511 - You Decide: Ethics Reality Show

Stephen Gillers
Emily Kempin Professor of Law
New York University School of Law

Milton C. Regan
Professor of Law
Georgetown Law

Honorable E. Norman Veasey
Former Chief Justice of the Delaware Supreme Court
Senior Partner, Weil Gotshal & Manges

John K. Villa
Partner
Williams & Connolly LLP

This material is protected by copyright. Copyright © 2007 various authors and the Association of Corporate Counsel (ACC).
Materials may not be reproduced without the consent of ACC.
Reproduction permission requests should be directed to the Legal Resources Department at ACC: 202/293-4103, ext. 342; legalresources@acc.com

Faculty Biographies

Stephen Gillers

Stephen Gillers is professor of law at New York University School of Law. He has served as vice dean and holds the Emily Kempin chair. Mr. Gillers does most of his research and writing on the law and rules governing lawyers and judges. His courses include regulation of lawyers and law and literature (a course whose readings range from Sophocles, Shakespeare, and Kafka to modern novels and detective stories and which he co-teaches with graduate school Dean Catharine Stimpson). His current work in progress includes a study of the legal battles to publish James Joyce's Ulysses in the United States.

Professor Gillers has written widely on legal and judicial ethics, including in law reviews and the legal and popular press. He has taught legal ethics as a visitor at other law schools and has spoken on lawyer regulatory issues at federal and state judicial conferences, ABA conventions, state and local bar meetings nationwide, at law firms in the U.S. and abroad, at corporate law departments, and in law school lectureships. He chairs the ABA's joint committee on lawyer regulation, which assists U.S. jurisdictions in development of the legal and judicial ethics rules. Professor Gillers is the author of Regulation of Lawyers: Problems of Law and Ethics, a widely used law school casebook now in its seventh edition. He and Professor Roy Simon of Hofstra Law School edit Regulation of Lawyers: Statutes and Standards, an annotated volume of rules governing American lawyers and judges, which has been published yearly.

Milton C. Regan

Milton Regan, Jr. is professor of law and co-director of the Center for the Study of the Legal Profession at Georgetown University Law Center. He teaches courses on ethics, corporations, the legal profession, and law firms, and is the author of Eat What You Kill: The Fall of A Wall Street Lawyer, and co-author of the casebook Legal Ethics and Corporate Practice.

Before joining Georgetown, he practiced law at Davis Polk & Wardwell, and served as clerk to Justice William Brennan on the U.S. Supreme Court and Judge Ruth Bader Ginsburg when she served on the U.S. Court of Appeals for the DC Circuit.

Honorable E. Norman Veasey

E. Norman Veasey is a senior partner at Weil, Gotshal & Manges and serves as a strategic adviser to the firm's roster of prominent global clients on a wide range of issues related to mergers and acquisitions, restructuring, and litigation. Additionally, he advises on corporate governance issues involving the responsibilities of corporate directors in complex financial transactions and crisis management.

Mr. Veasey is the former chief justice of Delaware, having stepped down from the Delaware Supreme Court, after serving as the top judicial officer and administrator of that state's judicial branch.

Mr. Veasey is a director of the institute for law and economics at the University of Pennsylvania, a member of the American Law Institute, a member of the international advisory board of the Centre for Corporate Law and Securities Regulation and numerous other professional organizations. Justice Veasey was president of the Conference of Chief Justices, chair of the Board of the National Center for State Courts, chair of the section of business law of the ABA and chair of the ABA's special committee on evaluation of the rules of professional conduct (ethics 2000). He is a fellow of the American College of Trial Lawyers and chair of the committee on corporate laws of the section of business law of the ABA.

Mr. Veasey received his A.B. from Dartmouth College and his LL.B. degree from the University of Pennsylvania Law School. At the University of Pennsylvania Law School, he was a member of the board of editors and the senior editor of the *University of Pennsylvania Law Review*.

John K. Villa
Partner
Williams & Connolly LLP

1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036-5425

tel 202.293.4103
fax 202.293.4701

www.ACC.COM

ACC'S ANNUAL MEETING 2007
SESSION 511: ACC Ethics Reality Show
October 30, 2007; 11:00-12:30 p.m.
Hyatt Regency Chicago

Program Description

Professional ethics and personal liability issues are at the top of everyone's agenda these days, but it's hard to plan ahead how you'll respond without some practice…. But hey, who wants to say they're experienced in dealing with this?

Session participants will use in-seat voting technologies to allow panelists to track and post responses in real-time on a screen up front, the audience will direct the action as an ethically-challenging hypothetical unravels before them: the audience will decide which actions and decisions our corporate counsel "hero" will make, while a panel of ethics experts will discuss the practical impacts of each decision and then tell you they did.

Session Materials

Attached are bibliography sheets with select background resources relating to each of the seven key ethics issue areas that relate to the overall session hypothetical:

- Executive Compensation
- Government Investigations and Surveillance
- Multinational Law Departments
- Attorney Client Privilege
- Parent- Subsidiary Issues
- Transactional Liability
- Outside Counsel & Outsourcing Considerations

1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036-5425

tel 202.293.4103
fax 202.293.4701

www.ACC.COM

Resource Bibliography

Session 511: ACC Ethics Reality Show

October 30, 2007; 11:00-12:30 p.m.
Hyatt Regency Chicago

Executive Compensation Resources

Below is a sampling of resource materials pertaining to the 2007 ACC Annual Meeting Session 511. Resources within ACC's Virtual Library are available for further reference at www.acc.com/vl. Other resources include links, where available.

How GCs Can Avoid Being Caught in the Middle, by Ben W. Heineman Jr. (Corporate Counsel, March 29, 2007)
http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1175072635813

Top Ten Lessons Learned by CLOs about Executive Compensation From the Stock Options Crises, by Susan Hackett, Senior Vice President & General Counsel, ACC (2007)
http://www.acc.com/resource/v8042

SEC Asks Firms to Detail Top Executives' Pay, by Kara Scannell and Joann S. Lublin (Wall Street Journal Online, August 31, 2007)
http://online.wsj.com/article/SB118851491281613993.html?mod=hpp_us_whats_news

Curbing Excessive Executive Compensation, Emilio Ragosa and Scott Cowan (New Jersey Law Journal August 3, 2007)
http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1186045603850

Lawyers 'Fly Blind' on Options Penalties, by Pamela A. MacLean (Law.com In-House Counsel, August 23, 2007)
http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1187558904373

Advice He Shouldn't Have Refused, by Jessie Seyfer (Law.com Counsel, September 1, 2007)
http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1187254924300

Open Books: Disclosing Executive Compensation, by Sven Skillrud (Wisconsin Lawyer Vol. 80 No.3, March 2007)
http://www.wisbar.org/AM/Template.cfm?Section=Home&CONTENTID=63877&TEMPLATE=/CM/ContentDisplay.cfm

Copyright © 2007 Association of Corporate Counsel
For more information, visit www.acc.com

Speech by SEC Staff: Executive Compensation Disclosure and the Important Role of CFO's, John W. White (October 3, 2006)
 http://www.sec.gov/news/speech/2006/spch100306jww.htm

U.S. Attorney's Office and SEC Separately Charge Former Brocade CEO and Vice President in Stock Option Backdating Scheme, SEC Brings Civil Fraud Claims Against Former CFO (SEC Release July 20, 2006)
 http://www.sec.gov/news/press/2006/2006-121.htm

SEC Charges Former General Counsel of KLA-Tencor And Juniper Networks For Fraudulent Stock Option Backdating (SEC Release, August 2007)
 http://www.sec.gov/news/press/2007/2007-170.htm

Ex-Juniper Lawyer Faces Fraud Charges in Backdating Case, Troy Wolverton (San Jose Mercury News via ECT News Network Inc. 8/29/07)
 http://www.ecommercetimes.com/story/59085.html

Gang of Four, by Jessie Seyfer (Law.com, August 1, 2007)
 http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1184663192584

Mixing it Up, Tamara Loomis (Law.com, July 25, 2007)
 http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1183453579798

Most Claims Against In-House Counsel Don't Make the Front Page, Susan F. Friedman (Law.com, July 23, 2007)
 http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1184956611840

SEC Scrutiny of Stock Plans Could Spell Trouble for General Counsel, Jessie Seyfer (Law.com, May 16, 2007)
 http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1179267774102

SEC Charges Former Apple General Counsel for Illegal Stock Option Backdating (SEC Release, April 24, 2007)
 http://www.sec.gov/news/press/2007/2007-70.htm

SEC charges ex-KLA-Tencor, Juniper general counsel, by Karey Wutkowski (Reuters, August 28, 2007)
 http://www.washingtonpost.com/wp-dyn/content/article/2007/08/28/AR2007082801209.html

SEC Preps Option to Charge Ex-GC of KLA, by Justin Scheck (Law.com, August 14, 2007)
 http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1186996023630

Former Brocade CEO Found Guilty on All Counts, by Justin Scheck (Law.com, August 8, 2007)
 http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1186563722035

McAfee's ex-general counsel indicted in stock-option backdating case, by Edward Iwata (USA TODAY, 2/27/2007)
 http://www.usatoday.com/money/companies/management/2007-02-27-options-usat_x.htm

Copyright © 2007 Association of Corporate Counsel
For more information, visit www.acc.com

1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036-5425

tel 202.293.4103
fax 202.293.4701

www.ACC.COM

Resource Bibliography

Session 511: ACC Ethics Reality Show

October 30, 2007; 11:00-12:30 p.m.
Hyatt Regency Chicago

Government Investigations & Surveillance Resources

Below is a sampling of resource materials pertaining to the 2007 ACC Annual Meeting Session 511. Resources within ACC's Virtual Library are available for further reference at www.acc.com/vl. Other resources include links, where available.

Managing an Internal Corporate Fraud Investigation & Prosecution (ACC Docket 2007)
 http://acc.com/resource/v8313

Recent Trends in Internal Investigations (ACC Docket April 2007)
 http://www.acc.com/resource/v8312

The Use of External Investigators to aid in Corporate Investigations (ACC Leading Practice Profile 2007)
 http://www.acc.com/resource/v8262

Internal Investigations InfoPAK (ACC 2007)
 http://www.acc.com/resource/v4737

What To Do When The Whistle Blows: Do's And Don'ts Of Internal Investigations (ACC Docket 2004)
 http://www.acc.com/resource/v4853

Using Organized Crime Investigative Techniques to Get Ahead of Corporate Fraud, Bridget Rohde (Law.com June 22, 2007)
 http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1182416754186

Companies Weigh the Risk of Exposure, Pamela A. MacLean (Law.com May 21, 2007)
 http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1179392705732

Copyright © 2007 Association of Corporate Counsel
For more information, visit www.acc.com

Lessons Counsel Can Learn From Hewlett-Packard's Pretexting Scandal, Jonathan Feld, Gil Soffer and Jeffrey Jamison (Law.com, April 11, 2007)
http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1176195848981

Corporate Guidelines on Pretexting Slow to Develop, Sheri Qualters (Law.com, February 7, 2007)
http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1170756166642

HandsOn: Internal Investigations of Your Senior Executives (ACC Docket, 2006)
http://www.acc.com/resource/v7585

CFO.com: Who Do You Trust? Esther Shein (CFO Magazine December 18, 2006)
http://www.cfo.com/printable/article.cfm/8377306/c_8443671?f=options

E-Discovery May Target Unexpected Sources, David Sumner and Damon Reissman (Law.com December 4, 2006)
http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1165244466373

Tips for a Successful Internal Investigation in a Post-SOX World, Jay A. Dubow and Myles A. Seidenfrau (Law.com October 27, 2006)
http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1161853520159

HP Scandal Shows 'Don't Ask, Don't Tell' Policy Is Not a Good One, Henry E. Hockeimer Jr. (Law.com, October 13, 2006)
http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1160643921349

Dunn, Four Others Charged in Hewlett Surveillance Case, Ellen Nakashima and Yuki Noguchi (Washington Post October 5, 2006)
http://www.washingtonpost.com/wp-dyn/content/article/2006/10/04/AR2006100401072.html

Intrigue in High Places, by David A. Kaplan (Newsweek September 6, 2006)
http://www.msnbc.msn.com/id/14687677/site/newsweek/page/0/

Ins & Outs—When Should You Outsource Investigations? (ACC Docket 2006)
http://www.acc.com/resource/v7530

Outside, Looking In, John H. Hemann and William H. Kimball (Law.com August 4, 2005)
http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1123059912197

A Primer for Lockheed Martin Corporation In-house Counsel: Handling Government and Internal Investigations, Scott MacKay (2002)
http://www.acc.com/resource/v3493

1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036-5425

tel 202.293.4103
fax 202.293.4701

www.ACC.COM

Resource Bibliography

Session 511: ACC Ethics Reality Show

October 30, 2007; 11:00-12:30 p.m.
Hyatt Regency Chicago

Global Practice Issues Across Jurisdictions

Below is a sampling of resource materials pertaining to the 2007 ACC Annual Meeting Session 511. Resources within ACC's Virtual Library are available for further reference at www.acc.com/vl. Other resources include links, where available.

The Challenges of Global Compliance in Emerging Markets (ACC Docket September 2007)
http://www.acc.com/resource/v8632

The Global Compliance Landscape: A Resource File (ACC Docket October 2005)
http://www.acc.com/resource/v6590

Small Bribes Buy Big Problems (ACC Docket September 2007)
http://www.acc.com/resource/v8633

Bribes, Borders & Bottom Lines- Why a Strong AntiBribery Policy is Essential (ACC Docket September 2006)
http://www.acc.com/resource/getfile.php?id=7523

In-House Counsel and the Attorney-Client Privilege (Lex Mundi Survey, 2006)
http://www.acc.com/resource/v7156

Legal Professional Privilege: The Issues For Multinational Businesses With Operations In Europe (Eversheds ILAC Briefing, 2004)
http://www.acc.com/resource/v6312

Resolving Multinational Ethical Issues: What Law Applies? (ACC Docket 2002)
http://www.acc.com/resource/v2938

Tips & Insights- International SOX Compliance, with Scott Robins (ACC Docket 2006)
http://www.acc.com/resource/v7184

European Briefings: Compliance, Confidentiality, and Whistleblowing (June 2007)
http://www.acc.com/resource/getfile.php?id=8507

Clash of the Titans: Complying with US Whistleblowing Requirements While Respecting EU Privacy Rights (ACC Docket 2006)
http://www.acc.com/resource/v7105

SOX Whistleblowing Rule Triggers a Continental Divide, Daniel P. Westman (Law.com, July 7, 2006)
http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1152176726157

Data Protection – InfoPAK (ACC InfoPAK 2006)
http://www.acc.com/resource/v6283

Global Law Department InfoPAK (ACC InfoPAK 2005)
http://www.acc.com/resource/v6020

Building A Global Law Department (ACC Docket October 2005)
http://www.acc.com/resource/v6589

Doing Business Internationally InfoPAK (ACC InfoPAK 2006)
http://www.acc.com/resource/v6087

Into the Global Services Pool (ACC Docket June 2004)
http://www.acc.com/resource/v8261

Global Law Department Design and Service Models (ACC Leading Practice Profile 2003)
http://www.acc.com/resource/v5906

Legal Globalization: The Challenges For In-House Counsel (ACC Docket 2001)
http://www.acc.com/resource/v2927

Copyright © 2007 Association of Corporate Counsel
For more information, visit www.acc.com

1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036-5425

tel 202.293.4103
fax 202.293.4701

www.ACC.COM

Resource Bibliography

Session 511: ACC Ethics Reality Show

October 30, 2007; 11:00-12:30 p.m.
Hyatt Regency Chicago

Privilege Considerations

Below is a sampling of resource materials pertaining to the 2007 ACC Annual Meeting Session 511. Resources within ACC's Virtual Library are available for further reference at www.acc.com/vl. Other resources include links, where available.

