counsel

B. Compensation of Lawyers

Organizational compensation policies and practices often define the framework for compensating in-house lawyers. The general counsel, however, should try to promote and achieve an equitable position for the in-house legal team.

For leading practices in this area see:

- *Leading Practices in Compensation Programs and Retention Strategies for In-house Lawyers: What Companies are Doing*, ACC (May 2004), available at www.acca.com/protected/article/lawdman/compensation.dpf

For more information, see also:

- *A Company's First General Counsel*, ACC InfoPAK (June 2006), available at www.acca.com/infopaks/firstgc.html
- Altman Weil Law Department Compensation Benchmark Survey, available at www.altmanweil.com

C. Billing

1. Task-Based Billing

Task-based billing is a system for managing legal services whereby the invoice is formatted to categorize time and dollars charged according to the nature of the services performed. It involves assigning a relative value to the services performed by outside counsel by subject matter and task. Using this system, attorneys record their time spent using specific task codes that describe the processes involved in a case or matter, as opposed to the traditional hourly figures with corresponding text descriptions.

For a more detailed analysis of Task-Based Billing see:

- *Alternative Billing*, ACC InfoPAK (April 2004), available at www.acca.com/infopaks/billing.html
- Richard A Hall and Keith Katsma, "Tips, Traps, and Technology for Tracking Costs with Task-Based Billing," ACCA Docket 18, no. 4 (April 2000), available at www.acca.com/protected/pubs/docket/am00/billing.html
- Stuart E. Rickerson, "Beyond Task-Based Billing: Dramatically Improve Results with Strategic Legal Management," ACCA Docket 19, no. 1 (January 2001), available at www.acca.com/protected/pubs/docket/jf01/beyond.html

2. Other Alternative Billing Arrangements

Increasingly, corporations want to pay for results, not just the time of lawyers. They want predictable costs, not surprises. Additionally, in the event of a poor result or cost overrun, corporations want their lawyers to share at least some of burden. In today's competitive market, many law firms are attempting to satisfy these needs by replacing the billable hour method with an alternative billing approach. Alternative billing refers to any billing method not directly tied to the number of hours outside counsel spends on a matter. Although traditional hourly billing remains the primary basis outside counsel use to charge their clients, the continual increase in hourly rates is providing an incentive for counsel to explore other billing options. Some of the newer methods of billing include: discounted hourly rates, blended hourly rates, value (task-based) billing, contingency billing, and

incentive billing.

For more information on this topic, see

- *Alternative Billing*, ACC InfoPAK (May 2005), available at www.acca.com/infopaks/billing.html
- Stuart E. Rickerson, *Beyond Task-Based Billing: Dramatically Improve Results with Strategic Legal Management*, ACCA Docket 19, no. 1 (January 2001) available at <http://www.acca.com/protected/pubs/docket/jf01/beyond.html>
- ABA Committee on Lawyer Business Ethics, *Business and Ethics Implications of Alternative Billing Practices: Report on Alternative Billing Arrangements*, 54 Bus. Law. 175 (1998).
- Toby Brown & Michele Roberts, *Pricing Your Legal Products: Alternative Billing Strategies and How to Get There*, 8 Utah B.J. 18 (1995).
- Stephanie B. Goldberg, *The Ethics of Billing: A Roundtable*, A.B.A. J., Mar. 1991, at 56.

3. Electronic Billing

Law departments with ebilling report savings of 5 to 15 percent or more of their outside legal spending. Law departments gain control by having instant access to what they are spending and where. Ebilling generates up-to-date reports with a few mouse clicks and can be used to create more realistic budgets, including projected legal spending for specific projects or business units. In addition, a well-designed ebilling system covering the legal department and all of its outside firms can provide accurate, complete and auditable information so that the law department can certify to upper management that it satisfies Sarbanes-Oxley and other compliance requirements.⁸¹

For more information on this topic, see

- Rick Lavers, James Sheets, and Rob Thomas, *Electronic Billing Enters the Mainstream*, ACC Docket (May 2006)
- Ron Peppe and David G. Briscoe, *Strategize This! Prepare Now for When Procurement Analysts Come Knocking on the Legal Department's Door*, ACC Docket 22, no. 9 (October 2004), available at www.acca.com/protected/pubs/docket/oct04/strategize.pdf
- *Electronic Billing: It's Not Just for Large Law Departments* (Serengeti)(March 30, 2005), available at www.serengetilaw.com/accesources

D. Financial Reporting

General counsel must understand their clients' businesses in order to render the best possible legal services and to offer management advice on business issues from a legal perspective. However, in order to understand a client's business, attorneys must first learn the fundamentals of financial reporting and the principles of financial statements.

Interestingly, when general counsel are asked what they would do differently if they could start over again, the answer often is to take more business classes in school. The following materials are designed to give an overview of this subject:

- Wendy J. Rose and Mary A. Woodford, *Understanding Financial Statements*, ACCA 1998 Annual Meeting, available at <http://www.acca.com/education98/cm98/48.pdf>
- William A. Barnett and Georganne C. Proctor, *Mini MBA*, ACCA 2001 Annual Meeting, available at <http://www.acca.com/education03/am/cm/502.pdf>
- Carol A. Gamble and James L. Gunderson, *Financial and Accounting Concepts for Lawyers*, Program Material ACCA 1999 Annual Meeting, available at <http://www.acca.com/education99/cm99/pdf/110.pdf>
- Randolph Coley, Chris LaFollette, Tana Pool, *Accounting Basics*, King and Spalding LLP and ACC Houston Chapter Program (April 22, 2003), available at <http://www.acca.com/chapters/program/houst/accounting.pdf>
- "Financial Reporting 'Red Flags' and Key Risk Factors," Report Of The NACD Blue Ribbon Commission On Audit Committees, available at <http://www.acca.com/public/reference/enron/NACD-BRC6-Audit-Ap-E.pdf>
- Debra A. Cutler, *GAAP and the Basic Financial Statements*, 1406 PLI/Corp 9
- Steven R. Berger, *Financial Language in Legal Documents*, 1406 PLI/Corp 643

VIII. Risk Identification and Assessment

* The information in Section VIII was taken from General Counsel as Risk Manager, ACC Annual Meeting: Program 406 (2004), available at <http://www.acca.com/am/04/cm/406.pdf>, unless otherwise noted.

A. Developing a Risk Assessment Plan

Risk management can be defined as the total process of identifying, reducing, and minimizing the impact of uncertain events.⁸² Every company faces different risks. As a result each business should design its own unique risk assessment plan. Avoiding standardized checklists can be beneficial, as they tend to prevent a detailed analysis of a company's overall risks.

During the initial development of a risk assessment plan, companies may find this simple five-step model helpful:

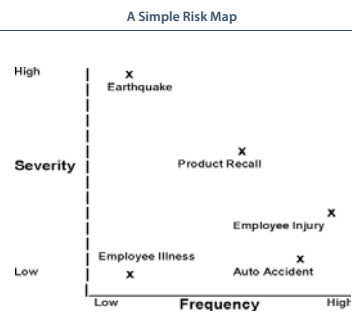
- Identify, assess, and measure the potential risks;
- Analyze risk management techniques;
- Create a carefully drafted implementation strategy for managing these risks within acceptable parameters;
- Implement the risk management strategies; and
- Report and monitor risk and risk management action plans.

The first step of any risk assessment plan is identifying the risks. Potential risks

may include the loss of real or personal property or loss of net income. Another potential risk for any company is the loss of key personnel through death, disability, or retirement. Liability of a company through its exposure to lawsuits must also be considered.

In a recent study conducted by Marsh Incorporated and Risk and Insurance Management Society (RIMS), successful risk managers from a number of organizations were asked what strategies they use to identify risks. The majority of the respondents identified three routes to detecting risks: (1) meetings with managers of various operating units within the company; (2) analysis of claims; and (3) integration of risk management with business unit planning processes. In addition to these methods, a company may choose to utilize surveys or questionnaires in order to identify potential risks. Additionally, reviewing documents such as a company's financial statements or flow charts will likely provide some insight into possible exposure to loss. A company may also want to consider hiring outside experts to analyze potential risks and to develop a report on such risks.

For every type of risk identified, a company must then determine (1) the value exposed to loss; (2) the event causing the loss; and (3) the financial consequences of the loss. In making this determination, a company should consider developing a risk map. A risk map is a graph that provides a snapshot of the company's identified risks in terms of severity and frequency of each exposure. Severity equals the intensity of a peril should it materialize, and frequency measures the likelihood that a certain risk will occur. This map will help the company to see the overall picture regarding potential risks and then to develop risk management strategies that address each potential risk. The following is an example of a risk map:



The next step in the development of a risk assessment plan is analyzing risk man-

agement techniques. During its analysis, a company should prioritize risks by assessing their impact on the income statement and consider strategies in which to effectively control loss. In addition to analyzing loss control programs, companies must recognize that these plans may not always provide a total safeguard against loss. For this reason, in addition to loss control plans, a company must also consider methods for financing losses. Finally, when making loss retention and loss transfer decisions, a company should establish a dollar value for the organization's risk-tolerance level, to which each potential loss can be compared. Based on the risk-tolerance, a company may choose (1) to retain certain risks by establishing a reserve or by placing the risks in captives or risk pools; or (2) to transfer risks through contracts or commercial insurance policies.

The third step in developing a risk assessment plan is selecting and designing the strategy that best suits the company. Loss control policies and procedures should be selected that would address each potential risk identified in step one. This decision will likely be driven by financial considerations. Next, a company must develop a plan to implement their risk assessment program. Finally, the company must design a process to monitor its risk assessment plan in order to ensure proper implementation and to detect and adapt to change.

Once a strategic plan is in place, the company must then determine whether the plan is being implemented and everyone is in compliance with the plan.

For effective oversight of plan implementation and compliance, the following elements must be coordinated:⁸³

- Internal resources. Primary internal resources will likely be the risk manager and legal counsel.
- Strategic partners. These will usually be the company's insurance broker and outside consultants.
- Communication. It is crucial that employees learn what to do and why doing this is important. The company must establish effective written policies and protocols for controlling risk.
- Culture. The company should foster a culture that appreciates risk management and must enforce its risk control policies and hold employees accountable if they violate them.
- Proactive claims management. Claims must be managed to avoid escalation into big cases. Outside counsel must be closely managed; the company should be aware of how outside counsel are handling matters assigned to them, particularly what the counsel are saying in court proceedings. Positions taken in one case can affect the company in other cases.

B. The Risk Management Team

Risk management teams are generally housed in a company's legal department as this group is in a unique position to understand the big picture within an organi-

zation. Furthermore, the legal department is in the best position to understand the reporting requirements of the Sarbanes-Oxley Act of 2002 and to ensure that those requirements are met in a timely manner. Additionally, business personnel will likely be more willing to disclose information to attorneys because of confidentiality. Furthermore, because the legal department already manages litigation and has relationships with outside counsel, this group is most suited to also direct the organization's risk management programs.

The number of professionals on the risk management team varies depending on the size of the company. While the risk management department within small companies may only include the General Counsel, larger publicly traded companies often involve corporate players in the risk management team, including the Vice President of Risk Management, the Chief Information Officer, the Chief Financial Officer, the Sarbanes-Oxley Compliance Officer, and the General Counsel. Regardless of the size of the company or the risk management team, risk managers have relationships with a various professionals, both internally and externally. For instance, risk management professionals often interact with senior management as well as the finance, audit, and human resources departments within a company. Externally, risk managers communicate regularly with insurance brokers, underwriters, outside counsel, and professional organizations.

When asked what roles risk management professionals should play within a company in order to be successful, participants in the Marsh/RIMS study identified three key responsibilities. First, risk managers serve as an insurance and claims administrator. The next role is that of a competent risk manager. In this position, risk managers identify risks and design plans to prevent or control loss. Finally, risk management professionals serve as strategic players. Through this role, they influence the company's bottom line as well as culture. In order to be an effective strategic player, companies must ensure that risk managers have access to senior management and have the information necessary to understand the financial, accounting, and tax implications of the risk management programs.

C. General Counsel as Risk Manager

* The information in subsection C was taken from Michael T. Burr, *What Is Your Boss Thinking?*, Corp. Legal Times, Oct. 2003, at 30-37, unless otherwise noted.

In this post-Enron world, risk management is becoming an increasingly important aspect of a general counsel's role. According to a recent *Corporate Legal Times* article, seventy-three percent of CEOs interviewed indicated that they want their General Counsels to spend more time managing risk. This figure is up from just twenty-three percent in 2001. Similarly, a 2004 ACC and Urbanomics Consulting Group survey indicated that more than eighty percent of corporate directors placed a great deal of importance on their general counsel in ensuring good corporate governance.⁸⁴ This figure has increased almost thirty percent from last year's results on the same topic.⁸⁵ "Compliance, litigation, and the cost of insurance

have forced general counsel to focus on understanding those parts of the business that drive up costs." For this reason, general counsel are often viewed as business executives in addition to legal advisors and are becoming more involved in companies' strategic planning. Through their involvement in strategic planning, general counsel "help a company's leadership team identify risks and opportunities that they might not perceive otherwise."

This evolution in the role of general counsel, however, presents ethical challenges. For instance, general counsel must balance their responsibility as independent legal advisors and their role as part of the executive team. Because new whistleblower laws can have a chilling effect on general counsels' relations with management, attorneys must "clarify with executives what is expected on both sides, and [manage] compliance and ethics matters in a way that does not threaten working relationships." "Effectively managing the tension in these roles will distinguish leading general counsel in the years and decades to come."

For more information on this topic, see:

- Michael T. Burr, *What Is Your Boss Thinking?*, Corp. Legal Times, Oct. 2003, at 30-37.
- *General Counsel as Risk Manager*, ACC Annual Meeting: Program 406 (2004), available at <http://www.acca.com/am/04/cm/406.pdf>.
- *General Counsel as Risk Manager Survey Results*, ACC & Urbanomics Consulting Group (2004), available at http://www.acca.com/Surveys/gc_risk.pdf.
- Robert Vosper, *GCs Struggle to Find a Balance Between Law and Business*, Corp. Legal Times, Aug. 2003, at 67.
- Amalia Deligiannis, *Compliance and Ethics Issues Unnerve General Counsel: Counsel Divulge Best Compliance Practices, Seek Solutions*, Corp. Legal Times, June 2003, at 30.
- *Ability to Assess Risks, Suggest Solutions, Key To Success In-house*, New England In-House, Vol. 2, No. 2, July 2004.

D. How to Achieve Excellence in Risk Management?

* Unless otherwise noted, the information in subsection D was taken from Excellence in Risk Management: A Qualitative Survey of Successful Risk Managers, May 2004, which is included in General Counsel as Risk Manager, ACC Annual Meeting: Program 406 (2004), available at <http://www.acca.com/am/04/cm/406.pdf>.

The continuing increase in health care costs, threats of terrorism, and the enactment of the Sarbanes-Oxley Act are just a few examples of why the role of a risk manager today is much different than just ten years ago. While the focus of a risk manager in 1994 tended to be on purchasing hazard insurance and processing claims, a proficient risk manager today "needs to have a finger on the pulse of the organization as a whole, maintaining a multidimensional view of risk across lines of business, operations, and geography."

With this evolution in the role of a risk manager, companies must determine what type of person would best fill the position of risk manager. In making this determination, companies may find a recent study conducted by Marsh Incorporated and Risk and Insurance Management Society (RIMS) useful. The objective of this study was to identify the personal, professional, and organizational characteristics of a successful risk manager. The findings were based on an "Excellence in Risk Management" survey, which was completed by thirty risk managers who had previously been recognized by *Business Insurance* magazine as a "Risk Manager of the Year" or named on its "Risk Manager Honor Roll."

The Marsh/RIMS study reveals the following key findings:

- More than two-thirds of the participants held advanced degrees, including MBAs, JDs, or both.
- When asked what concerns they had about moving forward, almost all of the participants expressed a need for a greater understanding of financial, accounting, and tax issues.

Participants identified the following as keys to success as risk managers:

- Technical and analytical skills;
- Ability to interact with senior management;
- Ability to communicate, persuade, and motivate; and
- Ability to understand the financial, accounting, and tax implications of risk management strategies and programs.

Most all of the participants view the broker relationship as a key to success. Forty-three percent of participants viewed selected brokers as trusted advisors, while forty percent viewed them as an actual extension of the risk managers' organizations.

Participants prioritize risk by:

- Assessing the potential risk's impact on their company's income statement;
- Developing policies and procedures to address each potential risk; and
- Establishing effective loss control plans.
- Participants rely on information including claims, loss data, trend data, internal benchmarking, and specific cost allocations to individual operating units to assess risk. Additionally, participants agree that continual feedback from the field to the risk manager is important and necessary.

A little more than one-third of participants stated that they have "innovative risk management technology."

Based on its findings, the Marsh/RIMS study offers some advice on ways to improve risk management programs. First, the study points out that because the risk manager ultimately affects the company's bottom line and culture, the company should elevate the visibility and the reporting relationship of the risk manager. The study concludes that this change will enhance the risk manager's effectiveness.

Additionally, the company's board of directors should consider forming a risk management committee, which would function similarly to the audit or compensation committee. Next, the study emphasizes the importance of implementing effective risk-identification and risk-mitigation plans. Because the success of loss control initiatives depends on identifying and mitigating risk, the study encourages companies to implement a strategy to closely monitor these programs. The study also recommends that a company incorporate their industry's best practices into their risk management programs in order to maximize the benefits of those programs. Moreover, the study suggests that risk tolerance be analyzed regularly in order to determine if more aggressive risk-retention strategies should be adopted.

Furthermore, the study emphasizes the importance of technology as it relates to risk management and encourages companies to make installation of integrated data systems and analytical tools a priority. When asked what the ideal risk management information system would include, study participants stated that the system should integrate the following channels: (1) a claims database fed by brokers, insurers, and third-party administrators; (2) operating-unit data on claims, costs, and mitigation of risk; and (3) staff-unit reporting on litigation, claims, risk identification, prioritization, and risk costs.

In addition to these recommendations, the study offers a number of ideas for ensuring the success of risk management professionals. For instance, companies are encouraged to develop programs that focus on the career development of risk managers. Key managers that have shown commitment and ability should be identified and given greater responsibility. Additionally, the study suggests that risk managers gain substantial benefit from continuous interaction with senior management. Similar to this conclusion, a more recent survey by ACC and Urbanomics Consulting Group suggests that when general counsel regularly attend board meetings, organizations are better able to manage company-wide risks.⁸⁶ For these reasons, the Marsh/RIMS study recommends that companies encourage interaction between these key players.

The study also recommends that companies ensure that their risk managers have a good understanding of finance, tax, and accounting issues. Because this expertise is necessary in order to impact a company's bottom line, resources and educational opportunities should be made available to risk managers. Additionally, the study suggests that by providing risk managers with the opportunity to gain an understanding of the organization as a whole as well as the financial implications of various risks, they will be more effective in their role. For this reason, companies are encouraged to expose risk management professionals to various operating units within the company. Finally, in order to ensure that technology is used most efficiently, companies should provide adequate training for risk managers.

For more information regarding the identification and evaluation of risks, see:

- *Risk Management Issues for Privately Held Companies*, ACC Docket (May 2006).

- Kathy Barlow and Kirk Pasich, *Disasters and Insurance: Lessons for Businesses from Katrina and Rita*, ACC Docket 24, no. 2 (February 2006), available at www.acca.com/protected/pubs/docket/feb06/barlow-feb06.pdf
- Charles E. Garner, Daniel L. Goodkin, Philip W. Lee, *How to Effectively Manage Real Estate Risk*, ACC 2005 Annual Meeting, available at acca.com/am/05/material.php
- *General Counsel as Risk Manager*, ACC Annual Meeting: Program 406 (2004), available at <http://www.acca.com/am/04/cm/406.pdf>.
- William F. Waite & David S. Claridge, *Terrorism Risk Management Strategies for Business*, ACCA Docket 21, no. 8 (Sept. 2003), available at www.acca.com/protected/pubs/docket/so03/risk.pdf.
- Kevin P. Kalinich & Kristina McGrath, *Identifying and Evaluating the Business Impact of Network Risks and Liabilities*, 33-WTR Brief 18.
- Emily J. Eichenhorn, *Office Staff: A Vital Link in Risk Management Strategy*, 64-JUN ORSBB 27.

IX. Crisis Management

The general counsel should assess whether the company has an efficient crisis management plan and discover ways to improve it.

The following material may be helpful:

- Donald D. Anderson, Denise Barndt Jonathan L. Bernstein, Daniel E. Karson, Drew McKay and Richard Seleznov "When Disaster Strikes: The Legal Department's New Imperative," ACCA 2001 Annual Meeting, available at <http://www.acca.com/education2k1/am/cm/disaster.pdf>
- Anton R. Valukas, Robert R. Stauffer, Thomas P. Monroe, *Crisis Management: The Economy, Security and Coping with the Unexpected: A Practical Guide to Preparing for and Responding to a Crisis*, available at <http://www.acca.com/protected/article/crisismanage/guide.pdf>
- *Leading Practices in Crisis Management and the Role of In-house Lawyers: What Companies are Doing*, ACC (January 2004), available at http://www.acca.com/protected/article/crisismanage/lead_crisis.pdf
- *Preparing for and Responding To an Accidental Environmental Release – A Legal Primer*, ACC InfoPAK (April 2004), available at <http://www.acca.com/infopaks/environment.html>

A. Internal Investigations

The internal investigation is a tool used by companies to look into facts after they have received information suggesting that some form of misconduct has been committed either by, or against, the business organization.

For more information on the topic of internal investigations, see:

- Internal Investigations, ACC InfoPAK (September 2004), available at: <http://www.acca.com/infopaks/intinvest.html>

www.acca.com/infopaks/intinvest.html

- William Joseph Linklater and Patrick J. Ahern, *Corporate Internal Investigations and Employee Privacy Rights*, ACCA Docket 18, no. 6 (November/December 1999), available at: <http://www.acca.com/protected/pubs/docket/nd97/investigate.html>
- Lisa Cahill, *Internal Investigations: You May be Working for the Government*, Outside Counsel (Winter 2001), available at: <http://www.acca.com/protected/article/oc/winter01/Zuckerman.pdf>
- Broc Romanek and Kenneth B. Winer, *The New Sarbanes-Oxley Attorney Responsibility Standards*, ACCA Docket 21, no. 5 (May 2003), available at: <http://www.acca.com/protected/pubs/docket/mj03/standard1.php>
- *Responding to Government Investigations*, ACC InfoPAK (September 2004), available at: <http://www.acca.com/protected/infopaks/govtinvest/INFOPAK.PDF>
- Earle F. Kyle IV and Gerald B. Lefcourt, *Help! I've been Subpoenaed! What Do I Do?*, ACCA Docket 20, no. 9 (October 2002), available at: <http://www.acca.com/protected/pubs/docket/on02/subpoena1.php>

B. Government Investigations

Generally, government investigations, if not mandated by law in a particular industry, are initiated in response to reports of wrongdoing on the part of a corporation or its agents.

Factors government prosecutors consider in deciding whether to investigate a corporation to combat corporate fraud include:⁸⁷

- Nature and seriousness of the offense;
- Pervasiveness of corporation's wrongdoing;
- Corporate history of criminal conduct;
- Corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation;
- Existence and adequacy of corporation's compliance program;
- Corporation's remedial actions; and
- Collateral consequences, including disproportionate harm to shareholders.⁸⁸

Additionally, an increased emphasis has been placed on: (1) "the authenticity of corporation's cooperation"; and (2) "the efficacy of the corporate governance mechanisms in place within a corporation, to ensure that these measures are truly effective rather than mere paper programs."⁸⁹ Clearly, the focus hinges on the design of a company's compliance program.⁹⁰ Essential questions the government may ask is whether the program is geared towards preventing and detecting wrongdoing by a company's directors or employees and effective management. Thus, prosecutors may consider the following questions in evaluating a compliance program and ultimately deciding whether to prosecute:

- Are effective mechanisms in place to detect and prevent misconduct?
- Are directors well-informed and equipped to exercise independent judgment?

- Does the company have internal audit functions that are independent and accurate?
- Does the company have an information and reporting system to provide management and the board of directors a mechanism for determining the organization's compliance with the law?⁹¹

For more information on the topic of government investigations, see:

- Mark J. Fucile, Peter R. Jarvis, and Michael Roster, *Timing is Everything: When Document Retention Policies and Related In-house Counsel Advice Intersect with Government Investigations and Litigation*, ACCA Docket 20, no. 5 (May 2002), available at www.acca.com/protected/pubs/docket/mj02/timing1.php
- John K. Villa, *What Can You Tell Your Employees When the Feds Arrive to Question Them*, ACCA Docket 20, no. 1, (January 2002), available at www.acca.com/protected/pubs/docket/jf02/ethics1.php
- John K. Villa, *Can the Feds Interview Corporate Employees without Your Counsel's Consent?*, ACCA Docket 20, no. 3, (March 2002), available at www.acca.com/protected/pubs/docket/ma02/ethics1.php
- John Villa, *Will Sharing with a Regulatory Agency the Report of an Internal Corporate Investigation Waive its Protections against Disclosure to Other Potential Adversaries?*, ACCA Docket 20, no. 7, (July/August 2002) available at www.acca.com/protected/pubs/docket/ja02/ethics1.php
- Victor A. Warnement, et al., *When the SEC Comes Calling: Tips for Dealing With an Enforcement Investigation*, ACCA Docket 20, no. 4 (April 2002), available at www.acca.com/protected/pubs/docket/am01/sec1.php.

C. Media Relations

In the event of a company crisis, it is important for the legal team to prepare for its response in a media-savvy manner.

For more information on the topic of media relations see:

- Jim Patton, Terrence D. Delehanty, David C. Fanning, Diane J. Geller, Theresa M.B. Van Vliet, and Naomi J. Paiss, *Responding to Media Inquiries in a Crisis: In-house Counsel as Spokesperson*, ACC Docket (July/August 2003), available at www.acca.com/protected/pubs/docket/ja03/media.pdf
- Sara Church Dinkler and Richard S. Levick, *Effectively Managing Public Relations for High Profile Litigation*, ACC 2003 Annual Meeting, available at www.acca.com/education03/am/cm/804.pdf
- Peter J. Brennan, Richard Mannella, James Patton, and Mark Sullivan, *Litigation Public Relations*, ACC 2000 Annual Meeting, available at www.acca.com/education2000/am/cm00/608.pdf

X. Litigation

The cost of litigation has risen dramatically over the past years. Thus, an efficient litigation strategy to manage the risks posed by litigation is indispensable for the corporate client. Therefore, managing litigation is one of the major tasks the general counsel has to oversee and communicate to the management. In meetings with the business leaders of the company, the general counsel has to decide what approach the company should take to the litigation (e.g. defending the corporation to the end irrespective of cost or settling a case early).

A. Initial Planning, Assessment and Strategic Evaluation

As litigation generally brings with it turmoil, randomness, and uncertainty, it poses particular challenges for the corporation. The general counsel, therefore, has to help the corporation to keep clear of the hazards on the way. Careful planning at the onset of the lawsuit is necessary to prevent the corporation from harm. Additionally, the strategic significance of the case to the company and the objectives sought should be carefully reviewed.⁹² General counsel must also keep in mind the company's goals, the significance of the case to the corporation, and the time frame needed to resolve the dispute. In order to conceive a strategy, however, the general counsel has to form a preliminary assessment of the facts of the case and the governing legal principles. Considering these factors, proper staffing and the appropriate approach to budgeting should be determined.

For further information, see also:

- Robert L. Haig, *Corporate Counsel's Guide: Legal Development Report on Cost-Effective Management of Corporate Litigation*, 601 PLI/Lit 475, 533 (April 1999).
- Julie S. Congdon and Patricia M. Hamill, *Managing Outside Counsel in Litigation: A Primer*, ACCA Docket 21, no. 4 (April 2003), available at <http://www.acca.com/protected/pubs/docket/am03/primer1.php>

B. Staffing

Based on the needs of the corporate client, the general counsel has to determine whether to keep the matter in-house, or to hire an outside law firm. Thus, the general counsel has to decide how much control and direct involvement he wants to have in the litigation. In making this determination, general counsel should consider the following factors: (1) Does your personality require you to make even small decisions; (2) Do you have expertise in litigation, negotiation, and the subject matter of the dispute; (3) Time constraints from your business schedule; (4) The company's budget for resolving disputes; and (5) Can other departments in your company help you with the dispute.⁹³

C. Periodic Reporting

The efficient management of litigation depends on the information received from

all persons involved. If in-house counsel obtain the help of outside counsel, they should insist on a comprehensive written analysis at the outset of the case and periodic reports thereafter while keeping in mind that such reports can be time-consuming and expensive. Because of the costs associated with written analysis, the benefit from a written report may not justify its cost in smaller cases. In general, however, such reports can help the legal team to handle the case more effectively and will also force the litigator to analyze the case at a very early stage. If requested, a report should include the following items:

- Background facts;
- Summary of claims and defenses;
- Significant witnesses;
- Issues of law and fact expected to be pivotal in the resolution of the case;
- Anticipated motions and the assessment of the likelihood of success for each motion;
- Projected timetable for discovery, motions, and trial;
- Document discovery and deposition discovery anticipated by the company and by the adversary and reasons for the company's discovery;
- Staffing;
- Experts needed;
- Budget for (i) each of the next two quarters, (ii) through the end of discovery, and (iii) through end of trial;
- Damages;
- Counterclaims;
- Likelihood of prevailing at the motion stage and at trial and limitations on analysis;
- Availability of insurance; and
- History of settlement discussions.⁹⁴

Periodic Meetings and Regularly Scheduled Conference Calls

Scheduling and holding regular meetings or conference calls with the litigators enable the general counsel to stay informed about the development of the case. Such meetings or conference calls are also an important tool in monitoring the progress of previously assigned tasks. To be effective, meetings should be scheduled well in advance and agendas circulated at least three business days prior to the meeting.⁹⁵

D. Trial Book

Preparing a trial book will help general counsel to collect important information about the case and can be valuable to understanding the key elements of the case.

