

A Key Compliance And Governance Role For The General Counsel

METROPOLITAN CORPORATE COUNSEL

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BY THOMAS WARDELL AND R. WILLIAM IDE

Editor: What characteristics should general counsel possess to be effective as a persuasive counselor?

Ide: Today, more and more public companies are relying on their general counsel to manage mounting challenges from their “publics” and the interplay among government affairs, public affairs, law, and policy. A legal background provides an ideal skill set for a problem solver – one who is flexible with a broad perspective. Too often, business people have a perception of their outside lawyers as ineffective business counselors. They believe that many outside lawyers simply tell them what they cannot do under the law and act as gatekeepers to blow the whistle on what they perceive to be wrongdoing. Fewer inside lawyers are cast in that mold; and more general counsel and their lawyers are joining the ranks of persuasive counselors. General counsel are being given greater responsibility, and management turns more frequently to them for advice as they demonstrate the ability to work with business units to achieve the best results for their companies.

Editor: Where should companies look to find general counsel who will be effective persuasive counselors?

Ide: Great companies pride themselves on building succession from within. I have seen companies rotate legal personnel into business functions to provide them with a well rounded corporate experience. Boards should discuss succession planning in key corporate areas, including legal, on a regular basis. It is important to develop leaders from within because they have the best understanding of the corporate environment and its relationship with stakeholders. When companies do not have the right candidate within their ranks, they often look for people with experience dealing with the issues that face the company and its industry. Today, it has become more common for companies to look for individuals with government experience because of the need to cope with Sarbanes- Oxley and heightened concern about exposure to prosecutorial scrutiny. When seeking outside talent, companies should look for individuals with global and strategic outlooks that will benefit the company. Those who have demonstrated such successes in the private practice and in government can bring tremendous value to an organization as general counsel.

Editor: Has the role of the CEO changed as well?

Ide: Globalization’s impact on companies has transformed the functions of the CEO. Today, CEOs must be more flexible and adopt a broader perspective in their strategic planning. We are seeing fewer authoritarian CEOs because that model does not lend itself to unleashing the creative talents of employees. Today, CEOs need to adopt a collaborative culture to create an environment that will enable them to attract and motivate the best people.

Editor: Have Board attitudes changed as well?

Ide: There has been a big shift since the Enron debacle. Boards understand that they are responsible for oversight and that they need to be actively engaged to fulfill their *Caremark* duties. Directors look to general counsel to implement processes to provide directors with information so that they can adequately evaluate risk. The old model of information being filtered through the CEO before it reached the Board no longer works. Directors are facilitating the process by actively approaching internal auditors, CFOs and general counsel to invite them to attend executive session meetings. That is a healthy process.

Editor: Has the more active role for directors affected Board procedures?

Ide: Yes. Companies need to establish protocols requiring all documents to be discussed at a Board meeting to be distributed at least a week in advance –except in unusual circumstances. A culture needs to be set so that management understands that they cannot raise difficult issues with the Board without giving directors and the general counsel adequate time to prepare.

Editor: Should the Board participate in the process for selecting and compensating the general counsel?

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Ide: Astute CEOs will involve the Board, asking for their input and review, during the recruitment process. Termination of a general counsel can be a red flag to directors that something is not right. Since the general counsel represents the corporate entity, directors must do their own diligence to understand why the termination occurred.

Editor: What has been the impact of the up-the-ladder reporting relationship?

Ide: Section 307 of Sarbanes-Oxley implemented an up-the-ladder reporting requirement for outside and inside lawyers where disclosure issues could be involved. This same requirement is in the professional responsibility codes of many states. It is important that senior management and the CEO understand and respect the general counsel's obligation to inform the Board if there are unresolved compliance issues with management.

Editor: To be an effective persuasive counselor, general counsel needs to be fully informed. How can this best be accomplished?

Ide: There are three cardinal principles. First, the general counsel should make sure that the legal function is organized so that the lawyers within the company are informed of significant developments that may have compliance implications and that the channels are kept open so that information flows up to the general counsel. Second, general counsel should be fully informed about what is happening at a senior management level. Finally, the general counsel needs to have an ongoing relationship with the Board and should attend all Board meetings as well as most meetings of the independent directors in executive session without other members of management being present. To ensure the general counsel is aware of the activities of Board committees, a best practice is to have a key inside lawyer familiar with the subject matter being dealt with by the committee, whether it be audit, governance, compensation, in the room as secretary taking minutes for the committee.

Editor: To whom should the chief compliance officer report? What is the general counsel's compliance role as persuasive counselor?

Ide: The chief compliance officer should have a dual reporting relationship. The primary one should be to the Audit or Governance Committees of the Board. However, to ensure that the compliance function is working properly from an administrative standpoint, the chief compliance officer could report to a more senior officer, which might be the CEO, general counsel or CFO. Irrespective of the administrative arrangement, the compliance function must interface on a continuous and smooth basis with corporate counsel not only because so much of its work involves legal considerations, but also because general counsel needs to be fully informed about its activities to play his or her role as persuasive counselor. The general counsel has the responsibility to assure that the appropriate legal mechanisms are in place to protect the stakeholders, including a robust compliance system. He or she is responsible for advising the directors about compliance with their *Caremark* duties and assuring them that the company complies with compliance "best practices" such as the revised Federal Sentencing Guidelines. The general counsel is the person that the Board should look to for advice about whether the compliance system is appropriately set up to protect the directors from liability. Typically, a general counsel will retain an outside expert to set up a compliance system that meets or exceeds the legal requirements and then periodically to review and advise with respect to its continuing operations. The Board can then reasonably rely on such experts for comfort that the compliance system has been appropriately set up.

Editor: Should the general counsel insist on having specialized lawyers in the legal department?

Ide: I have seen a movement towards having more inside lawyers in the field with the businesses. They are generalists who understand the business and help drive it. The best practice is for them to acquire the ability to spot problems in highly specialized areas such as law and accounting, antitrust or the Foreign Corrupt Practices Act. They may not be trained sufficiently to solve the problem, but they should have enough training to spot issues requiring the services of an expert. Such issues should then be brought to the attention of the central legal department, which can provide specialized advice from in-house experts or from outside counsel.

Editor: What should a general counsel do if a company does not provide the resources he or she needs?

Ide: One of the skill sets of a good general counsel is to learn how to persuade and network. Having good relationships with senior management members, business people and Board members is a necessary

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skill. If the general counsel has concerns that the company is going to be compromised by inadequate resources, typically, the general counsel can work with the business people to obtain the necessary resources. On the compliance and governance side, good Board members will ask if the company has the proper resources. Here too, the CEO will want to be in a position to assure them that the necessary resources are available and that the general counsel agrees. If the general counsel is in fact an effective persuasive counselor in his or her relationship with the CEO, there should never come a time when the general counsel needs to resign, which he would otherwise be required to do. Attempting to carry on with inadequate resources would be a betrayal of general counsel's paramount obligation, which is to the corporate entity.

Editor: Should companies look for general counsel who have the vision to bring issues such as corporate social responsibility to the attention of the CEO and Board?

Ide: The key challenge in the 21st century for public companies will be dealing with their "publics." If a company does not have the trust and confidence of its stockholders, customers, employees, regulators, media and NGOs, it will not be successful. In today's world, people want to know whether the food and water they consume and the products they use are safe. The job of enlightened CEOs, Boards and general counsel is to understand and follow the principle that socially responsible activities will be good for business by building the confidence and trust of the marketplace. This approach will place proactive companies at a competitive advantage compared to competitors who do not take social responsibility as seriously.