General Information:

ACC's Attorney-Client Privilege homepage: (offers articles, resources, testimony, links, etc.)
http://www.acc.com/php/cms/index.php?id=84

ACC's Pragmatic Practices in Privilege Protection:
http://www.acc.com/public/attyclientpriv/pragpract.pdf

ACC's Attorney-Client Privilege InfoPAK (a manual summarizing the privilege):
http://www.acc.com/resource/v6327

"Wither" Attorney-Client Privilege
An ACC Docket article by ACC's General Counsel, Susan Hackett, on Privilege in the In-house Context Post-Enron
http://www.acca.com/protected/pubs/docket/sept05/wither.pdf

ACC Acts to Protect the Privilege:

ACC's 2005 survey: Is the Privilege Under Attack?
http://www.acca.com/Surveys/attyclient.pdf

ACC's 2006 survey: The Decline of the Attorney-Client Privilege in the Corporate Context
http://www.acca.com/Surveys/attyclient2.pdf

Copyright © 2007 Association of Corporate Counsel
For more information, visit www.acc.com

Attorney Client Privilege Protection Act of 2007 (endorsed by ACC and its coalition partners): The same legislation introduced in December of 2006 was reintroduced in 2007 by Senator Specter as Senate Bill 186: identical legislation was introduced on July 12, 2007, in the House as H.R. 3013:
http://www.acc.com/public/attyclientpriv/thompsonmemoleg.pdf

ACC and its Coalition's Executive Summary of Why Congress Should Act to Protect the Attorney-Client Privilege:
http://www.acc.com/public/policy/attyclient/attyclientcoalitionmcnultyrebuttal.pdf

ACC and its Coalition partners' testimony before the US House Judiciary Committee's Subcommittee on Crime, Terrorism and Homeland Security, March 12, 2007:
- Testimony of ACC Board Chairman Richard T. White:
http://www.acc.com/public/policy/attyclient/richardwhitemcnultytestimony.pdf

- Testimony of Andrew Weissmann, former DOJ Enron Task Force Chairman:
http://www.acc.com/public/policy/attyclient/weissmanhousetestimony.pdf

- Testimony of ABA President Karen Mathis:
http://www.acc.com/public/policy/attyclient/abatestimonytohousejudsubcomm.pdf

- Testimony of William Sullivan, Partner, Winston & Strawn:
http://judiciary.house.gov/media/pdfs/Sullivan070308.pdf

- Testimony of Barry Sabin, US Department of Justice:
http://judiciary.house.gov/media/pdfs/Sabin070308.pdf

ACC and its Coalition partners' testimony before the US Senate Judiciary Committee, September 12, 2006:
http://www.acca.com/public/attyclientpriv/coalitionsenjudtestimony.pdf

Testimony and Statements made at the Senate Hearings (Sept. 12, 2006):
http://www.acca.com/public/attyclientpriv/writtentestimonyussenate.pdf

ACC and its Coalition partners' testimony before the US House of Representatives Judiciary Subcommittee on Crime, Terrorism and Homeland Security, March 7, 2006:
http://www.acca.com/public/accapolicy/coalitionstatement030706.pdf

Letter from former senior DOJ officials criticizing the Thompson Memo (2006):
http://www.acca.com/public/attyclientpriv/agsept52006.pdf

Letter from former senior DOJ officials - US Sentencing Commission (re Thompson) (2005):
http://www.acca.com/public/policy/attyclient/doj.pdf

ACC Policies and Comments/Testimony on Attorney-Client Privilege Issues:
http://www.acca.com/public/article/attyclient/debate.pdf
http://www.acca.com/public/comments/attyclient/privilege.pdf
http://www.acca.com/public/accapolicy/corpresponspolicy.pdf
http://www.acca.com/public/accapolicy/attyclient.pdf

ACC's Comparison "Chart" The Thompson and McNulty Memos and S. 186/H.R. 3013:
http://www.acc.com/public/attyclientpriv/mcnultychart.pdf

Copyright © 2007 Association of Corporate Counsel
For more information, visit www.acc.com

ABA Attorney-Client Privilege Task Force homepage:
This page contains the reports of the Task Force to the ABA House of Delegates, which are law review type articles that give a great outline of privilege issues, including the two most recent resolutions on privilege passed by the ABA House in August of 2006, focusing on privilege erosion in the context of audits and problems associated with employee or individual rights (a la the KPMG issues; it also has a resources section on which collected material resides, and info on Task Force activities. ACC is a member of the Task Force and supports their efforts.
http://www.abanet.org/buslaw/attorneyclient/home.shtml

Department of Justice/Prosecutorial Practices Eroding the Attorney-Client Privilege

Justice Department Release of the McNulty Memo (amending the Thompson Memo):
(DOJ charging policies – discussing waiver issues – to be used in assessing corporate cooperation):
McNulty Memo: http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf

McNulty's prepared remarks on release of the Memo:
http://www.usdoj.gov/dag/speech/2006/dag_speech_061212.htm

DOJ Executive Summary of McNulty:
http://www.acc.com/public/policy/attyclient/dojexecsummary.pdf

The DOJ's Holder Memorandum is at:
http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html

The DOJ's Thompson Memorandum is at:
http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm

The DOJ's McCallum Memorandum is at:
http://www.acca.com/public/attyclntprvlg/mccallumwaivermemo.pdf

The DOJ's response to the ABA regarding proposals to amend the Thompson Memo:
http://www.acca.com/public/attyclientpriv/dojresponsetoaba.pdf

"Then-US Attorney Jim Comey's Guidance on Interpretation of the Thompson Memo, and other DOJ discussions of the government's Corporate Crime/Fraud Task Force (2003)"
http://www.justice.gov/usao/eousa/foia_reading_room/usab5106.pdf#search=%22u.s.%20attorney's%20bulletin%20james%20comey%22

Securities and Exchange Commission Practices Eroding the Privilege

SEC's Seaboard Report [the internal document setting policy on (non-) "recognition" of privilege]:
http://www.sec.gov/litigation/investreport/34-44969.htm

SEC Proceedings Against In-House Counsel
http://www.acca.com/protected/article/ethics/seccrimproceed.pdf

Copyright © 2007 Association of Corporate Counsel
For more information, visit www.acc.com

SEC speeches particularly informative to the attorney-client privilege and gatekeeper debate:

SEC's general counsel explains the 307 rules and their context:
http://www.sec.gov/news/speech/spch040304gpp.htm

SEC's director of enforcement speaks on lawyers' responsibilities as gatekeepers of client conduct and shareholder interests*:* http://www.sec.gov/news/speech/spch092004smc.htm

SEC Commission Atkin's Remarks before the Federalist Society (see about page 6):
http://www.sec.gov/litigation/investreport/34-44969.htm

ACC and the Courts: Privilege as a Court-Protected Doctrine

Conference of Chief Justices Statement Supporting the Attorney-Client Privilege (and instructing States's Courts to Create Commissions to examine erosion issues):
http://ccj.ncsc.dni.us/resol9StateCommitteesOnAttorneyClientPrivilege.html

ACC's Comments to the Federal Courts' study committee examining proposed FRE 502 and its limited waiver provisions:
June of 2006: http://www.acca.com/resource/v7465
January of 2007: http://www.acc.com/public/policy/attyclient/accfre502comments.pdf

ACC's Amicus in a recent Texas Supreme Court case regarding the confidentiality of privileged documents produced to an auditor by a client during the regular audit process and then sought in discovery by a third party in litigation against the client.
http://www.acca.com/public/amicus/txamicus.pdf

ACC's amicus brief on limited waiver concerns: (QWEST)
http://www.acca.com/public/amicus/qwest.pdf

ACC's amicus briefs on the issue of government pressure on companies to deny employees' indemnification and fee advancement under corporate policies:

in the *US v. Stein*/KPMG case (2 amicus on related issues as requested by Judge Kaplan):

http://www.acca.com/public/amicus/acckpmgamicusbrief.pdf and
http://www.acca.com/public/attyclientpriv/suppl-us-stein.pdf

Judge Kaplan's decision in KPMG finding the Thompsom Memo unconstitutional:
http://www.acc.com/public/attyclientpriv/kpmg_decision.pdf

Judge Kaplan's dismissal of the charges against 13 of the 16 KPMG defendants:
http://www.acc.com/public/amicus/opiniondismissingcase.pdf

in the *Lake/Wittig* case:

http://www.acca.com/public/amicus/lakewittig.pdf

ACC's amicus in *Teleglobe v. BCE* case, in which privilege accorded to the parent company client of in-house lawyers working for both the parent and affilates in the corporate family is discussed (ACC's brief is cited by the court as arguing dispositively on several crucial points: http://www.acc.com/feature.php?fid=1238)

Copyright © 2007 Association of Corporate Counsel
For more information, visit www.acc.com

Other Related Issues:

Corporate Counsel: Caught in the Crosshairs
http://www.acca.com/protected/article/attyclient/crosshair.pdf

ACC's Leading Practices Profile: Indemnification and Insurance Coverage for In-House Lawyers
http://www.acc.com/resource/getfile.php?id=6300

ACC's "Paradise Tarnished: Today's Sources of Liability Exposure for Corporate Counsel"
http://www.acc.com/resource/getfile.php?id=4960

ACC's Sarbox 307 – Part 205 Rules homepage: This is the site of a significant number of primary and commentary resources on the SEC's new attorney conduct rules promulgated under the authority given in Sarbanes-Oxley Section 307, and codified at 17 CFR Part 205.
http://www.acca.com/legres/corpresponsibility/attorney.php

Lawyers as Whistleblowers: The Emerging Law of Retaliatory Discharge of In-house Counsel
http://www.acca.com/protected/article/governance/wrong_discharge.pdf

The appendix to this article contains the ABA Model Rules of Professional Conduct 1.6 (Confidentiality) and 1.13 (Organization as Client), which are most relevant to this discussion. The issue of lawyers as whistleblowers raises privilege questions in the context of privileged attorney-client conversations and information that the plaintiff lawyer would wish to introduce in order to make his or her case for retaliatory discharge.

Responsive Measures for Government Investigations
http://www.acca.com/protected/policy/compliance/respond.pdf

ACC's InfoPAK on Responding to a Government Investigation (ACC InfoPAK 2004)
http://www.acc.com/resource/v4738

ACC's InfoPAK on Conducting an Internal Investigation (ACC InfoPAK 2007)
http://www.acc.com/resource/v4737

If you are an in-house counsel and not an ACC member, and therefore need a temporary password to access some of these documents, please contact Susan Hackett at hackett@acc.com.

Copyright © 2007 Association of Corporate Counsel
For more information, visit www.acc.com

1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036-5425

tel 202.293.4103
fax 202.293.4701

www.ACC.COM

Resource Bibliography

Session 511: ACC Ethics Reality Show

October 30, 2007; 11:00-12:30 p.m.
Hyatt Regency Chicago

Parent-Subsidiary Issues

Below is a sampling of resource materials pertaining to the 2007 ACC Annual Meeting Session 511. Resources within ACC's Virtual Library are available for further reference at www.acc.com/vl. Other resources include links, where available.

ACC Articles

All in the Family? In-House Counsel Representing Parents/Subs/Affiliates: Conflicts and Confidentiality (Prepared for ACC by Peter R. Jarvis and Rene C. Holmes, 2007)
http://www.acc.com/resource/v8609

Corporate Subsidiary Governance (ACC CLO Executive Bulletin 2006)
http://www.acc.com/feature/allgoodarticlelh.pdf

Hold on to That Privilege! The Transfer of Privilege with the Sale of a Corporate Subsidiary (ACC Docket 2001)
http://www.acc.com/resource/v6325

ACC Takes Action

BCE, Inc. Battles Subsidiary, Teleglobe Communications, Over In-house Attorney Services
(ACC Press Release, 2006)
http://www.acc.com/resource/v7461

Amicus Brief: Teleglobe Communications v. BCE, Brief of 5 Companies, D. Del., 7/26/2006
http://www.acc.com/resource/v7485

Amicus Brief: Teleglobe Communications v. BCE, Brief of ACC, D. Del., 7/26/2006
http://www.acc.com/resource/v7543

Additional Resources

Implications of 3rd Circuit 'Teleglobe' Ruling on Attorney-Client Privilege (Law.com, August 29, 2007)
http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1188291740185

New Compliance Changes Coming for UK Subsidiaries (Law.com, December 11, 2006)
http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1165582060917

Compliance Lessons From the Chiquita Case (Law.com, August 30, 2007)
http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1188464547702

1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036-5425

tel 202.293.4103
fax 202.293.4701

www.ACC.COM

Resource Bibliography

Session 511: ACC Ethics Reality Show

October 30, 2007; 11:00-12:30 p.m.
Hyatt Regency Chicago

Transactional Liability Issues

Below is a sampling of resource materials pertaining to the 2007 ACC Annual Meeting Session 511. Resources within ACC's Virtual Library are available for further reference at www.acc.com/vl. Other resources include links, where available.

In-house Counsel as Gatekeeper

Speech by SEC Staff: The Themes of Sarbanes-Oxley as Reflected in the Commission's Enforcement Program By Stephen M. Cutler; Director, Division of Enforcement
U.S. Securities and Exchange Commission (September 20, 2004)
http://www.sec.gov/news/speech/spch092004smc.htm

In-House Counsel Responsibilities In The Post-Enron Environment (ACC Docket 2003)
http://www.acc.com/resource/v6289

In-house Attorneys as Gatekeepers: Practical Advice for Navigating in the Post Enron Era, James B. Moorhead and Jeffrey E. McFadden Partners, Steptoe & Johnson LLP (2007)
http://www.acc.com/resource/v8339

How GCs Can Avoid Being Caught in the Middle, Ben W. Heineman Jr. (Law.com March 29, 2007)
http://www.law.com/jsp/ihc/PubArticleFriendlyIHC.jsp?id=1175072635813

Metamorphosis of In-House Counsel Continues, Susan F. Friedman (Law.com February 22, 2007)
http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1172052183126

In-House SEC Gatekeepers Should Watch Their Backs, Jay A. Dubow and Jill L. Mandell (Law.com, March 1, 2006)
http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1141121112314

Teaching Enron, Milton C. Regan, Jr., 74 Fordham L. Rev. 1139-1249 (2005).

Former Enron In-House Counsel Look Backward ... and Forward, David Hechler (Law.com February 22, 2006)
http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1140516315050

Setting an Example, Tamara Loomis (Law.com February 1, 2005)
http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1105364102703

In-House Counsel as Whistleblower

Sarbanes-Oxley Whistleblowers: Avoiding the Nightmare Scenario (ACC Docket 2006)
http://www.acc.com/resource/v7106

Blowing the Whistle: Guidance to In-House Lawyers in England and Whales on Whistleblowing and Corporate Governance, Commerce & Industry Group (April 2007)
http://www.cigroup.org.uk/assets/whistle_blowing.pdf

Corporate Governance Programs for Reporting Concerns: What Companies are Doing (ACC Leading Practice Profile, 2005)
http://www.acc.com/resource/v6527

Lawyers as Whistleblowers: The Emerging Law of Retaliatory Discharge of In-house Counsel (Lucian Pera for ACC, 2004)
http://www.acc.com/resource/v4951

Sarbox 307 Up-The-Ladder Reporting and Attorney Professional Conduct Programs (ACC Leading Practice Profile, 2003)
http://www.acc.com/resource/v6328

Liability Issues

Is the SEC Targeting In-house Attorneys?, by John Villa for ACC (2005)
http://www.acc.com/protected/article/ethics/seccrimproceed.pdf

Speech by SEC Staff: Giovanni P. Prezioso; General Counsel, U.S. Securities and Exchange Commission (April 28, 2005)
http://www.sec.gov/news/speech/spch042805gpp.htm

How Can Corporate Counsel Avoid Getting Caught in the Crosshairs? (ACC 2005)
http://www.acc.com/resource/v6367

Paradise Tarnished: Today's Sources of Liability Exposure For Corporate Counsel (ACC by Lucian T. Pera; Brian S. Faughan, 2004)
http://www.acc.com/resource/v4960

Monson Case:
ALJ: in re Monson
ALJ_In_re_Scott_Monson(SEC_15June07)[2].pdf

Monson Opening Brief
Monson - Opening Brief[2].pdf

1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036-5425

tel 202.293.4103
fax 202.293.4701

www.ACC.COM

Resource Bibliography

Session 511: ACC Ethics Reality Show

October 30, 2007; 11:00-12:30 p.m.
Hyatt Regency Chicago

Outsourcing, Outside Counsel, Conflicts & Knowledge Management Considerations

Below is a sampling of resource materials pertaining to the 2007 ACC Annual Meeting Session 511. Resources within ACC's Virtual Library are available for further reference at www.acc.com/vl. Other resources include links, where available.