The following documents should be included in the trial book and kept current:

- To do lists;
- Complaint, answer, and a summary of them if they are voluminous;
- Local rules of court;
- Significant scheduling orders or pretrial orders;

- Key legal research memos;
- Chronology of major events;
- Periodic analyses of the case (or relevant portions of them);
- Cast of characters;
- Summary of key documents;
- Plaintiffs' and defendants' experts;
- Tentative witness lists;
- Tentative exhibit lists;
- Major themes for opening statements;
- Possible jury instructions;
- Points to be made in the major witness examinations; and
- Possible motions: (e.g. Rule 12(b), Rule 56 and in limine)⁹⁶

E. Discovery Planning

Strategic conclusions about the direction of the case are very important to tactical planning. The general counsel should estimate the likelihood of (1) whether the company will ultimately try the case and (2) what the probability is of settling the case. These decisions will also affect the discovery phase of the case.

An effective discovery plan should identify:

- witnesses that the company intends to depose;
- an explanation of why those witnesses are being deposed and the expected revelation in the deposition;
- whether the deposition is for discovery or introduction at trial;
- the lawyer expected to take the deposition;
- the timing in the discovery process;
- witnesses that the opposing party can be expected to call (plus plans to contact them);⁹⁷ and
- third parties from whom documents should be subpoenaed and at what point in the discovery process those documents will be sought.⁹⁸

F. Prior Approval of Litigation Tasks

Micromanaging litigation tasks, such as legal research, travel, initiating specific discovery, and the filing of routine discovery-related motions, adds little to the effective management of a case. Mandatory prior approval of such tasks can be unwieldy because the general counsel frequently is unavailable when such a decision must be made or he is not sufficiently knowledgeable about the importance of a particular issue. Outside lawyers usually are selected because the general counsel has confidence in them; therefore it is not prudent to impose excessive constraints on the tactical methods by which they seek to achieve their agreed-upon goals.⁹⁹

G. Decisions on Experts, Consultants, and Others:

The goal in deciding whether to hire experts, consultants, and others is to manage litigation rather than react to it. With this in mind, in-house counsel should ask

outside counsel to include a list of areas in which expert testimony is expected, the names of several experts, and recommendations in the initial report. Jury consultants are another possible resource during litigation. These consultants can help to determine the type of person most suited for the jury and what arguments, witnesses, or facts that will likely be best received by the jurors. Additionally, in very large or highly technical cases, as well as in cases involving a series of similar cases, document imaging and database development can be helpful and very cost effective. Careful preparation, analysis, judgment, and trial skill, however, not demonstrative tricks will win cases.¹⁰⁰

H. When Officers or Employees are Defendants¹⁰¹

As discussed earlier, the general counsel has to bear in mind that the corporation, not the officers or employees of the corporation, is the client. Consider following operative presumptions:

- A corporate employee should not be represented by the same lawyer representing the company if the employee is being prosecuted criminally.
- In civil litigation, dual representation is possible although not always prudent because it involves a risk of a conflict developing that will result in disqualification of the company's counsel.¹⁰²

I. Relationships with Outside Counsel¹⁰³

Use the following checklist to manage outside counsel in litigation:

- When you identify a dispute, determine the time frame for resolving it and your company's ultimate goal(s) in order to decide whether and when to hire outside counsel.
- If you are not experienced in negotiating, litigation, and the subject matter of the dispute, contact outside counsel immediately.
- Before meeting with prospective outside counsel, assess your company's budget and internal dispute resolution resources and your personal management style.
- To find potential attorneys, get recommendations from within your company and from contacts in the relevant legal and business communities.
- If you are an experienced litigator, consider playing a role in shaping discovery and motion practice to reduce costs, but do not deprive outside counsel of experience with witnesses, the adversary, and the court.
- Consider participating in settlement negotiations and know the case as well as outside counsel does.
- Select a role at trial that will accommodate your desired level of participation and time availability.
- Develop a collegial relationship with outside counsel that will benefit your company in this dispute and in any further disputes.

For additional information, see:

- *Outside Counsel Management*, ACC InfoPAK (March 2006), available at www.acca.com/infopaks/ocm.html

- *Conflict and Waivers*, ACC InfoPAK (January 2005), available at www.acca.com/infopaks/conflict.html
- Julie S. Congdon and Patricia M. Hamill, *Managing Outside Counsel in Litigation: A Primer*, ACC Docket (April 2003), available at www.acca.com/protected/pubs/docket/am03/primer1.php

J. Settlement

The general counsel should plan for the event of settlement even if it seems remote. Consider such factors as:

- Timing of settlement discussions;
- Persons involved in the negotiation on both sides of the litigation;
- Structure of the settlement discussion; and
- Goals and needs of both parties.

Furthermore, the ultimate decision-maker in the settlement process should be involved from an early point, unless the general counsel has unrestricted authority to approve the settlement. This will help to avoid redundant negotiations if one party is not happy with settlement. Also, offers and counter-offers should be documented in order to avoid confusion at a later stage.

ACC Resources:

- Riccardo Bianchini Riccardi, Sally J. March, Richard C. Mosher and James E. Nelson, *International Negotiation: A Comparison of Styles*, ACC 2003 Annual Meeting www.acca.com/education03/am/cm/503.pdf.
- Michael E. Neben, *Contract Negotiation: Helpful Hints for Clients*, ACCA Docket 14, no. 6, (November/December 1996), available at www.acca.com/protected/pubs/docket/nd96/negotiation.html.

For general information, see:

- Richard G. Shell, *Bargaining for Advantage: Negotiation Strategies for Reasonable People* (Viking 1999).

For ethical implications, see:

- ABA Ethical Guidelines For Settlement Negotiations (August 2002), www.abanet.org/litigation/ethics/settlementnegotiations.pdf.

K. Role of Inside Counsel at Trial

In-house counsel can perform many functions a trial lawyer cannot, thus her presence at trial is very important. Inside counsel can:

- Provide a more objective view of evidence;
- Establish a (less adversarial) relationship with the opposing parties' lawyers;
- Observe the performance of the trial lawyers;
- Act as intermediary between lawyers and company witnesses; and
- Act as mediator to resolve disagreements over the strategy of the case.¹⁰⁴

Restrictions on Access of Inside Counsel to Confidential Information

A general counsel overseeing or conducting corporate litigation involving a business competitor frequently is confronted with a protective order foreclosing him from obtaining access to competitive information. Such information, however, might be necessary to fully understand the issues presented in the litigation. This problem arises especially when intellectual property is involved.

Generally, Fed.R.Civ.P. Rule 26(b)(1) permits broad discovery into any matter not privileged which is relevant to the subject matter or to any claim or defense. As proprietary information is usually is not deemed privileged, it can be discovered.¹⁰⁵ Therefore, the producing party often seeks a protective order pursuant to Rule 26(c)(7), asking that the information shall not be shown to company executives involved in the competitive decision-making. This restriction, as a result, would also apply to general counsel who are involved in business decision-making or who work closely with those who do.

Whether an unacceptable opportunity for inadvertent disclosure exists cannot be determined by classifying the general counsel as in-house counsel. Rather the general counsel must be involved in "competitive decision making." This term can be defined as the general "counsels' activities, associations, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor."¹⁰⁶ A mere contact between the general counsel and other corporate officers involved in corporate decision-making is not enough.¹⁰⁷

For more information, see:

- William L. Schaller, *Protecting Trade Secrets During Litigation: Policies and Procedures*, 88 Ill. B. J. 260.
- Louis S. Sorell, *In-house Counsel Access to Confidential Information Produced During Discovery in Intellectual Property Litigation*, 27 J. Marshall L. Rev. 657.
- Protective Order – Confidential Information – Access by In-house Counsel, 16 No. 5 Fed. Litigator 122, 123 (2001).

Additional Resources:

- *Litigation Management*, ACCA Docket 14, no. 5 (September/October 1996), available at <http://www.acca.com/protected/pubs/docket/so96/litigation.html>
- Barry Nagler, "Reebok Rules" for *Litigation Management*, ACCA Docket 15, no. 3, (May/June 1997) available at <http://www.acca.com/protected/pubs/docket/mj97/reebok.html>
- John W. Borg & David F. Herr, *Handling Appeals: Beyond Litigation as Usual*, ACCA Docket 16 (November/December 1998), available at <http://www.acca.com/protected/pubs/docket/nd98/appeals.html>

XI. Outside Counsel Management

* The information in Section XI was taken from *Outside Counsel Management*, ACC InfoPAK (Sept. 2004), available at www.acca.com/infopaks/ocm.html, unless otherwise noted.

A. The Selection Process

When considering whether to hire outside counsel, two important questions must be answered:

- Should outside counsel be hired for this particular matter?
- If yes, which outside counsel should be retained?

1. Should outside counsel be hired for this particular matter?

A company must consider multiple factors in its analysis of whether to hire an outside law firm. First, the company's in-house counsel should determine whether the company would benefit from a relationship with an outside firm considering the cost associated with such a relationship.

When making this decision, in-house counsel should consider the following factors:

- "The decision to retain outside counsel, as opposed to handling the matter within-house staff, is driven by three main factors: geography, the need for specialized expertise, and a lack of inside resources."¹⁰⁸
- "Geography refers to the need to obtain local counsel when the location of the legal matter is at some distance from the corporate law department and is most often an important factor with respect to litigation."¹⁰⁹
- "The need for outside counsel provision of specialized legal expertise is an obvious situation for most in-house counsel. But the attempt to mesh specialized outside counsel with available in-house counsel knowledge can be a management challenge. This is especially so when an outside firm is providing only part of the legal advice for a transaction or when several outside firms are providing advice concerning the transaction. In such instances, the expertise of in-house counsel in identifying legal issues and coordinating their resolution is particularly necessary."¹¹⁰
- "Finally, in-house counsel sometimes require outside counsel, if due to the press of time and other matters, staff resources are simply unavailable even where geography and specialized knowledge are not an issue."¹¹¹

Next, when considering whether to hire outside counsel, in-house counsel should ask the following key questions:

- How much internal work is to be outsourced?
- What is the cost of providing legal services internally, and is that cost competitive with outside firms?
- What benefits does the company's law department bring to the organization by

handling the work?

- Are there particular services or areas of law that would be better handled by outside counsel?
- Does the company's law department have or want to develop the necessary skill sets to efficiently handle specific areas of work?

2. Which outside counsel should be retained?

Once the decision has been made to utilize outside counsel, the company and in-house legal department must analyze the information available to them in formulating a set of criteria with which they can evaluate prospective law firms. In making this decision, companies often rely on past relationships or a firm or lawyer's reputation and their expertise.

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While skills sets will vary depending on the company and nature of the work (litigation vs. contract development), the following are general attributes of a firm that companies should consider before making a decision to hire outside counsel:

- Highest quality work product;
- Lowest costs;
- Name and reputation;
- Fastest response;
- Ease to work with;
- Efficiency;
- Accessibility;
- Areas of expertise;
- Strong technical legal skills;
- Result – Outside counsel should be focused on the outcome to the company rather than on the dollar value of the work;
- Innovative-value added services;
- Solid project management – Outside counsel should work efficiently and complete tasks in a timely manner;
- Amount and flexibility of resources within firm;
- Location;
- Predictable pricing – Companies must communicate their expectations about

pricing; and

- Use of technology to enhance the efficiency of outside counsel.

For more information on selecting outside counsel, see:

- Richard C. Stewart II et al., *Outside Counsel Selection Process: Preparing for Success*, ACC Docket (Jan. 2004), available at <http://www.acca.com/protected/pubs/docket/jan04/selection.pdf>.
- *Best Practices in Hiring Outside Counsel*, On-line CLE Program (2003).
- *Best Practices in Hiring Outside Counsel*, ACC Annual Meeting: Program 504 (2003), available at <http://www.acca.com/education03/am/cm/504.pdf>.

3. The Interview Process

Before selecting a particular law firm, companies should request and check the firm's references. Additionally, companies should talk to clients of the firm and meet with the lead attorneys who would be working on the organization's matters. Companies should also conduct interviews with the law firms that they are most interested in hiring in order to ensure that the firm is willing to consider the organization's interest and not just the bottom line on their bill.

Several methods can be used when conducting interviews with potential law firms. One strategy is called the "beauty contest" approach. This method requires a company to interview several firms and then compare their presentations, rather than asking only the lead firm to make a presentation. By forcing the firms to compete, the company maximizes the services they receive while minimizing the legal costs.

A more formal way of interviewing is preparing a document similar to a "request for a proposal" (RFP) which is often used in government procurement processes. This method is most commonly used for matters involving special expertise, large litigation cases, or business transactions.¹¹³ The RFP should be comprehensive and specifically describe the nature and extent of the assignment. Additionally, the RFP should not only solicit information from the prospective firm that is necessary to select a firm, but it should also describe the factors that will determine the successful candidate. Although the RFP method provides a number of advantages for companies, this practice is not gaining as much momentum as expected and this may be due to lack of law firm responses to such requests.¹¹⁴ For instance, the 2006 ACC/Serengeti survey showed that for every RFP issued less than two responses were received from law firms.¹¹⁵ Despite this trend, about two-thirds of in-house counsel responding to this survey reported that they would issue the same number of RFPs in 2007 and about one-fourth indicated that they would increase the number issued.¹¹⁶

Whether using the "beauty contest" or more formal approach, a company should consider exploring the following issues during an interview:

- Law firm's experience;

- Matter at issue – Ask the lead attorney to provide an initial evaluation of the case and discuss what the strategies the firm would use to prepare the case and how the firm would staff the matter;
- Billing rates, alternative billing arrangements, and discounts for early bill payment; and
- Overall operation and management of the firm.

4. The Engagement Letter

Upon choosing to hire an outside law firm, the general counsel must create the working agreement that will govern the relationship between the firm and the company. This document, known as an engagement letter, defines the obligations and responsibilities of each party and the scope of the assignment. The letter should include the following:

- Role of in-house and outside counsel;
- Scope of work;
- Conflict waiver;
- Process for engaging new work;
- Responsible attorney and lead attorney;
- Persons qualified to handle matters;
- Objectives and measurements;
- Methods of communication;
- File retention;
- Type of compensation/Fee arrangement; and
- Billing Guidelines, including required levels of billing detail, requirement for timely submission of bills, and details of allowable expenses.

Additionally, the engagement letter should include the methods to be used to resolve future disputes, limit the nature of the work to be performed by the firm, and address potential issues of conflict. The company should also address the following issues in the engagement letter: case evaluation and disclaimer of results, dispute resolution clause, confidentiality waiver, press release provision, and termination. Finally, the engagement letter should address both current and future conflicts of interests between the client and the law firm.

To obtain better results from outside counsel, a GC should also consider including the following items in the engagement letter:¹⁷

- Bills from outside counsel must be provided on a regular, timely basis.
- All bills are to go to a specified billing address.
- There shall be no general matters or billings.
- Outside counsel will accept no work directly from someone in a business unit. All work must come from the legal department.
- Only pre-approved lawyers can work on a matter. If a lawyer leaves the firm, the firm must absorb the time incurred in bringing a replacement lawyer up to speed on the file – this time is nonbillable.

- Specify how and when outside counsel should communicate with in-house counsel concerning progress on a matter. Make sure communications are comprehensive.
- After initial communications on a new matter, outside counsel will deliver, within a specified number of days, a written plan and budget for the matter.

For more information including a sample engagement letter and checklist, a retention letter, a conflict waiver, and an outside counsel expense summary and performance evaluation letter, see:

- *Outside Counsel Management*, ACC InfoPAK (March 2006), at 31, available at www.acca.com/infopaks/ocm.html.

For more information on conflicts of interest practice and programs, see:

- *Leading Practice in Conflicts Management Programs: What Companies and Law Firms are Doing*, ACC Article (November 2003), available at <http://www.acca.com/vl/practiceprofiles.php>.

B. Building a Long-Lasting Partnership with Outside Counsel

* The information in subsection B was taken from Teresa T. Kennedy, *Inside Counsel & Outside Counsel: The Trust Factor*, ACC Docket 22, no.1 (Jan. 2004), available at <http://www.acca.com/protected/pubs/docket/jan04/trust.pdf>.

In order to ensure a successful, long-lasting relationship between in-house and outside counsel, both parties must demonstrate a commitment to the partnership and to the pursuit of new opportunities and strategies. Furthermore, in-house as well as outside counsel must strive to understand each other's interests and goals and to maintain open lines of communication. The key, however, to achieving the ideal relationship between in-house and outside counsel is what one expert has called "authentic trust." "If we can build and maintain authentic trust, we set a solid foundation for an effective and long-lasting partnership." Authentic trust is based on in-house counsel's confidence in the following factors in their relationship with outside counsel:

- Communication - "I can trust that my partner understands my values, drivers, and objectives."
- Credibility - "I can trust what my outside counsel says."
- Reliability- "I can trust that the firm will follow through by delivering the right product at the right time in the right way."
- Commitment - "I can trust that outside counsel is focused on my best interests and goals and will continually work with me to create innovative ways to deliver legal services more efficiently."

Furthermore, authentic trust includes the following elements and characteristics:

- Continuing process;
- Dynamic growth;
- Means by which organizations maintain their business relationships;
- Existing only when both parties believe in the concept and actively participate;

- Mutual commitment;
- Continually adapting to changing goals and challenges;
- Making and keeping commitments; and
- Ethical approach to a business relationship.

In order to build authentic trust, companies should follow four simple steps. The first step is communicating information and expectations to the other party. In-house counsel should consider sharing their companies' mission statements and invite outside counsel to do the same. This will ensure that each party understands the other's core values. Additionally, in-house counsel may want to consider inviting outside colleagues to a social function or company training or educational programs in order to encourage more open communication. The second step required for building authentic trust is the focus stage. In this step, parties are encouraged to openly discuss the issues, problems, and challenges facing the relationship without assessing blame to the other.

The next step of achieving authentic trust requires in-house and outside counsel to "examine the gaps between each other's expectations and to figure out how to close the gaps." "The key here is to envision win-win solutions and to identify the benefits to both sides." The final step of this process focuses on each party's commitment to the relationship. Both in-house and outside counsel must be committed to creating new ways to deliver legal services, adding greater value, achieving business objectives, and advancing common goals in order to achieve the ideal relationship.

For more information on this topic, see:

- *Benchmarking the Performance of Outside Counsel*, ACC Docket (May 2006) available at <http://acc.com/resource/v7174>
- Mark Chandler and Paul Lippe, *Five Ways In-house Counsel Can Talk to Law Firms*, ACC Docket 23, no. 10 (November/December 2005), available at <http://acc.com/resource/v6474>
- Teresa T. Kennedy, *Inside Counsel & Outside Counsel: The Trust Factor*, ACC Docket (January 2004), available at <http://www.acca.com/protected/pubs/docket/jan04/trust.pdf>.
- ACC's Top Ten Methods to Manage Outside Counsel, available at <http://acc.com/resource/v7740>

C. Strategies for Effectively Managing Outside Counsel

According to the ACC/Serengeti survey, in-house counsel report spending about one-quarter of their time managing outside counsel.¹¹⁸ In order to be more effective in this role and to ensure that a company is benefiting from a relationship with outside counsel, in-house counsel should implement a policy for evaluating the outside firm's performance on a regular basis. Evaluation can be done by regularly reviewing bills and work product. Additionally, in-house counsel may wish

to do an "end of matter assessment" or periodic assessment of the firm's performance.

In addition to conducting reviews, in-house counsel can monitor a hired firm's performance by comparing it with the traits of the ideal outside counsel. The presence of the following traits in outside counsel will help to ensure an effective partnership between a company and a law firm:

Traits of an Ideal Outside Counsel:

- Has recognized expertise and experience in the field;
- Clearly translates/applies legal advice into the context of what it means for the client's business and delivers it in a way that helps the client meet legitimate business needs;
- Anticipates client needs;
- Proactively solves problems;
- Is a creative, strategic thinker, and an effective communicator;
- Is timely, available, responsive, and result-oriented;
- Identifies what adds value to the client, delivers that value, and demonstrates that he has done so; and
- Consistently exceeds the client's expectations.

Additionally, in order to promote a good, working relationship with outside counsel, in-house counsel should strive to achieve the following, ideal traits:

Traits of an Ideal In-house Counsel:

- Communicates to outside counsel the reasons he was selected over other attorneys in order to help him understand in-house counsel expectations;
- Reminds outside counsel of the company budget and gives suggestions for minimizing costs;
- Expands on personal management styles and explains exactly how he wants to participate in the dispute resolution process;
- Explicitly records corporate goals and objectives at the outset of transactions and encourages other in-house counsel and managers to discuss this with outside firms;
- Invites outside counsel as observers to selected internal meetings, particularly those relating to corporate strategy;
- Includes outside counsel on distribution lists of corporate and industry publications;
- Invites outside counsel to identify three ways to help achieve corporate objectives and three ways to add more value aside from simply doing the assigned work; and
- Invites outside counsel to identify three ways and circumstances in which they might charge other than hourly billing to more accurately reflect value to the client.

In addition to these traits, companies should consider using other methods to

help ensure a win-win relationship with outside counsel. For instance, preparing engagement agreements together can strengthen relations between the two parties and can help outside counsel to better understand the client's needs. Companies should also encourage in-house and outside counsel to develop a case strategy and work collaboratively as a team with clearly delineated division of work. Additionally, the two parties should schedule reporting and review meetings on a regular basis. These meetings build open communication, help keep track of budget and objectives, and facilitate forward planning. Companies should also make sure that communication between the two parties is centralized through the in-house counsel in order to ensure appropriate briefing on a matter's status and progress and to protect privileged information. Finally, companies should reward efficient representation by repeat hiring.

D. Strategies for Monitoring and Reducing Outside Counsel Spending

The 2006 ACC/Serengeti survey indicates that the most effective methods for reducing outside counsel spending include:

- Case/matter budgets (60.7%);
- Discounted/alternative fees (57.1%, an average saving of 10.1%);
- Billing Guidelines/ Spending rules (45.7%);
- Re-allocation of work to firms with lower rates (45%, an average saving of 12.6%); and
- Evaluations of outside counsel (24.3%, an average saving of 11.9%).¹¹⁹

Other methods that can be used to control outside counsel spending include the use of case management systems and convergence programs, which are discussed below:

1. Case Management Systems

In-house counsel may also want to consider using a Case Management System (CMS) in order to more effectively manage outside counsel. These systems have three primary functions that can be adapted to meet the unique analytical needs of a company's law department:

- Primary Economic Denominators – This aspect of a CMS can point out factors that have the greatest impact on costs. For instance, these systems assist in-house counsel in tracking outside counsel billing habits. Additionally, the systems can turn invoice information into legal cost reports which provide a comparison of the amount spent with each outside law firm in a specified time frame.
- Budget Burn Analysis – This feature identifies matters that are using up their budget too quickly by comparing the actual amount spent and the budgeted amount. Because in-house counsel generally do not have time to constantly compare actual spending for a particular matter to the budget, this function is helpful in that it alerts counsel if spending for a particular matter is likely to

exceed the budget before this actually happens.

- Standardization of Decision-making – This feature assists in-house counsel in hiring outside law firms by ensuring that outside firms are selected based on standardized criteria rather than a gut feel. The system makes a recommendation on which firm to hire based on the criteria established by the legal department during implementation.

2. Convergence Projects

In order to reduce spending on outside law firms, a company's legal department may want to consider conducting a convergence project. Convergence is a method by which companies reduce the number of outside firms with which they do regular business. The benefits of this strategy include: establishing a network of preferred legal providers, lowering outside counsel fees, increasing the quality of work and responsiveness of law firms, and reducing duplication of efforts common to companies that use multiple law firms. According to a recent survey of in-house counsel, seventy-three percent of those who had conducted convergence projects expressed satisfaction with the method, stating that it met their expectations for reducing their number of outside law firms.¹²⁰

The process of convergence involves the following four steps:

- Choosing the nominees;
- Requesting proposals;
- Evaluating the responses; and
- Selecting the final list.

For more information on convergence projects, see:

- *Outside Counsel Management*, ACC InfoPAK (September 2004), available at www.acca.com/infopaks/ocm.html.

Understanding the role of in-house versus outside counsel is vital to deciding whether to hire outside resources. For more information, see:

- James R. Buckley, *Welcome to Lawyerland: Why Even Brilliant Outside Counsel Cost Too Much*, ACC Docket 23, no. 1 (January 2005), available at www.acca.com/protected/pubs/docket/jan05/lawyerland.pdf
- Ronald F. Pol and Patrick J. McKenna, *The Quest for Seamless Service: Ensuring Consistency with MultiOffice Law Firms*, ACC Docket 23, no. 1 (January 2005), available at www.acca.com/protected/pubs/docket/jan05/seamless.pdf
- *Leading Practices in Strategic Outsourcing and Alternative Service Models: What Companies Are Doing*, ACC Leading Practice Profile, available at www.acca.com/protected/article/lawdman/lead_outsource.pdf
- *Outside Counsel Management*, ACC InfoPAK (March 2006), available at www.acca.com/infopaks/ocm.html
- *A Company's First General Counsel*, ACC InfoPAK (June 2006), available at www.acca.com/infopaks/firstgc.html
- Teresa T. Kennedy, "In-house and Outside Counsel: The Trust Factor," ACC

Docket 22, no. 1 (January 2004), available at www.acca.com/protected/pubs/docket/jan04/trust.pdf

- ACC/Serengeti Managing Outside Counsel Survey: Assessing Key Elements of the In-house Counsel/Outside Counsel Relationship (2006), available at <http://acc.com/resource/v7665>
- Ronald F. Pol, *Get More Value for Outside Counsel: Show them the Flipside*, ACCA Docket 21, no. 4 (April 2003), available at www.acca.com/protected/pubs/docket/am03/flipside1.php
- Susan Hackett, *Conflicts of Interest: Do you understand how your outside counsel assess conflicts-or do you just trust them to act in your client's best interests? It's a growing crisis that needs your attention*, Vol. 25 Legal Times No.3, Jan. 21, 2002.
- Julie S. Congdon and Patricia M. Hamill, *Managing Outside Counsel in Litigation: A Primer*, ACCA Docket (April 2003), available at www.acca.com/protected/pubs/docket/am03/primer1.php
- Jeffrey W. Carr and Daniel S. Hapke Jr., *Retaining Outside Counsel Online at Market Price*, ACCA Docket (October 2001) available at www.acca.com/protected/pubs/docket/on01/retain1.php
- Thomas M. Yih, *Six Steps to Better Foreign Counsel Relationships*, ACCA Docket 18, no. 5 (May 2000), available at www.acca.com/protected/pubs/docket/mj00/foreign.html

E. Methods for Improving Outside Counsel Performance

This section details some practices that can help implement new ideas and processes to improve the performance of outside counsel.¹²¹ It is vital to formalize these practices, document them, and distribute them to all appropriate personnel within the organization.

1. Create a Formal Panel

One common method for improving performance is to establish a formal panel of selected, pre-approved outside counsel. In order to be included on this panel, each of the law firms must satisfy selected criteria. Each of the selected firms should have a single designated lawyer through whom all work is to be funneled and who has formally accepted the role of managing the company's files throughout the firm.

2. Identify Common Goals

Work with outside counsel to identify some common goals. A typical goal is for the law firm to develop a solid understanding of the company's business. Another goal is for the firm to understand how the company wants to approach certain types of matters. In almost all instances, one of the goals will be to create and maintain a collaborative, long-term relationship.

3. Have a Formal Intake Procedure

Establish a formal intake procedure for each new matter. This subjects the matter to a standard review and approval process, but the process may vary according to the nature of the matter and the anticipated fees. For example, if a new matter is expected to have fees that exceed a certain amount, work should not begin until the firm has submitted a budget that has been accepted in writing by the general counsel.