Outsourcing Considerations

Nine Contractual Items to Consider Before You Outsource Your Company's Data Center (ACC Docket 2007)
http://www.acc.com/resource/v8046

European Briefings: European Outsourcing: Growing Demand Highlights Data Protection and Other Key Issues (September 2006)
http://www.acc.com/resource/v7539

Strategic Outsourcing And Alternative Service Models (ACC Leading Practice Profile 2004)
http://www.acc.com/resource/v5903

Sending Contracts Offshore, Kenneth A. Adams (Law.com May 15, 2007)
http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1179146390199

Sharing Business Information in a High-Risk World, William A. Tanenbaum (Law.com March 16, 2007)
http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1173949429016

What In-House Counsel Should Know About Outsourcing Disputes, Randall S. Parks (Law.com October 20, 2006)
http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1161248718204

Copyright © 2007 Association of Corporate Counsel
For more information, visit www.acc.com

Outsourced Around the World in a Billable Hour, Taylor H. Wilson (Law.com May 9, 2006)
http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1147091732765

Outsourcing Transactions InfoPAK (ACC InfoPAK 2006)
http://www.acc.com/resource/v7547

A Smaller Legal World, Emily Kopp (Law.com December 13, 2005)
http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1134394503849

The Brave New World of Global Outsourcing (ACC Docket 2003)
http://www.acc.com/resource/v4882

Conflicts of Interest Issues

Conflicts Management Programs (ACC Leading Practice Profile 2003)
http://acc.com/resource/v6298

Conflicts of Interest Issues Involving Outside Counsel (ACC Docket 2001)
http://www.acc.com/resource/v833

Conflicts & Waivers InfoPAK (ACC InfoPAK 2007)
http://acc.com/resource/v4987

Lawyer Mobility

Where You Stand Depends on Where You (Want to) Sit: Conflicts, Confidentiality and Non-Compete Issues When In-House Counsel Change Employers (2006)
http://www.acc.com/resource/v7669

Calif. Court Finds Employees Can't Be Forced to Sign Noncompetition Agreements (Law.com, September 1, 2006)
http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1157030381726

Non-Competes Stricken for In-House Counsel, Henry Gottlieb (Law.com July 6, 2006)
http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1152090320880

Model Rules of Professional Conduct 5.6 - Rule 5.6 Restrictions On Right To Practice - Center for Professional Responsibility
http://www.abanet.org/cpr/mrpc/rule_5_6.html

Knowledge Management; Additional Issues

Knowledge Sharing and Management (ACC Leading Practice Profile 2004)
http://www.acc.com/resource/v5897

Adding Value And Moving Beyond The Cost Center Model (ACC Leading Practice Profile 2005)
http://www.acc.com/resource/v5900

Copyright © 2007 Association of Corporate Counsel
For more information, visit www.acc.com

The Tensions, Stresses, and Professional Responsibilities of the Lawyer for the Corporation

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

The lawyer for the corporation—whether general counsel, subordinate in-house counsel, or outside counsel—faces tensions, stresses, and professional responsibilities that often differ from those of lawyers who represent individuals. The primary reality that must be faced is that this lawyer's client is—or should be—only the corporate entity.

This article is an attempt to highlight some of the issues that corporate counsel, directors, and managers should seek to recognize and understand. The various challenges faced by both in-house and outside lawyers representing corporations include the maintenance of professional independence, dealing with "up-the-ladder" reporting obligations, seeking to serve the client's best interests through persuasive counseling, the separation of legal and business advice, and dealing with internal investigations, to name a few.

Moreover, in the case of general counsel, special tensions arise because he or she has only one client (the general counsel's employer) and answers both to the CEO **and** *to the board of directors. When these two "bosses" have potential differences or conflicts, the tensions placed on the general counsel may be palpable and difficult to manage consistently with the lawyer's ethical duties, advancement of corporate interests, and job security. Most general counsel are up to the task and do not take the difficulties of their challenges for granted. It is also important, in our view, that directors understand corporate counsel's roles and challenges, as well as the value that counsel brings to the board's responsibilities.*

We attempt to address questions of how to establish and fulfill counsel's obligation to be independent, when to advise the corporate actors to seek outside counsel, when to go up the ladder and to summon up the courage to do the right thing. Although we have tried to survey as much of the practical learning and the literature as is reasonable for an article, we believe we have only scratched the surface.

* E. Norman Veasey is the former Chief Justice of the Delaware Supreme Court, and is now a Senior Partner at Weil, Gotshal & Manges LLP, in Wilmington, Delaware, and New York, New York. Christine Di Guglielmo is an associate at Weil, Gotshal & Manges, in Wilmington, Delaware. The authors express their deep appreciation to Kenneth J. Fredeen, Esquire, Thomas A. Gottschalk, Esquire, Holly J. Gregory, Esquire, Professor Lawrence A. Hamermesh, Frank H. Menaker, Esquire, Stacey J. Mobley, Esquire, Robert H. Mundheim, Esquire, and Stephen A. Radin, Esquire, who kindly agreed to review a draft of this article and contribute their extremely valuable observations. Thanks are also due to Andrew Werner, a summer associate at Weil, Gotshal & Manges LLP, for his work on this article. The views expressed in this article are our own and do not necessarily reflect the views of Weil, Gotshal & Manges LLP, or its clients.

Table of Contents

Setting the Scene 2
Introduction 3
I. Overview of the Role in the Corporation of the Modern General Counsel 5
II. Dual Reporting: Relationships with the Board and Senior Management 8
A. Lawyer Independence 8
B. General Counsel's Financial Dependence on a Single Client 11
C. Relationships with Senior Management 13
D. Special Considerations 15
1. Corporate Counsel as Directors 15
2. Corporate Minutes 18
3. Reporting Up 19
4. Informational Issues 22
III. Dual Roles: Providing Legal and Business Advice 25
IV. Dual Identities: Corporate Counsel as Advocates, Gatekeepers, or Persuasive Counselors 28
A. Advocate, Gatekeeper, or Persuasive Counselor? 28
B. Internal Investigations 30
V. Structuring the Legal Department: Compartmentalization and Decentralization 33
Conclusion 35

Setting the Scene

Geena Caldwell was exhausted. As General Counsel of Worldwide Conglomerate, Inc., she had been working night and day planning for the launch of a hostile takeover. She had just dropped off to sleep in her Los Angeles hotel room when her cell phone intoned that funny chime she had thought was pleasantly distinctive, but seemed jarring at this hour. She fumbled for her glasses and looked at the digital clock—4:07 a.m.! Looking at her phone's caller i.d., she saw that it was Charlie Oliver, Worldwide's Board Chair and CEO, calling from New York. Why the wake-up call at this ungodly hour? It was early even in New York!

"Geena, have you seen today's Wall Street Journal?" Charlie shouted through the phone.

"Of course not. It's four in the morning and I was up almost all night working on the 13D and the Hart-Scott for you-know-what," Geena grumped.

"Well," Charlie shouted, "the 'you-know-what' is all over the front page of the Journal. There's been a leak of our takeover plans!"

Geena was now wide awake, but she couldn't get in a word before Charlie barked, "Here's what I want you to do. Get Paul Connor from WCI Security to investigate this leak business—we're going to find the rat who's spilling board business and hang him out to dry, no matter what it takes!"

Geena jumped in. "Wait a minute, Charlie. Maybe we should get the rest of the board involved—after all, it's the board's . . . ."

Charlie cut her off. "No way! There's a mole in the boardroom, and I'm not giving him a chance to hide by warning him that I'm coming. Do it now, and do it fast. And here's another thing. Last night I got a call from a reporter at the New York Times asking questions about our stock option strategy and the option timing. He suggested that we backdated some options, including yours and mine, and that our SEC filings are misleading. What yellow journalism! We have to act quickly. Those options are the best thing that ever happened to this company. We are not letting some self-righteous reporter make a mountain out of nothing. The board's gonna start asking questions about this if it hits the papers. Well, they signed off on it. If they've got questions, they can look at the presentation we made to the comp committee."

It was Geena's turn to interrupt: "But Charlie, weren't the option dates decided after the committee approved the strategy? As the company lawyer, you know I have an ethical duty to the board. Maybe we should reevaluate our process and make sure the board is getting the information it needs before making these decisions. If we release a new plan for getting the board the information it needs, that could look good in the newspapers and clean this mess up. And approaching the SEC before they come to us could help down the road . . . ."

But Charlie pressed on. "The board agreed to the options plan. If they wanted more information, they could have asked. Look, your duty is to me! I can't fix all the board's problems. They're on their own on this one. And we're definitely not going to the papers or the feds. If they strike first, we'll deal with it and get tough outside lawyers. Now, get on the first plane to New York and get cracking on running down the source of the leaks and figuring out what to do on this option thing."

Charlie hung up abruptly, and Geena began to ponder . . . .

Introduction

This vignette is fictional, but it raises some of the many vexing issues faced by corporate counsel—lawyers who represent corporations—particularly those who serve as in-house counsel. Geena and Charlie seem to have a close working relationship, presenting Geena with the challenge of determining where Charlie's interests differ from those of Geena's client, Worldwide, and how to deal with the board in the context of those differences. In order to do her job well, Geena needs Charlie to include her in informational loops and to seek and give credit to her advice. And she needs to be a persuasive and ethical counselor to Charlie and the board.

Geena must know that certain issues must or should be presented to the board. If Charlie or another member of senior management does not do it, Geena herself may have to report to the board. This could create a confrontational situation, perhaps leading Charlie to exclude Geena from informational loops and to attempt to circumvent her rather than value, seek, and implement her advice. The issues may be exacerbated if Charlie, rather than the board, solely controls decisions related to Geena's compensation and retention, because Geena may fear termination and professional blacklisting if she butts heads with Charlie. But she is no ordinary employee. She is the lawyer for the corporation with fiduciary duties and professional responsibilities.

The vignette raises issues concerning what approach Geena should take in bringing matters to the board's attention. This issue arises with respect to Charlie's current plans regarding investigation of the boardroom leak and dealing with the options issue. It also arises with respect to what Geena might have done differently when the stock option plan was initially under consideration. Did Geena advise the board regarding whether it had the information it needed to consider the plan? Did she advise the board regarding whether the proposed plan was sufficiently specific or whether critical details, such as the option dates, were missing from the proposal? What should Geena's role have been with respect to those issues? What should she do now about the leaks and the options?

Following the spate of Enron-era corporate scandals, lawyers, directors, and academics have taken an increased interest in the professional responsibility challenges faced by corporate counsel. In this article we discuss some of the challenges and tensions corporate counsel must confront and resolve in order to serve their clients ethically and well, focusing primarily on the general counsel. We attempt to make clear that the client is the corporate entity—not the chief executive officer or the individual directors and officers with whom the lawyer interacts—and to note some similarities and differences in the issues that confront the general counsel and outside counsel.[1]

This article does not attempt to deal completely with all of the professional responsibility challenges faced by corporate counsel. That task would require a book, at least. Instead, we raise some issues in order to highlight a few of the challenges and tensions that face corporate counsel. Further discussion and debate concerning these issues are ongoing and will continue to evolve in boardrooms, law offices, articles, courts, studies, and reports.[2]

Part I of this article is an overview of the multiple roles that the corporate general counsel fills. It introduces the concept of tension among the general counsel's various roles as well as counsel's advisory and reporting relationships.

1. Of course, the issues may arise with different degrees of complexity or frequency for the general counsel and outside counsel. In addition, subordinate in-house counsel face many of the same challenges, also to different degrees. *See, e.g.*, Lisa H. Nicholson, *Sarbox 307's Impact on Subordinate In-House Counsel: Between a Rock and a Hard Place*, 2004 Mich. St. L. Rev. 559 (discussing some of the special challenges faced by subordinate in-house counsel); *see also* Model Rules of Prof'l Conduct R. 5.1 (2006) (addressing the responsibility of partners, managers, and supervising lawyers); Model Rules of Prof'l Conduct R. 5.2 (2006) (addressing the responsibilities of the subordinate lawyer); Responsibilities of Supervisory Attorneys, 17 C.F.R. § 205.4 (2006) (codifying the SEC's rule describing and regulating the professional responsibilities of supervising lawyers); Responsibilities of a Subordinate Attorney, 17 C.F.R. § 205.5 (2006) (codifying the SEC's rule describing and regulating the professional responsibilities of subordinate lawyers).

2. For example, a study by a task force of the New York City Bar Association on the lawyer's role in corporate governance was issued in November 2006. New York City Bar, Report of the Task Force on the Lawyer's Role in Corporate Governance (Nov. 2006), *available at* http://www.abcny.org/pdf/report/CORPORATE_GOVERNANCE06.pdf. Also, the Committee on Corporate Laws of the Section of Business Law of the American Bar Association is in the process of a comprehensive revision and draft of a fifth edition of *The Corporate Director's Guidebook*. The fourth edition of the *Guidebook*, dated 2004, continues to be a viable guide for directors, and the fifth edition should be completed by mid-2007.

Part II addresses the importance of professional independence for both in-house and outside corporate counsel. It discusses how certain structural, interpersonal, or psychological factors may create or enhance the tensions faced by corporate counsel, especially in-house counsel. It describes the benefits and drawbacks of the “up-the-ladder” reporting obligation under the Sarbanes-Oxley Act and the rules implementing the act as well as the Model Rules of Professional Conduct. It also suggests that the goals of the rules could be better achieved through ensuring that the general counsel consistently has direct access to the board.

Part III considers the potential complications that may arise in connection with the general counsel’s dual role as both a business and a legal advisor to the corporation.

Part IV addresses the tensions that result from competing views of inside and outside corporate counsel as both advocates for and advisors to their corporate clients and protectors of the public interest. This part analyzes the competing models of corporate counsel as “gatekeepers,” corporate advocates, and persuasive counselors. The latter is the preferred model, in our view, of the influential agents who are well positioned to guide directors and officers to follow the right course for their corporate clients.

Part V discusses how certain structural characteristics of the legal department itself may impede or enhance the general counsel’s ability to oversee the corporation’s legal work.

I. Overview of the Role in the Corporation of the Modern General Counsel

A major factor contributing to the variety and complexity of the tensions faced by the general counsel is the multiplicity of roles counsel is expected to play.[3] In a broad view, the general counsel’s roles within the corporation may be divided into four general categories:

- legal advisor;
- corporate officer and member of the senior executive team;
- administrator of the in-house legal department; and
- corporate agent in dealings with third parties, including outside counsel.[4]

3. For descriptions of the general counsel’s many roles in the corporation, see, e.g., Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 Fordham L. Rev. 955, 955 (2005); Z. Jill Barclift, *Corporate Responsibility: Ensuring Independent Judgment of the General Counsel—A Look at Stock Options*, 81 N. Dak. L. Rev. 1, 5, 5–7 (2005); Susanna M. Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, 68 Tenn. L. Rev. 179, 201–04 (2001); Sally R. Weaver, *Ethical Dilemmas of Corporate Counsel: A Structural and Contextual Analysis*, 46 Emory L.J. 1023, 1039–40 (1997).

4. *See* DeMott, *supra* note 3, at 957–58; *see also* Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 Emory L.J. 1057, 1061–62 (1997) (categorizing the functions as management and review of outside legal services, performance of routine legal services and sometimes complex transactions or litigation, counseling clients and constituents on regulatory requirements, and creating compliance programs).