4. Watch the Budget

While a matter is ongoing, in-house counsel should regularly compare actual activity and billings against the matter's plan and budget. This should be done on an informal basis every thirty days.

5. Have a Formal Review Process

A formal review of the work and billings of outside counsel allows the GC to assess outside counsel's performance and also provides an opportunity to reconsider a particular matter and develop further strategies. When confronted with questions such as "How can we be only this far along when we've spent so much money?" a law firm may become more creative and more open to new suggestions for resolving a particular matter.

6. Debrief after Completion

After a matter is resolved, in-house counsel may want to have a postcompletion debriefing from outside counsel. Work with outside counsel to assess how well they performed on the particular matter. Compare the original plan and budget with the actual, final one to determine if there were any significant discrepancies. Such information can be used to provide more accurate plans and budgets in the future.

XII. Sample Form and Policy

A. General Counsel Job Description¹²²

Mission

As a senior vice president of Sun and a member of the executive management team, the general counsel is functionally responsible for legal affairs for the entire enterprise.

The general counsel acts as the legal advisor to the board of directors, the chairman of the board and chief executive officer, the president, chief operating officer, the executive vice president, and other senior executives of Sun Company, Inc.

Pursuant to the "Management Control Process," he/she has the responsibility and obligation to identify, develop, communicate, and monitor policies which will ensure compliance with law by the entire enterprise.

The incumbent has the responsibility for assuring the availability, continuity and quality of competent, timely, and cost efficient legal services throughout the function.

Role

A dual role exists which consists of being the principal legal advisor for the Sun Company board of directors and senior management and being responsible for the corporate-wide legal function.

This position has a major role in providing legal advice in areas of significant company-wide impact, in the formulation of the corporate strategic plan, in the evaluation of new ventures, acquisitions, mergers, divestments, and in major investment proposals.

The general counsel must maintain oversight responsibility in law related areas of significant company-wide impact, as well as direct involvement in policy matters outlined in the "Management Control Process." Also, where overlap or irreconcilable conflict involving legal matters occurs between two or more operating units, the general counsel by necessity must become involved in assuring that an acceptable resolution is achieved.

Other General Counsel roles include:

1. **Reporting manager of the assistant general counsel and the corporate secretary.**
2. **Formulation and involvement in administration of corporate policies involving law, such as "Conflict of Interest" and "Standards of Business Conduct."**
3. **Assurance to directors and officers of corporate legal compliance per "Management Control Process."**
4. **Counseling on legislation and government relations.**
5. **Ensuring of career development for corporate-wide legal staff.**
6. **Inputting to operating unit management in the performance appraisal and salary administration of operating unit chief counsel.**

7. **Seeking input from operating unit management as to the quality, timeliness, and responsiveness of legal support.**
8. **Seeking input from operating unit chief counsel as to the quality, timeliness, and responsiveness of Radnor law department legal support.**

The general counsel concentrates his activities on providing advice and guidance to the senior executive staff and board of directors. To properly fulfill these responsibilities, there is a need for the general counsel to delegate numerous tasks to the assistant general counsel such as the management of the Radnor law department and ongoing communication with subsidiary chief counsels.

B. General Counsel Job Description¹²³

Summary

The General Counsel shall possess an LLB or JD from an accredited law school and at least twenty years of professional experience. He will be responsible for ensuring that firm business strategies, policies, and programs are developed and applied in full recognition of all legal implications and risks. The general counsel will act as the manager of the Legal Department while providing legal services as a practicing counsel, and managing relationships and matters with outside counsels. He will ensure that the legal affairs of the firm are attended to in an effective and efficient manner and that all legal records are properly compiled and securely maintained for the required time period.

Status

Exempt

Reporting Relationship

Reports and is responsible to the Board of Directors and executive management

Authority

- **Clients**
Advises clients, in keeping with the firm's principles, with respect to all aspects of case management.
- **Outside Agencies**
Represents the firm in dealings with outside law firms, government representatives and agencies, independent technical experts, court representatives, and others in the legal profession.

Professional Activities

A member of appropriate professional organizations. Fees and expenses related to

such activities are paid by the firm.

Specific Responsibilities

■ Corporate Strategies

Defines and develops corporate strategies, policies, procedures, and programs. Provides counsel and guidance on legal implications of all matters to the Board of Directors and members of executive management. Converts firm strategies and policies into specific objectives for subordinate areas of responsibility and monitors the accomplishment of such objectives.

■ Legal Issues

Reconciles and determines the legal position in major legal matters. Reviews, evaluates, and comments on other obligations of the firm, and advises the appropriate function head of the degree of legal risk associated with such contracts and obligations prior to the firm becoming a party or otherwise becoming legally bound. Assesses the merits of major court cases filed against the firm and approves, with the advice of the appropriate function head, settlement of such court cases where warranted.

• Budget

Determines the budget for the Legal Department and monitors the administration of the current budget. Evaluates the legal risks to which the firm may be exposed in order to allow these risks to be accurately reflected in the firm's financial statements.

• Board of Directors

Advises the Board of Directors and other members of executive management of the impact on the activities and proposed activities of the firm of proposed local, state, and federal laws and regulations and judicial and administrative decisions.

• Policies and Records

Provides legal consulting in policy development and training with regard to preventative law. Guides and directs the preparation and maintenance of the records of the firm.

• Special Projects

Undertakes special projects as assigned dependent upon knowledge or experience.

XIII. Additional Resources

ACC Docket Articles

Teresa T. Kennedy, *In-House and Outside Counsel: The Trust Factor*, ACCA Docket (January 2004), available at <http://www.acca.com/protected/pubs/docket/jan04/trust.pdf>.

Teresa T. Kennedy, Eva M. Kripalani and Elinora S. Mantovani, *Achieving Balance: A Recipe for High-Quality Work Life for In-House Counsel*, ACC Docket, (February 2004), available at <http://www.acca.com/protected/pubs/docket/feb04/balance.pdf>.

John K. Villa, *Hidden Storms for Those in Safe Harbors: The SEC's Professional Conduct Rules and the Federal Preemption Doctrine*, ACC Docket, February 2004, available at <http://www.acca.com/protected/pubs/docket/feb04/ethics.pdf>.

Steven N. Machtinger and Dana A. Welch, *In-House Ethical Conflicts: Recognizing and Responding to them*, ACC Docket, February 2004, available at <http://www.acca.com/protected/pubs/docket/feb04/conflict.pdf>.

Deborah L. Edwards, Mark T. Colloway, Brian D. Edwards, *What to do When the Whistle Blows: Do's and Don'ts of Internal Investigations*, ACC Docket (May 2004), available at <http://www.acca.com/protected/pubs/docket/may04/whistle.pdf>.

Ronald F. Pol, *Get More Value for Outside Counsel. Show them the Flipside*, ACCA Docket (April 2003) available at www.acca.com/protected/pubs/docket/am03/flipside1.php

Julie S. Congdon and Patricia M. Hamill, *Managing Outside Counsel in Litigation: A Primer*, ACCA Docket (April 2003) available at www.acca.com/protected/pubs/docket/am03/primer1.php

Jeffrey W. Carr and James Lovett, *Getting Closer to the Business: How to Foster Innovation and Value Through Culture and Philosophy*, ACCA Docket (January 2001), available at www.acca.com/protected/pubs/docket/jf01/getting.html.

Michael Roster, J. Daniel Fitz, John Scott, Peter J. Turner, and M. Elizabeth Wall, *Adding Value Around the Globe*, ACCA Docket (November/December 2001) available at www.acca.com/protected/pubs/docket/nd01/add1.php.

Stephen J. Friedman and C. Evan Stewart, *The Corporate Executive's Guide to the Role of the General Counsel*, ACCA Docket May 2000, available at www.acca.com/protected/pubs/docket/mj00/geguide.html.

John H. Ogden, *Synchronizing Business and Legal Priorities-A Powerful Tool*, ACCA Docket (October 2000), available at www.acca.com/protected/pubs/docket/on00/synch.html.

D.C. Toedt III and Robert R. Robinson, *250 Things (and Counting) That I'm Glad I Knew-or Wish I'd Known-during My First Year as General Counsel*, ACCA Docket (November/December 2001), available at www.acca.com/protected/pubs/docket/nd01/250things1.php.

ACC InfoPAKS

Alternative Billing, ACC InfoPAK (May 2005), available at <http://www.acca.com/infopaks/billing.html>.

Attorney-Client Privilege, ACC InfoPAK (July 2006), available at www.acca.com/infopaks/attclient.html.

Client Surveys, ACC InfoPAK (June 2006) available at www.acca.com/infopaks/clientsurv.html.

Hiring Foreign Nationals in the United States, ACC InfoPAK, (September 2004), available at <http://www.acca.com/infopaks/hireforeign.html>

In-house Ethics InfoPAK (March 2006), available at www.acca.com/infopaks/ethics.html.

Internal Investigations, ACC InfoPAK (September 2004), available at <http://www.acca.com/infopaks/intinvest.html>

Outside Counsel Management, ACC InfoPAK (March 2006), available at <http://www.acca.com/infopaks/ocm.html>.

Records Retention (Corporate Records Management — New Issues and Solutions in Records Management), ACC InfoPAK (July 2006), available at <http://www.acc.com/infopaks/crdretention/recrctent06.html> and Records Retention (Voices: Critical Considerations Surrounding Records Management) ACC InfoPAK (July 2005), available at <http://www.acc.com/protected/infopaks/records/recrctent05.pdf>.

Responding to Government Investigations, ACC InfoPAK, available at <http://www.acc.com/infopaks/govinvest.html>

Technology Primer InfoPAK (June 2006), available at www.acc.com/infopaks/tech.html.

Practice Profiles

Leading Practices in Providing In-House Legal Support to the CFO & Finance Functions, 2004, available at http://www.acc.com/protected/article/governance/lead_cfo.pdf.

Leading Practices in Board Governance and the Role of In-House Lawyers post Sarbanes-Oxley: What Companies are Doing, 2004, available at, http://www.acc.com/protected/article/governance/lead_governance.pdf.

Leading Practices in Codes of Business Conduct and Ethics, 2003, available at http://www.acc.com/protected/article/ethics/lead_ethics.pdf.

Leading Practices in Compensation Programs and Retention Strategies for in-house Lawyers: What Companies are Doing, 2004, available at <http://www.acc.com/protected/article/lawdman/compensation.pdf>.

Leading Practices in Using Non-Lawyer Personnel to Help Perform Legal Functions, 2004, available at <http://www.acc.com/protected/article/lawdman/nonlawyer.pdf>.

Leading Practices in Sarbox 307 Up-The-Ladder Reporting and Attorney Professional Conduct Programs, 2003, available at, http://www.acc.com/protected/article/corpresp/lead_sarbox.pdf.

For more ACC InfoPAKs, please visit www.acc.com/vl/infopak

ACC Annual Meeting Materials

Leadership and Management Skills for the Attorney/Manager, ACC Annual Meeting Program Material 2003, available at <http://www.acca.com/education03/am/cm/209.pdf>.

Corporate Legal ROI: A Strategic Tool that Corporate Management Understands, ACC Annual Meeting Program Material 2003, available at <http://www.acca.com/education03/am/cm/105.pdf>.

Establishing and Maintaining an Effect Best Employment Practices Audit Program, ACC Annual Meeting Program Material 2003, available at <http://www.acca.com/education03/am/cm/506.pdf>.

Managing Employee Performance & Attendance Issues, ACC Annual Meeting Program Material 2003, available at <http://www.acca.com/education03/am/cm/706.pdf>.

Document Retention & e-Discovery in a Post-Enron/Andersen World Trends and Corporate Governance, ACC Annual Meeting Program Material 2003, available at <http://www.acca.com/education03/am/cm/704.pdf>.

Endnotes

¹ Throughout this InfoPAK, the terms "corporation" or "company" refer to typical employers of ACC members.

² See Rees W. Morrison, Law Department Benchmarks, Myths, Metrics, and Management, Ch. 10 (2nd Edition 2001).

³ Robert E. Rosen, We're All Consultants now: How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services, 44 Ariz. L. Rev. 637

⁴ Steven J. Friedman & Evan Stewart, The Corporate Executive's Guide to the Role of the General Counsel, ACCA Docket 18 no. 5 (May 2000), available at www.acca.com/protected/pubs/docket/mj00/gcguide.htm

⁵ See Steven N. Machtinger & Dana A. Welch, In-house Ethical Conflicts: Recognizing and Responding to Them, ACC Docket 22, no. 2 (February 2004), available at <http://www.acca.com/protected/pubs/docket/feb04/conflict.pdf>

⁶ 17 C.F.R. 205.

⁷ Carole Basri & Irving Kagan, Corporate Legal Departments, § 8:2 (PLI, 3rd Ed. 2001).

⁸ John K. Villa, Corporate Counsel Guidelines, vol. 1 § 3.08 (2003 ed.)

⁹ See Md. Ethics Op. 87-19.

¹⁰ John K. Villa, Corporate Counsel Guidelines, § 3.08 (2003 ed.)

¹¹ Id. see also generally R. Franklin Balotti & Jesse A. Finklestein, The Delaware Law of Corporations and Business Organizations, § 4.10 (2d ed. 1996).

¹² Rule 1.13, Cmt. 3.

¹³ Id.

¹⁴ Ronald D. Rotunda, The Lawyer's Deskbook On Professional Responsibility, § 14-2.2 (2002-2003 Ed.).

¹⁵ Model Rule 1.13(b)(1),(2),(3).

¹⁶ John K. Villa, Corporate Counsel Guidelines, § 3.06 (2003 ed.)

¹⁷ Id. at § 3.09.

¹⁸ Id. at § 3.10.

¹⁹ Id. at 3.14.

²⁰ See Carole Basri & Irving Kagen, Corporate Legal Departments, § 3:8.6. (PLI 2001)

²¹ Jeffrey W. Carr and James Lovett, Getting Closer to the Business: How to foster Innovation and Value Through Culture and Philosophy," ACCA Docket 19, no. 1 (January 2001), available at www.acca.com/protected/pubs/docket/jf01/getting.html

²² See Veta T. Richardson, From Lawyer to Business Partner: Career Advancement in Corporate Law Departments, ACC Docket 22, no. 2 (February 2004), available at <http://www.acca.com/protected/pubs/docket/feb04/partner.pdf>.

²³ See also ABA Formal Opinion 74-336.

²⁴ Model Rule 5.7 (b).

²⁵ John K. Villa, Corporate Counsel Guidelines, § 3.03 (2003 ed.)

²⁶ John K. Villa, Corporate Counsel Guidelines, § 3.07 (2003 ed.)

²⁷ Id. at § 3.13.

²⁸ Id. at § 3.18.

²⁹ Id.

³⁰ See Model Rule 5.1(c)(2).

³¹ See Model Rule 5.1(b).

³² John K. Villa, Corporate Counsel Guidelines, § 3.32 (2003 ed.)

³³ Model Rule 1.7, cmt. 1.

³⁴ Model Rule 1.6(a) ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation ...").

³⁵ John Villa, Corporate Counsel Guidelines, § 3.02 (2003 ed.)

- ³⁶ Cf. e.g. different versions of Model Rule 1.6 governing confidentiality.
- ³⁷ Model Rule 8.5(b)(1).
- ³⁸ Model Rule 8.5(b)(2)(i).
- ³⁹ Model Rule 8.5(b)(2)(ii).
- ⁴⁰ John K. Villa, *Corporate Counsel Guidelines*, § 3.02 (2003 ed.).
- ⁴¹ *General Dynamics Corp. v. Superior Court*, 876 P.2d 487 (Mass. 1984).
- ⁴² See Steven N. Machtinger & Dana A. Welch, "In-house Ethical Conflicts: Recognizing and Responding to Them," ACC Docket 22, no. 2 (February 2004), available at <http://www.acca.com/protected/pubs/docket/feb04/conflict.pdf>
- ⁴³ 584 N.E. 2d 104 (Ill., 1991).
- ⁴⁴ *Id.* at 106.
- ⁴⁵ *Id.* at 110.
- ⁴⁶ See *General Dynamics Corp.* at 499.
- ⁴⁷ John K. Villa, *Corporate Counsel Guidelines*, vol. 2 § 6.09 (2003 ed.).
- ⁴⁸ *New to In-house Practice, ACC InfoPAK* (June 2007), available at www.acca.com/infopaks/inhouse.html.
- ⁴⁹ *In-house Counsel Must Take Initiative in Managing Risk*, BNA's *Corporate Counsel Weekly* (March 17, 2004), available at www.bna.com.
- ⁵⁰ John K. Villa, *Corporate Counsel Guidelines*, vol. 2 § 6.13 (2003 ed.).
- ⁵¹ *Sarbanes-Oxley Act of 2002*, Pub. L. No. 107-204, (hereinafter referred to as SOA), available at <http://www.acca.com/legres/enron/srbanesoxley.pdf>.
- ⁵² John F.X. Peloso & Stuart M. Sarnoff, *The Sarbanes-Oxley Act of 2002: Whom Does it Affect and How?*, 8/14/2002 N.Y.L.J. 3 (col.1).
- ⁵³ See Section 307 SOA.
- ⁵⁴ *Securities and Exchange Commission Final Rule: Implementation of Standards of Professional Conduct for Attorneys*, 17 C.F.R. pt. 205 (2002), available at <http://www.sec.gov/rules/final/33-8185.htm>.
- ⁵⁵ John K. Villa, *Corporate Counsel Guidelines*, § 3.02 (2003 ed.).
- ⁵⁶ See *FDIC v. Mmahar*, 907 F.2d 546 (5th Cir. 1990).
- ⁵⁷ See Kurt Eichenwald, *Warning to Executives: Honesty is the Best Policy*, *New York Times*, July 10, 2004, Section C, Page 1 Column 2.
- ⁵⁸ Excerpted from: Randy S. Segal and Richard K.A. Becker, "Through The Looking Glass," ACC Docket 22, no. 5 (May 2004), available at www.acca.com/protected/pubs/docket/may04/glass.pdf
- ⁵⁹ *Corporate Compliance, ACC InfoPAK* (October 2004), available at www.acca.com/infopaks/compliance.html.
- ⁶⁰ *Corporate Compliance Programs in the Aftermath of Sarbanes-Oxley – or – "The Time has come, the Walrus Said..."* Program of the Ad Hoc Committee on Corporate Compliance, ABA Business Section Spring Meeting (April 2003).
- ⁶¹ See Carole L. Batri, *Corporate Compliance and Ethics after the Sarbanes-Oxley Act*, 1417 *PLI/Corp* 1211.
- ⁶² See Kenneth B. Abel & Benjamin J. Rubin, *Advising Business Clients On Document Retention Policies*, 37-FEB *Md. B. J.* 30 (January/February 2004).
- ⁶³ See *New to In-house Practice, ACC InfoPAK* (January 2007), available at www.acca.com/infopaks/inhouse.html.
- ⁶⁴ *Corporate Chronicles: How to Do Records Management for Maximum Protection*, ACC Docket 23, no. 6 (June 2005).
- ⁶⁵ See *Records Retention, ACC InfoPAK* (February 2005), available at www.acca.com/infopaks/retent.html.
- ⁶⁶ *Corporate Chronicles: How to Do Records Management for Maximum Protection*, ACC Docket 23, no. 6 (June 2005).
- ⁶⁷ See *Records Retention, ACC InfoPAK* (July 2006), available at www.acca.com/infopaks/rcrdsretention/retent06.html.
- ⁶⁸ *Id.*
- ⁶⁹ *Altman Weil/ACC 2003 Survey of Law Department Management Benchmarks survey*, available at <http://www.altmanweil.com/products/surveys/ldcbs.cfm>
- ⁷⁰ *Id.* According to the 2003 survey results, 52% of General Counsel surveyed also function as Corporate Secretary.
- ⁷¹ The percentages do not total 100% because some General Counsel report to more than one person.
- ⁷² Carole Basri and Irving Kagan, *Corporate Legal Departments*, § 2:4 (PLI 2001).
- ⁷³ Rees W. Morrison, *Law Department Benchmarks, Myths, Metrics, and Management*, Ch. 9 (2nd Edition), at 243.
- ⁷⁴ Sean Carter, *Corporate Law, And The Livin' Is Easy*, 3 *No. 18 A.B.A. J. E-Report* 6.
- ⁷⁵ *Id.* at § 2:5.3
- ⁷⁶ Rees W. Morrison, *Law Department Benchmarks, Myths, Metrics, and Management*, Ch. 2 (2nd Edition), at 41. Frequent surveys show that more than 85 percent of legal departments consider themselves to be a "centralized" department in one of the above mentioned ways. *Id.*
- ⁷⁷ Excerpted from: Adam Frederickson, *Global Counsel best practice indicators: law department structures and reporting lines*, Vol. III, *Global Counsel Magazine* (March 2003) available at http://www.acca.com/protected/gc.php?key=20030424_8126.
- ⁷⁸ The following is an excerpt from the ACC InfoPAK - *Recruiting and Retaining In-house Staff*, (July 2006), available at <http://www.acca.com/infopaks/recruit.html>
- ⁷⁹ See Lorri Salyards and Mary Matthies, *Hiring, Maintaining, and Retaining the Best Employees*, 31-Jan *Col. Lawyer* 61.
- ⁸⁰ See Marc R. Jeske, *Controlling Legal Costs: The Three C's Theory of Action*, ACCA Docket 20, no. 8 (September 2002) available at www.acca.com/protected/pubs/docket/so02/costs2.php
- ⁸¹ Rick Lavers, James Sheets, and Rob Thomas, *Electronic Billing Enters the Mainstream*, ACC Docket (May 2006).
- ⁸² John C. Yates & Paul H. Arne, *Balancing the Scales – Managing Risks in IT Projects*, 780 *PLI/Pat* 105.
- ⁸³ *Risk Management Issues for Privately Held Companies*, ACC Docket (May 2006).
- ⁸⁴ *General Counsel as Risk Manager Survey Results, ACC & Urbanomics Consulting Group* (2004), available at http://www.acca.com/Surveys/gc_risk.pdf.
- ⁸⁵ *Id.*
- ⁸⁶ *General Counsel as Risk Manager Survey Results, ACC & Urbanomics Consulting Group* (2004), available at http://www.acca.com/Surveys/gc_risk.pdf.
- ⁸⁷ Memorandum from Larry D. Thomson, U.S. Department of Justice Deputy Attorney General, to Heads of Department Components & United States Attorneys (hereinafter "Thompson Memo") (January 20, 2003), available at: <http://www.acca.com/education03/am/cm/611.pdf>
- ⁸⁸ *Id.* at 3.
- ⁸⁹ *Id.* at 1. See also, Angela F. Williams, "Corporate Compliance: Now They're Getting Serious!" White Paper, pg. 6-7 (Bryan Cave LLP: June 2003), available at <http://www.acca.com/protected/legres/corresp/corpcompliance.pdf>
- ⁹⁰ See generally, T. Banks & F. Banks (eds), *Corporate Legal Compliance Handbook*, Chapter 8, *Components of an Effective Compliance Program*, excerpted in ACCA 2003 Annual Meeting Program Material, pg. 23, <http://www.acca.com/education03/am/cm/311.pdf>.
- ⁹¹ See Angela F. Williams, *Corporate Compliance: Now They're Getting Serious!*, at 7.
- ⁹² John K. Villa, *Corporate Counsel Guidelines*, § 4.02 (2003 ed.).
- ⁹³ See Julie S. Congdon and Patricia M. Hamill, *Managing Outside Counsel in Litigation: A Primer*, ACCA Docket 21, no. 4 (April 2003), available at <http://www.acca.com/protected/pubs/docket/am03/primer1.php>
- ⁹⁴ John K. Villa, *Corporate Counsel Guidelines*, § 4.08-4.10 (2003 ed.).
- ⁹⁵ *Id.* at § 4.11.
- ⁹⁶ John K. Villa, *Corporate Counsel Guidelines*, § 4.12 (2003 ed.).

⁹⁷ If ethically permissible under Model Rule 4.2.

⁹⁸ John K. Villa, *Corporate Counsel Guidelines*, § 4.14 (2003 ed.).

⁹⁹ *Id.* at § 4.16.

¹⁰⁰ See *id.* at § 4.17.

¹⁰¹ See *infra* p. 4.

¹⁰² *Id.* at § 4.18.

¹⁰³ See *Outside Counsel Management*, ACC InfoPAK (March 2006), available at www.acca.com/infopaks/ocm.html

¹⁰⁴ *Id.* at § 4.23.

¹⁰⁵ *Id.* at § 4.24.

¹⁰⁶ See *U.S. Steel Corp. v. U.S.*, 730 F.2d 1465, 1468 (C.A. Fed. 1984).

¹⁰⁷ *Matsushita Elec. Ind. Co., Ltd. v. U.S.*, 746 F.Supp. 1103.

¹⁰⁸ Richard E. Mulroy, *Issues of Outside Counsel Management*, ACCA Docket (May/June 1995).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² ACC/Serengeti Managing Outside Counsel Survey: Assessing Key Elements of the In-house Counsel/ Outside Counsel Relationship (2003), at 20–21, available at <http://acc.com/resource/v369>. See also ACC/Serengeti Managing Outside Counsel Survey: Assessing Key Elements of the In-house Counsel/ Outside Counsel Relationship (2006), available at <http://acc.com/resource/v7665>.

¹¹³ *Id.* at 22.

¹¹⁴ See ACC/Serengeti Managing Outside Counsel Survey: Assessing Key Elements of the In-house Counsel/ Outside Counsel Relationship (2006), at 21, available at <http://acc.com/resource/v7665>. The response rate has remained steady in the past few years, with the exception of 2004.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See *Benchmarking the Performance of Outside Counsel*, ACC Docket (May 2006), available at <http://acc.com/resource/v7174>

¹¹⁸ ACC/Serengeti Managing Outside Counsel Survey: Assessing Key Elements of the In-house Counsel/ Outside Counsel Relationship (2003), at 20–21, available at <http://acc.com/resource/v369>.

¹¹⁹ See ACC/Serengeti Managing Outside Counsel Survey: Assessing Key Elements of the In-house Counsel/ Outside Counsel Relationship (2006), at 21, available at <http://acc.com/resource/v7665>.

¹²⁰ *Id.* at 23.

¹²¹ See *Benchmarking the Performance of Outside Counsel*, ACC Docket (May 2006), available at <http://acc.com/resource/v7174>

¹²² Obtained from Sun Company, Inc

¹²³ Excerpted from: *Job Descriptions for Law Firms and Corporate Law Departments*, A Special Abridgement for 1996 Law Department Compensation Benchmarking Survey Altman Weil Pensa (December 1995).

THE GENERAL COUNSEL AND IDEAL OF THE LAWYER-STATESMAN

Despite the scandals, I would argue that it is also the best of times for lead lawyers at corporations.

General counsels are uniquely positioned in the private sector to carry out the rather grandiloquently named role of “lawyer-statesman” or “statesman-advisor.” Indeed, the “worst of times” problems demand that we aspire to this “best of times” role.

In a recent article, Yale legal historian Robert Gordon noted that “in the post-World War II era, a group of lawyers and legal academics—including Lon Fuller, Willard Hurst, Hart and Sacks, and Beryl Harold Levy—theorized, from hints dropped by such Progressive lawyers as Brandeis and Adolf Berle [about] . . . the role of the new corporate legal counselor as a “statesman-advisor.”¹¹

Similarly, in his book *The Lost Lawyer*,¹² Yale Law Dean Tony Kronman tried to rehabilitate the concept of the lawyer-statesman and noted that the leaders of in-house legal departments might play such a role.

Both Gordon and Kronman are, however, describing a role model they view as in decline. Dean Kronman says, “the ideal is now dying in the American legal profession.” Such pessimism about the lack of leadership on the private side of the legal profession has been voiced consistently during the past decade—in such books as *The Betrayed Profession*¹³ by former Xerox General Counsel and CEO Sol Linowitz and *A Nation Under Lawyers*¹⁴ by Harvard Law Professor Mary Ann Glendon.

What then is this ideal for those in the private sector? (I put to the side the many distinguished lawyers who have had notable public careers—who are quite literally lawyer-statesmen—and I do not believe there is any decline in the willingness of pri-

vate lawyers to engage in public service.)