Each of these categories encompasses numerous important functions. To appreciate the breadth and depth of the general counsel’s roles, one should also consider the many individual functions that general counsel often fulfill. These include:

- ***Business as well as legal advisor.*** The general counsel’s role at the top of a corporation’s management structure gives counsel a broad impact on strategic business planning.[5] This may often affect the style of lawyering that a general counsel brings to the table.[6] The issues and concerns raised by the general counsel’s role as a business advisor are the subject of detailed discussion in Part III.
- ***Manager.*** The general counsel must devote substantial time to managing or directing the management of the work and employees of the corporation’s legal department, as well as the corporation’s procurement and monitoring of outside legal services.[7]
- ***Mediator among corporate constituencies.*** Some corporations call upon the general counsel to help resolve disputes or issues among individuals or groups within the corporation.[8]
- ***Compliance program designer or chief compliance officer.*** As the complexity of corporate compliance programs has increased, so too has the general counsel’s involvement in the planning or management of those programs.[9]
- ***Governmental affairs officer.*** In addition to legal responsibilities, the general counsel may be in charge of governmental affairs for the company.[10]
- ***Corporate advocate, gatekeeper to the securities markets,* or *persuasive counselor.*** Corporate counsel’s role with respect to corporations’ access to

5. *See* Carl D. Liggio, *Perspective: The Changing Role of Corporate Counsel*, 46 Emory L.J. 1201, 1209–10 (1997) (“No strategic plan can be developed which does not include the legal ramifications of the proposed conduct. To be effective, the earlier and the more involved that counsel is in this process, the more likely it is that counsel will be able to provide meaningful advice and help avoid problems.”).

6. *See* Daly, *supra* note 4, at 1068 (“The proactive model of lawyering springs from personal and professional traits seemingly unique to U.S. lawyers. It is characterized by a ‘can do’ attitude that focuses on problem-solving and mixes business and legal counseling with little concern for the boundaries between them.”).

7. *See* Liggio, *supra* note 5, at 1219 (observing that corporate counsel must be skilled managers and administrators); *cf. also* Michele D. Beardslee, *If Multidisciplinary Partnerships Are Introduced into the United States, What Could or Should Be the Role of General Counsel?*, 9 Fordham J. Corp. & Fin. L. 1, 21 (2003) (quoting an interview with a general counsel, who described the general counsel position as “a management job as opposed to a practice job”).

8. *See* Beardslee, *supra* note 7, at 24 (describing one general counsel’s role as the corporation’s internal mediator).

9. *See* Richard S. Gruner, *General Counsel in an Era of Compliance Programs and Corporate Self-Policing*, 46 Emory L.J. 1113, 1113 (1997) (discussing “the changing roles of corporate general counsel and inhouse attorneys as architects of and participants in the management of corporate law compliance”); *see also Compliance Readiness—General Counsel’s Expanded Role*, Metro. Corp. Counsel, Sept. 2006, at 1, *available at* http://www.metrocorpcounsel.com.

10. *See, e.g.*, *Corporate Counsel: Taking Stock*, 40 Az. Attorney 12 (Nov. 2003), *available at* http://www.myazbar.org/AZAttorney/PDF_Articles/AZAT1103RoundP12-21.pdf (reporting the governmental affairs duties of the general counsel of the Dial Corporation); Michael A. Lampert, *In-House Counsel and the Attorney-Client Privilege*, *available at* http://library.findlaw.com/2000/Oct/1/128767.html.

the securities markets has been the subject of significant recent debate. In Part IV, we discuss counsel's potential gatekeeping role and the issues it raises with respect to lawyers' ability to counsel their clients and advocate clients' interests. We then suggest our preferred model under which corporate counsel, as persuasive counselors, can serve to protect the markets by guiding their clients to the right course, without compromising their ability to provide to their corporations excellent and independent legal advice, service, and advocacy.

- ***Manager of legal and reputational risk* and *educator.*** General counsel perform the increasingly important function of assessing legal risks and translating those risks into business terms in order to facilitate decision making concerning those risks.[11] When doing so, they are well positioned to counsel decision makers regarding the potential implications of a course of action, including those that extend beyond strictly financial considerations.[12] In addition, the role of educating employees about compliance is a critical component of managing legal risk.[13]
- ***Ethicist.*** Some corporations have implemented policies instructing employees to seek guidance from counsel regarding the resolution of business and legal ethical issues.[14]

11. *See* Howard B. Miller, *Law Risk Management and the General Counsel*, 46 EMORY L.J. 1223, 1223 (1997) ("General counsel are managers of law risk. Law risk is a kind of commercial risk, similar to credit risk, interest rate risk, currency risk, or market risk faced by modern businesses. What distinguishes and obscures law risk is the extent to which it is composed of transactional and dispute resolution inefficiencies. . . . The general counsel, comfortable in the worlds of business management and law, can translate and mediate between the concepts of business risk and the vocabulary of the law."); *see also* Beardslee, *supra* note 7, at 32 ("'The level of risk the company is assuming is often undertaken without a conscious decision having been made . . . . While the managers involved in each project may have made a careful judgment about what they believe to be the legal risk involved, in fact the scope of that risk, its wider consequences for the company, the relationship between that risk and others, and the aggregate risk being assumed by the company often are matters that only the General Counsel is in a position to assess in their entirety.'" (quoting STEPHEN J. FRIEDMAN & C. EVAN STEWART, THE CORPORATE EXECUTIVE'S GUIDE TO THE ROLE OF THE GENERAL COUNSEL 1) (alteration in original)).

12. *See* Beardslee, *supra* note 7, at 32 ("It is the General Counsel's job to appraise [sic] the other Senior Managers of the [company's overall legal risk position] and as one General Counsel pointed out to 'encourage [them] to think of risk in terms other than money.'" (quoting interview with anonymous general counsel)); *see also* Timothy P. Terrell, *Professionalism as Trust: The Unique Internal Legal Role of the Corporate General Counsel*, 46 EMORY L.J. 1005, 1009 (1997) ("What every corporation needs is this sophisticated lawyer who respects not only the strong foundations of the law but the nature and significance of its constraints as well.").

13. *See* James F. Kelley, *The Role of the General Counsel*, 46 EMORY L.J. 1197, 1198 (1997) ("[T]he general counsel's role in th[e area of shaping corporate operations to avoid liability] is mostly educational . . . . Compliance programs are just frameworks for the actual process of educating corporate employees about the need for compliance and managing the implementation of that process."); *see also Compliance Readiness—General Counsel's Expanded Role*, *supra* note 9, at 24 (stressing the importance of providing within a compliance program education regarding regulatory developments).

14. *See* Daly, *supra* note 4, at 1084 n.116 (citing IBM's instruction to its employees to consult IBM's in-house counsel when faced with a business decision that raises ethical concerns). This role may expand because the Sarbanes-Oxley Act and the SEC's implementing rules as well as recent amendments to the self-regulatory organizations' listing standards require that corporations subject to their regulation enact a code of business ethics. *See, e.g.*, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 406(a), 116 Stat. 745, 789–90 (codified at 15 U.S.C. § 7264 (Supp. III 2003)) (directing the

- ***Corporate secretary.*** Although the duties of general counsel and corporate secretary are discrete and these positions are often held by different persons, the general counsel sometimes fills the increasingly complex role of corporate secretary.[15]

As discussed in Parts II.C and II.D.4. below, the general counsel's deep and daily understanding of, and involvement in, the corporation's business may make the general counsel more valuable in many contexts than outside counsel who does not have the same familiarity with the business. General counsel's business involvement can also work, however, to increase his or her tensions. Greater knowledge and familiarity often leads to greater recognition of problems (for example, the accuracy of corporate disclosures), which in turn can lead to increased exposure to ethical dilemmas.[16]

At the end of the day, however, there is no "one-size-fits-all" approach to the manner of handling the multifaceted responsibilities and expectations of the lawyer for the corporation. The opening vignette to this article suggests some of these issues through the stresses and tensions experienced by Geena. There are many other issues to consider as well.

II. DUAL REPORTING: RELATIONSHIPS WITH THE BOARD AND SENIOR MANAGEMENT

A. LAWYER INDEPENDENCE

Certain tensions arise for many corporate counsel because of their relationships with other corporate actors, including the directors and officers. Before we can consider how those relationships affect corporate counsel's professional responsibilities, we must first recognize the importance of independence and

SEC to issue rules requiring issuers to disclose "whether or not, and if not, the reason therefore, such issuer has adopted a code of ethics for senior financial officers, applicable to its principal financial officer and comptroller or principal accounting officer, or persons performing similar functions"); Code of Ethics, 17 C.F.R. § 229.406 (2006) (codifying the SEC's final rule implementing § 406 of the Sarbanes-Oxley Act); Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, Release No. 33-8177, 68 Fed. Reg. 5110 (Jan. 31, 2003) (releasing and discussing the final rule); N.Y. STOCK EXCH., LISTED COMPANY MANUAL § 303A.10 (2004), *available at* http://www.nyse.com/ ("Listed companies must adopt and disclose a code of business conduct and ethics for directors, officers and employees, and promptly disclose any waivers of the code for directors or executive officers.").

15. *See* Weaver, *supra* note 3, at 1035 (suggesting that the most common additional officer designation of general counsel is that of corporate secretary). Even where the offices of corporate secretary and general counsel are separate, as they often are, the officers serving in those positions must coordinate their activities. For discussion of a particular context in which such coordination is usually necessary—recording minutes for meetings of the board and its committees—see *infra* Part II.D.2.

16. *See* Gruner, *supra* note 9, at 1185 ("Since general counsel and other inside attorneys will often have greater knowledge about past corporate operations and misconduct than their outside attorney counterparts, the likelihood that they will recognize the incompleteness or inaccuracy of proposed disclosures is correspondingly greater. Hence, the chances that inside counsel will face significant ethical dilemmas while overseeing disclosures about corporate misconduct are unusually high.").

courage as professional qualities for lawyers.[17] Independence has several aspects[18] and must be evaluated in light of the particular circumstances of any proposed or ongoing representation. As a general matter, independence requires that corporate counsel "must exercise professional judgment in the interests of the corporate client, independent of the personal interests of the corporation's officers and employees"[19] or the lawyer's own personal interests.[20]

Lawyers must remain vigilant about evaluating their independence not only with respect to representing a particular client but also with respect to working on a particular matter for a client. For example, if management seeks to engage regular outside counsel in conducting an investigation of questionable conduct, that counsel should consider whether the investigation might implicate counsel's earlier work for the corporation and thus present a conflict of interest, or whether limitations imposed by management on the investigation might impede proper and competent representation of the entity's interests in the investigation.[21]

In short, determining the independence of counsel requires a context-specific inquiry. When independent counsel is needed, that counsel need not be a stranger to the company—in fact, outside counsel's work may frequently be more valuable if counsel has an established familiarity with the business and culture of the company. But that counsel's independence with respect to the particular matter at hand must be evaluated. And the possible benefit of counsel's familiarity with the company's business must be weighed against the possible desirability and favorable optics of a completely "fresh face."

The necessity of continual evaluation of one's professional independence applies equally to outside and in-house counsel. For example, a general counsel

17. *See, e.g.*, 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 17.7 (3d ed. Supp. 2007) (noting the importance of a corporate lawyer's exercising "independent professional judgment to determine what is truly in the client's best interest—setting aside, if need be, the views of other highly placed agents"); Lawrence J. Fox, *MDPs Done Gone: The Silver Lining in the Very Black Enron Cloud*, 44 ARIZ. L. REV. 547, 553 (2002) (describing independence as one of the "core values" of the legal profession); E. Norman Veasey, Chief Justice of Delaware, Delaware Bar Admission Ceremony: Response for the Court (Dec. 15, 2003) (on file with authors and *The Business Lawyer*) [hereinafter "Veasey, Delaware Bar Admission"] (reflecting on the importance of independence among lawyers); E. Norman Veasey, The Lawyer's Higher Calling, Remarks at the Wake Forest School of Law Hooding Ceremony (May 14, 2006) (on file with authors and *The Business Lawyer*) [hereinafter "Veasey, Wake Forest Ceremony"] (discussing the importance of independence and courage among lawyers in the pursuit of doing the right thing).

18. *See* Fox, *supra* note 17, at 553–54 (examining some of the many facets of lawyer independence, including "independence from influences that would compromise our ardor for our clients" and "independence from the client" so that the lawyer can "be free of client influence [in order] to do the right thing").

19. ABA Task Force on Corporate Responsibility, *Report of the American Bar Association Task Force on Corporate Responsibility*, 59 BUS. LAW. 145, 157 (2003) [hereinafter "Cheek Report"].

20. *See id.* ("There are times, moreover, when the corporate lawyer must recognize that his or her own independence may be compromised by relationships with senior executive officers . . . .").

21. *Cf., e.g.*, Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1187–88 (2003) (describing the potential conflict issues arising in the internal investigation conducted at Enron by its regular outside counsel, and the ethical implications of the limitations imposed by senior management on the scope of the investigation); Susan P. Koniak, *Corporate Fraud: See, Lawyers*, 26 HARV. J.L. & PUB. POL'Y 195, 209 (2003) (arguing that Enron's regular outside counsel should not have accepted the task of investigating Sherron Watkins's allegations).

should evaluate whether the board or a committee of the board should rely solely on his or her advice regarding a particular matter or consider using regular outside counsel or obtaining separate and independent counsel. The general counsel may determine that independence considerations demand special counsel in certain situations, such as a management buyout, a special litigation committee, or an internal investigation. But these situations should usually be confined to a real need for special counsel to assist and counsel the board or independent directors. Ultimately, the board or the independent directors must decide whether and when they need special outside counsel. In making this decision, they should be able to turn to the general counsel or regular outside counsel, who must have the professionalism and integrity to provide the directors with unvarnished, objective advice. And, indeed, regular outside counsel may sometimes serve the corporate entity best by recommending that the board consider and perhaps retain separate and independent outside counsel.[22]

The tensions arising from a lawyer's relationships with other corporate agents may be particularly acute for a general counsel because of the position counsel occupies within the corporation's organizational structure. The general counsel simultaneously is a part of the client-corporation and a lawyer—an advisor and advocate—for that client, while also maintaining a close working relationship with the client's managers.[23] These structural features of the general counsel's job may sometimes place the general counsel in an anomalous position of "rendering legal advice to himself or herself."[24]

In addition, the general counsel usually is subject to a dual reporting structure. The CEO often controls the selection, hiring, firing, and compensation of the general counsel, and the general counsel generally reports to the CEO within the management hierarchy.[25] But the general counsel also has a duty to report to and advise the board of directors, either in the normal course under the corporation's policies or when special situations arise requiring reporting "up-the-ladder" to the highest authority in the corporation. The tensions created by this dual reporting

22. *See* E. Norman Veasey, *Separate and Continuing Counsel for Independent Directors: An Idea Whose Time Has Not Come as a General Practice*, 59 BUS. LAW. 1413, 1414 (2004) ("It is the general counsel, with a fully-staffed office, who must shape the quest for best practices by the board, and it is she who must make a professional decision about her counseling and reporting responsibilities in a variety of contexts, some of which may be very troubling. And, one would expect that a highly professional general counsel would have the intellectual honesty to counsel directors when they should consider separate representation."); *cf.* Cheek Report, *supra* note 19, at 157 & n.54 (stating that a lawyer for a corporation must recognize when relationships with senior executives compromise her independence and must sometimes then ensure that "the corporate client retains other counsel who can exercise the requisite professional detachment"). *But cf.* Geoffrey C. Hazard, Jr. & Edward B. Rock, *A New Player in the Boardroom: The Emergence of the Independent Directors' Counsel*, 59 BUS. LAW. 1389, 1391, 1396 (2004) (suggesting that independent directors may now prefer to have regular, "genuinely independent counsel" rather than being represented by the in-house general counsel or the company's main outside counsel).