For Gordon, the statesman-advisor is one who represents his client’s interest “with an eye to securing not only the client’s immediate benefit, but his long range social benefit.”¹⁵ For Kronman, it is:

- practical wisdom, not just technical mastery;
- broad judgment based on a knowledge of history, culture, human nature and institutions, not just a sharp tactical sense;
- the ability to understand long term implications, not just achieve short-term advantage;
- a deep concern about both the private good and the public interest—and a deep concern about building durable institutions which achieve their aims in a fair and honest way even under stress.¹⁶

In the golden era (whenever that was) these private lawyer-statesmen were the great senior partners in the great firms who advised the great leaders of our private institutions with great wisdom—the Cy Vances, Lloyd Cutlers, Howard Trienens, or Jim Bakers. But all the authors decry the well-known trends of the past 20 years, which have eroded the role of the solons of the private bar. To name a few:

- Increasing specialization in private firms.
- Pressures to make law firms more like business organizations driven primarily by the profit motive.
- The corporation’s selective purchase of legal services based on matter-specific determinations of cost and quality so that a single outside firm no longer dominates with a client—and a senior partner is more likely to be bidding for work than whispering in the ear of the CEO.
- Finally, the upgrading of general counsel and the cadre of inside lawyers so that power has shifted from outside to inside, with the general counsel now the closest lawyer-advisor to the CEO and the board.

I personally believe that the death of the statesman-like senior partner is greatly exaggerated. I know many. In most cases, they are deeply committed to diversity and pro bono activities, to the broad interests of the bar and their communities, and to national policy and international affairs. A number still wish for a turn in government or a final career move to the bench. They exist, even without the media coverage afforded former giants.

But there is certainly truth about the upgrading of general counsel and other inside counsel. Indeed,

many mid-career partners in law firms are as interested in a senior position in complex private sector institutions as a stint in government. And, it is certainly true that, with many hired by corporations after careers both in law firms and the public sector, general counsels have assumed the role of senior advisor to CEOs and boards once held by senior partners.

INDEPENDENCE MUST EXTEND SO FAR AS A WILLINGNESS TO SPEAK PRIVATELY TO SELECT BOARD MEMBERS, OR TO RESIGN WHEN IMPORTANT INTERESTS OF THE COMPANY, OUR ULTIMATE CLIENT, ARE CLEARLY NOT BEING SERVED.

THE POTENTIAL—AND—CHALLENGES OF BECOMMING A LAWYER-STATESMEN

Responsibility Accompanies Potential

There is little question in my mind that the position of general counsel allows—indeed demands—that the incumbent try to act as a lawyer-statesman.

This is so for at least two reasons.

First, the large, modern (often transnational) corporation is a highly complex organization serving a multitude of stakeholders with both near and long-term interests. GE, for example, has millions of shareholders and creditors, hundreds of thousands of employees and retirees, and hundred upon hundreds of communities where we work and where our suppliers work. Further, hundreds of millions of people depend in a profound way on our products: from financial services to aircraft engines to power generation equipment to diagnostic imaging machines.

The simplistic public view of a company is symbolized by overpaid executives grubbing for that most suspect of all goals, corporate profits. But the reality is far different. For example, GE's \$15 billion in 2005 profits, when converted into cash, are used almost exclusively for three purposes: distributions to an extraordinarily broad base of shareholders; investment in organic growth; and acquisitions

to strengthen existing business and geographies or move into new ones. Cash compensation for the top 55 executives is a fraction of one percent.

Moreover, the long-term success of GE depends on wise strategies for growth, technology development, and customer service—in satisfying the many legitimate needs of the many types of stakeholders over time. There is no long-term shareholder value without addressing this much more complex set of varied and legitimate stakeholder interests, of broad, varied, and dispersed constituencies.

A second, related reason we all need to aspire to the lawyer-statesman role is the range of issues that we, as heads of legal departments, must today address with our boards, our CEOs and our colleagues. To list but a few:

- Effecting balanced globalization—and addressing such hot-button issues as trade, sourcing and worker protection.
- Ensuring sound corporate governance and meaningful transparency.
- Securing global compliance with law and ethics and institutionalizing other aspects of corporate social responsibility.
- Ensuring balanced, constructive relationships in our interactions with customers and in doing acquisitions and dispositions.
- Responding forcefully and responsibly to the litigation explosion and managing the varied public and private disputes which comprise the company's docket.
- Finding balanced, credible, fact-based public policy responses to a broad array of offensive and defensive issues—responses that should recognize the legitimacy of competing values and be fair-minded and explicable to those who will listen.
- Even more broadly, defining the line in a mixed economy between necessary market regulation and needed enterprise freedom—that balance, in Art Okun's famous formulation⁷, between equity and efficiency.
- Providing pro bono services by in-house lawyers.

Both the true nature of the corporation as a complex economic and social organization, and the broad range of issues confronting business demand the practical wisdom, the broad judgment, the long-term view and the ability to create durable positions and institutions which are characteristic of the idealized lawyer-statesman.

Challenges

But, if our positions demand a broad counselor/decision-maker role, what are some of the salient challenges we face in making that aspiration a reality?

First and foremost is resolving the ultimate tension of the general counsel—of any inside counsel—between giving independent judgment and advice and securing the trust and confidence of the board, the CEO, and other executives. Is it possible to be both an independent counselor and a business partner, to be both a lawyer and member of the management team?

It is probably no surprise if I say that I believe the answer is “yes.” But there do have to be certain pre-conditions.

IF THE COMPANY HIRES INDIVIDUALS OF STATURE, THEN SUCH INDIVIDUALS HOPEFULLY DO NOT SELL OUT THEIR REPUTATIONS AND THEIR CONSCIENCE FOR DOLLARS.

First, the CEO has to want, really want, unvarnished views about the problem at hand *and* in the context of a multi-faceted view of the long-term interests of the company. Obviously, on legitimate judgment calls (not calls on what is legal and illegal), the CEO has the last word. But, to play a broader role, the general counsel needs a broader CEO and a board that demands such a CEO.

Also, the general counsel must have the strength of character to act independently. He or she must have enough life experience, stature, and self-confidence to express honest, complex views even under the inevitable pressure for simple, short-term answers. This independence must extend so far as a willingness to speak privately to select board members, or to resign when important interests of the company, our ultimate client, are clearly not being served. These extreme measures should rarely occur, but a general counsel should not take the job unless he or she is prepared for this possibility.

The trend of hiring general counsels who have had notable careers both in private practice and in the public sector creates a cohort of lead lawyers who know how to work in complex organizations.

But they also have independent stature which allows them to give independent advice. This means they value their reputations for integrity, and it also provides a range of future options should their independence be sorely tested.

Also, there is the question of whether equity interests and other long-term economic benefits compromise a general counsel's independence. This is not easily answered in a sentence or two. But if the company hires individuals of stature, then such individuals hopefully do not sell out their reputations and their conscience for dollars, any more than the great senior partner advisors of yore were compromised by the possibility of losing a company's business if they spoke bluntly and honestly to the CEO.

Paradoxically, the greater a role the general counsel can play in helping the CEO and other business leaders achieve the myriad of legitimate business goals of the company, the greater the likelihood that the necessary relationship of trust will develop in which the CEO wants, even demands, views that are as candid and complete as possible. The broad counselor role does not involve pious pronouncements, but in-the-trenches collaboration with the business team on offensive and defensive, public and private issues—collaboration which earns real trust because of real contribution.

A second, related challenge which must be met for the general counsel to play the broad counselor role is that the company must have a culture of integrity and compliance.

There are several important dimensions of corporate governance: the relationship between the shareholders and the board/management; the relationship between the board and the management; and the relationship between management and the company. Much of the corporate governance literature—and much of the attention since the scandals began with Enron—has focused on the board-management relationship. Recently, with the SEC shareholder access proposal and the issues at Disney, there is increasing attention to the shareholder-company relationship.

But in my judgment, the most important relationship between senior management and rest of the company has received the least attention: How does a company manage, in Jeff Immelt's phrase, “to achieve performance with integrity?” What is a

culture of compliance and how do a company's leaders create it?

I cannot here write the book which is required to answer those questions. A couple of observations must suffice.

The culture of compliance and integrity obviously begins with the CEO and business leadership, however significant the implementing role is for finance and legal. If CEOs do not believe in these core values in their hearts and souls, and communicate those beliefs with that passion, then the culture may not flourish. General counsels must be convinced of that critical CEO commitment before accepting the top legal job, although they obviously have a central role to play in helping the CEO make good on that commitment.

An absolutely essential check and balance in the internal management of the corporation is a robust ombuds system. Employees and others with connections to the company must have confidence that they can report concerns about legal or ethical vio-

lutions; that their anonymity will be respected; that there will be no retaliation; and that the concerns will be dispassionately investigated by finance, legal, and HR with appropriate individual and remedial action and without fear or favor.

At GE, we have a long-standing ombuds system for employees. As a result of Sarbanes-Oxley, we also have parallel systems for anyone to report concerns directly to the directors and for lawyers to report concerns to their supervisors. In our legal channel, we just made it simple: any lawyer in the company with any concern should lodge it with the ombuds system, like other employees, and additionally cut through any legal layers and immediately report it to the company's general counsel.

We fire people for failure to report a concern that they did know or should have known, and we

fire people for retaliating against those who make reports. We have independent processes for investigating and resolving those concerns and reporting to the board. This ombuds process is, we believe, a critical element of a compliant culture because it gives powerful voice to people all across the organization.

A third challenge to general counsels who aspire to the lawyer-statesman role is the skepticism—and cynicism—in the public and the media about corporations. Some of this skepticism is, of course, well-founded given the extraordinary string of scandals in the past few years and the tendency of some in the business community to make narrow, self-serving arguments on public issues. And some of it, despite the fundamental role of the corporation in our economy, is due to a deep, historic strain of American populism which distrusts or misunderstands big business, business executives and the broad, constructive impact of corporations on a wide array of individuals in our society.

Discussions of public policy issues, like the current debate about globalization and overseas outsourcing, will of course take place in a political environment, if not the turbulent atmosphere of a political hurricane. Seeking to make broad economic and social policy points in a highly charged and often distrustful political world is a daunting task for us all.

But we cannot blame others. Corporations will have to decide how to engage in more effective and credible public advocacy on issues of great importance. Analysts' reports, MD&A, and short one-sided press releases or position papers are not sufficient. Corporations will have to face an issue they like to avoid: whether they want to take the risk of raising their heads above the foxhole; to engage in a broad public debate on controversial issues; and, given the vagaries of the modern media, to face the possibility that there could be more downside than upside.

Yet, making a fair-minded and fair-sounding case for necessary public positions in our bitter, anti-corporate political culture must be a core competency of the broad counselor/advisor. We should not be concerned about the *New York Times* test in the following sense: given anti-corporate bias, the media will not hand out kudos to general counsels. We should, instead, be concerned about the "look

in the mirror" test: Have we served our private enterprise and its varied constituencies well in both the near-term and the long-term, while also being sensitive to broader public interests?

The Worst of Times

Let me return briefly to the lawyers' role in the recent scandals.

If it is proven in court that a general counsel of a major corporation committed a crime by stealing from that company and violating its internal rules, then we will have the case of a rogue lawyer who, like many others in many professions, succumbed to greed. The more important issue, beyond one person's failings, will be why that company failed to have a culture of compliance and integrity—and checks and balances—where such an event would be unthinkable and impossible, even by the general counsel.

A different failing, perhaps exemplified by Enron, is where lawyers were asked to approve and paper transactions which may have been questionable from a legal, ethical, and reputational point of view. Reduced to basics, the report of Neal Batson, court appointed examiner in the Enron bankruptcy, suggests that the lawyers approached these transactions with blinders, trying to find a narrow legal justification and failing to comprehend (or even trying to comprehend) completely their purpose, their relationship to the company ethics policies, and their clarity to key company officials and the board. We may not always succeed. But we must try, in gray cases, to be well inside the line between right and wrong and to consider the legal issues we are being asked to address in a much broader reputational, ethical, and governance context.

Finally, there is that haunting question in other financial fraud scandals: Where were the lawyers? CFOs, not GCs, have been accused of, and in some prominent cases pled to, crimes. Legal and finance are together responsible for adequate internal controls and disclosure controls under Sarbanes-Oxley. But beyond those important reforms, general counsels have a significant role in ensuring the voices of employees and others may, in a protected setting, raise concerns through an honest, robust ombuds system. If such a system had existed, then misdeeds like massive accounting fraud might have surfaced far earlier and, if senior management was involved, directed immediately to the board.

Without pretending to understand the detailed factual circumstances in all these scandals, and while necessarily needing to wait until legal matters are ultimately adjudicated or otherwise resolved, it does seem clear that the inside legal community's important role in providing checks and balances—and taking a broader view of the issues—was sadly wanting in the corporate scandals.

PROVING KRONMAN WRONG

Let me end with the paradox with which I began. The "worst of times" failures of a few inside counsel, and the larger scandals of which they were a part, create the opportunity—indeed, the requirement—that inside counsel play the "best of times" role continuously. We must all take on the challenge of being lawyer-statesmen. Our jobs have not changed, but times have. And there is, no doubt, greater receptivity to this broader role than ever before, with quality companies deeply concerned about performing with integrity, about being transparent, and about deserving the trust of all their stakeholders.

At the end of *The Lost Lawyer*, Kronman gives three reasons why in-house practice may not be congenial to the lawyer-statesman ideal.

First, some company's range of issues may be too narrow. But even "single product" companies have a wide array of goods and services and operate in a complex regulatory, global, NGO, and media environment.

Second, Kronman says, "The lawyers on a company's in-house staff, though familiar with its day-to-day activities, are unlikely to be involved in the handling of their employer's most extraordinary problems, which today, as in the past, are assigned to outside specialists."²⁸ He does acknowledge that this may not be true of the general counsel and his or her top assistants. But since Kronman wrote, corporate practice has shifted toward in-house specialization and toward bringing more and more of the difficult problems in-house or, at a minimum, having inside-outside partnerships of equals to address the company's most challenging issues. This is the real answer to Kronman's concern.

Finally, Kronman raises the question of independence. The answer here is to hire people of experi-

ence and stature whose loyalty to the company and the company's leaders will be demonstrated by giving the broadest and best possible counsel—and to have a business culture that demands such a contribution from its chief lawyer (and other inside counsel).

Kronman ten years ago concluded: "There is reason to doubt whether the immense in-house law departments that many corporations now possess can provide a new and more enduring home for the 'lawyer statesman' ideal. I do not say this impossible, but it is dubious at best."

Based on more than 15 years as GE's general counsel, and my honor and privilege to work with great GE inside lawyers around the globe, I believe Dean Kronman is wrong.

More importantly, it is the duty and responsibility of all general counsels to *prove* him wrong.

NOTES

1. Robert Gordon, "?????????" 55 CONN.L.REV. 85 (????).
2. Tony Kronman, *The Lost Lawyer* (Harvard University Press 1993).
3. Sol Linowitz, *The Betrayed Profession* (Charles Scribner's Sons 1994).
4. Mary Ann Glendon, *A Nation Under Lawyers* (Farrar, Straus and Giroux 1994).
5. Gordon, *supra*, at ___ [please fill in]
6. Kronman, *supra*, at 11-53.
7. Art Okun, *Equality and Efficiency: The Big Tradeoff* (Brookings Institution).
8. Kronman, *supra*, at 508.

Recruiting & Retaining In-House Staff

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Attracting qualified professionals and motivating them to give their best are top concerns for today's corporate legal departments. This InfoPAKSM offers some tips on how to successfully recruit, hire and manage employees. This information does not represent legal advice and should not be relied on as such, nor do the opinions expressed in this material reflect the views of ACC or its lawyers, unless so stated. This is not intended as a definitive statement on the subject, but as a tool, providing practical information for the reader. Included are sample forms and checklists relevant to the topic.

Please help us improve this InfoPAK by contributing your relevant information concerning Recruiting and Retaining In-house Staff. We hope that you find this material useful. Thank you for contacting the Association of Corporate Counsel.

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I. Recruiting, Hiring and Managing: An Overview

Attracting qualified professionals and motivating them to give their best are top concerns for today's corporate legal departments. These offices must locate attorneys, paralegals and administrative staff with the right expertise to address the changing array of legal issues that companies face. And once a first-rate team is assembled, general counsel and supervisors must encourage them to strive for peak performance and to work effectively together to accomplish common goals.

Despite your best efforts, sometimes you'll be faced with problem employees or other difficult situations. Knowing how to promptly and appropriately react allows you to minimize the impact of adverse circumstances on your staff. This InfoPak offers some tips on how to successfully recruit, hire and manage employees.

Following is a summary of the areas we'll cover in detail:

Recruiting Top Talent

Before you begin the hiring process, you should have a comprehensive recruiting strategy in place. This involves forecasting possible workload peaks and valleys, which will help you decide the type of employee required — full-time, part-time or project — or whether you even need a new hire at all. After creating a plan, prepare a job description and research compensation trends in your area.

Hiring the Best People

A well-prepared job description can help you evaluate the quality of the resumes you receive. When you've decided whom you would like to interview, the job description can also assist you in developing questions to ask during these meetings. Once you have a top candidate for the position, be sure to check references thoroughly in accordance with your company's policies and/or procedures. Once new hires are on board, provide a proper orientation so they can hit the ground running.

Motivating and Managing People

Sustaining your team's productivity levels and minimizing turnover requires that you effectively manage and inspire employees to give their very best. Providing a supportive work environment that offers open communication and honest feedback are among the best ways to elicit peak performance from your legal staff.

Handling Difficult Situations

Even the strongest companies can face difficult times that make staff reductions necessary. And managers who employ the best hiring strategies and supervisory

styles are not immune to the problems presented by underperforming team members. How you deal with a variety of challenging workplace situations — including layoffs and terminating employees — will determine whether you're able to protect your company as well as the morale of the rest of your team.

II. Recruiting Top Talent

A. Determining Your Staffing Needs

As corporate legal departments attempt to address rising workloads while also containing human resources costs, they're often faced with the challenge of doing more with less. There is an alternative, however, and it's called strategic staffing. This approach begins with reassessing your employment requirements in terms of your department's long-term objectives. The next step involves satisfying those needs with a well-chosen mix of full-time and project legal professionals. With this process, you don't become locked into maintaining additional staff you may not need regularly. Instead, you turn a portion of your largest fixed cost — labor — into a variable cost that is tied to your changing workloads. This flexibility can give you a significant competitive advantage. Strategic staffing also protects the jobs of full-time employees by helping you avoid a demoralizing cycle of overhiring, layoffs and costly rehiring when conditions change again.

1. Filling Needs, Not Desks

As caseloads increase and deadlines loom, many hiring managers and administrators respond by immediately attempting to fill job vacancies or create new positions. A well-planned hiring process can help you keep up with the rapid pace of change within organizations today. To cost-effectively maintain access to top legal talent, try to look beyond the "one person, one job" approach.

When a staff member leaves, don't automatically assume you must replace him or her with another full-time professional with the very same qualifications. Examine how the work may have changed since the last person that held the position was hired: Are new skills and abilities now needed? Also consider whether some of the job responsibilities could be redistributed among existing staff. Duties that must be performed only occasionally can be assigned to a qualified project professional.

2. Initiating a Strategic Staffing Plan

After you've determined the staffing needs for the position in question, step back and conduct a comprehensive analysis of your entire department's employment trends for the past year. By identifying workload peaks and valleys, you can better

plan for upcoming demands.

While a full-scale staffing evaluation for your department is recommended, you may already know how well your staffing plan is working without doing a formal analysis. The indications are obvious. Low morale, missed deadlines and increased absenteeism are danger signs that your team is understaffed. If that's the case, a strategic staffing plan — carefully thought-out and executed — should be your first priority.

3. Deciding on the Kind of Help You Need

Once you've determined that a strategic staffing plan can help you achieve maximum productivity, take a look at the different types of temporary professionals available:

- Pinch hitters fill in during employee absences, providing assistance during peak work periods. They can also help you bridge the gap during job vacancies resulting from an extended job search or hiring freeze.
- Specialized experts include professionals with skills that don't exist internally who can help with specific new initiatives.
- Professionals for special projects can work with full-time staff or with technical experts on one-time tasks, such as automated litigation support for a particular case.

4. Monitoring Your Staffing Activities

Strategic staffing is a year-round effort. Once you've put a plan into action, you will still need to regularly reassess your human resources needs. This allows you to make any necessary adjustments, such as utilizing paralegal project professionals in new areas if you find they have additional knowledge of which you were previously unaware.

Talk to your full-time staff often about how project professionals are working out. Are they making a difference in workloads? Members of your team who are closest to the projects are obviously in the best position to offer this feedback.

If intelligently planned, implemented and monitored, a strategic staffing approach offers your legal department considerable flexibility and provides a cost-effective way to deal with fluctuating workloads while maintaining your full-time team's morale and productivity.

B. Using Competency Modeling

Whether you decide on full-time, part-time or project professionals, what qualities should you seek in staff members? Many firms today are using a process called "competency modeling" to help target the characteristics that distinguish top

performers. This information can then be used in the hiring process to evaluate prospective employees.

Competency modeling involves determining, as accurately as possible, what combination of traits and abilities are required for professionals to excel in their jobs. This process not only helps you hire the most qualified legal staff, but it also uncovers areas in which employee training might be useful. Following are several strategies designed to help you build an effective competency model.

1. 'Interview' Your Top Talent

Nearly every firm employs several stand-outs who consistently outperform their peers. For example, if you're a senior corporate counsel overseeing 12 employees, you may have a particular staff member who has become the troubleshooter by default. Coworkers rely on his or her interpersonal skills and analytical abilities when they need to resolve an issue — two traits to incorporate in your model. The key to competency modeling is identifying all of the traits inherent in extraordinary performers.

One of the easiest ways to gain this insight is to observe your outstanding employees directly. As you do, ask yourself:

- What, if any, special skills do they possess?
- What personality traits do they share?
- What common attitudes and beliefs do they bring to work?

Typically, patterns will emerge, and these are the qualities you should incorporate into your competency model.

2. Talk to Clients and Vendors

Your contacts within the company and the vendors you use can also be sources of valuable information. Seek input from those with whom staff members interact on a regular basis. You may find they value a particular employee because he or she listens carefully to their requests and often is able to resolve issues independently, rather than passing problems on to others. Based on that information, you would incorporate problem-solving ability, listening skills and accountability into your competency model.

A fully developed competency model will help to enhance the talents of your current employees. Weigh their strengths against those you've found to be most important to your company's success. If you find a gap that applies to a significant number of workers, invest in additional training. It can be an excellent way to build and promote leadership from within the organization.

C. Writing a Job Description

A detailed job description should be developed well in advance of the recruitment process. As you receive and review resumes, the job description will help you narrow the field. And when the candidate you select comes on board, you will be able to define exactly what's expected on the job.

A well-written job description should include the following:

- Primary responsibilities. Outlines the main duties of the position.
- Secondary responsibilities. Describes periodic, rather than daily, duties (i.e., "train new staff members").
- Experience required. Specifies type and amount of experience. For example, does the candidate need to be familiar with a specific practice area and industry (i.e., extensive knowledge of intellectual property for software manufacturing) or have a minimum number of years' experience in the field?
- Compensation. Establishes a starting salary range for the position.
- Preferred educational background. Specifies degrees, certifications and other credentials sought. (Be careful not to turn this item into a "deal-breaker" later in the hiring process. Credentials can be a useful screening device, but their absence should not prevent you from hiring an otherwise qualified, experienced prospect.)

Sample Job Description #1

Position: Associate General Counsel for XYZ College

Job Summary: Provide a wide range of legal services to the client; report to the General Counsel.

Primary Responsibilities:

- Assist the General Counsel, primarily in the areas of employment law, contract and commercial law, and general civil litigation.
- Litigation responsibilities include both assisting the General Counsel and supervising outside counsel.
- Educate and counsel faculty and staff on legal issues.
- Draft, review and negotiate contracts.
- Represent the client in administrative proceedings.

Requirements & Qualifications:

- Candidate must be a member of the Florida Bar.
- Candidate must have at least 3 years of experience in Labor and Employment Law or 5 years of experience in General Civil Litigation.
- At least 1 year general corporate/transactional experience preferred.
- Prior college or university experience preferred.

Sample Job Description #2

Position: Legal Administrator for the Legal Department of ABC Corporation
Reports to: ABC General Counsel

Supervises: Legal Secretaries and/or technical and support staff as assigned.

Job Summary: Supervise all legal support personnel, including legal secretaries, word processors, files clerks and legal data entry personnel; handle administration and management of office operations; liaise with other ABC Corp. operating departments.

Primary Responsibilities:

- Hire, train, supervise, evaluate and terminate all legal support personnel, including legal secretaries, word processors, files clerks and legal data entry personnel, under the general direction of the General Counsel.
- Prepare work plans and coordinate the scheduling and timely completion of work for all legal support personnel.
- Purchasing and payment of all accounts; prepare, coordinate, review and monitor overall accounting and financial administration including budgets, financial reports, cost of service analysis, and organizational reviews, all in consultation with appropriate Legal Department staff members.
- Handle daily office administration and management including selection and maintenance of office equipment and automation, organizing and maintaining office records systems, maintaining law library.
- Coordinate departmental agenda, including tracking, assembling, and monitoring agenda items, attend agenda planning meetings.
- Act as liaison and interface between Legal Department and other ABC Corp. employees, operating departments and bodies.
- Perform related duties and responsibilities as required.

Requirements & Qualifications:

- Bachelor's degree in public or business administration or equivalent work experience.
- At least 3 years of experience as a legal administrator in a public agency or private law firm or corporate legal department.
- Accounting experience including budget preparation, analysis, monitoring, and expenditure control.
- Human resources experience including hiring, training, supervising, evaluating and terminating personnel.
- Knowledge of and ability to maintain a law library.

Sample Job Description #3

Position: Legal Secretary in the Legal Department of MNO Corporation
Job Summary: Perform clerical, secretarial, and administrative support work in maintaining office operations and assisting MNO Corporation's legal department; report to the General Counsel.

Primary Responsibilities:

- Perform all functions of a legal secretary working in the area of general civil and commercial litigation, including calendaring, docketing, filing, preparing motions, pleadings and correspondence.
- Perform all functions of an executive secretary including composing, typing and editing correspondence, memoranda and reports, arranging and coordinating travel and appointment calendar, and performing miscellaneous administrative and clerical duties in support of the General Counsel and MNO Corporation's legal department.
- Establish and maintain legal department's filing system, control records and indexes.

Requirements & Qualifications:

- At least 3 years of experience as a litigation legal secretary with experience at both the State and Federal court level.
- High level of proficiency with all MS Office programs, particularly MS Word, Excel, Access, PowerPoint and Outlook.
- At least 1 year of in-house experience preferred.
- Graduation from high school or a GED equivalent.

D. Researching the Market

A prerequisite for successful recruiting is a competitive compensation package. Managers who have access to the most up-to-date information on salaries and other incentives will be best positioned to structure an attractive employment offer.

1. Comparing Salaries

While legal professionals consider many different factors when deciding among job offers, a competitive base salary is still key to recruiting top talent. Ideally, you should offer salaries that keep pace with — or slightly exceed — current industry and local market standards.

If you're not sure what these standards are, contact specialized recruiters or consult industry surveys for information about salary ranges for legal personnel at other companies of comparable size in your area. Robert Half Legal Salary Guide fea-

tures compensation levels for a wide range of in-house legal department positions as well as insight into job market trends. Other ways to benchmark your compensation levels include:

- U.S. Bureau of Labor Statistics Occupational Outlook Handbook — available online at www.bls.gov
- Reports prepared by industry publications and professional associations (online and in libraries)

Competitive compensation is not only an essential element of successful recruiting and hiring; it's critical to effective, ongoing staff management. Compensation has a significant effect on how employees feel about their jobs; therefore, salary levels should be periodically reevaluated to ensure they are keeping pace with the market.

2. Attracting Hard-To-Find Talent

If you're looking for expertise in specialty areas currently in high demand, you may have to be more flexible when planning compensation and benefits. Knowledge of patent law, for example, continues to be sought by many corporate legal departments. That means competition for these experienced professionals is likely to be more intense and you may have to pay a little more.

What should you offer to attract hard-to-find talent? Signing bonuses may be used as an added incentive for senior-level professionals. While these are most often thought of as recruitment tools, they can also aid in retention since they usually require employees to remain with a firm for a specified length of time. Other incentives to discuss with top candidates include company stock options or equity incentives; retirement programs; employee health care plans; and on-site benefits such as a childcare center, cafeteria and workout facilities.

These and other elements are part of your staff's overall compensation and should be presented to prospective candidates, particularly those with in-demand skills and experience.

E. Making Recruitment an Ongoing Commitment

Once you've identified the skills and qualities you need, your next step is to locate candidates who possess them — through a strong and ongoing recruitment program. Remember that recruiting is more about quality than quantity. Just because you attract a large number of resumes doesn't mean all applicants are equally qualified. Focus on identifying professionals with the skills you need most.

1. Recruiting is a Year-round Job

Many hiring managers view the recruitment process to be an as-needed activity. The most successful recruiting efforts, however, require an ongoing commitment

that involves continually reassessing your needs and searching for top talent. In fact, companies known for their ability to attract and hire quality employees are always recruiting — even when they have no immediate openings.