23. *See* Beardslee, *supra* note 7, at 22 (discussing the general counsel's position as the client's lawyer and as "part of the client"); Kim, *supra* note 3, at 196 (describing the "[t]riangular relationship between the lawyer, the client, and the client's agents").

24. Terrell, *supra* note 12, at 1006–07.

25. DeMott, *supra* note 3, at 967.

structure may be particularly pronounced for general counsel because of (1) the close collegial relationships that develop between general counsel and the other members of senior management and (2) the general counsel's financial dependence on a single client.

It is in the face of such challenges to independence that corporate counsel must courageously assert their views in the best interests of their clients. Courage is a necessary complement to lawyer independence. It is the critical quality that allows a lawyer to express and advocate independent views in order to make a difference for the client.[26]

B. General Counsel's Financial Dependence on a Single Client

In-house counsel may be tempted to refrain from challenging courses of action sought by management for fear of placing his or her livelihood at risk.[27] In-house counsel's inability to spread employment risk over multiple clients may result in a temptation at times to "go along with"—perhaps by rationalizing decisions—the courses of action sought by the managers who hold the power to hire, promote, compensate, and fire them.[28] But the employment relationship may also enhance an in-house lawyer's job security as compared with that of outside counsel, giving the in-house lawyer a greater opportunity to influence positively the company's legal policies.[29]

In-house counsel's financial dependence on a single client—his or her employer—may raise questions concerning counsel's ability to use courageously independent judgment when providing legal advice to the corporation or when examining corporate compliance practices. Whether or not this dependence raises an issue of compromised objectivity and the potential for conflict of interest is a concern. It may raise a potential conflict of interest question under Rule 1.7 of the Model Rules of Professional Conduct if the effectiveness of the professional service is "materially limited" by counsel's "personal interests."[30]

In the minds of some, the common and often quite proper practice of compensating general counsel with stock options may also raise special issues about independence.[31] Stock options need not create a conflict or dilute independence, but they do give a general counsel a direct financial interest in the corporate client as well as imposing pressures similar to those faced by other senior executives who have an interest in maintaining an ever-increasing stock price, perhaps even when actual performance does not support the price.[32] Compensating the general counsel with stock options may not create such incentives in all circumstances, and thus may not be a negative concern in the context of a particular corporation. In particular, if one adopts the view that in-house counsel will see their investment in the company as most other long-term stockholders (and employees who may become retirees) do, such investment creates incentives for counsel to work for the long-term value of the company. But the issue should be considered in certain contexts when the lawyer's independence is severely put to the test. Corporations can implement a number of policies to reduce the concerns that arise from the general counsel's employment relationship.

---

26. *See, e.g.*, Veasey, Delaware Bar Admission, *supra* note 17 (observing the relationship between independence and courage); Veasey, Wake Forest Ceremony, *supra* note 17 (same).

27. *See* DeMott, *supra* note 3, at 956 ("[A] general counsel's dependence on a single client may call into question counsel's capacity to bring an appropriate degree of professional detachment to bear."); *id.* at 967–68 ("Conventional skepticism about the capacity of in-house corporate lawyers to exercise independent professional judgment focuses on the exclusivity of their relationship with a single client (their employer), which calls into question the feasibility of withdrawing from representation if professional norms so require."); *see also* Daly, *supra* note 4, at 1099–1100 ("Whether in-house counsel can exercise the required degree of [professional independent judgment] is a question that has universally troubled the legal profession. Critics insist that a lawyer who is dependent on a single client, i.e., the corporate employer, for his or her livelihood cannot provide independent advice and judgment of the same caliber as outside counsel whose financial ties to a single client are presumably much weaker." (footnotes omitted)); *cf. also* Weaver, *supra* note 3, at 1027 ("The first, and perhaps most critical, difference between [in-house] counsel and their colleagues in private practice is the economic dependence of [in-house] counsel on a single client.").

28. *See, e.g.*, Hazard & Hodes, *supra* note 17, § 17.7 ("[B]ecause in-house counsel has only a single client, and that client controls professional advancement and salary increments, there may be more of a tendency to avoid confrontation [than is experienced by outside counsel]."); Cheek Report, *supra* note 19, at 152 (observing that in-house counsel's "desire to advance within the corporate executive structure[] may induce lawyers to seek to please the corporate officials with whom they deal rather than to focus on the long-term interest of their client, the corporation"); Kim, *supra* note 3, at 204 ("The outside lawyer who seriously offends or disagrees with managers of the corporation ultimately risks losing a client, but the inside lawyer who does the same thing risks losing a job and being professionally blacklisted. Therefore, inside lawyers face stronger pressures to conform to the wishes and objectives of managers who have the authority to hire and fire them."(footnote omitted)); Weaver, *supra* note 3, at 1032 ("The inevitable divergence between the goals and objectives of the individual constituents of the organization and the best interests of the organization can, and do, create career threatening situations for corporate counsel.").

29. Hazard & Hodes, *supra* note 17, § 17.7. It is also worth noting that financial dependence on a single client may affect general counsel differently than it does outside counsel only in a matter of degree. Many outside lawyers or law firms rely heavily on a single client or a small group of clients for a substantial portion of their revenue, and loss of these clients can be quite significant.

30. Rule 1.7(a)(2) of the Model Rules of Professional Conduct provides that a lawyer shall not represent a client if that representation may be materially limited by the lawyer's own interests. Model Rules of Prof'l Conduct R. 1.7(a)(2) (2006). *See also, e.g.*, Barclift, *supra* note 3, at 16 (suggesting that the commentary to Model Rule 1.7 "recommends that a lawyer withdraw from representing a client if the lawyer's financial interest in the client leads to the reasonable conclusion that the representation would be adversely affected," and that this may be the case for general counsel, particularly when they receive stock option compensation).

31. The stock option compensation issue is not necessarily limited to general counsel. Outside counsel is sometimes compensated with stock options as well. *See* Jason M. Klein, *No Fool for a Client: The Finance and Incentives Behind Stock-Based Compensation for Corporate Attorneys*, 1999 Colum. Bus. L. Rev. 329, 330 (suggesting that stock compensation for outside lawyers may be appropriate because it would simply parallel a common form of compensating in-house lawyers). In addition, stock options are only one of many ways that an in-house counsel's financial well-being may be tied to the company's financial results. For example, many companies require some amount of stock ownership, many grant restricted stock instead of or in addition to options, and some grant long-term incentive compensation based on stock price performance.

32. *Cf.* Barclift, *supra* note 3, at 17 ("[A] large personal equity interest might raise questions on the in-house lawyer's ability to represent a client if the legal advice might result in a significant financial loss of the lawyer's equity interest."). But see Klein, *supra* note 31, at 348–61 for discussion of some potential benefits of inside or outside counsel's compensation in stock or stock options.

The directors need to understand and assert their prerogatives in this area and, when needed, to feel free to seek further opinions from outside counsel of their choice. First, the board of directors should have approval responsibility for selecting, retaining, and compensating the general counsel.[33] By providing a buffer between the general counsel and the CEO, this will serve to reduce the pressure on general counsel to accede to questionable management plans.[34] This ability of the directors to act as a buffer between the general counsel and the CEO, and thus enhance the general counsel's ability to fulfill his or her professional responsibilities to the company, will also be further enhanced if the directors remain aware of and understand the complex role and professional responsibilities of the general counsel.

Second, the corporation should design a compensation plan for in-house counsel that rewards exceptional and professionally independent legal work, as distinct from pure financial performance.[35] This may or may not include a bonus system as well as stock option compensation for the general counsel, depending upon the corporation's particular circumstances. Most general counsel adhere closely to their professional responsibilities and personal integrity, unswayed by the potential for stock option wealth. Moreover, we recognize and applaud the common practices of well compensating in-house counsel. Including stock options as a portion of a general counsel's compensation package may or may not raise issues in any particular corporation. Thus, a review of the corporation's compensation structure may be appropriate, with sensitivity to independence and the potential for even the appearance of impropriety.

C. Relationships with Senior Management

As discussed above, corporate counsel must exercise independent judgment on behalf of the corporate client when advising directors, officers, and employees of the client. But general counsel's position as a member of the senior management team can place special pressure on that independence, beyond the tensions created by the employment relationship. This pressure arises naturally from the interactions and relationships that develop as individuals work together on the

33. *See* Cheek Report, *supra* note 19, at 161 ("Public corporations should adopt practices in which . . . [t]he selection, retention, and compensation of the corporation's general counsel are approved by the board of directors."); *cf. also* Veasey, *supra* note 22, at 1414 ("[T]he board must have a voice in the selection and retention of the general counsel . . . .").

34. *See* DeMott, *supra* note 3, at 980 ("Strengthening the board's relationship with general counsel may weaken the bonds between the CEO and general counsel, as would instituting a practice of regular meetings between general counsel and a committee or other group of independent directors.").

35. Jill Barclift has suggested that

> [t]he general counsel should be rewarded for outstanding legal work, including compliance with ethical obligations of the SEC and the state bar. Salary and bonuses in recognition of outstanding performance are appropriate. Stock options are rewards for reaching financial performance goals. Millions of dollars in stock option wealth not only raises questions about where the general loyalties lie, but can compromise the general counsel's judgment in the same way other corporate executives are compromised by the lure of stock option wealth.

Barclift, *supra* note 3, at 25.

senior management team.[36] It does not necessarily require overt instructions or demands from other executives.[37]

For example, some commentators have suggested that a general counsel may develop a "loyalty to superiors" that can compromise the ability to view management plans with an independent, objective, critical eye.[38] Others have observed that close working relationships create a sense of identification or association between the general counsel and other senior managers.[39] Professor DeMott has characterized this effect as "socialization" and has described some of the personal benefits that individual lawyers working in these positions may derive from such relationships:

> [T]o the extent general counsel is socialized as a member of the senior management team, general counsel may be reluctant to jeopardize ongoing membership in the team and inclusion in its informational loops, which underlie effective power within the corporation. The impact of such socialization on a general counsel may run stronger and deeper than the impact that socialization into a corporate employer may carry for subordinate members of the legal department. This is so both because the stakes associated with general counsel's position are higher and because the bonds of personal loyalty between general counsel and other members of the senior management team may bind more tightly than the more impersonal ties between a subordinate lawyer and a corporate employer.[40]

Whether described in terms of identification, socialization, or loyalty, the social or psychological tendency not to abandon or violate these relationships may give rise to tensions that present special challenges. Thus, human nature, and not just financial dependence on a particular employment position, may also enhance the tensions experienced by general counsel when they seek to take the right course of action for their corporate clients.

Of course, many general counsel effectively manage these tensions and serve as strong, independent advisors to, and advocates for, their clients. The general

36. *Cf., e.g.*, Weaver, *supra* note 3, at 1028 ("[T]he close working relationship between management and corporate counsel may create confusion and uncertainty about the role of corporate counsel in the representation of the organization."); *id.* at 1045 ("The problems related to independence, or lack thereof, are most likely to arise when the interests of the corporation diverge from the interests of any of its constituents, especially constituents with whom corporate counsel have a particularly close working relationship.").

37. *See, e.g.*, DeMott, *supra* note 3, at 969 ("[A]s a member of the senior management team, counsel may tend to address legal questions in a manner that pays allegiance to the wisdom of executive-level commitments and perspectives, even in the absence of explicit instructions from other members of the team.").

38. *See, e.g.*, Barclift, *supra* note 3, at 3 (suggesting that general counsel's independent judgment may have been compromised by loyalty to superiors, contributing to recent corporate scandals); *id.* at 24 ("The integrity of public disclosures [is] dependent on the perception that the general counsel's loyalty to superiors will not influence his or her independent advice to executive management or the board of directors."); DeMott, *supra* note 3, at 968 (noting "the bonds of personal loyalty between general counsel and other members of the senior management team").

39. *See* Kim, *supra* note 3, at 252–53 ("The close, day-to-day working relationships that inside lawyers develop with corporate constituents and the personal feelings associated with being a valued member of a corporate team produce a deeper and ongoing identification of the lawyer with the client.").

40. DeMott, *supra* note 3, at 968 (footnote omitted).

counsel's position on the senior management team and his or her intimate knowledge of the corporation's affairs can also provide a host of benefits to the corporation.[41] For example, a strong familiarity and close working relationship with other senior managers may give the general counsel's views more authority with other corporate agents. The general counsel will have greater influence with managers if the general counsel's perceived relationship with the CEO and the directors leads managers to believe that the general counsel is speaking for the CEO and the board. Furthermore, in-house counsel's position as an employee of the corporation and a member of the corporate "team" increases incentives to ensure the long-term viability of the enterprise.[42]

D. Special Considerations

1. Corporate Counsel as Directors

If the general counsel also serves as a member of the board of directors, that status itself may play a substantial role in buttressing the general counsel's credibility and authority with the board as well as with the officers and other employees.[43] Despite the increase in status that may be achieved when general counsel serves as a director, it may or may not be advisable for counsel to do so. Similar competing factors should also influence the determination of whether it is desirable for a corporation's outside counsel to serve on the corporation's board of directors.

The comment to Model Rule 1.7 advises that before accepting a position on the board of directors of a client, a lawyer should consider whether working in the dual role will compromise the lawyer's independent professional judgment. Specifically, the comment states:

> A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining

41. *See* Geoffrey C. Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 Emory L.J. 1011, 1018–19 (1997) (discussing in-house counsel's superior access to "water cooler" or "back-channel" information and the importance of such information); *see also* Beardslee, *supra* note 7, at 26 (observing that general counsel "specialize" in their clients' business, and suggesting that this strong familiarity with the business is an important asset to their clients that differentiates them from outside counsel).

42. *See* Kim, *supra* note 3, at 206–07 ("Inside lawyers tend to feel as though they are integral members of a team, and their goals are centered on furthering the long-term success of the corporate enterprise."). See *infra* Part II.D.4. for additional discussion of the added value that in-house counsel provide to their clients.

43. *E.g.*, Geoffrey C. Hazard, Jr., *Three Afterthoughts*, 46 Emory L.J. 1053, 1054 (1997); *cf.* Weaver, *supra* note 3, at 1034 ("Corporate counsel often acknowledge the increased effectiveness that they enjoy when senior management believes that they are 'team players.' I do not dispute the accuracy of this perception; however, the close working relationship that often exists between corporate counsel and senior management offers many opportunities for confusion about the identity of the client that counsel represents.").

> legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director. . . .[44]

This applies with force and reason where outside counsel is a director and his firm realizes substantial legal fees from the corporation. Such a practice was common years ago, but today it may compromise generally accepted understandings of director independence for many purposes and may complicate other issues, including preservation of the attorney-client privilege.[45]

In order to render advice that is objective and will be perceived as objective, counsel, whether it is the general counsel or regular outside counsel, must determine how to remain close enough to the various corporate actors to achieve a depth of understanding and credibility, while also maintaining some degree of distance from the corporate clients' representatives.[46] When a lawyer serves as a director of a client, his or her advice may become or be seen as becoming less detached and more cautious because of extraneous concerns, including job security and personal liability.[47] In addition, the lawyer for the corporation—whether inside or outside counsel—may not be independent for the purpose of considering many matters that come before the board of directors.[48]

Some observers argue that it is not prudent for in-house or outside corporate counsel to serve on their clients' boards of directors under any circumstances.[49] Others take a different view. Geoffrey Hazard has explained:

> I once held that view [that it is never advisable for corporate counsel to serve as a director of a client], but no longer do. Rather, I hold to the more indeterminate view

44. Model Rules of Prof'l Conduct R. 1.7 cmt. (2006).

45. *See* Marc I. Steinberg, *The Role of Inside Counsel in the 1990s: A View from Outside*, 49 SMU L. Rev. 483, 494 (1996) (stating that when in-house counsel serves as a director of the corporation, "application of the attorney-client privilege may be determined on an ad hoc basis depending on whether the attorney/director was acting as legal counsel or as a director. By assuming this dual function, therefore, the corporation's assertion of the attorney-client privilege may be subject to stricter scrutiny").

46. *See* Kim, *supra* note 3, at 187 ("Lawyer independence, however, is concerned primarily with the lawyer's relationship *with the client*. Lawyers must also keep a safe distance *from their own clients* because lawyers must maintain a separate identity if they are to render detached, objective advice.").

47. *See id.* at 233 ("Proponents of dual service argue that the corporation benefits by having its lawyer on the board because the lawyer knows he is at risk of personal liability as a director. That fact, however, may actually increase the threat to the lawyer's independence. Because the lawyer-director has placed himself in a position of being personally affected by the legal advice he renders, self-protection concerns may affect the lawyer-director's ability to render objective, detached advice. The result may be that the lawyer-director's opinion is far 'more cautious than it would otherwise be.' The corporate client suffers because it does not get the detached, objective, legal perspective it would normally receive from its counsel." (footnotes omitted)).

48. *See, e.g.*, N.Y. Stock Exch., Listed Company Manual § 303A.02 (2004), *available at* http://www.nyse.com/ (establishing various tests for director independence for listed company boards); General Electric Governance Principles, *available at* http://www.ge.com/en/citizenship/governance/govprinc.htm (setting forth GE's principles of director independence); General Motors Corporate Governance Guidelines, *available at* http://www.gm.com/company/investor_information/corp_gov/guidelines_pg2.html#9 (setting forth GM's principles of director independence). Under Delaware law, independence is measured by considering the questions—independent from whom and for what purpose? Beam *ex rel.* Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1050 (Del. 2004).

49. *E.g.*, Weaver, *supra* note 3, at 1039–40.

> [that] [a]n in-house counsel should be very aware of the risks involved in that dual role. . . . My view of a lawyer's serving as both a director and general counsel changed as a result of a conversation with a very good lawyer who held that dual role. The lawyer served as general counsel to a major corporation and, prior and subsequent to that engagement, practiced with a leading law firm in a major city. My colleague's proposition was this: The risk of a dual role as general counsel and director can sometimes be offset by the advantage that members of the board of directors will regard legal advice much more seriously when it comes from a social equal in the corporate hierarchy than when it comes from someone who is in the hierarchy's second tier.[50]

In essence, Professor Hazard's argument is that a lawyer-director may be more effective at persuading other directors to follow his or her advice because the other directors know that counsel is a peer and faces the same risk of personal liability as his or her fellow directors. Though this may make the advice more credible to other directors concerned about personal liability, it may not necessarily be in the corporation's best interest.

This is a debatable issue that must be resolved within the context of the particular corporation and its culture. While there is no "one-size-fits-all" solution, it is our view that in most cases it is preferable for counsel not to be a member of the board. But it is essential that counsel be present at board meetings and "in the loop" as the board's advisor on almost all issues. Indeed, when the independent directors meet in executive session, as should be the norm these days,[51] the independent directors should consider making it a practice of inviting the general counsel to attend or at least be available to attend the sessions, absent some personal involvement of counsel in the subject matter under discussion.[52] This is an evolving issue and depends on the culture and the practices with which the independent directors are most comfortable in encouraging candor in their executive sessions. It must be emphasized that the decisions whether or not and when the general counsel should be invited to attend executive sessions will vary.

Ultimately, the balance between effectiveness and the risks to professional independence is not easy to achieve or to determine *ex ante.* Corporate counsel should remember who is the client (**only** the entity) and carefully weigh the potential benefit of effectiveness against the potential cost to professional independence when deciding whether to serve or to continue to serve on the board of directors of a client.

---

50. Hazard, *supra* note 43, at 1053–54; *see also* Kim, *supra* note 3, at 222 ("Proponents of dual service also argue that the corporation benefits by knowing that the corporate lawyer is on the hook as a board member. Corporate clients feel comforted when their lawyer serves on the board because the other directors know that the lawyer is subject to the same risk of personal liability that they bear as directors. Recognizing that they are at risk of personal liability as directors, lawyers presumably are likely to be more alert and diligent than they might otherwise be, and fellow board members are more likely to heed the lawyer's advice as a consequence. Outside directors in particular will find it easier to give weight to the legal opinions of someone who is taking the same risks that they are.").

51. See *infra* text accompanying notes 62–63 for discussion of current recommendations regarding the relationship between counsel and the board, including the independent directors.

52. *See, e.g.*, Cheek Report, *supra* note 19, at 161.

2. Corporate Minutes

Whether or not the general counsel is a director or corporate secretary, he or she usually must be integrally involved in the process of preparing the corporate minutes. Opinions differ regarding the various methods of preparing the minutes, but the issue's importance has been magnified by recent events. For example, the problematic minutes regarding the board's consideration of the hiring and termination of Michael Ovitz may have contributed to the protracted litigation in the *Disney* case.[53]

The legal issues lurking in the process of preparing the minutes are significant, and require substantial involvement of and vetting with the general counsel. Whatever process is ultimately implemented, those involved in preparing and reviewing the minutes must bear in mind that the minutes may be obtainable by court order as a corporate record.[54] Essentially, the minutes must be written as if for an audience of public stockholders (and their lawyers).

Given the critical importance of the minutes, the general counsel should prepare the minutes or supervise the process of preparing the minutes so that they are professionally prepared and consistent from meeting to meeting. Each board, with the advice of the general counsel, should decide what level of detail to include in the minutes. If the directors' actions or decisions later become the subject of litigation, a greater level of detail in the minutes may help the directors demonstrate that they engaged in an appropriately deliberative process in reaching their decision. The minutes should include at least the following:

---

53. *See, e.g.*, *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 768 n.539 (Del. Ch. 2005) ("It would have been extremely helpful to the Court if the minutes had indicated in any fashion that the discussion relating to the OEA was longer and more substantial than the discussion relating to the myriad of other issues brought before the compensation committee that morning."), *aff'd*, 906 A.2d 27 (Del. 2006); *see also Disney Decision Refuses to Assess Director Liability and Provides Important Guidance for Directors*, WEIL BRIEFING: CORPORATE GOVERNANCE 3–4 (Aug. 12, 2005), *available at* http://www.weil.com/wgm/cwgmhomep.nsf/Files/Briefing10_2005/$file/Briefing10_2005.pdf (discussing the importance of good minutes and noting that stockholders may use minutes to survive a motion to dismiss); *Delaware Supreme Court Affirms Chancellor's Judgment of No Liability for Directors in Ovitz Case*, WEIL BRIEFING: CORPORATE GOVERNANCE 2 (June 16, 2006), *available at* http://www.weil.com/wgm/cwgmhomep.nsf/Files/Briefing006_2006/$file/Briefing006_2006.pdf (reflecting on the importance of good documentation of board decision-making processes in avoiding lengthy and expensive litigation).

54. DEL. CODE ANN. tit. 8, § 220 (Supp. 2004); Stephen A. Radin, *The New Stage of Corporate Governance Litigation: Section 220 Demands—Reprise*, 28 CARDOZO L. REV. 1287, 1412 (2006) ("The availability of this new stage of corporate governance litigation—in essence, pre-complaint discovery intended to facilitate better drafted complaints (and decisions by shareholders not to file weak complaints)—puts a premium on the preparation of books and records that can be produced in response to a Section 220 demand that show informed decision-making by disinterested and independent directors acting in good faith."); *but cf.* Seinfeld v. Verizon Communications, Inc., 909 A.2d 117, 120 (Del. 2006) (concluding that plaintiff had not shown a "credible basis" from which the trial court could infer that there were possible issues of waste, mismanagement, or wrongdoing to support plaintiff's books and records request (citing Stephen A. Radin, *The New Stage of Corporate Governance Litigation: Section 220 Demands*, 26 CARDOZO L. REV. 1595, 1647 (2005); E. Norman Veasey & Christine T. DiGuglielmo, *What Happened in Delaware Corpoprate Law and Governance from 1992–2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1466–69 (2005)).

- the date of the meeting and the names of the directors and other persons who attended the meeting;
- the times that the meeting began and ended, and the times when persons entered and left the meeting;
- a description of the topics discussed or considered;
- some general relationship between the length of the minutes devoted to a particular issue and the time devoted to the issue;
- identification of anyone who provided information and advice at the meeting;
- a topical or other description of the information provided to the directors at and in advance of the meeting;
- a brief summary of the major terms and rationale discussed (without attributing particular words or points to particular directors) in connection with significant transactions;
- the board vote on matters put to a vote, indicating any director who dissented, abstained, or absented herself or himself from the vote;
- if discussions were held or information exchanged between or among some directors before the meeting relating to matters considered at the meeting, those facts should be reflected; and
- the identity of the person preparing the minutes.

A draft of the minutes should be sent to each director promptly after the meeting, and the directors should promptly review and correct or comment on the draft. The final version of the minutes should then be considered and approved with any further changes at the next board meeting. Once the minutes have been finally approved, they become the official record of the meeting. Accordingly, to avoid confusion, preliminary drafts and notes relating to the minutes should not be retained. It is important for the general counsel to supervise this process, as well as the contents of the minutes.[55]

3. Reporting Up

Section 307 of the Sarbanes-Oxley Act directed the SEC to issue rules establishing "minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers"[56]—

55. The forthcoming fifth edition of the *Corporate Director's Guidebook*, expected to be completed in mid-2007, will include a complete exposition of the issue of corporate minute-taking and will serve as an excellent source of reference in this area. *See also Delaware Supreme Court Affirms Chancellor's Judgment of No Liability for Directors in Ovitz Case*, WEIL BRIEFING: CORPORATE GOVERNANCE 2, *supra* note 53 (advising that minutes should note when a subject has been discussed on a one-on-one or informal basis before a board meeting as well as the nature of discussions had and questions asked at a board meeting).

56. Pub. L. No. 107-204, § 307, 116 Stat. 745, 784 (codified at 15 U.S.C. § 7245 (Supp. III 2003)).

a very broad group of lawyers to whom the rules might apply.[57] In particular, the Commission was directed to include in its rulemaking a rule

> (1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and
> (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.[58]

The SEC issued final rules implementing this "up-the-ladder" reporting requirement in February 2003.[59]

The up-the-ladder reporting requirement, which includes an option to report wrongdoing to the SEC,[60] places tension on the general counsel by potentially

57. The rule's definition of "appearing and practicing before the Commission" includes transacting any business or communicating in any way with the SEC, representing an issuer in an SEC administrative proceeding or in connection with any SEC investigation, inquiry, request for information, or subpoena, providing advice regarding the securities laws or the SEC's rules or regulations regarding any document that the attorney has notice will be filed with or submitted to the SEC (or incorporated into any document that will be filed with or submitted to the SEC), and advising an issuer regarding whether information or a statement, opinion, or other writing must be filed with or submitted to the SEC (or incorporated into any document that will be filed with or submitted to the SEC). 17 C.F.R. § 205.2(a)(1) (2006).

58. 17 C.F.R. § 205.3 (2006).

59. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296 (Feb. 6, 2003) (codified at 17 C.F.R. pt. 205 (2006)). The Commission proposed a companion "noisy withdrawal" rule requiring a lawyer to withdraw from representation and notify the Commission about the withdrawal in the event that the lawyer's up-the-ladder reporting does not yield an appropriate response from the board of directors. *See* Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71670 (Dec. 2, 2002). The SEC's "noisy withdrawal" proposal, however, has not been adopted as a final rule. It has effectively been tabled indefinitely. *See* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6324 (Feb. 6, 2003).

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

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

17 C.F.R. § 205.3(d)(2) (2006).

creating an adversarial atmosphere within the corporation. Where in-house counsel has an obligation to be an internal whistleblower, other constituents within the corporation may become reluctant to bring issues to counsel's attention. In addition, awareness of this newly codified obligation (which applies to both in-house counsel and outside lawyers) may place management or the board on the defensive when the general counsel does raise an issue because they may automatically view the vetting of issues as out of the ordinary, rather than as appropriate matters of prophylaxis, routine internal control, and management of legal compliance.

Does the formal up-the-ladder reporting requirement tend to undermine the general counsel's position as chief legal advisor to the corporation, instead rendering counsel an enforcer or internal "cop"? In most instances it should not, but it does provide counsel with leverage to cause the corporate constituents to "do the right thing." That is, the up-the ladder reporting requirement may enhance general counsel's ability to exercise judgment, independent of other senior managers. For example, the reporting requirement may provide "some check on the apparent tendency of some general counsel to maintain insufficiently critical detachment from officers and other senior managers, preventing them from giving the board the frank advice it need[s] to perform its own monitoring function."[61] The same considerations would seem to apply to outside counsel in many instances.

The ABA Model Rules of Professional Conduct, in the form finally approved by the ABA House of Delegates in 2003, include comparable provisions. Rule 1.13 contains a presumption that requires the lawyer, as a matter of ethics, to report "up the ladder" certain law violations that are likely to result in substantial injury to the corporation, unless the lawyer reasonably believes that it is not in the best interest of the corporate client to do so.[62] The rule contains a further provision that tends to protect the lawyer by requiring board notification of the lawyer's firing or withdrawal for reporting up.[63] Model Rules 1.6(b)(2) and 1.6(b)(3) also contain reporting out options to prevent, mitigate, or rectify potential, substantial financial harm to the corporation from a crime or fraud, in furtherance of which the lawyer's services were used.[64] Those rules have been adopted in a number of states and are pending in others.[65]

Corporations should, in our view, adopt policies ensuring that their general counsel have regular, direct access to the board. The ABA Task Force on Corporate Responsibility has recommended that public corporations adopt policies that ensure such direct contact between the board and the general counsel:

> Public corporations should adopt practices in which . . . [g]eneral counsel meets regularly and in executive session with a committee of independent directors to com-

61. Mark A. Sargent, *Lawyers in the Perfect Storm*, 43 Washburn L.J. 1, 38 (2003).
62. Model Rules of Prof. Conduct R. 1.13(b) (2006).
63. Model Rules of Prof. Conduct R. 1.13(e) (2006).
64. Model Rules of Prof. Conduct R. 1.6(b)(2)-(3) (2006).
65. *See* ABA Joint Committee on Lawyer Regulation, Additional Links of Interest, *available at* http://www.abanet.org/cpr/jclr/home.html (tracking the status of states' review and adoption of the Model Rules).

> municate concerns regarding legal compliance matters, including potential or ongoing material violations of law by, and breaches of fiduciary duty to, the corporation.[66]

Implementation of such policies may tend to enhance the general counsel's rapport and credibility with the board. It may also facilitate the board's objective and independent evaluation of issues raised by the general counsel because the general counsel's reports to the board will be perceived as matters to be addressed by the board in the ordinary course of its oversight of the corporation.[67] Whether or not the particular corporation adopts such a formal policy establishing regular contact between the general counsel and the board, the directors should focus on understanding counsel's complex role and the tensions that counsel faces. Such understanding will help to ensure that the board will be able to identify and address potential pressure points when they arise between general counsel and management.

4. Informational Issues

General counsel's position within the corporation provides added value that is rarely matched by outside counsel. In-house counsel, and the general counsel in particular, usually have a deeper and broader knowledge of the client's business than do outside counsel.[68] In addition, in-house counsel's skills may be specialized to match the corporation's needs.[69]

But, in addition to increasing his or her value to the corporation, the general counsel's superior access to information may also increase the incidence of ethical dilemmas with which counsel must grapple. This is the "water cooler" phenomenon, which Professor Hazard has explained this way:

> Here lies the most significant difference between corporate counsel and lawyers in independent practice. The difference, simply stated, is in the factual conditions of their day-to-day work. To put the point bluntly, a lawyer in independent practice is sheltered from the informal, back-channel information that flows around the com-

66. Cheek Report, *supra* note 19, at 161.
67. *See Compliance Readiness—General Counsel's Expanded Role*, *supra* note 9, at 1, 24 (identifying lessons for general counsel learned from the Worldcom scandal, including that the general counsel should have "direct access and frequent and open communication with the board of directors").
68. *See, e.g.*, Daly, *supra* note 4, at 1060–61 (noting that general counsel add value through specialized knowledge of their clients' business and the strategic goals of the corporation); Hazard, *supra* note 41, at 1018–19 (discussing in-house counsel's superior access to "back-channel" information and the importance of such information); Kim, *supra* note 3, at 199–200 (discussing the "added value" of in-house counsel's advice because it "is enhanced by in-house lawyers' direct knowledge of and involvement in the company's business affairs"); *see also* Beardslee, *supra* note 7, at 25 (noting the activities in which the general counsel engages in order to maintain strong knowledge of the business and industry); Terrell, *supra* note 12, at 1007 (describing "a perception among American lawyers—and perhaps business people as well—that general counsel bring to their corporate employment something more than just legal 'service.' They also bring (or should bring) to the business context a subtle but vital extra quality that is their own brand of legal 'professionalism.'").
69. *See* Kim, *supra* note 3, at 203 ("Because inside lawyers develop skills that are specialized to serve the corporation's needs, they perform many functional legal services efficiently without consulting outside counsel."); *cf. also* Beardslee, *supra* note 7, at 25 ("[T]he one thing General Counsel do 'specialize' in is their client's business.").