2. Identifying Candidate Sources

There are a number of ways to recruit the talent you need for your legal department. Some of the more traditional include:

- **Classified advertising:** Evaluate the cost versus the benefit of newspaper or business publication classified ads. These advertisements can reach a large audience, but, in the process, may attract a great number of unqualified candidates you'll have to evaluate.
- **Employee referrals:** Encourage employees to refer friends and relatives by offering incentives such as bonuses or extra vacation days.
- **Network referrals:** Attend professional association events regularly to meet potential new hires. Ask others in your network for candidate referrals. Be as specific as possible when you're telling people what you're looking for, and make sure you trust the source of a recommendation.

3. Going Online

In addition to traditional recruiting methods, the Internet has become an invaluable tool for sourcing qualified legal professionals. The ease of posting employment openings, the relatively low cost of advertising and the speed of candidate response has many legal administrators and managers devoting more time than ever before to recruiting online.

As with other tools, the Internet is not without its limitations as a means of attracting qualified candidates. For example, firms listing opportunities on major job boards may receive applications from a much wider geographic region — and sometimes from less-qualified applicants — requiring additional sorting and review. Firms are also noting that some candidates who post their resumes online may be more passive job seekers; they merely want to “test the waters” and wait for results.

If you are using the Internet in your recruiting efforts, here are some tips for increasing your success in locating candidates:

- **Make your company's website candidate-friendly.** Are job opportunities at your office easy to find? Can candidates apply online? What message do applicants receive once they've submitted their resumes? All of these factors play a role in the number of job seekers visiting your site and the type of first impression your firm presents.
- **Explain what's unique about the position(s) you're advertising.** What exactly about this role is exciting and challenging? What type of person would be most likely to

thrive in your company?

- **“Sell” the firm as well as the position.** Unless your company is a household name, be sure to include a sentence or two describing your business. If your firm has just celebrated a major milestone or received positive media coverage or industry recognition, briefly mention that as well. What innovative employee benefits do you provide? Differentiating your organization from the thousands of others recruiting online will help you build name recognition.
- **Network on industry sites.** Become familiar with websites of bar and professional associations as well as others targeted to the legal field. These sites can provide valuable opportunities for broadening your reach in the legal community and getting to know a group's officers and members, many of whom may be qualified job candidates. Often these sites will post job openings for a nominal fee.
- **Familiarize yourself with recruiter sites.** Whereas major job boards guarantee you'll reach a wide spectrum of job seekers, recruiter sites can expose your employment openings to targeted legal professionals in specific practice areas or industries.

4. Adding Flexibility

Staffing a position on a temporary or temp-to-hire basis can provide you with greater flexibility during your decision-making process. In addition, this arrangement gives you a chance to evaluate a candidate over an extended period of time to determine if he or she is a potential fit for a full-time position.

5. Maximizing Your Efforts

Make the most of the time you invest in your recruitment program by keeping the resumes of all candidates on file after interviews — even those who don't get the job. You never know when your requirements will change and you'll need expertise you weren't originally seeking.

6. Working with Recruiting Firms

In addition to the recruiting sources discussed above, using specialized staffing firms can help you fine-tune your search. You'll gain access to a large pool of qualified applicants and avoid the administrative details of placing ads and preliminary screening. If you decide to adopt this approach, here are some suggestions for finding the best firm:

- **Check out recruiters personally.** While online and newspaper sources can be helpful, firms offering a personal approach to service can save you time and money in the long run because they can give individualized attention to your specific needs. To take advantage of this benefit, make in-person visits to firms that specialize in locating legal professionals with the experience and skills you require.
- **Be explicit about your needs.** When speaking to your account executive, make sure he or she understands your business, your corporate culture and your exact

requirements as a legal department.

- **Clarify fee arrangements.** Ensure that you have a clear understanding of how your recruiter charges, and make sure any arrangement you make is in writing.
- **Express your concerns openly.** If you aren't happy about any aspect of the arrangement, clearly explain your concerns to the recruiter.

F. Promoting From Within

If you're staffing strategically, you've likely already considered internal resources before you began the recruitment and hiring process. If you have not, take a moment to consider the advantages of promoting from within.

Internal promotions are proof to your employees that hard work and excellence are rewarded in the company. But promoting from within requires careful planning. You need to actively groom promising employees to take on new responsibilities and assume greater authority. Include your best performers as frequently as possible in high-level meetings outside the legal department. This can help them build skills in strategy development, and it offers them an opportunity to observe firsthand the management style in your company.

To expand your employees' leadership abilities, consider appointing promising individuals to chair key committees or task forces. Most importantly, make yourself available to them as often as possible to offer tips on how you approach managing other people, prioritizing your time and interacting with colleagues in other departments to achieve overall company objectives.

G. Writing the Right Job Ad

Classified advertisements, whether in print or online, are probably the most widely used recruiting method in business today. If you expect to attract candidates who best match the qualities you're seeking for a particular position, invest some time in writing your employment listings. Refer to the job description you've created and try to summarize it, outlining key responsibilities and required skills.

While advertising costs may limit the length of your ads, you should include enough information to make them as targeted as possible. Be straightforward; if you're too general, you'll increase work for yourself in evaluating unqualified candidates.

Here are some elements of a well-written job ad:

- **Headline.** The headline is almost always the job title.
- **Job information.** Include a line or two about the general duties and responsibilities of the job. Whenever possible, use the active voice in your description.
- **Company information.** Always include a few words about what your company does.

- **Qualifications and hiring criteria.** Specify the level of education and experience required to do the job.
- **How to respond.** Let applicants know the best way to reach you: phone, fax, e-mail, etc.

Here is an example of an ad that takes into consideration these criteria:

Legal Secretary, Corporate (In-House)

Busy, expanding legal department of large insurance corporation seeks capable, well-organized individual to support three in-house lawyers. Responsibilities include producing correspondence, maintaining attorney schedules and client files, and updating publications. Position requires dynamic individual who can work independently and multi-task with ease. High school diploma or GED required; BA or AA (associate of arts) degree preferred. Must be proficient in Windows and Microsoft Office. Competitive salary and benefits offered. Mail or fax resume to:

III. Hiring the Best People

A. Reviewing a Resume

With a little preparation and a discerning eye, you can reduce the time you spend scanning resumes and ensure you schedule interviews with only the most qualified legal professionals. Here are some tips:

- **Define requirements.** Have a detailed job description on hand before you begin. It should focus on skills and expertise that will truly impact performance. (See "Writing a Job Description," p. 4). While you will no doubt have a fairly clear idea of what the position requires, this document can keep you on track as you review resumes. It can serve as your "filter" and help you narrow the field.
- **Review styles.** Resumes typically fall into two categories, chronological or functional, and it's important to know what to look for in each type. The classic resume is organized chronologically, with most recent work experience listed first. Job responsibilities are then described after each position listed. An alternative is the functional resume, wherein information is organized according to individual skills, with experience and abilities most relevant to a given position listed first.

When reviewing a chronological resume, pay close attention to dates of employment and any gaps in work history. For example, a resume that states a position

was held in "1996" does not clearly indicate the length of employment. The job could have lasted one day or up to 12 months.

With functional resumes, be on guard for vague job descriptions or failure to list actual positions held. This can indicate that the job seeker hasn't acquired enough relevant work experience.

- **Read between the lines.** A resume should be well-written and free of any typos, misspellings and grammatical errors. Candidates who take the time to produce a clean and professional resume demonstrate attention to detail and a desire to make a favorable impression. Also be on the lookout for such vague phrases as "exposure to," "familiar with" or other qualifiers. These often indicate the candidate lacks hands-on experience.
- **Follow up with phone calls.** Even after carefully reviewing resumes, you may still have doubts about which candidates are suitable for in-person interviews. Consider conducting brief telephone calls to narrow the field. This additional step can save you valuable time: An unproductive phone conversation may take only five minutes, but an unnecessary in-person meeting could require an hour or more of your day.

B. Interviewing Effectively

The personal interview is one of the most — if not the most — critical parts of the hiring process. While a resume, cover letter and phone conversation can offer insights into a candidate's qualities, a one-on-one meeting allows you to observe an individual's demeanor, confidence level and interpersonal skills. Here are some suggestions to help you make the most of an in-person job interview:

- **Prepare in advance.** Develop an approach you'll use with all of your candidates. Rank key factors required for the job in order of importance. Also, prepare a list of specific questions that will allow you to explore candidates' problem-solving abilities, legal experience, practice area expertise, interpersonal skills and overall business acumen. Compare these qualities to the competency model you developed. (See "Using Competency Modeling," p. 3).
- **Ask the right questions.** To assess the candidate's work style and compatibility with your firm's culture, vary the style of your questions. Ask closed-ended, factual ones ("How many years did you work for Firm A?"); open-ended questions ("Can you describe your major accomplishments?"); and hypothetical, job-related scenarios ("How would you handle a situation in which one of your employees complains that someone else took credit for his ideas?"). Develop interview questions that specifically address key competencies you've identified from your model, such as problem-solving or strategic planning. With pre-established guidelines in place, you'll increase your odds of making the best hiring decisions.
- **Make a pitch for your firm.** Gone are the days when only the candidate had to

project a good image. Job seekers today want to know what your organization has to offer them, so it's critical to give a positive first impression. Employees are looking for firms that offer progressive compensation packages and corporate cultures that foster career growth and support a balance between work and personal demands. Be sure to point out specific programs your firm offers when meeting with candidates.

- **Rephrase questions to get complete answers.** If an applicant's response to your question is vague or insufficient, don't be afraid to ask it in a different way. For example, you could rephrase "Why did you leave your previous position?" to "What types of opportunities are you looking for that your last job did not provide?"
- **Pay attention.** Fight the urge to formulate your next question while the candidate is still responding to the last one. Actively listen to the answers provided to pick up on bits of information that might otherwise escape notice.
- **Write it down.** Memory is unreliable, so it's best to take notes in an unobtrusive way during the interview. Don't try to transcribe everything the candidate says word-for-word; jotting down the highlights should be sufficient. You may also want to write more comprehensive notes immediately after the interview. In addition, try to follow a consistent format in your notes. As you likely will be interviewing a number of candidates, this will help you to more easily compare the strengths and weaknesses of prospective employees.
- **Don't rush to judgment.** Try to avoid forming an opinion too quickly about a candidate. Wait until after the interview to evaluate responses and make interpretations.
- **End on a positive note.** Once you feel you have enough information, end the interview politely. Thank the applicant for his or her time and interest, and briefly mention subsequent steps (i.e., "We'll begin the second round of interviews within the next couple of weeks").

C. The Do's and Don'ts of Interviewing

To be most effective, the interview process should be streamlined, efficient and uniform. Here's some additional advice that can help you maximize your meetings with prospective hires.

Do:

- **Make your candidate comfortable.** Start by engaging in small talk. You can gain insight into the candidate's personality and also put him or her at ease, increasing the likelihood that you'll receive candid responses.
- **Double-check answers.** Ask the candidate many of the same questions that you plan to ask his or her references in order to compare the answers. If a reference tells you something significantly different than what the applicant tells you, follow up with the candidate for an explanation. (See "Checking References," below).
- **Create a standard rating system.** Use a uniform system to evaluate all candidates.

You can even use a form that lists the hiring criteria and how each applicant rates on a scale of 0 to 5. Don't forget to measure both strengths and weaknesses.

Don't:

- **Fall victim to the "halo effect."** Don't allow one aspect of a candidate's background — such as the fact that you went to the same school or that the applicant worked with someone famous — blind you to reasons he or she may not be right for the job.
- **Overemphasize interview performance.** Don't attach undue importance to how well the person interviewed. Legal professionals who interview well may not necessarily be the best people for the job — they may just be well-practiced at interviewing.
- **Let too many "cooks" spoil the hiring decision.** Don't get too many people involved in making the final decision. If you hire "by committee," you may not find the best person for the position but rather a candidate who satisfies everyone in some way yet is not right for the job.

D. Checking References

It can be tempting to rush through the reference-checking process — or bypass it altogether — in order to make a quick hire. While it's important not to delay making the job offer and risk losing the candidate to someone else, reference checking is still a critical tool for evaluating prospective legal professionals.

Legal issues have compelled many firms to institute policies in which they offer no more candidate information than dates of employment, title and salary. This presents a new set of challenges in the reference-checking process. However, with a little preparation and persistence you can glean valuable insights from a candidate's references.

1. Announce Your Intention

Making a thorough reference check a precondition of hiring can improve your odds of getting quality responses. This is perfectly legal as long as the information being verified is job-related and does not violate discrimination laws.

Inform candidates early in the process that if they become finalists for the position, you will be calling their references. They will likely arrange for cooperative individuals — and applicants with something to hide may voluntarily remove themselves from consideration. It's wise to also get the candidate's written approval — not only to check the references provided, but also to pursue additional references of your choosing who might provide further insight.

2. A Do-It-Yourself Project

Handle the reference-checking process yourself. You know better than anyone else the experience, skills and personality that will best fit the job. Additionally, by speaking with the candidate's former managers — your counterparts — you're more likely to develop some camaraderie, enhancing your chances of gaining useful information.

3. What Should I Ask?

Start your inquiry with the basics: Ask for confirmation of date of hire, title, job duties, salary and previous place of employment. If the reference is receptive, ask for further information, such as the candidate's strengths and weaknesses, and his or her ability to work as part of a team. Also inquire whether the contact would rehire the applicant if the opportunity arose.

Keep in mind that the same discrimination laws that apply to interviewing also apply to reference checking, so you may not ask about marital status, age, disabilities, religion, ethnicity, sexual orientation or other personal issues.

4. Getting 'Real' References

If you encounter a negative reference among several outstanding ones, continue checking to determine if this is an isolated incident or a sign that the candidate may not be a good fit for the position. Similarly, if you suspect the reference may be a "fake" (i.e., your calls reach only voice mail or an answering machine), call the firm's main switchboard to see if the person is in fact employed there, and ask for his or her title. It's not unheard of for a former coworker to pretend to be a past supervisor.

5. Going Beyond Reference Checks

In addition to checking references, some employers administer drug tests, require medical exams or conduct criminal background checks. Whether or not you decide to take these additional steps depends on the nature of your business and the type of position that is being filled. Before making any such moves, however, be sure to consult an employment or labor law specialist.

E. Extending the Offer

While it's important to be thorough when evaluating an applicant's skills and experience, don't delay too long once you've identified your first choice. Sometimes a strong candidate is interviewed and evaluated only to be lost because the final hiring decision was slow in coming.

An experienced legal secretary, for example, may receive multiple employment offers before making a final decision, which means there is always a risk he or she may pursue another opportunity if your offer isn't forthcoming. Expediting the selection process will improve your chances of securing the best candidates.

Sample Offer Letter to Prospective Employee

[Date]

[Address]

Re: Terms of Employment

Dear [Potential Employee]:

We are pleased to inform you that after careful consideration [Company Name] (the "Company") has decided to extend this offer of employment. [This decision is made, in part, on the information provided by you in the Company's form of Employment Application.] This letter sets forth the terms of the offer, which, if you accept, will govern your employment.

You will be employed in the position of [Position] and will report to [Name, Position]. Your first day of employment will be on [Date]. Your responsibilities will be as directed by the Company from time to time.

Your compensation will be a salary at the annual rate of \$ _____, payable in [weekly, biweekly, monthly] installments; _____ weeks of paid vacation for each full year of employment completed with a maximum period of _____ weeks; and participation in the health and other benefit plans of the Company according to their terms and as may be amended or terminated from time to time.

Our employment relationship will be terminable at will, which means that either you or the Company may terminate your employment at any time and for any reason or for no reason with or without notice (or upon _____ weeks notice for pay in lieu of notice if terminated by the company).

In the event a dispute does arise, this letter, including the validity, interpretation, construction and performance of this letter, shall be governed by and construed in accordance with the substantive laws of the State of [California or other State]. Jurisdiction for resolution of any disputes shall be solely in [State].

[You also will be subject to the Company's Confidentiality and Invention Assignment Agreement, which is enclosed with this letter and must be signed and returned to the Company.] By signing below, you not only accept the terms and conditions of this offer, but also represent to the Company that you are under no obligation or agreement that would prevent you from becoming an employee of the Company or adversely impact your ability to perform the expected services.

Upon your acceptance, this letter will contain the entire agreement and understanding between you and the Company and supersedes any prior or contemporaneous agreements, understandings, communications, offers, representations, warranties, or commitments by or on behalf of the Company (oral or written). The terms of your employment may in the future be amended, but only through a written document which is signed by both you and, on behalf of the Company, by a duly authorized officer.

If these terms are agreeable to you, please sign and date the letter in the appropriate space at the bottom and return it to [Personnel Department] or [specific person] prior to _____, 20____. We hope you accept this offer and look forward to you coming on board.

Sincerely,

[Company Name]

By:
Title:Agreed and Accepted:
[Prospective Employee]
Date:**F. Providing Orientation**

An employee's first few weeks on the job are especially formative. This is the time when newcomers establish perceptions about the position, coworkers, management and the company itself. That means it's essential to get new hires off to a solid start with a quality orientation.

1. Plan Strategically

The best orientation programs are well-planned, ongoing processes tailored to your firm's corporate culture and its unique employee base. Your objective should be to:

- Clearly define responsibilities of new hires
- Educate new employees on your company's overall mission and business practices
- Provide an overview of policies and procedures, giving new hires a sense of the prevailing culture at your firm
- Ensure employees have the tools they need to be productive

- Engender a sense of camaraderie, collaboration and teamwork

2. Explaining the Corporate Culture

Be sure to include in your orientation an explanation of your corporate culture, especially your core values and how they represent your company. Describe the level of professionalism expected on the job, including the importance you place on ethical behavior. Make it clear what you expect from your employees in their daily activities based on those values.

3. Establishing Expectations

Besides information on your working environment, facilities and corporate policies, the new employee will also want to know how his or her job fits into the big picture. This is where a basic overview of the mission, clients and competitors is valuable. Having the general counsel or a senior attorney on hand to provide this summary can underscore its value.

Individual attention in the first few days is as important as the corporate overview. An employee's orientation should also include some quality one-on-one time with his or her immediate supervisor, who can provide job-specific information and, of course, introductions to those with whom the new hire will work most closely.

To help newcomers achieve a successful start in your department, provide a job description and outline one or two projects they can begin work on right away. Assigning a mentor can help reduce the learning curve and take some of the stress out their first few days. More tenured staff members or attorneys can show new hires the ropes, provide informal introductions to coworkers, answer questions and provide support.

4. An Ongoing Process

For a new employee — who is often inundated with information in his or her first days on the job — orientation spread over several weeks or months may yield more lasting results. After a month or two when professionals have become immersed in their new roles, for example, consider asking them to “shadow” others in the department to learn more about what their colleagues do and how all parties can work together more effectively.

Of course, the most successful orientations are continual. Make sure you maintain the flow of information when new policies are announced or expectations shift. Let your orientation efforts blend seamlessly into ongoing internal communications programs.

IV. Building an Effective Legal Administrative Staff

A. Emerging trends call for expanded roles

As corporate legal departments move more work in-house to address budget constraints, the skill levels and retention of existing staff are becoming increasingly important. But attorneys and paralegals aren't the only professionals departments must recruit, train and motivate. Supervisory counsel must also locate and retain administrative personnel with the right expertise to help the department manage a growing number of projects and cases.

Flexible, highly skilled legal administrative professionals are especially pivotal today as departments face new challenges and a heightened need to control costs. Successfully addressing growing workloads and reduced budgets requires support staff with more sophisticated skills and a willingness to assume broader responsibilities.

B. How Are Recent Trends Affecting Administrative Staff?

1. Increased regulation

Since the passage of the Sarbanes-Oxley Act of 2002, public and private companies and their legal departments have undergone upheaval and dramatic change. Responsibilities related to compliance with these complex rules along with an obligation to act as — and protect — “whistleblowers” who report violations have transformed the role of general counsel and the day-to-day duties of legal departments.

SOA-related concerns are taking up more time in the typical general counsel's schedule, while also resulting in more work for already overloaded attorneys and paralegals. Consequently, there is pressure on administrative staff — especially legal secretaries — to take up the slack wherever they can by broadening their roles. This entails assuming some responsibilities formerly handled by other legal professionals.

And it's not just support staff in public companies that are being affected. Many privately owned companies are voluntarily adopting some of the SOA provisions to ensure their own practices are consistent with internal control and governance processes quickly becoming the new standard for business conduct. As a result, legal secretaries and other support personnel must expand their roles just as their counterparts in public companies are doing.

Compliance-related activities are not likely to cease demanding attention from in-house counsel any time soon. The first round of businesses to comply with Section 404 of the Act reported to the SEC in the spring of 2005, but SOA compliance is an annual requirement – and in some cases continuous and quarterly – for all public companies. Private companies may follow suit. The ongoing nature of compliance is one factor among many that is rapidly changing the roles of legal support staff.

2. Technology

Another major force impacting today's legal departments is the continual evolution of technology. To improve operating efficiencies, organizations are using sophisticated software packages designed especially for legal applications. Examples include implementing remote access solutions, automating document management systems and adopting electronic litigation tools. Because of potentially catastrophic viruses, departments also are investing in a number of security measures. Administrative staff must be able to use and often train others on this state-of-the-art technology in order to support lawyers and paralegals as well as carry out their own projects.

3. Changing relationships with outside counsel

In an effort to keep expenses down, corporate legal departments are curbing their use of outside counsel and opting instead to depend more heavily on in-house professionals. As a result, caseloads are becoming heavier for partners, associates and legal assistants. This is another reason administrative support staff are seeing more work come their way.

Attorneys were asked, "Is your law firm or corporate legal department planning to increase spending on technology over the next five years?" Their responses:

- Increase significantly – 14%
 - Increase somewhat – 54%
 - No change – 22%
 - Decrease somewhat – 3%
 - Decrease significantly – 1%
 - Don't know – 6%
- Total – 100%

Attorneys were asked, "Has your corporate legal department increased or decreased its work with outside law firms during the last 12 months?" Their responses:

- Increased – 45%
 - Decreased – 15%
 - No change – 38%
 - Don't know – 2%
- Total – 100%

What was the primary reason for the decrease?

- More work being done in-house – 47%
 - Cost management or reduced budgets – 33%
 - Poor client service – 7%
 - Poor quality of work – 7%
 - Other – 6%
- Total – 100%

Source: Survey of 200 attorneys among the largest law firms and corporations in the United States and Canada commissioned by Robert Half Legal and conducted by an independent research firm.

Increased workloads resulting from all of these changes are causing a "trickle down" effect as a growing number of basic legal activities and tasks are passed on to administrative personnel. This practice extends a trend already in place as support staff assume more of the work formerly performed by paralegals. Years ago, paralegals handled primarily administrative and clerical duties, but today they continue to take on more and more substantive casework. Administrative employees, in the meantime, have gradually been assuming paralegals' former clerical tasks but are now taking on even more of the responsibilities these individuals previously managed, such as selected research and document preparation.

C. What Do the Changes Mean For You?

Consider the effect these changes are having — or could soon have — on your department. When making staffing decisions regarding administrative staff, evaluate the extent to which compliance activities, restricted use of outside counsel and the need to learn new technologies will occupy the time of attorneys and paralegals. What additional assistance will they need? Will you have sufficient resources to meet rising workloads?

Many support staff are, of course, limited by law as to the scope of their involvement in cases, but there are creative ways you can apply their skills in additional areas. Start by thinking of ways in which your existing administrative staff can:

- Handle routine research or document preparation not requiring a licensed attorney or paralegal;
- Help you prepare and distribute information to educate company employees on the increased importance of compliance standards and ethics;
- Help you comply with stringent new rules for electronic record retention and destruction, which can significantly add to the scope of discovery;
- Master new legal software and become the department's "go-to" persons for new technical applications.

D. Will New Skills Be Needed?

Assisting in these new areas may require legal administrative professionals with broader skills sets. Activities that used to occupy most of a legal secretary's time, such as typing, transcribing and filing, are being replaced by responsibilities requiring advanced technical knowledge as well as time- and project-management skills. These may include research projects, document preparation and, increasingly, interacting with internal clients and others involved in cases.

The bar is also being raised for other administrative positions. Office clerks, legal receptionists, document coders and other support personnel must be able to use a growing array of technologies, including web- and CD-ROM-based resources. Some may be expected to assist legal secretaries in using new software for managing calendar dates and deadlines.

Support staff must also be able to contribute to case and project teams. This collaboration is increasingly important as departments attempt to manage more work in-house, and the work of administrative personnel is a crucial part of the group's success. They must have excellent interpersonal skills since project teams can include people from a variety of backgrounds and perspectives — both in-house and project-based attorneys, associate attorneys and paralegals as well as expert witnesses and many more. (For more, see the "Fostering Teamwork" section.)

E. What Training Should You Offer?

After determining what new developments mean for your department, you'll need to provide relevant training for your support staff. To help them assist in SOA-compliance-related tasks, for example, you should offer updates on requirements and new filing deadlines. Make sure staff understand the company's liability for non-compliance and the importance of ethics in the activities of every employee. The legal department plays a central role in coordinating compliance efforts. Employees should be familiar with procedures for documenting "whistleblower" complaints and how the department is charged with protecting these individuals and reporting wrongdoing "up the ladder" (first to the chief legal officer, then the CEO, and up to the full board of directors, if necessary). While not all administrative staff will be involved in compliance support, they still need to understand the importance of this new focus, which is so significantly impacting the work of corporate legal departments.

Also be sure your administrative team remains up to date on technology. Depending on individual roles, they must understand software tools for organizing and managing information including CaseMap, TimeMap, NoteMap, PowerPoint, Summation and artificial intelligence software. If your department is involved in litigation, support staff should be able to help attorneys and paralegals prepare for high-tech presentations in the courtroom, including video evidence presentation, videoconferencing and e-transcript systems. Secretaries, in particular, must assist lawyers and legal assistants in synchronizing schedules via wireless devices, including BlackBerrys and handheld Palms when these professionals are out of the office. Also provide a business context for work support staff may be called upon to perform. In-house counsel must combine legal skills with a thorough understanding of a company's business objectives more than ever before. The more administrative professionals know about business issues and potential legal problems, the better support they can provide.

F. What Are the Staffing Implications?

A key obligation of any supervisory counsel is to maintain sufficient human resources to meet growing workloads, and this is no less of an issue when it comes to administrative teams. Training efforts will mean little if you lack adequate staff to handle the work and your best people become increasingly overburdened and stressed.

Many legal departments today must observe cost-control mandates that limit both the use of outside counsel and the hiring of additional staff. These restrictions can make staffing a significant challenge, especially since they come at a time of increasing workloads in most departments. So how can you maintain productivity and avoid staff burnout yet remain within departmental budget limits?

Admittedly, it's a tall order, but there are some effective solutions. First consider the feasibility of reassigning or postponing less critical projects. Junior support staff may welcome the opportunity to take on new projects under the supervision of more senior employees. Perhaps you could create ad hoc administrative project teams that can focus on a critical aspect of a case, then rapidly disband or regroup to meet changing needs. Or maybe you could combine some functions of a particular position to free up a staff member to assist in other areas.

Ultimately, you may not be able to continue meeting growing workloads with exclusively internal solutions. Selected hiring may be appropriate if this can be done within budget and you judiciously select individuals based on the skills you require. To address the needs of your particular caseload, you may want to pursue an approach that gives you more flexibility. Many departments are bringing in additional support on a project basis (see the "Determining Your Staffing Needs" section). This allows them to augment the efforts of full-time staff, especially during peak times. This choice offers immediate access to specialized skills not available internally or not required long-term and helps relieve the load on core employees. Contract employees can also contribute on an as needed basis when hiring someone full-time is not practical.

G. Retaining Your Top Talent

Once you've built a knowledgeable and capable administrative staff, keeping your top performers is key. Your most capable employees are always in demand by other firms. The retention strategies described throughout this InfoPAK also apply to support staff, but there are some special circumstances to take into consideration.

Students preparing for a legal career today often choose to become paralegals, creating a limited pool of administrative personnel — legal secretaries in particular. This shortage increases demand for these professionals, so you should make a concerted effort to ensure your existing staff remain satisfied.

Like attorneys and paralegals, legal administrative professionals also want jobs that are challenging and rewarding. Offer career advancement potential and assignments that allow support staff to use their creativity to accomplish their objectives. Even in seemingly routine tasks such as legal document preparation, there is room for innovation — especially when it comes to the use of technology. Remain open to suggestions from your team regarding alternative ways of approaching their work. Allowing increased autonomy demonstrates that you trust and value their contributions.

The assistance of capable administrative staff is increasingly critical to a legal department's ability to accomplish its goals. Especially as organizations navigate new governance requirements and adopt emerging technologies, hiring managers must do all they can to attract and retain talented support professionals.

V. Motivating and Managing People

A. A Positive Corporate Culture

Besides financial incentives, the most important motivator for employees to give their best — and to remain satisfied with your company — is your corporate culture. Many businesses are addressing these priorities by revising policies and changing long-held attitudes in order to create a more attractive organizational climate.