> pany water cooler. Instead, engagement of an independent law firm is necessarily predicated on a distillation of the facts about the matter in question. This is so even when the outside lawyer is given all of the documents and access to all of the company employees. Back-channel information simply cannot be recreated. And there are times, I have been told, when outside counsel may be retained on the basis of selected facts precisely to accommodate a response that provides a desired outside opinion. We can harken to Rule 1.13(b)(3), where one of the options is to obtain "a separate legal opinion on the matter" to be presented "to appropriate authority in the organization."[70]

In-house counsel's enhanced knowledge of all aspects of their clients' business enables them to be "proactive as opposed to purely reactive because the lawyers' involvement could occur at an earlier phase of any given transaction."[71] This greatly enhances the lawyers' capacity to structure transactions in a manner that is appropriate for the company. The proactive model of in-house lawyering involves "performing legal risk analysis, [in which] an in-house lawyer blends both legal and business advice by drawing 'upon the corporation's conception of itself embedded in its cultures and policies.'"[72] This proactive model of lawyering means that effective in-house lawyers are "innovative counselors" instead of mere "scribes" and "legal servants."[73]

The corporation's lawyer, particularly the general counsel, must be continuously mindful of what is over the horizon. Corporate counsel must also be assertive about legal and ethical issues while matters are still "ripe"—that is, while decisions or changes may still be made. He or she needs to think ahead and anticipate what is coming, just as a good hockey player skates not to where the puck is, but to where the puck is going. Corporate counsel should try to maintain a clear distinction between legal and business roles, with emphasis on legal matters as his or her primary responsibility. Counsel should avoid interjecting herself unduly into business decisions, usually constraining his or her role to one of pure counselor—advising the company's agents on the legal aspects of pending decisions, as enhanced by the considerable knowledge counsel possesses concerning the business. Nevertheless, as discussed in the next part, there is often an invitation, temptation, or gravitation of counsel's role into a mixture of legal and business considerations.

In addition to enhancing in-house counsel's value to the corporation, the breadth of counsel's responsibilities and familiarity with the business may make

---

70. Hazard, *supra* note 41, at 1019.

71. DeMott, *supra* note 3, at 960–61; *see also* Kim, *supra* note 3, at 201 ("The in-house lawyer today is actively involved 'in shaping corporate events, in assessing corporate policies, and in establishing the tone and standard for corporate conduct.' In-house lawyers serve as legal advisors to management on all transactions and matters that have significant legal ramifications for the corporation. The lawyers are consulted before these transactions occur and not merely after the fact; in other words, in-house lawyers practice preventive law. Because outside lawyers have no way of insisting that corporations involve them early in matters, the role of outside counsel is usually reactive. Inside lawyers, however, play a much more proactive role because they are involved in earlier phases of transactions." (footnote omitted)).

72. Daly, *supra* note 4, at 1070.

73. *Id.* at 1078; *cf. also* Gruner, *supra* note 9, at 1116; Liggio, *supra* note 5, at 1209–10. See *infra* Part IV.A for discussion of a "persuasive counselor" model of corporate lawyering.

them implicitly (but not necessarily realistically) charged with knowing everything that is going on in a company.[74] But because of structural and other barriers, general counsel may sometimes encounter difficulty accessing all the information that they in fact need to do their jobs. For example, many corporate law departments operate in a compartmentalized or decentralized manner.[75] An even greater—though perhaps less prevalent—obstacle may be other senior executives' intentional exclusion of the general counsel from the informational loop.[76] The reasons for such exclusion are not clear, but one explanation might be fear that corporate lawyers may act as "cops" and not as counselors, advisors and advocates.[77] Such distrust is generally unfounded,[78] but the mere perception of untrustworthiness is one reason for law makers and corporate decision makers to consider carefully any policy changes that may negatively impact the trust between the corporate lawyer and the client-corporation and its managers and directors.

These informational obstacles also highlight the need for corporations to develop and implement policies to ensure that the optimal quantity and quality of information flows to and from the general counsel. Professors Fisch and Rosen have suggested some key features of such systems and the benefits they might secure:

> One method of increasing information flow to corporate decision-makers is the development of information reporting systems relating to legal representation. Some corporations already provide structures through which the general counsel, the board or the CEO demands information from inside and outside counsel on a regular basis. Systems through which lawyers are regularly required to provide information on risks, liabilities and other potential problems relieve the lawyer of the responsibility for coming forward with information about potential misconduct. Structures in which lawyers regularly report directly to the board or a key corporate official allow lawyers to bypass managers without creating the risk of retaliation that might result from sporadic reporting up.[79]

Thus, policies requiring regular interaction and reporting between the general counsel and the board and the senior management team provide dual benefits.

---

74. *See* Terrell, *supra* note 12, at 1007 ("Moreover, the general counsel, with overall legal responsibility for actions throughout the corporation, may perhaps be legitimately saddled with at least constructive knowledge of virtually everything occurring within the company.").

75. Nicholson, *supra* note 1, at 595–96 (discussing the problems and benefits associated with such structural organization of legal departments).

76. *See* DeMott, *supra* note 3, at 966 ("Although many reasons may keep general counsel out of informational loops that operate at the senior management level, one structural explanation is the ability of other members of senior management to exclude general counsel from any particular loop.").

77. *See* Nicholson, *supra* note 1, at 597 (observing that some general counsel see themselves as internal cops); *see also infra* Part IV.A for discussion of the gatekeeping role that some observers have suggested that corporate counsel should fill.

78. *Cf.* Terrell, *supra* note 12, at 1007 ("Every constituency that comprises the dynamic business corporation, whether it perceives this fact or not, ultimately trusts the general counsel—as the chief (or only) lawyer in the organization—to provide, and in fact emphasize, an unusual sense of context for all corporate decision making.").

79. Jill E. Fisch & Kenneth M. Rosen, *How Did Corporate and Securities Law Fail? Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097, 1135–36 (2003).

They enable the corporation's legal department to operate to the best advantage of the corporation and they relieve the tensions placed on corporate counsel by certain structural features of in-house lawyering as well as newly formalized rules such as up-the-ladder reporting.

We should pause here and reflect on the vignette we discussed at the outset. Geena has a real challenge, not only in helping the corporate entity (her only client) navigate the boardroom leak and options problems but also in dealing with both her "bosses," Charlie (the CEO) and the board of directors. No doubt there are a variety of approaches for her to consider, and different readers of this article will have varying approaches to doing the right thing. The leak issue implicates a potential violation by one or more directors of their fiduciary duty of confidentiality.[80] That, in turn, implicates a variety of potentially proper and viable alternative methods of handling this concern. The options issues are intensely fact-driven, and may involve mistakes already made by counsel as well as management, possible criminal or civil liability, and various remedial alternatives.

III. Dual Roles: Providing Legal and Business Advice

It has been noted by some observers that perhaps the most prominent distinction between the general counsel of several decades ago and contemporary general counsel is the modern general counsel's combination of business with legal advice.[81] In addition, for many general counsel, the business aspects of their jobs may at times predominate.[82] Indeed, the challenges and variety of work undertaken by those engaged in this type of lawyering often is what draws general counsel to their positions.[83]

The in-house lawyer's involvement in business strategy and offering business advice can create pressure, often asserted by corporate managers, on the lawyer to enable transactions rather than to act as a "bottleneck" to getting the deal

80. On the duty of confidentiality, consider *Brophy v. Cities Service Co.*, 70 A.2d 5 (Del. Ch. 1949); *In re Oracle Corp.*, 867 A.2d 904, 934 (Del. Ch. 2004), *aff'd*, 872 A.2d 960 (Del. 2005); *Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1061–62 (Del. Ch. 2004), *aff'd*, 872 A.2d 559 (Del. 2005).

81. *See* Daly, *supra* note 4, at 1062 ("This new generation of in-house lawyers . . . frequently offers business as well as legal advice, and its members decidedly reject any notion that their role is limited to counseling clients on purely legal matters. A 'can do' attitude characterizes their lawyering."); *see also* HAZARD & HODES, *supra* note 17, § 17.7 (observing that in-house counsel are typically more integrated into the daily operations of the corporation than are outside counsel and that they are therefore "more likely to be called upon to participate in making business judgments as well as legal judgments on behalf of the company"); Beardslee, *supra* note 7, at 23 (describing general counsel's involvement with "non-legal aspects of all kinds of business projects, such as development of new products, marketing, hiring, internal restructuring); Amy L. Weiss, Note, *In-House Counsel Beware: Wearing the Business Hat Could Mean Losing the Privilege*, 11 GEO. J. LEGAL ETHICS 393, 393 & n.4 (discussing the many business-oriented roles that in-house counsel fill, including "as business advisors, negotiators, investigators, accountants, messengers, corporate directors, and corporate officers").

82. *See* Beardslee, *supra* note 7, at 23–24 ("Not only do General Counsel have non-legal responsibilities, but they are often business people first and lawyers second.").

83. *See, e.g.*, Weaver, *supra* note 3, at 1035 ("[C]orporate counsel often consider the opportunity to participate in business decisions to be one of the principal reasons that they prefer the in-house environment to private practice.").

done.[84] A corporate culture that emphasized getting the deal done quickly with too little regard for getting the deal done in an ethically and legally appropriate manner—and company lawyers' inability or unwillingness to apply the brakes—may have been a factor contributing to the corporate scandals around the turn of the twenty-first century. The pressure on general counsel and other in-house counsel to enable rather than "inhibit" deals may be strong in those companies where managers are particularly skeptical about the value of the legal department.[85]

The tendency—at times—of general counsel to blend legal and business advice can have important implications for the attorney-client privilege. It is well settled that the attorney-client privilege applies when the client is a corporation.[86] It is also clear that the entity itself, and not the various agents who speak on the corporation's behalf, is the client for privilege purposes.[87] But there has been some recent split of authority and academic opinion concerning what types of communications qualify for the protection of the privilege, in particular when in-house counsel are involved. The concern is that the involvement of in-house lawyers in both legal and business affairs may "blur the line between legal and non-legal communications."[88] Thus, communications that might contain some legal advice (or convey information to the attorney for the purpose of obtaining such advice) could be found not to be covered by the privilege and therefore become subject to discovery.[89]

84. Milton C. Regan, Jr., *Teaching Enron*, 74 FORDHAM L. REV. 1139, 1220 (2005) ("[C]orporate lawyers today want to be seen as creative business problem solvers and team players, not obstructionists who tell the client what it cannot do.").

85. *Cf.* Beardslee, *supra* note 7, at 51 ("'[I]n-house legal departments are now frequently challenged to demonstrate the value, efficiency, and cost-effectiveness of their services—even to justify their very own existence . . . .'" (quoting Norman K. Clark, Three Questions for Corporate Law Departments to Ask Before Outsourcing Legal Work to Law Firms (on file with Beardslee))).

86. *See* HAZARD & HODES, *supra* note 17, § 9.8 (discussing the application of the attorney-client privilege in the corporate context); *see also* Upjohn Co. v. United States, 449 U.S. 383 (1981).

87. *See* Hazard & Hodes, *supra* note 17, § 17.3 (stating that the client-lawyer relationship in the corporate context is understood under the "entity theory," and discussing the difficulty that lawyers may encounter in practice in "maintaining the distinction between an organization and its constituents"); *id.* § 17.7 ("The linchpin of the entity theory is that unless arrangements for multiple client representation have been made, a lawyer representing an organization represents *only* the organization, and that highly placed agents (or 'constituents') of the entity are not themselves clients." (emphasis in original)).

88. Rossi v. Blue Cross & Blue Shield of Greater N.Y., 540 N.E.2d 703, 705 (N.Y. 1989); *see also* Weiss, *supra* note 81, at 398 (discussing various tests applied by courts in determining whether a communication is protected by the attorney-client privilege, including whether the contents are "primarily legal" or whether they are "for the express purpose of securing legal advice"); *cf.* Fox, *supra* note 17, at 552–53 (discussing the risks to client confidentiality and the attorney-client privilege that arise when lawyers practice in a multidisciplinary setting, and asserting that "the fact of lawyers providing services in a multi-service firm will make it too easy to argue that any particular consultation between lawyer and client was related to something other than legal advice," placing the "sanctity of the lawyer-client encounter" at risk).

89. *Cf. Rossi*, 540 N.E.2d at 705 (noting the need to apply the attorney-client privilege "cautiously and narrowly" in the corporate context in order to avoid sealing off disclosure through "mere participation of an attorney," because lawyers mix legal and business advice and "their advice may originate not in response to the client's consultation about a particular problem but with them, as part of an ongoing, permanent relationship with the organization"); *cf. also* Weiss, *supra* note 81, at 393 (stating that "[c]ourts are narrowing the scope of the attorney-client privilege in the corporate context," and

Because the distinction between legal and business advice may be "blurred," it is difficult to anticipate which functions will be considered legal tasks and which will be considered business tasks when performed by an attorney. For example, in *Georgia-Pacific Corp. v. GAF Roofing Manufacturing Corp.*,[90] an in-house lawyer at GAF had negotiated the terms of a contract with Georgia Pacific. The contract became the subject of litigation between GAF and Georgia Pacific, and Georgia Pacific sought to compel deposition testimony relating to certain aspects of the attorney's role in the negotiations. GAF opposed the motion, claiming that the testimony was protected by the attorney-client privilege. The court rejected the privilege argument, finding that in negotiating on behalf of management, counsel was "acting in a business capacity."[91] But isn't negotiation a classic and traditional function of a lawyer?

Courts have recognized that lawyers often do include consideration of non-legal issues when advising clients on the best course of action with respect to a legal matter—and even that doing so may be critical to providing good counsel. But when lawyers do mingle business advice with legal advice there arises a degree of uncertainty regarding whether a court would ultimately find the advice to be predominantly legal or non-legal in nature when determining whether it is protected by the attorney-client privilege. It is not clear, however, that in-house counsel offer business advice more frequently than do outside counsel,[92] suggesting that courts should not be more skeptical of the legal nature of a communication simply because it involved in-house counsel.

There is no single model or "right" answer to the legal/business conundrum. A good lawyer's skepticism about the business wisdom of a transaction may be very valuable. And we do not suggest that counsel should stand down and be mute when he or she senses an irrational folly in a business decision that may be able to be avoided even if it is legal. We merely suggest that counsel be aware of which "hat" counsel is wearing—and the potential risks to the privilege—and we are confident that most general counsel are keenly aware of the distinction.

---

suggesting that the protection offered by the privilege is eroding where the client is a corporation).

It is worth noting that whether a particular communication might be protected by the privilege becomes less important when governmental bodies use "strong-arm" tactics to induce extensive privilege waivers. *See* ABA Task Force on the Attorney-Client Privilege, *Report of the ABA's Task Force on the Attorney-Client Privilege*, 60 BUS. LAW. 1029, 1043 (2005) (observing that law enforcement and regulatory authorities have recently "employed practices and procedures that suggest that if corporations disclose documents and information that are protected by the corporate attorney-client privilege and work-product doctrine, they will receive credit for cooperation," leaving companies with "no practical choice but to comply, since the agencies can employ their discretionary exercise of prosecutorial or enforcement authority under criminal law or civil regulation to impose a substantial cost on corporations that assert rather than waive the privilege").