While professionals' interest in achieving a better work-life balance has prompted many companies to offer options such as flexible hours, telecommuting and child-care programs, it's the intangible elements of corporate culture that are probably the most important to employees. Your policies regarding open communication, regular recognition and opportunities for intellectual growth, for example, are key influences for legal professionals considering your company and department.

B. Empowering Employees

A firm's competitive edge often lies in the intellectual capital of its staff. Businesses that encourage their employees to be resourceful, exercise creative decision making and take appropriate risks are more likely to achieve future success. One of the most efficient ways to increase the performance of your staff and your firm is to empower your employees. Taking advantage of the following strategies can significantly increase employee productivity and satisfaction in your office.

1. Encourage Creative Decision Making

Allow employees as much flexibility as possible in order to enhance business processes and achieve project objectives. While everyone assigned to a particular case or project shares the common goal of a successful outcome, the means to the end may not be the same for everyone. Recognizing this allows you to capitalize on the creativity of your workforce to improve best practices. Specific training on solving problems, making sound decisions and managing time effectively can help prepare your staff for increased responsibility.

2. Provide Necessary Information

Providing employees with the facts necessary to make informed decisions is crucial. Communicate openly about your firm's big picture. Discuss information such as progress on cases and long-term strategies.

Don't forget that exchange of information should work both ways. Encourage your staff members to share their observations, concerns and ideas, and provide a convenient method for them to do so. Regular meetings between employees and management, staff surveys and even a traditional "suggestion box" can be effective.

Be sure to respond swiftly to input from employees, since prolonged silence or delay can be discouraging.

3. Allow Room for Error

When people are challenged to become more resourceful and responsible — which inevitably entails risk taking — a certain amount of error will occur. Rather than abandoning empowerment strategies, assess what went wrong. Carefully consider why the mistake occurred and how it might have been prevented. Did the employee have the information necessary to render a good decision? Were others involved in the decision-making process (peers, support staff, etc.)?

Based on your findings, incorporate changes in the employee empowerment process that will prevent problems from reoccurring. Ultimately, empowering your staff members can result in increased department productivity and greater employee satisfaction.

C. Fostering Teamwork

The legal profession requires experts in a wide range of disciplines to work together, not only in person, but on the phone and via the Internet. Your ability to inspire employees to collaborate effectively and seamlessly on projects and activities can add tremendous value to the service your department provides the company.

Explain that, given the collaborative nature of law, credit for successes should go to the team rather than individuals. Nothing is more disruptive to group productivity than an employee who seeks personal credit for an accomplishment that was earned by the efforts of many hardworking people. When exceptional results occur, recognize the contributions of as many individuals as possible, both in writing and in person. Legal staff will learn from this and use your example to promote a spirit of positive teamwork within their workgroups.

Be prepared to provide assistance at a moment's notice, and make sure others in the department do the same. Unanticipated situations occur continually in the legal profession. While you may not be involved every time, you will be more effective if you and your team maintain a flexible approach when these sudden demands surface. Remember, the better you are at being a team player, the more likely you are to inspire a productive legal staff and office environment.

D. Conducting Performance Appraisals

While many managers regard performance reviews as more of a time-consuming chore than a benefit, developing and conducting employee appraisals can keep your staff focused on their most important objectives, identify areas where training is needed, and further motivate those who excel in their jobs.

Still, successful reviews require careful balancing. You'll want to provide your employees the feedback they need to advance their careers, yet you don't want to damage morale or diminish their enthusiasm. Consider these tips for your next evaluation:

- **Don't make it an annual event.** Provide input to employees throughout the year so there won't be any surprises when it's time for a formal review. If an employee needs to improve in a certain area, for example, don't wait eight months for the formal review to let him or her know. Your immediate feedback will help workers fix the problem behavior before it becomes a habit.
- **Deliver negative feedback with care.** Discussing an individual's weaknesses in a constructive way can be quite a challenge. To keep employees optimistic, provide examples of how to improve in specific areas. This will help them focus better on future success. Be sure to comment on positive attributes as well. Encouragement is the best incentive for improvement.
- **Reinforce company values.** Employees who are clear about expectations and how their daily contributions tie into the business's goals are the most successful in their jobs. Discuss key corporate objectives during the appraisal process to help clarify staff members' roles and how their projects fit into the big picture.
- **Consider self-evaluations.** You may want to ask each staff member to assess his or her own strengths and weaknesses prior to your review. This not only gives them an opportunity to examine their performance and career paths, but also provides you insight into their perceptions and goals. Of course, some employees may feel awkward completing a self-evaluation because they are worried about rating themselves too highly or too harshly. To help staff members feel more at ease, let them know that any discrepancies can be discussed during the review.
- **Document appraisals in writing.** Whether your company issues standard evaluation forms or you create your own, all comments should be in writing. Cite specific examples to support your assessments.
- **Keep the tone conversational.** Schedule a personal meeting with each employee, and be sure to budget enough time to engage in a two-way dialogue on all topics that need to be covered.
- **Set objectives for the next year.** Make sure individual goals are in line with your department's casework, but also consider a staff member's career path. If an employee has future plans of advancing into an expanded role, for example, then objectives should be geared toward acquiring the skills needed for the type of position envisioned. Discuss options for seminars, classes or other professional development. Your employees should leave the review with several specific goals for the coming year.

VI. Handling Difficult Situations

A. Working With Underperforming Employees

Regardless of where you work, sooner or later you'll have to deal with underperforming employees. How you respond determines whether the situation is resolved quickly or gradually worsens and ultimately affects your entire team's productivity.

1. Putting Fairness First

Above all, the process you have in place to deal with problem employees must be fair. Here are some tips:

- **Clarify expectations.** Your employees need to fully comprehend the standards of acceptable performance and how their efforts — or lack thereof — affect the company's productivity.
- **Outline the consequences.** Staff members should know the consequences of their failure to meet these standards.
- **Address problem behavior as soon as possible.** Otherwise, you send the message to other employees that a certain behavior is acceptable.
- **Respect employees' privacy.** Avoid criticizing one staff member in front of others.
- **Offer employees a chance to improve.** Share your input face to face, discussing what can be done to enhance performance.
- **Match the discipline to the offense.** How serious was the offense? What does the individual's employment record look like? Has he or she been a problem employee before, or is this the first time that there's been a performance issue? A first-time offense does not typically deserve the same reprimand as a regularly recurring problem.
- **Be consistent.** Applying the same rules, protocols and expectations to everyone helps limit the possibility of being charged with discrimination.
- **Document, document, document.** Recalling what you talked about last year in a performance review with a staff member can be difficult. To be fair to everyone involved, you need to take notes and keep a written record of your discussions. That way, at a later time you won't inadvertently think the person said or did something he didn't say or do; likewise, you can't be accused of saying or doing something that you didn't. And you may need this documentation in the event the person's behavior — or termination — becomes an issue.

B. Considering Termination

1. Some Basic Guidelines

Despite your sincere efforts to help underperformers get back on track, some-

times your only option will be termination. State labor and employment laws may vary, and it is advisable that you always check first with someone in your human resources department and, if necessary, an attorney who specializes in employment law. While no termination case is exactly alike, there are some general steps many companies use. You may need to skip or add steps, depending on the circumstances. Here are some general guidelines:

- **Notify your employee that he or she is not meeting company standards.** You should give this warning verbally, in a one-on-one meeting. Make a memo to yourself about what was said.
- **Issue a second warning.** If the behavior hasn't improved, have another one-on-one meeting. This time, deliver a memo that outlines areas that need improvement and explains how the employee's actions are negatively affecting business.
- **Issue a final warning.** If the individual's conduct doesn't improve, ask your human resources or legal representative to guide you. In some instances, a final warning is appropriate. In other cases, termination without a final warning may be the correct step.
- Terminate the employee.

C. Coping with Layoffs

Layoffs differ from terminations in one critical respect: The people being let go haven't necessarily done anything to warrant losing their jobs. Companies downsize for a variety of reasons, including seasonal shifts in productivity, an unexpected business downturn, a merger or an acquisition.

1. Exploring Alternatives

Downsizing should always be a last resort for a firm. If you've staffed strategically, your careful planning may help you avoid layoffs — or at least minimize them. Some companies that have found downsizing to be unavoidable have been able to reduce the number of people who need to be terminated using the following ideas:

- **Temporary pay cuts.** Reducing labor costs is probably the simplest and most direct way to cut staffing expenditures without having to terminate employees. The key is to make sure everyone shares in the reduction — including senior attorneys and managers.
- **Voluntary leaves of absence.** Some employees in a layoff situation may be receptive to taking a voluntary leave of absence with certain conditions: approximate idea of how long they'll be away from work; reasonable assurance their jobs will be waiting when they return; and a promise that certain benefits, depending on the situation, may remain in place during the leave.
- **Leaves of absence.** During a downturn, companies sometimes ask their employees to volunteer to take a period of time off in lieu of termination. While not all employees can afford to "wait it out" until the company needs them again, if a firm can convince enough workers to accept this option, it can emerge much

more quickly from a slowdown once conditions improve. That's because a company can more easily expand again to meet increased demand if it has a pool of experienced workers to call upon.

- **Early retirement.** An often-used method of reducing payroll costs is to encourage early retirement, generally through financial incentives. Offers of early retirement usually have to be extended to wide classes of employees in order to avoid charges of age discrimination. This means you run the risk that a significant number of employees you want to retain may accept the offer.

2. Using Outplacement Firms

Outplacement firms specialize in helping dismissed employees regroup and find new jobs. In a typical outplacement program, workers who've been terminated are offered an opportunity to attend seminars or one-on-one sessions in areas such as career counseling and the basics of job hunting. In addition, job seekers are often given office space, access to a phone and administrative help — all for a predetermined period of time.

Outplacement can become expensive, particularly if you're dealing with large numbers of dismissed legal professionals. Still, it's one of the best ways to help those who've been with your company for a long time and need the support that outplacement services can provide.

3. Helping Remaining Staff Cope

Layoffs are stressful not only for those who lose their jobs but also for remaining employees. Downsizing affects morale, company productivity and long-term processes. If you do have to lay off employees, it's critical to step up your efforts to motivate remaining staff and help them focus on the positive.

Practicing open — and regular — communication and allowing employees to make decisions on their own not only demonstrates that you welcome their ideas, but it also helps them to feel more in control of their jobs. Encourage people to work together more effectively by holding inexpensive team-building events, such as brown-bag lunches. And don't hold back your praise for those doing a particularly good job.

VII. Additional Resources

ACC Docket Articles

Richard Hurford, Eric P. Tuchmann, and Mark Wolf, *Attitude Adjustment: Eight Leading Practices in Building a Dispute-savvy Organization*, ACC Docket 23, no. 3 (November/December 2005): 90-103, available at <http://www.acca.com/protected/pubs/docket/nd05/attitude.pdf>

When A Lawyer Just Won't Do: The Secret To A More Efficient, Productive Law Department, ACC Docket 23, no. 3 (March 2005): 44-60, available at <http://www.acca.com/protected/pubs/docket/mar05/secret.pdf>

Michele S. Gatto, *SWOT and Beyond: How to Make Your Law Department Effective*, ACC Docket 21, no.9 (October 2003): 40-58, available at www.acca.com/protected/pubs/docket/on03/swot.pdf

James K. Cowan Jr. and Laura Effel, *Interviewing Job Applicants: Can I Ask This Question?* ACCA Docket 19, no. 3 (March 2001): 40-48, available at www.acca.com/protected/docket/ma01/interviewpage1.html

Thomas L. Sager and Scott L. Winkelman, *Six Sigma: Positioning for Competitive Advantage*, ACCA Docket 19, no. 1 (January 2001):18-27, available at www.acca.com/protected/pubs/docket/jf01/six.html

Michele S. Gatto, *What Every Law Department Needs: A Performance Evaluation System That Works*, ACCA Docket 19, no. 1 (January 2001):50-63, available at www.acca.com/protected/pubs/docket/jf01/what.html

Jeffrey W. Carr and James Lovett, *Getting Closer to the Business: How to Foster Innovation and Value Through Culture and Philosophy*, ACCA Docket 19, no. 1 (January 2001): 64-77, available at www.acca.com/protected/pubs/docket/jf01/getting.html

ACC InfoPAK

Law Department Glossary of Job Descriptions, ACC InfoPAK, available at <http://www.acca.com/infopaks/glossary.html>

ACC Leading Practice Profiles

Using Non-Lawyer Personnel To Help Perform Legal Functions, ACC Leading Practice Profile, available at www.acca.com/protected/article/lawdman/nonlawyer.pdf

ACC Annual Meeting Program Materials

Use of Nonlegal Managers to Perform Legal Functions, Program 511 2005 ACC Annual Meeting Material, available at www.acca.com/am/04/cm/511.pdf

Managing Employee Performance & Attendance Issues, Program 706 2003 ACC Annual Meeting Material, available at www.acca.com/education03/am/cm/706.pdf

Recruiting, Hiring, and Retaining Employees, Program 104 2001 Annual Meeting Material, available at www.acca.com/education2k1/am/cm/104CD.pdf

The employee manual: No policy is not good policy, Program 603 2001 Annual Meeting Material, available at www.acca.com/education2k1/am/cm/603CD.pdf

ACC In-house JobLine

This is an online database for both searching for and listing in-house positions. Qualified in-house counsel seeking new positions conduct more than 90,000 searches every month, and they're tapping into hundreds of new positions posted each month. Best of all, Jobline is free to prospective employees searching for new opportunities.

The new Resume Bank allows you to post a confidential resume and pre-approve the release of your information to prospective employers. Additionally, you can explore online employment information specific to your job search in the Resources section. <http://jobline.acca.com/>

Sample Form and Policy

A. Sample Interview Questions¹

Personality

1. How would a person who dislikes you describe you to me?
2. Do you consider yourself tactical or strategic? Give examples.
3. Have you ever had to go out on a limb to do something you thought was right?
4. Give me three adjectives to describe yourself.
5. What are your favorite leisure time activities?
6. Do you consider yourself creative or analytical? Give examples.
7. What books have had the most impact on your life, and why?
8. Who are your heroes?
9. Do you have any crusade or soap box issues?
10. How do you motivate yourself?
11. What magazines do you subscribe to at home?
12. What are you going to be doing at 2:00 p.m. on Saturday afternoon?

Values

1. Have you ever made any mistakes at work? Discuss.
2. Tell me about your ethics.
3. Have you had any major disappointments in your work? Discuss how you handled them.
4. Describe your value system.
5. Tell me about a situation where you had to violate your standards. What caused you to make the decision?
6. How do you manage your emotions?
7. What are your most important deeply held values?
8. Give me an example of _____ (a value) that is really meaningful to you.
9. What is your personal philosophy about life?
10. How do you deal with situations at work when company events contradict your philosophy or values?

Teamwork

1. Who was your best boss, and why?
2. Who was your worst boss and why?
3. What have you found to be the most effective way to change someone's mind?
4. In which of your previous positions did you most enjoy working with your immediate work group? What factors made it rewarding?

5. What kind of people do you like working with?
6. How do you take direction?

Goals and Objectives

1. How do you define success?
2. What is the most important goal around which you organize your life?
3. What are your short- and long-term career goals?
4. Why do you want this job? What do you most deeply hope for in a new job with us, if we bring you aboard?
5. Why do you want to leave your current job?
6. What is really important to you, not only in your role as a worker, but also as a whole individual outside of work?

Qualifications for Employment at Company/Expectations

1. Now that you have met with us on several occasions and understand our organization and style, tell me how you would fit in and why.
2. How can you uniquely contribute to _____ (company)?
3. Tell me your understanding of the job.
4. What expectations do you have of your supervisor?
5. What would be your expectations as an employee?
6. What interests you about the position?
7. Do you have any questions about what is important to you at _____ (company)?
8. What information have you found out about _____ (company) that you did not know before?

Assessment

1. In what areas could your boss have done a better job?
2. Tell me about an instance where your work or your ideas were criticized.
3. Do you think your former boss(es) evaluated you fairly?
4. What was the biggest business risk you ever took? Why was it a risk? What was the outcome?
5. What do you consider/analyze before deciding to take a risk?
6. What did you really like about your last job?
7. What bothered you or stressed you the most about your last job?

Perseverance

1. Describe a work situation where you faced incredible odds but prevailed.
2. Describe a similar situation where the odds against succeeding were so great that you gave up.
3. What was the most difficult adjustment you have had to make in your career? Why was it difficult? What did you do? What was the result?

Teachability

1. What work style or personality characteristics do you think are most valuable for success? Which do you possess? Which do you not possess or would you like to improve?
2. What kinds of things do you learn quickly?
3. What kinds of things do you find difficult to learn?

Management Questions

1. How many people have you hired?
2. How many people have you fired, and why?
3. What is your style with employees you supervise? How do you handle difficulties?

For more information, see "Interviewing Job Applicants" by James K. Cowan Jr. and Laura Effel, from ACCA Docket, March 2001.

B. Chart Of Legal Questions²

Following is a quick reference detailing legal and potentially discriminating interview questions.

Topic	Legal Questions	Discriminatory Questions
Family Status	<ul style="list-style-type: none"> Do you have any responsibilities that conflict with the job attendance or travel requirements? Must be asked of all applicants. 	<ul style="list-style-type: none"> Are you married? What is your spouse's name? What is your maiden name? Do you have any children? Are you pregnant? What are your child-care arrangements?
Race	<ul style="list-style-type: none"> None. 	<ul style="list-style-type: none"> What is your race?
Religion	<ul style="list-style-type: none"> None. You may inquire about availability for weekend work. 	<ul style="list-style-type: none"> What is your religion? Which church do you attend? What are your religious holidays?
Residence	<ul style="list-style-type: none"> What is your address? 	<ul style="list-style-type: none"> Do you own or rent your home? Who resides with you?
Sex	<ul style="list-style-type: none"> None. 	<ul style="list-style-type: none"> Are you male or female?
Age	<ul style="list-style-type: none"> If hired, can you offer proof that you are at least 18 years of age? 	<ul style="list-style-type: none"> How old are you? What is your birth date?
Arrests or Convictions of a Crime	<ul style="list-style-type: none"> Have you ever been convicted of a crime? You must state that a conviction will be considered only as it relates to fitness to perform the job being sought. 	<ul style="list-style-type: none"> Have you ever been arrested?
Citizenship or Nationality	<ul style="list-style-type: none"> Can you show proof of your eligibility to work in the U.S.? Are you fluent in any languages other than English? You may ask the second question only as it relates to the job being sought. 	<ul style="list-style-type: none"> Are you a U.S. citizen? Where were you born?
Disability	<ul style="list-style-type: none"> Are you able to perform the essential functions of this job with or without reasonable accommodation? Show the applicant the position description so he or she can give an informed answer. 	<ul style="list-style-type: none"> Are you disabled? What is the nature or severity of your disability?

2007 ACC Chief Legal Officer Survey Results

April 2008

Executive Summary

In late-October/early-November 2007, the Association of Corporate Counsel (ACC) invited 5355 of its US members holding the title of Chief Legal Officer (CLO) or General Counsel (GC) to participate in the 8th Annual Chief Legal Officer Survey.¹ The survey was open for a period of three weeks and 1166 responses were received.²

The information contained in this Executive Summary, along with the survey's full report, can prove to be useful for those working in corporate legal departments, along with auditors, law firms, and vendors (e.g., recruiters, litigation support providers). This year's survey addressed a number of issues that were covered in previous years' surveys, including the relationship with outside auditors, outside counsel spending, company revenue, intentions to expand legal staffing, and the type of legal work that would demand most of the general counsels' time and resources.³ The findings from the 2007 survey results tracked very closely to the 2006 results, and where there were variances, they were not startling.⁴ These results can prove to be functional benchmarks for CLOs and GCs wishing to evaluate their own corporate legal departments in comparison with their peers and determine if changes should be considered.

For auditors, the results can prove to be an effective tool for strengthening the relationships with their corporate clients. For instance, a fraction of this year's respondents indicated that there was a slight improvement in the relationship with their outside auditors but most indicated that the relationship remained unchanged. The reasons cited by some general counsel who, in the 2007 survey indicated that the relationship had become more adversarial, had less to do with concerns about the competencies or objectives of the auditors as evidenced by some responses to the 2006 survey, but perhaps, were attributed to "perceptions about the respective roles and boundaries."

Additionally, the survey offers supplementary information for law firm attorneys and vendor representatives hoping to glean new perspectives into their clients' legal departments to better understand and anticipate needs and identify opportunities. This year's responses indicated a slight increase in outside counsel budgets, along with an increase in the total average annual budget. The real discovery, however, was in the wide-range of law department budgets and outside counsel spending. For example, some respondents indicated an aver-

age total law department budget of \$50,000 and outside counsel budgets around \$10,000 annually. On the other end of the budget spectrum, one respondent indicated that the outside counsel budget was \$500 million, with a total law department budget of \$750 million annually. (Note: The range of budgets was not gauged in previous years' surveys.)

The 2007 survey focused more on the health of the profession and, in particular, on the legal department leader. Given the increased scrutiny and regulation from outside auditors and state and federal agencies, we were curious to learn whether our CLO members were satisfied with their careers. Overall, our members remain very content and in fact, not only anticipate, but welcome opportunities to expand their roles and the support they provided to their clients.

The key areas addressed in this year's CLO Survey include:⁵

- Challenges CLOs are confronted with, including their assessment of the health of the profession;
- Law department demographics, including reporting structure, location and the number of attorneys in the legal department; and
- Relationships with outside counsel and outside auditors.

Key Findings:

- Respondents anticipate spending most of their time in 2008 on transactional work. The next most consuming issue is expected to be compliance work. Such was the case in previous years' findings, as respondents in the 2005 and 2006 surveys reported that transactional work would demand the greatest amount of their time. In 2006, respondents reported that compliance work would have been the second most demanding work.
- While compliance, governance and e-discovery are hot topics, survey respondents indicated that records management would be the next significant issue that general counsel would tackle in 2008, followed closely by staff recruiting, retention, and training. It is interesting to note that in 2007, records management was not the dominant concern, but instead, was a close second to international expansion and globalization issues.
- Alternative billing/flexible billing/e-Billing was ranked as the best initiative implemented by outside counsel to improve the relationship with the law department in 2007. This initiative ranked third in 2006; Seminars/Training/CLE ranked highest in 2006, but second in 2007.

When asked how they would characterize their relationship with outside audi-

- As in previous years, most respondents indicated that they were not going to expand their in-house staff. In fact, more than 50% of all respondents reported that they were not going to expand their in-house counsel staff in 2008. This percentage is consistent with the responses provided in 2005 and 2006.
- It appears, however, that the law department size has grown slightly over the past year, as only 76% of respondents indicated that their law department had between 1 to 5 in-house attorneys in 2007. In 2006, almost 80% of law departments had between 1 to 5 in-house counsel. Furthermore, in 2006, just under 15% of respondents indicated that the number of in-house attorneys ranged from 6 to 20. The proportion had increased to 17% in 2007.
- 85% of the CLOs surveyed expressed deep satisfaction with their chosen career, despite the fact that their roles have changed dramatically in the last few years.
- The CLOs surveyed have a healthy "appetite for risk," whereby 59% of respondents reported that the increased scrutiny had only a modest influence on their career satisfaction. Less than one-third reported that these external burdens would influence their decisions to retire or pursue another CLO position.
- About two-thirds of CLOs report to the CEO, with 14% reporting to the President, 7% reporting to the CFO, and about 2% reporting to the Board of Directors.
- A majority of in-house attorneys report directly to the CLO.
- Of the 864 CLOs who reported having paralegals on staff, 349 indicated that paralegals accounted for 25% to 50% of the law department personnel.
- 967 CLOs reported that all of their in-house attorneys were based in the United States, while 126 reported having attorneys in Western Europe. Half of these 126 respondents reported that less than 20% of their attorneys were based in Western Europe.
- Only 12% of respondents are required to, or require their in-house counsel to, track their hours.
- 82% of respondents indicated that the cost of running the law department is considered a part of the company's general overhead.
- 49% of respondents belonged to companies that employ over 1000 employees.
- The revenues of the organizations are also increasing, as 52% of respondents to the 2007 survey worked for companies with less than \$500 million in annual revenues. In 2006, 58% of respondents' organizations had under \$500 million in annual revenues.
- As in 2006, 50% of respondents worked for privately-owned companies.

Health of the CLO Profession

The majority of the CLOs surveyed expressed deep satisfaction with their chosen career:

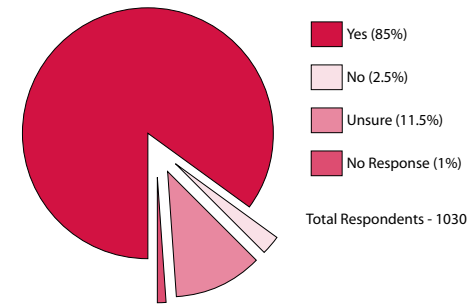
"As CLO, I feel that I have a greater opportunity (compared to private practice) to implement "best practices" and processes specifically designed to influence and support many of the significant decisions faced by all areas of the company. The impact of these practices and processes is immediate. From the company's perspective, the internal legal group routinely provides an "ounce of prevention" up front, thereby reducing and eliminating the potential for significant liability. It was always difficult to obtain this type of immediate, "up front" access in private practice."

"Very interesting and challenging. I did not start out to be a GC; I had no idea that position even existed 30 years ago! But it is a wonderful career! Intellectually stimulating in a complex environment. I love that together with working with so many different people all over the world, and in a company with values. I feel very fortunate and am extremely happy with my career."

"Depends on the day - but for the most part yes. I hated the billable hour system. I didn't feel my clients got the best amount of work b/c I couldn't get really deep into it or I'd have to cut my hours. So in-house lets me commit more hours to a project and not have an issue with my "client".

"The choice to be a CLO has been rewarding and challenging. I have not regretted for one minute the decision to leave private practice and go "in-house." My duties and areas of responsibility and influence are more wide-ranging than I have anticipated, and that only makes the work more enjoyable."

I. **Question: The CLO role has changed dramatically in recent years, significantly expanding your duties as a legal and business advisor. Are you still satisfied with your chosen career?**

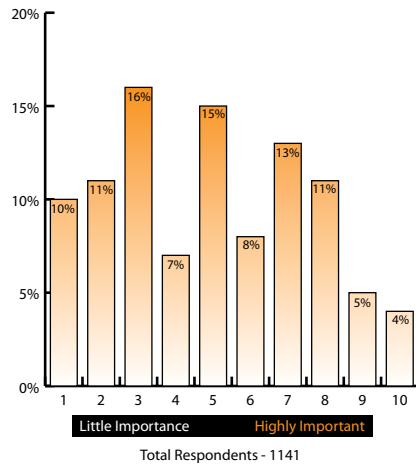


Not all respondents reflected this enthusiasm, and it appears that the professional reality for about three percent of CLOs is less rewarding. In commenting on his current employment, one member shared that he received:

"[N]ot nearly the recognition/respect/compensation given the monumental accomplishments, work hours, and multi-million dollar difference I have made and make. [The] CEO and CFO take credit for all of my proactive work to improve the bottom line or make money."

Nevertheless, it appears that the CLOs surveyed have a healthy "appetite for risk,"⁶ where 59% of respondents reported that the increased scrutiny had a modest influence on their career satisfaction.

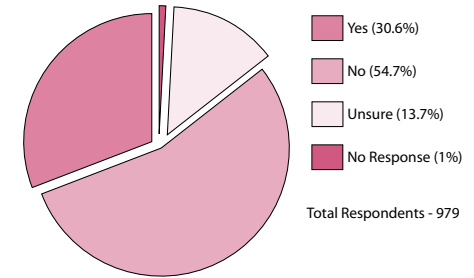
2. **Question: CLOs have been under increasing scrutiny over the past few years by law enforcement, regulators, and others. On a scale of 1 to 10 (1 being of little importance and 10 being highly important), how would you characterize the significance of this fact as it relates to your career satisfaction?**



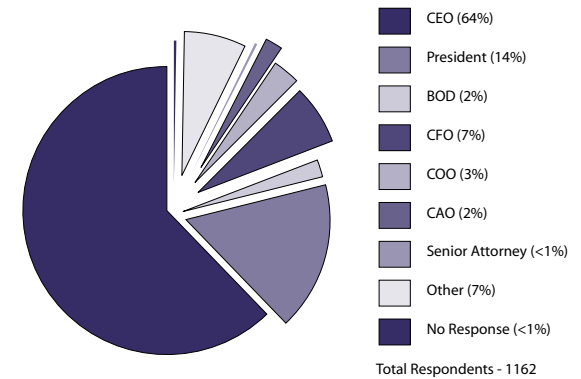
Despite a healthy level of satisfaction with their career, the increased legislative and regulatory pressures have made an impression on this group of legal practitioners. As one respondent cogently remarked:

“The challenges and frustrations of the work continue to be there and I often think that an operations position would be much less difficult. Due to the SEC’s recent indictments and settlements with GCs and the DOJ’s investigation of companies regulated by the DHHS [Department of Health and Human Services], the attorney is exposed to strict liability concerns over which he may not have any control. This puts the attorney in a position where he or she may more likely become a whistleblower than a trusted advisor. This, coupled with the breakdown in the attorney-client privilege, will have a chilling effect on a client’s desire to include the GC in valuable business discussions. I sometimes think that the attorney operating within the organization of a business entity is like a duck out of water.”

3. **Question: Would this increased scrutiny have a considerable impact on any future decision you might make concerning retirement or seeking another CLO position?**



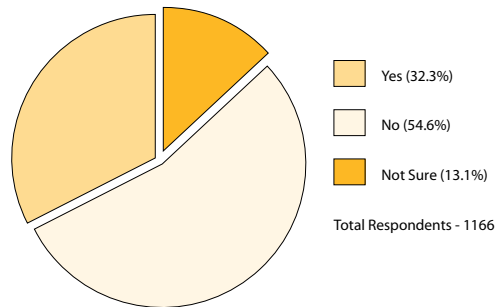
4. **Question: To whom do you report?**



More than two-thirds of CLOs report to the CEO. This finding is consistent with the 2006 ACC Census of In-house Counsel.⁷

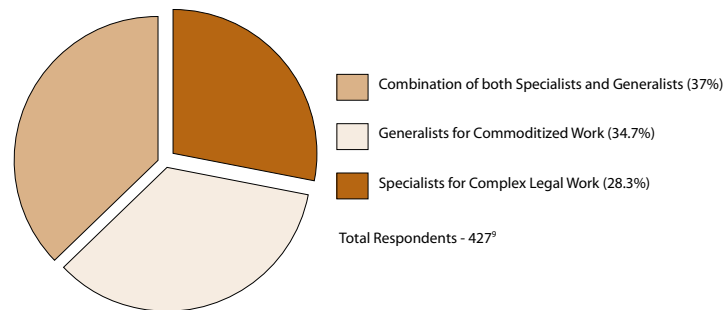
II. Law Department Demographics

5. **Question: Within the next 12 months, do you plan to extend your in-house legal capabilities by hiring additional lawyers?**



In the 2006 CLO survey, 52.9% of respondents indicated that they were not going to hire additional lawyers in 2007.⁸

6. **Question: If you plan to hire additional lawyers, are you planning to hire generalists or specialists?**



7. **Question: We asked our members what percentage of their staff were attorneys, paralegals, or contract administrators.**

Of the 1,141 CLOs who responded to this question:

- Approximately 800 reported that more than half of their law departments were comprised entirely of lawyers, and of this group, approximately 250 stated that 100% of the law department staff were lawyers.

Of the 864 general counsel who reported having paralegals on staff:

- 349 indicated that paralegals accounted for 25% to 50% of the law department personnel.

Of the 238 general counsel who reported having contract administrators on staff:

- 62 reported that contract administrators accounted for 25% to 50% of the law department personnel.

Of the 91 general counsel who reported having computer/software/technical support staff:

- 7 reported 33% to 50% of law department personnel were in this category.

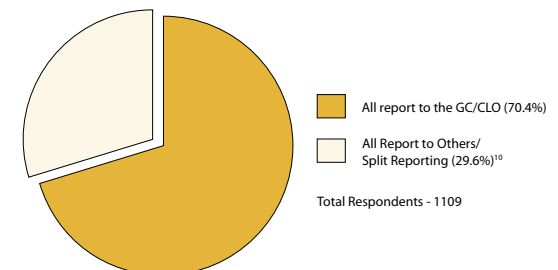
Of the 211 general counsel who reported having other personnel on staff:

- 52% indicated having administrative staff;
- 17% indicated having compliance and ethics staff;
- 3% indicated having patent agents; and
- 2% indicated having interns/law clerks.

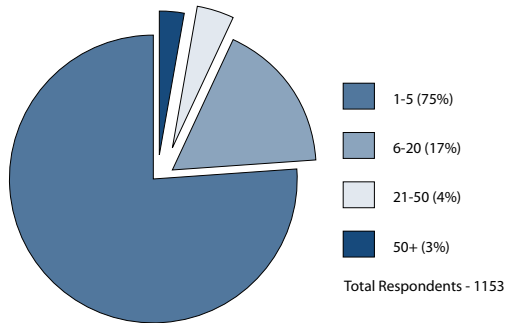
Also listed as other personnel on staff in law departments:

- Engineers
- Human resources personnel
- Risk management personnel
- Bookkeepers
- Environmental specialists
- Real estate specialists

8. **Question: To whom do the attorneys in your law department report?**



9. Question: How many attorneys are in your department (in all locations)?



10. Question: What is the approximate percentage (%) of your law department's attorneys in the following regions:

Region	# of GC w/ staff in region	% of GC w/ staff in region	Average % of in-house staff represented in region
United States	1145	99.7%	95.1%
Canada	48	4.2%	0.4%
Latin/Central/South America	53	4.6%	0.5%
Eastern Europe	30	2.6%	0.2%
Western Europe	126	10.9%	2.4%
Africa/Middle East	16	1.4%	0.2%
Asia/Pacific	82	7.1%	1.1%
Total Respondents			1148

Of the 1148 general counsel who responded to this question:

- 967 reported that all of their in-house counsel are based in the United States.
- 54 reported between 50% to 75% of their in-house counsel are based in the United States.
- 9 reported that less than 25% of their in-house counsel are based in the United States.

Of the 48 general counsel who reported having attorneys in Canada:

- 2 reported that between 30% to 35% of their attorneys are based in Canada.
- 32 reported that less than 10% of their attorneys are based in Canada.

Of the 53 general counsel who reported having attorneys in Latin/Central/South America:

- 4 reported that between 40% to 60% of their attorneys are based in Latin/Central/South America.
- 44 reported that less than 20% of their attorneys are based in Latin/Central/South America.

Of the 30 general counsel who reported having attorneys in Eastern Europe:

- 19 reported that less than 10% of their attorneys are based in Eastern Europe.

Of the 126 general counsel who reported having attorneys in Western Europe:

- 6 reported that 60% to 80% of their attorneys are based in Western Europe.
- 61 reported that less than 20% of their attorneys are based in Western Europe.

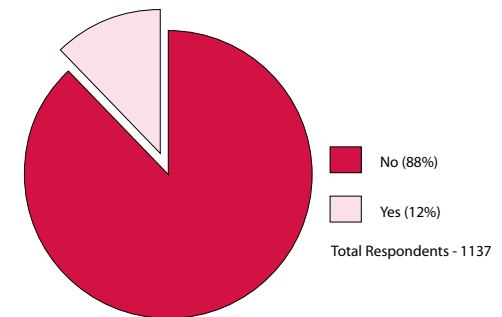
Of the 16 general counsel who reported having attorneys in Africa/Middle East:

- 1 reported 100% of their attorneys are based in Africa/Middle East.
- 10 reported that less than 10% of their attorneys are based in Africa/Middle East.

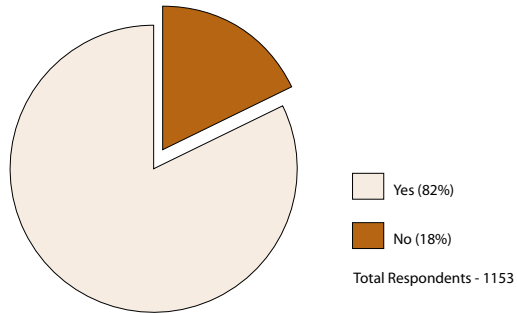
Of the 82 general counsel who reported having attorneys in Asia/Pacific:

- 5 reported between 50% to 75% of their attorneys are based in Asia/Pacific.
- 64 reported that less than 25% of their attorneys are based in Asia/Pacific.

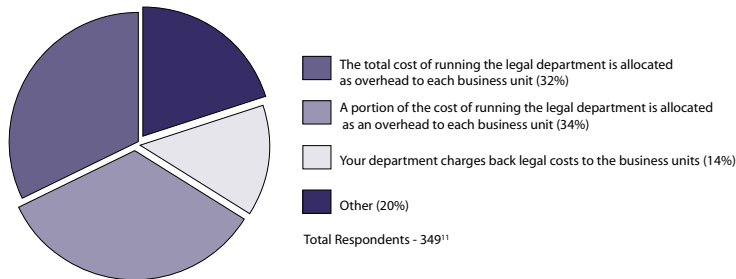
11. Question: Are you required, or do you require your in-house attorneys, to track their hours?



12. Question: Is the cost of running your department considered a part of the company's general overhead?



13. Question: If you answered no to the above question, how is the cost of your department distributed?

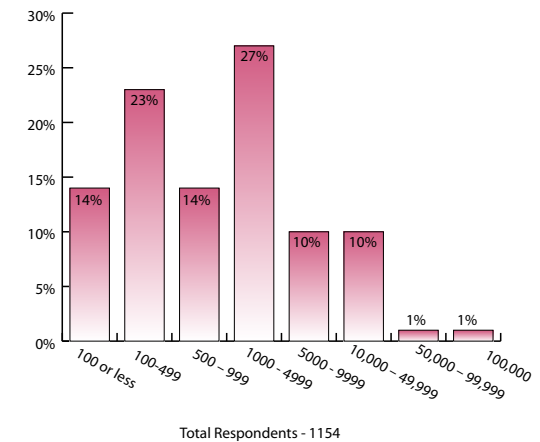


A number of respondents who selected "Other" noted that the law department cost allocation was a hybrid of two of the above options:

- "My answer ... is yes and no. Part is considered corporate overhead (counseling corporate departments such as treasury, insurance, supply chain, etc.) while the work that is directly related to a business unit is charged back to that business unit."
- "Our internal costs are allocated as overhead. Outside legal costs are charged back to the business units where they relate to a specific business unit."

- "Costs are allocated to the lines of business, as well as our wholly-owned subsidiaries, as are other support functions of the corporation. Cost allocations are reviewed (on a high level) by our regulators."
- "We charge business units directly for everything we can directly attribute (outside counsel, online research hours, etc.). Salaries, equipment, etc. that cannot be directly attributed is allocated as overhead."

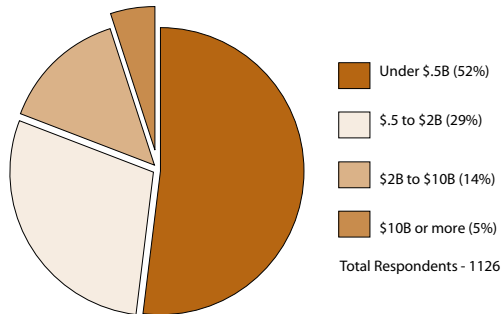
14. Question: What is the approximate total number of employees in your company?



15. Question: What is your total 2007 departmental budget in U.S. dollars?

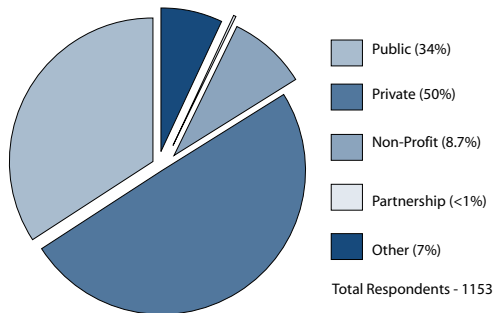
- The statistical average for the 749 general counsel reporting an annual budget is \$7,835,649.¹²
- Annual law department budgets ranged from \$50,000 to \$750,000,000.

16. Question: What is your organization's annual revenue?



In the 2006 CLO survey, 58% of respondents' organizations had under \$500 million in annual revenues.

17. Question: Is your organization:



Other answers included:

- Subsidiary of foreign public corporation
- Government business enterprise
- Indian tribe
- LLC

- ESOP¹³
- Wholly-owned private by public company
- Publicly traded in Europe
- A business unit of a public company
- Mutual Insurance Company¹⁴
- Alaska Native Corporation
- Publicly held debt, privately held equity
- Non-reporting public company

The 2006 In-house Counsel Census revealed that 47% of in-house counsel worked for public organizations. In contrast, in the 2006 CLO Survey, 51% of respondents indicated that they worked for private companies.

18. Question: Have you implemented any practices that have created significant cost/time efficiencies for your department?

Response	Rank	Number of Respondents
Increased use of paralegals	1	369
Use of temporary/contract personnel	2	303
Document management	3	277
Contract management systems	3	277
Matter management	4	266
Redesigned discovery processes ¹⁵	5	105
e-Billing	6	99
Extranets with law firms	7	66
Client-facing intranets	8	56
Other	9	44
Total Respondents		859

Other responses included:

- Brought in more legal work in-house
- Instituted client training programs
- Hired smaller firms
- Negotiated better rates with outside counsel.

19. Question: In which areas do you expect to spend the greatest amount of your time in the next 12 to 18 months?

Response	Most Time	2 nd Most	3 rd Most	Number of Respondents
Transactional work	70%	18%	12%	872
Compliance	28%	43%	29%	667
Board relations	21%	35%	44%	446
Outside counsel management	15%	41%	44%	376
Litigation	23%	38%	39%	432
Government affairs/External relations	21%	35%	44%	184
C-suite relations	34%	31%	35%	265
Mergers & Acquisitions	30%	32%	38%	323
Cost control	24%	34%	42%	154
Staff retention and development	18%	34%	48%	195
Information technology and management	11%	42%	47%	118
Document/records management	13%	32%	55%	246
Total Respondents				1161

Respondents indicated that they will spend most of their time in 2008 on transactional work, followed by compliance work. This finding is consistent with the 2006 CLO survey.

20. Question: In addition to dealing with issues like Compliance, Governance, and E-Discovery, what is the next big issue you will face?

Response	Response %	Number of Respondents
Record Management/Retention	10%	71
HR – Staff Recruiting, Retention, Training and Development	9.3%	66
Cost Control	6.4%	51
Litigation	5.4%	38
Globalization (International Expansion/Legal Issues)	5.4%	38
Keeping ahead of industry change caused by statutory and regulatory changes	4%	29
Mergers and Acquisitions	3.6%	26
Increased Workload with Minimal Resources	3.5%	25
Intellectual Property	3.3%	24
Patent Protection	2.5%	18
Compliance	2.3%	16
Risk Management	2.1%	15
Contract Management/Standardization	2.1%	15
Privacy/Security	1.9%	14
Employment/Labor Law Issues	1.8%	13
Board Relations	1.5%	11
Restructuring/Reorganization	1.5%	11
Succession Planning/Business Continuity	1.4%	10
Outside Counsel	1.4%	10
SEC Reporting	1.2%	9
Compensation	1.2%	9
Company Growth	1.2%	9
IPO	1.1%	8
Don't Know/Unknown	1.4%	10
Other	24.5%	167
Total Respondents		709

III. Outside Counsel Relationship

21. Question: What sort of initiatives could your outside counsel implement to improve relationships with your department?

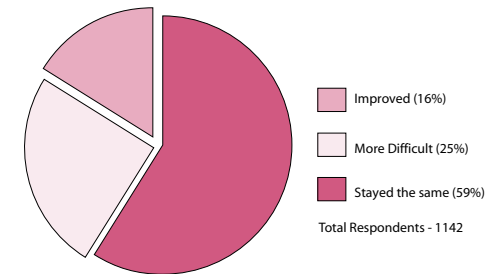
Response	Rank	Number of Respondents
Alternative/Fixed fees/Discounted rates/Flexible billing structure/e-Billing	1	738
Seminars/Training/CLE sessions	2	730
Updates on developments in applicable areas of law	3	617
Improved reporting/Status updates/Communication	4	599
Non-billable advice	5	548
Detailed budgeting and planning	6	477
Desire to understand business	7	408
Invitations to outside counsel events/Networking opportunities/Contact referrals	8	369
Post-performance reviews	9	285
On-site visits	10	242
Online Database/Intranet/Extranet	11	202
Other	12	29

22. Question: What is your 2007 departmental budget in U.S. dollars for outside counsel?

- The statistical average for the 733 general counsel reporting an annual budget for outside counsel is \$4,690,116.¹⁶
- Annual budgets for outside counsel range from \$10,000 to \$500,000,000.¹⁷

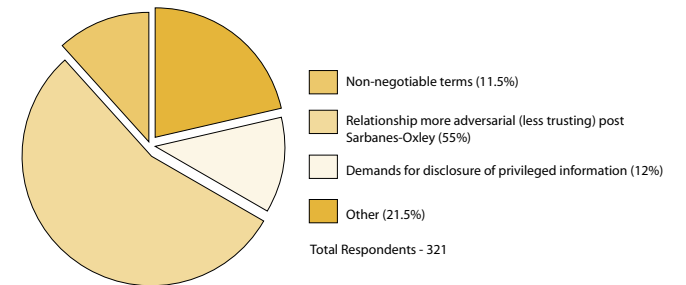
IV. Outside Auditor Relationship

23. Question: How would you characterize your relationship with outside auditors over the past few years?



In 2006, 53.4% of CLO respondents indicated that the relationship stayed the same. 33.7% reported that the relationship has become more difficult.

24. Question: If the relationship has become more difficult, please identify the primary reasons for this change:



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Other reasons cited for the increasingly adversarial relationships with outside auditors included:

- "They protect the accounting firm at the expense of the client... even to cover their own mistakes."
- "Not so much less trusting as just making more demands that seem too form over substance oriented."
- "Requests for Waiver of Jury Trials; Mandatory Binding Arbitration Requests."
- "While we are a privately owned company, our auditors have treated us like a publicly-traded company and thus the relationship has become more adversarial post Sarbanes-Oxley."
- "Also, outrageous demands in engagement letters (such as indemnification for intentional misconduct)."
- "The request for more data relating to internal investigation[s]."
- "Following stock option investigations, auditors seem much more concerned about their own liability so they are papering their files more."
- "Independence that suddenly means they don't offer guidance."
- "Unwillingness of auditors to sign confidentiality agreements."
- "Insistence on reviewing and commenting on aspects of SEC filings that are properly the province of lawyers."
- "Costs and compliance burdens are larger."
- "Unprecedented and unreasonable demands for opinions."

Jeffrey Paquin is currently chief operations counsel for Abbott in Chicago, Illinois. In such capacity, he is responsible for outside counsel management initiatives, legal technology, ediscovery, performance management initiatives, legal vendor management, records management, IP operations, administration, and other areas involving the operational infrastructure of the legal division. Paquin manages the operations of the legal division so that his colleagues on the general counsel's senior staff can focus on managing their practice areas and attorneys.

Abbott is a global, broad-based health care company devoted to the discovery, development, manufacture, and marketing of pharmaceuticals and medical prod-

ucts, including nutritionals, devices, and diagnostics. Abbott had \$25.9 billion in sales in 2007, has 68,000 employees, and markets its products in more than 130 countries. The legal division has approximately 300 employees, about half of which are attorneys, including approximately 30 attorneys working outside of the United States.

Paquin was previously a senior partner in the specialty law firm of Paquin Victor LLP; the national practice leader for Ernst & Young LLP's Legal Management Services group; chief litigation counsel for United Parcel Service; and a commercial litigator at Powell Goldstein LLP, where he was also chair of the ADR Section.

The views expressed in this interview are Paquin's own, and may not necessarily reflect the views of his employer.

Law Department Management With Jeffrey Paquin

Working with a group of people who have varying personalities and ideas about how things should be done is never an easy situation. This is a tall order for any leader, but for one charged with working with lawyers, the order is even taller—but Jeff Paquin is up for the challenge.

"Lawyers by nature are very bright and independent, and also want to be involved in virtually every decision. This is not necessarily a bad thing. So, a big part of my job is working with the other lawyers to bridge the gap that sometimes exists between practicing law and running a business," says Abbott's chief operations counsel.

"The objective of managing the operations of a legal department is not that different than managing other businesses or groups—the overall objective is to help inspire and motivate a group to accomplish a common goal."

Having managed in legal departments, an association, businesses, an accounting firm, and law firms, Paquin admits that the manager's role is pretty challenging. In order to help the legal

team focus on serving the business, Paquin works with Laura Schumacher, the general counsel, to develop a yearly operating plan and strategy to integrate the people, the processes, and the technology required to accomplish that strategy. "Part of what I do is to help make sure that we have a clear mission and that we follow it—we actually developed a new mission statement last year." Abbott legal division's new mission statement reads:

To be a world-class legal division that provides proactive, high quality, and cost effective service tailored to advance Abbott's strategic goals, protect its reputation, and enhance its profile, doing so in a diverse, collegial, and rewarding environment.

According to Paquin, the new mission statement was prepared with input from administrative personnel, paralegals, lawyers, and other key people at the company. "If we continue to follow this mission, we'll do an excellent job of focusing on our values and priorities."

Paquin feels that positions like his—those of attorneys specifically dedicated to managing the operations of legal departments—are going to continue to prevail in the business world. "I think my type of role is expanding quite a bit. I see it becoming more and more commonplace throughout corporate America, and I think many more large legal departments in the next five to ten years will also have the foresight that our general counsel had in hiring me to manage the operations of our legal division."

How does one demonstrate their value at work? This is a question that many in-house law departments have to tackle. "In-house lawyers have struggled with that issue for many decades—how do we quantify our value? Personally, I've been tackling it for the last 20 years. At the end of the day, we have to look to our clients to see that they're satisfied—and we certainly need to do everything that we can to make sure we're aligning what we're doing with the business goals of our clients."

Abbott has found that its clients value a few things immensely: the quality of advice given (is it accurate?); the speed at which that advice comes (is it provided quickly?); and the results of the advice (did we close the deal?). "And then certainly cost savings and avoidance—that definitely has become even more important in the last few years. We're actually in the midst of rolling out a new client survey. We recognize how important it is to get feedback from our clients and so we're revamping that whole process," says Paquin.

In terms of demonstrating the value of certain practice areas like litigation or patents, Paquin calls attention to the very specific metrics that look into those areas (e.g., cycle times in litigation, the number of patents being filed in the patent area, etc.). "One thing that I've seen a lot more of in the last two or three years in legal departments is a focus on taking these sort of microvalue metrics and rolling them up into dashboards that are useful in providing information, making decisions, and establishing targets: either real-time dashboards or those that are updated quite frequently. I think having this type of business intelligence will become more and more critical."

Much of what Paquin does and has done throughout his career is lead. Being a great leader is not necessarily about telling people what to do, how to do it, or when it should be done. A great leader needs to figure out how to inspire his or her team, and adopting "best practices" for leadership is something that Paquin has worked on for quite some time. "Being a leader is a privilege that should not be taken lightly. I've spent a good part of my career studying leadership and teaching leadership in various forums, and about ten years ago, I actually started 'Jeff's Top 10 Leadership Principles.' Fortunately for me, I am surrounded by strong leaders in the legal division and



Most Valuable Lessons Learned That I Still Apply Today

The most valuable lesson that I've learned that I still apply today is that your family, your spiritual needs, your health, and your friends should all come before your work. That may sound like a bold statement as I'm sitting here being interviewed in connection with my work at Abbott, but if you follow that advice, you'll be in a much better position psychologically and physically to serve your employer and to excel at work.

Most Pivotal Career Move

Definitely, being brave enough to move away from traditional law—in other words, litigating and managing litigation—to also focus on the business aspects of the legal profession, running legal-related firms and practices, and certainly law department management. At the time I did it, people thought I was a little crazy, and there's certainly a loss of comfort in making that type of career move. But I made the transition and it served me very well. The opportunities I've had and the things that I've done have been quite exciting. For example, if I hadn't made that career move, I wouldn't be here at Abbott.

Advice for My Fellow In-house Attorneys

I have two pieces of advice that have served me well, neither of which is necessarily profound but both of

which are very important. First, The Golden Rule. Treat everyone the way you want to be treated. In the work context, this includes not only your boss but also the person who delivers your mail. And in the in-house context, this includes outside counsel and vendors, even if they are trying to sell you something. And second, plan and then plan some more, but do so with incredible flexibility. Be prepared to throw away your plan. Whether it's related to your career or personal life, flexibility is one of the keys to success and happiness.

What's Next For Jeffrey Paquin

Well, next for me is what I am currently doing at Abbott. I've only been here for about one year. The legal division was doing great things before I arrived, but we have so much more that we want to accomplish to continue to be a world-class legal division. Working with our general counsel and the other legal division leaders, we have put together a five-year plan of leading-edge initiatives that will enhance our client service and advance Abbott's strategic goals.

There's Not Enough Time in the Day....

To focus on mentoring young lawyers and other employees. Whether it is formal or informal mentoring, this is so important. I spend as much time as I can mentoring others, but I would definitely welcome more time to do so. It is so rewarding for me, and hopefully for them.



Additional Resources on...Law Department Management

TITLE	DESCRIPTION	URL
ACC's Law Department Executive Leadership Management Report: Developing and Implementing Law Department Metrics that Work (Article)	This management report includes discussion highlights from an executive discussion on law department metrics among law department executives from 12 different companies.	www.acc.com/resource/v8920
A Company's First General Counsel (ACC InfoPAKSM)	Created to assist in starting a legal department, this InfoPAK update includes data from the Altman Weil Compensation and Management Survey.	www.acc.com/resource/v239
How to Give Orders (Quick Reference)	A quick reference guide on how to effectively delegate responsibility.	www.acc.com/resource/v7922
Let's Get Organized—Using Six Sigma and Other Programs to Streamline Law Department Procedures (Program Material)	Looking for optimal workflow, organization, and productivity in your legal department? Who isn't! Here is a thought-provoking session on how to apply top down and bottom up principles in conjunction with Six Sigma practices to turn a disorganized legal department—with circular work patterns and other inefficiencies—into a highly productive team with quality on-time deliverables.	www.acc.com/resource/v9007
Managing and Motivating Difficult Employees (InfoPAKSM)	As a manager, you're expected to deal with a difficult employee proactively and effectively. If you're unable to manage difficult employees adequately, you may be viewed as an ineffective manager—a label that can have a lasting impact on your career. Prepared by ACC alliance partner WeComply, this InfoPAK examines strategies and suggestions for dealing with difficult employees.	www.acc.com/resource/v8708
Metrics to Creating and Fostering a Successful Law Department (Program Material)	Smart companies measure results. In an era increasingly driven by metrics, it is essential for law departments to find or develop tools that provide some measure of the value of the work being accomplished. This material provides key performance indicators and benchmarking data for in-house counsel that can be used to measure and track the performance of your law department.	www.acc.com/resource/v8441
Time Management Tips and Tricks (Article)	This article from ACC alliance partner Robert Half Legal offers tips and tricks for effective time management for the in-house counsel.	www.acc.com/resource/v8871

throughout Abbott from whom I can continue to learn new leadership skills."

Paquin's leadership principles include: inspiring to motivate; empowering the people you're working with; developing careers; leading by example; knowing your team's strengths and weaknesses; communicating and listening effectively; caring about others; being passionate about the job; being honest with others and yourself; and having fun.

Jeff's Top 10 Leadership Principles

- **Inspire to Motivate.** "Above all else, we must inspire those we lead. Motivation and success come from inspiration. We want those we lead to follow because they want to, not because they have to. We should likewise seek inspiration from those we lead."
- **Empower the Team.** "I think empowerment is critical to success. Not false empowerment, but real empowerment. We must not hinder decision-making. And through empowerment comes creativity. Creativity and innovation are things that many leaders fail to fully encourage."
- **Career Development.** "We often give lip service to that, but I really focus on career development and spend a considerable amount of time on this area. There is no greater feeling as a leader than knowing that you were able to help someone realize their potential."
- **Lead by Example.** "I roll up my sleeves every day and have no problem doing exactly what it is that I'm asking others to do. I am not too important to make copies for my employees."
- **Know your People's Strengths and Weaknesses.** "Strengths should be emphasized; weaknesses should be addressed. Knowing your people is important. It is the only way to ensure their success."
- **Communicate and Listen.** "Most of us don't do as good of a job commu-

nicating as we think or as we should, myself included. And we often talk too much, but we don't listen to what people are saying. I mean *really* listen."

- **Show Compassion.** "Care about people, and take an interest in their lives. Encourage others to do the same. And in the work context, this means all employees, regardless of level or position. If you care about what is important to others, they will care about what is important to you."
- **Be Passionate.** "If you're not extremely passionate and energetic about what you are doing, why should you expect people that you're trying to lead to be excited?"
- **Be Honest.** "Most people can tell when you are evading an answer or the truth. Within ethical and other constraints, be honest and to the point. Honesty builds trust and loyalty. And in addition to being honest with others, be honest and true to yourself."
- **Have Fun.** "Have fun and laugh at yourself. Having a sense of humor is a very good thing. Enjoy what you're doing, and if you are not having fun, do something else—life is too short."

"That's 'Jeff's Top 10 Leadership Principles'—those are the skills and traits that I try to follow and encourage in terms of leadership," Paquin notes.

One of the things that Paquin works on closely with the general counsel is to ensure that legal division personnel are content. Paquin says that while he has worked in places where there may have been discontent among employees, at Abbott that is typically not the case. "I think Abbott employees are generally content—Abbott is a great company and a premier employer. We are on top employer lists around the world. We have been one of the 100 best companies for working mothers for the past seven

years according to *Working Mother Magazine*. And we have been one of *Business Week's* 50 best places to launch a career for the past two years. We're also one of the best 50 companies for diversity according to Diversity, Inc., and we're one of *Fortune's* 50 best companies for minorities. So generally, we do very well in terms of our employees."

In addition to outside accolades, internally Abbott's legal division conducts an employee survey every other year to assess how it is doing. Paquin says that, like most organizations, last year's survey identified areas where Abbott can improve, and he says the legal division leadership is looking into those areas. "That's why we do these surveys: we want to know if and how we can improve—there is always room to be better. Through the recent survey, we have identified several key focus areas. For example, while we already do a great deal in this area, one is to improve communication. Among other things, in response to the survey, we're revamping our legal division intranet to include more communication components: we're putting in place a new newsletter that will be distributed worldwide to all of our legal division personnel; we are increasing the number of all-employee meetings; and we are putting in place several other exciting communication-related improvements."

Making sure that employees that are based outside of the United States are integrated into the flow of the main office is another critical component to law department management. "Like most large companies, we face challenges with ex-US legal professionals in terms of keeping them in the loop and integrating them into our activities here at Abbott Park. So, in connection with the recent restructure of our international legal group, the new head of that team, Lara Levitan, is doing great things to address this issue."

Calling attention to career develop-

ment, and in particular training and education, Paquin is seeing a lot more legal departments providing training programs for their personnel. At Abbott, Paquin notes that they have a "robust" training program for all legal division personnel. "We have a very comprehensive offering of internal and external training and education courses. The curriculum is broad and deep, with both in-person and online courses. We basically allow our employees at every level to obtain as much training and education as their manager determines appropriate. It's an excellent program—best-in-class in every respect; we're very proud of it."

Paquin also pointed out that pro bono and community service activities are important to the Abbott legal team, an area that seems to be growing in importance throughout the in-house legal community. "Not only did our general counsel emphasize to all of us that pro bono and community service were important, but she actually built it into everyone's goals. Everyone in the legal division is encouraged to spend at least 10 hours of their time during the year, at Abbott's expense, on pro bono and community service activities. These are activities in addition to pro bono and community service one might typically participate in independent of this program. The things that Abbott accomplishes in the community through this program are remarkable." According to Paquin, 262 legal division employees from around the world participated in the initiative last year, serving about 3,000 hours in addition to the regular pro bono and community service that they provide on their own.

Programs like the one outlined above, as well as the opportunity to work on a variety of legal issues in order to further the business goals of a corporation, as well as a more reliable schedule—in some cases, are a few of the reasons why more and more attorneys seem to be turning to in-house

careers. Paquin sees this trend as well. "I've certainly noticed an increased interest. I've been involved in the in-house world for quite a while, and I've noticed a significant increase in the number of resumes from people who are interested in in-house positions. But I haven't really noticed a relative increase in the number of opportunities. In other words, there are far fewer in-house positions available for the number of interested and qualified candidates."

Paquin points out some of the challenges involved in landing an in-house position, especially for younger attorneys. Paquin personally prefers lawyers who have broad experiences under their belts, which is a typical expectation of in-house law departments and not typical of new lawyers. "It's very unusual to hire in-house lawyers straight out of law school, or even with just a few years of experience. That's the primary challenge for a young lawyer."

While all legal departments typically look for bright attorneys with general or specialized substantive expertise, Paquin also strongly values strong leadership skills, creativity, collaborative attitudes, and a sense of humor. "We work on serious and important things, often under incredible pressure. Under these conditions, at the end of the day, to be able to laugh at oneself and have fun is important. Those are the kinds of things I look at. I'm sure everyone has their own list, but that's what I consider when I meet with people who are being evaluated for in-house positions."

In-house attorneys are often tasked with being the epicenter for all things legal within their companies. However, many things need to be outsourced to outside firms, and Paquin, working with the general counsel and the other department heads, has to be concerned with the associated costs. "In the outside counsel area, Abbott is currently looking at all of the programs that we have in place to manage outside firms

and we're enhancing them or adding new programs. For example, last year, we developed enhanced outside counsel guidelines, updated technology to track outside counsel and related spending, and implemented a new preferred legal vendor program." The company has also established a new outside counsel rate review process and has implemented alternative fee arrangements with firms. "We're also in the early phase of developing a comprehensive, multi-year outside counsel convergence program and a new process to evaluate the effectiveness of our firms. Because there is a huge disparity in the legal industry between the economics of law firms and the economics of corporations, managing outside counsel expense is a very important and complicated issue. I know that ACC is also launching some efforts to focus on this area to help in-house lawyers address this issue."

Paquin also points out issues surrounding ediscovery as an area of importance to in-house legal departments. "If you go to a convention of legal technology vendors these days, 90% of them are ediscovery vendors, which is due to the incredible amount of money that is being spent in this area by corporations. The challenges of this area are enormous. At Abbott, we have a relatively new group headed by Alex Buck that is focused specifically on ediscovery, and we've updated and enhanced our enterprise-wide ediscovery and record hold practices. We also put in place a new record hold system, PSS Atlas, which at Abbott we call ALERT. Like many companies, we're also planning to roll out a new enterprise-wide data collection tool this year."

Another area of concern for the chief operations counsel is identifying and implementing sustainable technology to create and maintain efficiencies in the law department. "Abbott, like many companies, is looking at our technological infrastructure and we're in the process of putting in place enhanced or

new legal technologies in many areas." The company has already implemented a new financial management system, Smart Invoice, and is considering enhanced or new technology with respect to management of matter, documents, knowledge, IP, and other areas.

Needing additional resources is not reserved for smaller law departments only, as Paquin can think of a few additional things Abbott's large legal department could benefit from. "Compared to a small law department, we have to deal with many more clients, more matter volume, more costs, more firms, and a lot more issues. So, leaders in most large legal departments, myself included, would probably argue that we need more resources just like smaller legal departments." However, Paquin does understand the limitations that operating in a smaller department

can cause. He suggests that small, under-resourced legal departments focus on their people. "If you don't have a large budget for technology and other resources, focus on 'no cost or low cost' people initiatives—that should be your primary focus." Paquin also suggests that smaller legal departments use the resources available through ACC membership. "Taking advantage of ACC resources is important. There's a vast amount of benchmarking and best practice information available—things that basically have already been done for smaller legal departments so that they don't have to reinvent the wheel. Through ACC, one can take advantage of some of the work that the larger companies in particular have already done with their resources."

Not reinventing the wheel, but drawing on past experiences, programs, and

initiatives—while focusing on developing new ones—are keys to efficient law department management, as is staying on course with the business goals of the company. "Manage legal processes like business processes," says Paquin. "As in-house lawyers, we sometimes think that lawyers are unique and that our legal issues are unique, when at the end of the day, if we think more like them and solve issues more like our business clients, we'll be able to serve them better. The process of identifying, analyzing, and resolving legal problems by in-house lawyers should not be markedly different than the process our clients use to identify, analyze, and resolve non-legal problems."

How to Say **NO** to Your CEO

This is the first of a two part interview; the second will appear in the November ACC Docket.

An Interview with **Ben W. Heineman, Jr.**

Ben W. Heineman, Jr., the ACC's 2007 Annual Meeting's keynote speaker, recently sat down with ACC President Fred Krebs and Vice President and Deputy General Counsel Deborah House to discuss challenges facing corporate general counsel when delivering difficult advice.

Ben W. Heineman, Jr., served as General Electric's senior vice president-general counsel from 1987-2003, where he was responsible for managing over 1,000 in-house counsel in over 100 countries. He retired from GE in 2005 as senior vice president for law and public affairs. He is a senior fellow at the Belfer Center for Science and International Affairs at the Kennedy School of Government at Harvard University. Heineman is also the first distinguished senior fellow at Harvard Law School's Program on the Legal Profession and a senior advisor to the Center for Strategic and International Studies. He also is senior counsel at WilmerHale.

Heineman holds degrees from Harvard College, Oxford University, and Yale Law School. A former Rhodes Scholar, he served as editor in chief of the *Yale Law Journal* and as law clerk to Supreme Court Justice Potter Stewart. He is the author of books on British race relations and the American presidency.

ACC: One difficult question that plagues in-house counsel is "How do you say 'No' to the CEO?" Investigations into many of the recent scandals at major companies reflect that the general counsel or the legal department were either purposefully excluded from the table, or more subtly, not included at the table. This is a complaint we often hear from our members. How do you get to the table as a meaningful partner who always receives an invitation, even in areas that clients may traditionally consider non-legal or in areas where clients may not wish you to venture?

Heineman: If you're starting the job, you should define the scope of your role first, both with the CEO and with the board of directors. In this day and age it is appropriate that the board of directors or members of the executive

committee interview the final candidate for the general counsel's position. The general counsel's role is as a key player in the corporation's quest for performance with integrity. The general counsel must have a job that is broad enough in scope to address the myriad business and society issues facing modern corporations. The GC, either as a lead or as a supporting actor, should be involved in complying with laws and regulations across the world, establishing global values and standards beyond what financial and legal rules require, and shaping the company's governance, public communications, reputation, and role as a corporate citizen. It also includes ultimately being involved in addressing the question of how to balance the company's private interests with the public interests affected by the corporation's actions.

A different way of saying this is that the general counsel, as a member of senior management, should on most matters facing the company, assess them for legal, ethical, reputational, and, when knowledgeable, commercial risk. And then to take it to another level, this then involves being both a business partner to the business leadership, but most importantly being a guardian of the company. And as readers of the *ACC Docket* know, the general counsel's duty is to the company and not to the CEO. But clearly, to be effective, you have to be a partner to the CEO as well as a guardian of the corporation. Simultaneously resolving that tension is what the job, in essence, is all about.

I think the way you ensure this is that you establish this understanding when you are interviewing with the CEO and with the board, if you have the courage to raise these issues and you should. You should define and describe the scope and the kinds of risks you expect to evaluate. You describe the partner-guardian tension, and that you expect to be involved in virtually all fundamental decisions of the company. Now, in a large company you can't be everywhere. But you certainly should say that you ought to be involved in first order matters, even when they have legal dimensions but are not primarily legal—or have reputational, or ethical dimensions. And that is virtually everything from new products to new geographies to the business strategy.

And I think that if you clarify that going in with both the CEO and the board, you have a chance of being included in business matters, to be consulted as a business partner to get things done. But also you have the opportunity to speak as a guardian of the corporation with respect to, at a minimum, legal, ethical, and reputational risk, and conceivably commercial risk as well. But opportunity at the outset must, of course, be matched by subsequent performance.

ACC: In a recent article, you commented that the GC for Hewlett-Packard Corporation was “incurious” and that she failed to probe the legality and propriety of pretexting to secure confidential information. Ultimately that failure caused her to lose her job and another law department colleague to be indicted. Implicitly then, before a GC can come to the determination that they ought to be saying “Yes” or “No” to the CEO, he or she should have exercised appropriate curiosity in identifying and drawing conclusions about the relevant issues. How would

you describe or define the appropriate level or scope of that curiosity?

Heineman: Let me talk about Hewlett-Packard. First, my comments on the general counsel were based on news reports; I have no personal knowledge about that situation.

What I think is instructive is that this was a case where the board of directors and senior management wanted something done. I don't think there's any question that this was a matter of the first order for the corporation. And, on those matters where the board asks the company to do something, or it's a priority of the CEO, those are quintessentially the kind of matters when the general counsel—as opposed to any of the general counsel's subordinates—should understand the legal, ethical, and reputational dimensions in some detail and with some care.

The second way to think about the question is: how big is the company? In a large company, there obviously will be division general counsel and corporate experts in tax, environment, employment transactions, IT, and other specialty areas. But even then, everyone should have the same orientation in terms of the scope of the job and the partner guardian role—the job of assessing legal, reputational, and ethical risk, as well as commercial risk. Then this flows down, again depending on how big the legal staff is, and how you're organized, to even the more junior lawyers. They all have basically the same role and responsibility and, if there are issues with respect to any of these dimensions, there needs to be a reporting relationship back up to the top legal officers, including the general counsel, depending on the magnitude of the issue.

A third dimension of this is problematic—and it certainly caused us problems at GE—accounting. One of the salient phenomena of the past five years, certainly since Enron, has been what I call the “legalization” of accounting. Obviously, lawyers are involved in what a company discloses in its 10Qs, 8Ks, public relations statements, etc., in terms of vetting it with disclosure committees for accuracy. But there are many complex accounting decisions that may be made at the end of the quarter or the end of the year, in terms of exercising judgments about how to treat things like revenue recognition.

I wouldn't want the chief financial officer telling me how to handle a merger clearance in Washington. So, what's the role of the legal function now that the SEC has made so many accounting issues fraught with le-

gal implications? This is an area where there is special expertise elsewhere in the company—in finance—and yet the implications are far different than they were 10 years ago. Ten years ago, if there were an accounting issue, most of the time the chief accountant of the SEC would talk to the comptroller of the company. They'd discuss it, and if the company agreed, they would change the matter prospectively on many questions. It would be a question of accounting judgment. Today, you're much more likely to have an investigation and the SEC enforcement division is going to be involved.

Take Fannie Mae. I'm not trying to judge that case, but Fannie Mae did have two accounting firms and a former head of the SEC enforcement division saying that their way of dealing with FAS 133—which is an accounting for derivatives rule that is hundreds of pages long and quite complex—was correct. But both OFHEO [the Office of Federal Housing Enterprise Oversight, Fannie Mae's regulator] and the SEC viewed it differently. It had enormous consequences.

That's a long way of saying that this is a particularly problematic area where 10 years ago there was church and state. Legal did the law; finance did the accounting. But now this particular area, because it has caused so much legal activity in companies, raises hard issues. I think one solution is to build stronger forensic accounting capacity into the finance function so it can deal with emerging legal trends relating to accounting, and not have the legal function involved in every controversial accounting decision.

I cite that as a special problem. But, as a general matter, I go back to what I said a moment ago: the legal function, from the general counsel down, should have a very broad scope of activity. It should be involved in discussing various kinds of risk, not just legal risk, and it should be involved in most of the major decisions as a member of the senior management team.

ACC: Legal advice is usually provided in gray situations, not black and white ones. For example, it is generally easy to tell a CEO that he or she cannot fix prices. It is a little more difficult if the proposed action is not *per se* illegal under the antitrust laws, but where a rule of reason comes into play. Perhaps then your advice is “maybe.” In the latter scenario, how does your advice differ and how do you present that advice?

Heineman: When it's grey, it's not that the answer is “maybe.” It is a question of time. CEOs are always in a hurry. They always want the answer tomorrow. In a fast-moving corporation, the first tension you've got to deal with is how much time do we really have to look at this

So basically what you're saying to the CEO is not “yes” or “no,” you're saying “look, here's the line.”

problem? Let's assume that you can get a reasonable amount of time, even though a reasonable amount of time in a company is not necessarily what a law firm would consider a reasonable amount of time. Then your job is not to give the “maybe” answer. Your job is to say, look, here are the assumed facts, the essential facts as we know them today. This requires really being concise, precise, and knowing how to speak to business people, not an hour and a half later when they've fallen off their chairs and are asleep. Very concisely, but fairly, state what are the key facts and the key legal considerations. What are the legal risks that we have under options A, B and C. This may involve some discussion with business people to generate those options.

So basically what you're saying to the CEO is not “yes” or “no,” you're saying “look, here's the line.” We're in a gray area. How close to the line, how much legal risk do we want to take in a world where the law's unsettled and the regulators are uncertain? I'm going to give you, let's say, three options. One is risky because the law's uncertain here and we're going to be in this or that regional office of this or that regulatory agency and the person there has this reputation. I'm going to give you another one that's a little further away from the line. I'm going to give you still another one that's quite a bit away from the line. How much risk do we want to take? And that analysis of different levels of risk, all of them being legal but each one with lesser or greater risk, is really the first job on these gray area issues.

Then, the second job is to give your recommendation. In fairness to the CEO, unless it's illegal in which case the GC has a different obligation, the GC should give his or her advice as to which of the options described is, in the GC's judgment, the right one to follow. That doesn't necessarily mean the most conservative option because this might be extremely expensive; it might be quite onerous. You'll have to use judgment and explain why and you have to lay out the considerations.

Now, that's the ideal. And if you've got 24 hours to do it, you may not be able to do that much. There are very few things in companies though, that have to be decided with that rate of speed, even though a CEO likes to say that they have to be decided that quickly. They will press hard for

your decision that quickly. So, to some extent, without being obstructionist, without losing the deal, or without having the newspaper write the story that demolishes you before you can respond, you have to be timely. All deliberate speed is a pretty good watchword.

I want to emphasize that good lawyers are good analysts. A wise businessman once said to me: "If I know the facts, every decision is pretty easy." It is getting the facts and asking the right questions. And that's the problem whether you're in finance, or law, or tech, or engineering, or whatever. There's always this time pressure in companies. That's what makes them fun. You're in a real world with real competitors with all sorts of things happening, with a real organization, people waiting to hear. Time is a really vital dimension in thinking about how to answer the question that you've posed.

I want to emphasize that good lawyers are good analysts.

ACC: There's the time issue and there's also just the sheer volume of information and detail that's available. So, to get to those facts you have to have an ability to sift through them.

Heineman: That's good lawyering. If you're going to trial and you've got three years of interrogatories and depositions and documents, what's the story that you're telling to the jury? You're certainly not going to tell three years worth. One of the things everybody learns, as they get older, is to make it simpler in the mathematical sense of "powerful and elegant." When you come out of law school you've been trained to see every issue and run every rabbit down its hole. That's how you get good grades on exams. When you're practicing, it is different. The difference between academics and practitioners is practitioners have to make complex things simple and sometimes academics make simple things complex.

ACC: On a practical basis, lawyer and statesman Elihu Root advised that sometimes you just need to tell clients that they are "damn fools and should stop." Can you comment on the advisability of that approach, particularly if it is outside the legal arena, and how you give such advice?

Heineman: There are three dimensions of this that we should discuss. The first dimension is the place that you give this advice, the second is the form, and the third is the style. Let's just take them in order.

The place. If you're in a group, most CEOs are testing ideas. There is a kind of debate. But if you're there with your peers in a group of seven or eight senior leaders, it is very hard to basically contradict the CEO if that's what saying "no" is. If there's an open debate and the CEO is taking his or her counsel and hasn't yet taken a position, then you can state the position quite clearly. If you're in a group, at least in my experience and certainly with [former GE CEO] Jack Welch, it was very hard to beard the lion in his den when the other lions and tigers were around the room and he was pretty dug-in on something. For obvious reasons, CEOs view their authority as being very important. They don't want it directly challenged. So, saying "no" in a big group can be done and sometimes needs to be done, but it's sometimes better if you can go in afterwards or find a place where you can be one-on-one to express the concern.

On the other hand, there was a danger, at least with Welch: he would say, "We're going to decide this by 4:00." He was a very shrewd person and had been around the bureaucracy a million times. He would say, "I don't want to have any end runs. I don't want to have you come in later. I don't want any sort of letters for the record. Say it all now or shut up." And that was fine, but when he was under full sail it was hard to get him to turn around sometimes at a meeting. So, one question is the place—group or alone.

The second dimension is the form. This goes back to the question of options. If you have the time and you can lay out different options with different kinds of risk, sometimes it will be pretty obvious, without saying "no," which is the right option. In other words, without saying "Mr. CEO, you jerk, you suggested an option X which is flat unlawful. We can't do that. And even option A which is close to the line has got way too much risk because of where the law's going or where we're going to be having this fight." And then you lay out B and C. Sometimes the option exercise can be a useful form, especially since you can engage without lobbying your colleagues.

You have to disagree without being disagreeable.

The last dimension of your delivery is the style. Sorry for the cliché—but they are true sometimes. You have to disagree without being disagreeable. CEOs can be very confrontational. Their strongest weapon, given that they have to be generalists, is hard questioning. They're used to playacting, including pushing the person to the wall in an aggressive way. People just have to understand and keep their eye above the mouth that is speaking across the

table at them somewhat aggressively. Just count to 10 and speak in a way you know may be disagreeing, but not in a disagreeable or angry way. It is hard to do under a lot of pressure and in tight situations, especially if the person is being close to abusive. But you normally don't win those kinds of fights with the CEO if you lose your cool.

Welch was the kind of person who heard everything. He was a brilliant man. So, after a while I learned that you could take him on and contest with him even though he had taken a different position and even though he had said the decision had to be made at 4:00. He would hear what you were saying. You didn't have to say it seven times. You could say it once or twice and he got it. And

he would think about it and three days later he might end up where you or someone else was without ever saying "Oh thank you Mr. CFO for that great insight. You changed my mind." That wouldn't happen, but it didn't matter. Not all CEOs are able to hear that well. Some CEOs, obviously, when they have a position, they're just going to repeat it over and over again and not hear. That wasn't the case with him.

So much of this is really the delicate relationship that exists between the CEO and the top people. How much tension can there be without you being banished beyond the pale? And part of that is the judgment—if you're lucky enough to make a judgment going in and doing diligence going in—about what kind of person the CEO is. Many of them, even though they're going to be brusque and tough cross-examiners and push you, absolutely want you to push back. Some may not.

ACC: We discussed how you go about doing the best to establish your position, your responsibilities, and your role as an incoming general counsel. But how about the general counsel who are already in place, and who may be struggling to change a culture, struggling to make certain that their advice is heeded, or that it's safe to deliver unpopular advice. Do you have any advice for these GC? Or suggestions about how to bring about a culture change in the organization or to stop a bad culture change so they can do the right thing?

Heineman: I'm not big on advice because everyone faces their own circumstances and has to make their own judgments. I would just make the observation that there are two obvious places to go if the world's changing. The first is to your senior colleagues: the head of HR, the head of finance, or whatever the case may be. Talk privately about

what's happening and what, if anything, you can do to help shape the CEO's thinking to change direction and go in a better way, a higher integrity way. If they are creatures of the CEO and part of the palace guard, you're sunk. But they may not be.

The second obvious place to go is to the board, if that is possible. One of the important changes because of Enron, and I think most of the changes after Enron have been good, is that the boards are, in reality, more independent. They are concerned about their reputations. Having independent directors is a good thing. The general counsel can always go talk to friends who are directors if they've been

there awhile. Because I was secretary, I was at every board meeting. I was part of the board culture. Over time, I became extremely good friends with virtually all the directors. I never had to go see them, but I could have if I had a problem that I couldn't solve inside myself. I could go talk to them.

But you do face the question of when do you have to resign and when do you have to give up your non-vested financial interests that are significant. That is the conflict and that is the hardest question, maybe one of the hardest questions for general counsel. You have to look in the mirror and not be corrupted by the money.

ACC: That's a perfect segue. Where should a general counsel draw the line or how should a general counsel draw a line in the professional sand at which time they depart from the company that fails to heed their advice? And what should they do before they finally go?

Heineman: One way to think about this is three simple scenarios.

First scenario, is good board, good CEO. Normally you can work it out. You may have had honest differences of agreement, but assuming that the company hasn't crossed over into the clear area of wrongdoing, to some extent it's a command structure. As long as you think you've had due process and issues have been presented fairly, it shouldn't be a problem staying even if you disagree with the decision as long as it is not illegal or grossly unethical. But there can be a lot of tension even in the good board, good CEO situation, just because of the speed, size, and complexity of these gray area decisions which come up all the time.

Second scenario is bad CEO, good board. The CEO has just gone over the deep end. The CEO wants to do things that are clearly improper, either in a legal, ethical,

You have to look in the mirror and not be corrupted by the money.

or reputational sense. At that point, let's say it has crossed the threshold for a U.S. general counsel. You can go talk to the board, but normally you won't win an argument with the CEO because killing the king is pretty tough. But you may be able to work out a deal of leaving with some honor. Just say, look we've come to differences. Here's the issue; I personally feel it's wrong. It is time for me to go home. And, depending, you may have a chance to work out an arrangement where you get a package and you go away quietly, assuming you don't have an obligation to report an illegality. Normally, just talking to the board is enough even though it is far more likely you leave because trust with the CEO has been shattered, even if the board tries to address the underlying issue with outside counsel. I should hasten to add for your readers, that anyone who is a general counsel and gets in these situations needs a lawyer. The rules in this area about when lawyers are obligated to overcome the privilege and report to outside authorities are about as complicated as any I've ever seen: when you have to report and to whom you report. There are local bar rules and special SEC rules if you're an SEC practitioner. It is an area fraught with ambiguity requiring counsel to get counseling.

Then the third scenario is bad board and bad CEO.

You may have to report to the authorities under these different rules. But I wouldn't want to live my life in this compromised situation because what's happening is just wrong. Sadly, I'm afraid I don't have any good answer other than the resignation. I think people who go into the general counsel position, if they take a chance on a company that's on the edge, they need to have thought through what they're going to do if the situation arises. They could go and say hopefully it's a turnaround situation. New CEO. Bad culture. But if the new CEO doesn't change the culture, indeed is captured by it, they've got to be prepared. They're naive if they haven't thought about the doomsday scenario of the flat resignation without the financial benefits.

ACC: Thank you so much. This has been very helpful and I am sure will be helpful not only to our general counsel who advise the CEO, but for all ACC members who sometimes have to deliver difficult advice to their client.

Part two of this interview will run in the November issue.

RESOURCE LIST

ACC CLO ThinkTank, Association of Corporate Counsel, Executive Report: CLO's Role in Government Relations & External Affairs (2007).

ACC CLO ThinkTank, Association of Corporate Counsel, Executive Report: Navigating the Complexities of C-Suite Relationships (2007).

Janice Block, *Intelligent Diversification*, Inside Counsel, Aug. 2006, available at <http://www.insidecounsel.com/print.php?article=572>.

Robert E. Bostrom, *Corporate Governance, Risk Management and Compliance After Sarbanes-Oxley: Some Thought on Best Practices and the Role of the General Counsel – Part I*, 10 Metropolitan Corporate Counsel 10, 13, (Oct. 2002)

Robert E. Bostrom, *Corporate Governance, Risk Management and Compliance After Sarbanes-Oxley: Some Thought on Best Practices and the Role of the General Counsel – Part II*, 10 Metropolitan Corporate Counsel 11, 14 (Nov. 2002)

DuPont Legal, International IP Convergence Saves DuPont Millions, <http://www.dupontlegalmodel.com/onlinelibrary-detail.asp?libid=154>.

Ben W. Heineman, *How GCs Can Avoid Being Caught in the Middle*, In-House Counsel Online, March 29, 2007, <http://www.law.com/jsp/ihc/PubArticleFriendlyIHC.jsp?id=1175072635813>.

Ben W. Heineman, *Seeing the Big Picture*, In-House Counsel Online, March 29, 2007, <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1175072635697>.

The Legal Playing Field – Directors and General Counsel Cover the Bases, Corporate Board Member, 2007 Special Supplement.

Vincent J. Napoleon, *The 21st Century GC*, Inside Counsel, March 2006, at 14.

New York City Bar Association, Report of the Task Force on the Lawyer's Role in Corporate Governance (November 2006).

Rees W. Morrison, *Three Benchmark Metrics that All GCs Should Track*, Legal Times, Nov. 27, 2007, available at <http://www.law.com/jsp/ihc/PubArticleFriendlyIHC.jsp?id=1196071460181>.

Adele Nicholas, *The Talent Exodus*, Inside Counsel, March 2006, at 47-52.

Operational Risk Management, <http://operationalrisk.blogspot.com/2007/11/gc-truth-can-be-adjusted.html>.

Laurie Robinson, *Asset Management*, Inside Counsel, June 2008, available at <http://www.insidecounsel.com/print.php?article-1763>.

Heather Smith, *Fixating on Fee Systems for Outside Litigators*, The American Lawyer, Dec. 5, 2005, available at <http://www.law.com/jsp/ihc/PubArticleFriendlyIHC.jsp?id=113351...>

Success as General Counsel Requires Proactive Engagement, The Metropolitan Corporate Counsel, at 32 (August 2007), available at <http://www.metrocorpcounsel.com/pdf/2007/August/32.pdf> and at <http://www.metrocorpcounsel.com/current.php?artType=view&artMonth=August&artYear=2007&EntryNo=7012>.

Mary Swanton, *Cost Cutters*, Inside Counsel, Feb. 2007, at 52-59.

When the Going for GCs Gets Tough, Persuasive Counselors Need to Step Up, 16 Metropolitan Corporate Counsel 3, 1 (March 2008)

Remarks by secretary Henry M. Paulson, Jr. on Blueprint for Regulatory Reform, available at www.ustreas.gov/press/releases/hp897.htm