90. 91 Civ. 5125 (RPP), 1996 U.S. Dist. LEXIS 671 (S.D.N.Y. Jan. 25, 1996).

91. *Id.* at *12; *see also* E.I. duPont de Nemours & Co. v. Forma-Pack, Inc., 718 A.2d 1129, 1143 (Md. 1998) (rejecting claim of attorney-client privilege because transmission of documents was for the "purely business purpose of debt collection" rather than for a legal purpose).

92. *Cf.* Weiss, *supra* note 81, at 399 (discussing a study by Professor Vincent Alexander that found that "47.8% of outside counsel and 46.7% of in-house counsel said that they give business advice frequently," and therefore suggesting that "outside corporate counsel . . . give business advice just as frequently as in-house counsel do" (citing Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 228–31 (1989)).

IV. Dual Identities: Corporate Counsel as Advocates, Gatekeepers, or Persuasive Counselors

A. Advocate, Gatekeeper, or Persuasive Counselor?

Lawyers serve as both their clients' advisors and their advocates. But it has long been suggested that lawyers should not only serve their clients but should also act as "gatekeepers."[93] This gatekeeper view generally seeks to impose a duty on lawyers to protect public policy or the public interest rather than solely pursuing their clients' interests—including, in the most skeptical view, serving as enablers of improper dealings.[94] Indeed, at times the lawyer's best service to the client is to "just say no."

If one performs an "autopsy" on Enron, Worldcom, and many of the other scandals that became infamous in the early part of the twenty-first century, one is reminded of the famous questions asked by District Judge Stanley Sporkin in the similarly infamous savings and loan scandals of the late 1980s:

> Where were these professionals, a number of whom are now asserting their rights under the Fifth Amendment, when these clearly improper transactions were being consummated?
>
> Why didn't any of them speak up or disassociate themselves from the transactions?
>
> Where also were the outside accountants and attorneys when these transactions were effectuated?
>
> What is difficult to understand is that with all the professional talent involved (both accounting and legal), why at least one professional would not have blown the whistle to stop the overreaching that took place in this case.[95]

These sentiments were echoed on the Senate floor during the Sarbanes-Oxley debate of 2002. Some Senators had their own questions concerning the whereabouts of the lawyers:

---

93. *See* John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U.L. REV. 301, 302 (2004) ("Securities markets have long employed 'gatekeepers'—independent professionals who pledge their reputational capital—to protect the interests of dispersed investors who cannot easily take collective action."); Lisa H. Nicholson, *A Hobson's Choice for Securities Lawyers in the Post-Enron Environment: Striking a Balance Between the Obligation of Client Loyalty and Market Gatekeeper*, 16 GEO. J. LEGAL ETHICS 91, 100 (2002) (examining securities lawyers' role as "gatekeepers to the 'level playing fields' of the capital markets"); Sargent, *supra* note 61, at 18 ("Lawyers acting in the context of public companies are . . . . gatekeepers. They stand at the approaches to the capital markets. As the auditor constrains access to the markets by its power to certify financial statements, and the analyst by its power to make investment recommendations, the company's lawyer has the duty, and at least some power, to constrain unlawful behavior by the company as it seeks access to capital.").

Elihu Root, the nineteenth century statesman, suggested in more colorful fashion this gatekeeping role for lawyers: "'About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop.'" Robert T. Begg, *The Lawyer's License to Discriminate Revoked: How a Dentist Put Teeth in New York's Anti-Discrimination Disciplinary Rule*, 64 ALB. L. REV. 153, 201 n.252 (2000) (quoting PHILIP C. JESSUP, 1 ELIHU ROOT 133 (1938)).

94. *See* Gordon, *supra* note 21, at 1188 ("After every wave of business failures resulting from corporate fraud, pressures mount to revise the rules to make lawyers and accountants better monitors—or at least less amiably cooperative enablers—of managers' misconduct.").

95. Lincoln Sav. & Loan Ass'n v. Wall, 743 F. Supp. 901, 920 (D.D.C. 1990).

> The truth is that executives and accountants do not work alone. Anybody who works in corporate America knows that wherever you see corporate executives and accountants working, lawyers are virtually always there looking over their shoulder. If executives and/or accountants are breaking the law, you can be sure that part of the problem is that the lawyers who are there and involved are not doing their jobs.[96]

These concerns translate into a call by many for lawyers—particularly corporate lawyers—to be "gatekeepers." And that is in part a fair observation, to the extent that the lawyer is asked about the legality of the matter by the board or management or the lawyer takes the initiative to raise a question if a legal problem arises. But our concern is that the term "gatekeeper" may, in certain situations, be either too broad or too narrow, and thus may be misleading as an appropriate model for understanding counsel's role.

Professor Jack Coffee has explained that the gatekeeping role for lawyers presents a unique problem of striking an acceptable balance between the lawyer's obligations of client loyalty and advocacy and the purported role of protecting the integrity of the securities markets.[97] Opponents of the concept that the lawyer should act as a gatekeeper argue that the gatekeeping role is akin to the accountant's or auditor's role and is inconsistent with the lawyer's role as advocate, largely because imposing on lawyers a gatekeeping function will chill the attorney-client communication that is essential to good advocacy.[98] Coffee rejects this argument by distinguishing a litigator's perspective as an advocate from a securities lawyer's self-image as more like that of auditor, bearing at least some responsibility for due diligence on documents that are drafted and filed with the SEC. He concludes that under this paradigm, the securities lawyer should exercise greater independence from the client, recognize a duty to the public, and employ professional skepticism.[99]

96. 148 CONG. REC. S 6524-02, S 6551 (daily ed. July 10, 2002) (statement of Sen. Edwards).

97. Coffee, *supra* note 93, at 346. Mark A. Sargent has described lawyers' traditional roles as advocates as making their participation in the Enron-era scandals more ambiguous than those of accountants or analysts:

> Auditors' roles, when boiled down to their essence, are straightforward. They must play a quasi-adversarial role versus their auditing clients. Their job is not to help the managers of the company achieve their goals. The auditors' responsibility is to protect the investing public by casting a dispassionate, disinterested eye on management's accounting and financial disclosures and placing their own reputation on the line by certifying the corporate financial statement. . . . Similarly, the securities analysts' job is to pierce through the appearance projected by the corporation and to be the one who says, "The emperor has no clothes!" . . . . To the extent that conflicts of interest led auditors and analysts to place currying favor with corporate managers ahead of their clear obligations to investors, they failed their essential tasks. In other words, to the extent they became advocates, they failed as auditors and analysts.
>
> That, of course, is the basic difference between the auditors' roles and the role of lawyers that makes lawyers' participation in the perfect storm of systems failures more ambiguous, and not the subject of a simple morality tale. Lawyers are advocates.

Sargent, *supra* note 61, at 17–18 (footnote omitted).

98. *E.g.*, Report of the ABA Task Force on Corporate Responsibility, at text accompanying note 26 of the Report, *available at* http://www.abanet.org/leadership/2003/journal/119a.pdf (recommending changes to the Model Rules of Professional Conduct).

99. Coffee, *supra* note 93, at 360–61; *cf. also* William T. Allen, *Independent Directors in MBO Transactions: Are They Fact or Fantasy?*, 45 BUS. LAW. 2055 (1990) (discussing lawyers' "absolutely crucial" role "in establishing the integrity" of board processes when selling a public company); Peter J. Hennings, *Sarbanes-Oxley Act 307 and Corporate Counsel: Who Better to Prevent Corporate Crime?*, 8 BUFF. CRIM. L. REV. 323, 352–53 (2004) (arguing that a gatekeeping role for corporate counsel, imposed through a noisy withdrawal requirement, would not greatly alter the lawyers' roles or the attorney-client relationship).

It seems that there is a middle ground between these views of lawyers as "gatekeepers" and lawyers as "enablers." Instead, lawyers serving their clients with integrity and professional independence may act as "persuasive counselors."[100] Under the persuasive counselor model, lawyers attempt, through their legal counsel, persuasively to guide their clients to the right course of action.

Proponents of the gatekeeper model likely fear that the persuasive counselor model would allow a lawyer to shirk responsibility for corporate misconduct by arguing that the lawyer gave accurate advice concerning the law and how to comply with it, but the client's agents simply chose not to follow the advice. Under the persuasive counselor model, however, lawyers go further than simply describing the law and suggesting ways to comply with it. Instead, they affirmatively, proactively, and courageously try to persuade their clients to follow the law, to go beyond mere compliance with the law, and even to "do the right thing" from a moral or ethical perspective.[101] In many senses, the general counsel is often the "conscience" of the corporation. The directors should understand that a principal role of corporate counsel is to serve the board in ensuring that the board's and management's best efforts are devoted to achieving the proper "tone at the top."

B. INTERNAL INVESTIGATIONS

In this section we intend simply to introduce the issue of the role of counsel on the threshold of a potential internal investigation. This introduction is more in the nature of a segue to another article in this issue of *The Business Lawyer.* That article is an outstanding piece by Bob Bennett and his colleagues, entitled *Internal Investigations and the Defense of Corporations in the Sarbanes-Oxley Era.*[102] It ex-

100. *See* Veasey, Wake Forest Ceremony, *supra* note 17 ("In my opinion, the best lawyers are the persuasive counselors: those who make the professional effort to see pitfalls that may lie ahead and persuade their clients to change course. . . . Judge Stanley Sporkin[] said famously from the bench many years ago during the Savings and Loan crisis: "Where were the lawyers?" It was clear to him then that good lawyers might have foreseen and prevented those scandals. In my opinion, the lawyer's responsibility is to be holistic and to eschew tunnel-vision in service to clients and justice."). Judge Sporkin's question is as applicable to the more recent corporate scandals as it was to the savings and loan crisis. *See, e.g.*, Regan, *supra* note 84, at 1227, 1238 (discussing the Enron board's waiver of its conflict of interest policy with respect to Enron's CFO's involvement in SPEs).

101. For one example, general counsel are in a position to evaluate the entire legal risk portfolio of a company, including its wider consequences, and "'encourage [management] to think of risk in terms other than money.'" Beardslee, *supra* note 7, at 32 (quoting interview with general counsel); *see also* DeMott, *supra* note 3, at 955–56 (arguing that a general counsel is in a strong position "to shape its activities and policies in highly desirable directions, exercising influence that may extend well beyond the bare bones of ensuring legal compliance," including potentially "champion[ing] a transformation of the organizational culture that shapes how the corporation addresses its relationships with law and regulation" (footnote omitted)).

102. Robert S. Bennett, Alan Kriegel, Carl S. Rauh & Charles F. Walker, *Internal Investigations and the Defense of Corporations in the Sarbanes-Oxley Era*, 62 BUS. LAW. 55 (2006).

amines "when and how internal investigations should be conducted" and "provides some basic guidelines for the manner in which an internal investigation should be conducted."[103] Those issues are beyond the scope of our article, and our limited purpose in the pages that follow is simply to set the stage for consideration of these issues in the context of the tensions faced by corporate counsel.

When, despite corporate counsel's best efforts, the specter of corporate misconduct arises, an internal investigation may be necessary in order to uncover and deal with wrongdoing within the corporation, ensure compliance with the law or the public interest, or minimize the long-term criminal and civil liability of the corporation.[104] The pursuit of these goals brings many conflicting forces to bear on counsel. A lawyer must deal with management, governmental agencies, employees, and other third parties while acting in the best interests of the corporation. Most significantly, in this context counsel may take on the role of corporate "cops," effectively acting as internal law enforcement agents.[105]

An internal investigation may advance the objective of minimizing corporate liability, but it also presents risks. It may lead to unintended adverse consequences, corral facts supporting corporate liability, or chill employees' willingness to disclose problems.[106] Furthermore, the results of an internal investigation are often disclosed to third parties,[107] which may affect the attorney-client privilege as well as airing the corporation's "dirty laundry" or enhancing liability risk. As a result, a general counsel considering an internal investigation faces a complex risk/benefit calculus.[108]

In certain cases, the decision to undertake an internal investigation is not difficult. An impending government investigation or private lawsuit often compels an internal investigation.[109] Closer questions place counsel in a more difficult position. Prosecutors increasingly expect counsel to be proactive in ferreting out "culture problems," even when no clear triggering event has occurred.[110] To accomplish this, in-house counsel must leverage their familiarity with corporate culture to make a legal judgment that may put them at odds with their close colleagues.

103. *Id.* at 57.

104. *See* Sarah H. Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 938.

105. *See* William R. McLucas et al., *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 J. CRIM. L. & CRIMINOLOGY 621, 639 (2006) ("[P]rivate lawyers are effectively 'deputized' in many internal investigations, and the government obtains the facts of their inquiry through waiver of attorney-client privilege.").

106. *See* Theodore R. Lotchin, Note, *No Good Deed Goes Unpunished? Establishing a Self-Evaluative Privilege for Corporate Internal Investigations*, 46 WM. & MARY L. REV. 1137, 1149 (2004).

107. *See* McLucas et al., *supra* note 105, at 630–32.

108. *See* Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1144 (2006).

109. *See* Brad D. Brian & Barry F. McNeil, *Overview: Initiating an Internal Investigation and Assembling the Investigative Team*, *in* INTERNAL CORPORATE INVESTIGATIONS 1, 6 (Brad D. Brian & Barry F. McNeil, eds., 2d ed. 2002).

110. *See* Christopher A. Wray, Remarks at the 22nd Annual Corporate Counsel Institute, Georgia State Bar, *available at* http://www.usdoj.gov/criminal/press_room/ speeches/2003_2986_rmrk121203 Corprtconslinst.pdf (Dec. 12, 2003).

Once the decision to undertake an investigation is made, corporate counsel must decide or recommend who should conduct the investigation. In-house counsel's superior familiarity with corporate operations and culture are an asset in the management of an internal investigation.[111] But reliance on insiders may undermine the real or perceived independence of the investigation.[112]

Nor does the use of outside counsel by itself guarantee that law enforcement will credit an internal investigation with independence. Prior relationships with outside counsel may limit the extent to which the investigation is perceived as independent.[113] Moreover, outside counsel's mandate must afford a sufficiently broad scope of review,[114] and management must not exert excessive control on the investigation while it is in progress.

Pressures to disclose wrongdoing to the government[115] have become particularly acute in light of a 2003 memorandum, by then-Deputy Attorney General Larry Thompson, setting forth guidelines for the prosecution of corporations (the "Thompson Memorandum").[116] The Thompson Memorandum specified that a corporation's "willingness to cooperate with the government's investigation" may be relevant in determining whether to prosecute the corporation.[117]

Many have argued that the Thompson Memorandum was coercive and misused, sometimes by forcing a waiver of the attorney-client or work product privileges or denying employees the right to counsel. Commentators and courts have observed that the emphasis on "cooperation" creates possibilities for overbroad and coercive government investigations.[118] Indeed, there is an important concern about how to counsel the company in paying legal fees of corporate employees who may be swept up in a government investigation. This issue was dealt with forcefully by Judge Lewis Kaplan in the *KPMG* case. In that case, Judge Kaplan

111. *See* H. Lowell Brown, *An Overview of Internal Investigations from the In-house Perspective, in* INTERNAL CORPORATE INVESTIGATIONS, *supra* note 109, at 449, 458.

112. *See* Securities and Exchange Commission, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Rel. No. 34-44969, at ¶ 10 (Oct. 23, 2001), *available at* http://www.sec.gov/litigation/investreport/34-44969.htm (last visited Aug. 2, 2006) [hereinafter "SEC Report"]; *see also* Gabriel L. Imperato, *Internal Investigations, Government Investigations, Whistleblower Concerns: Techniques to Protect Your Health Care Organization*, 51 ALA. L. REV. 205, 209–10 (1999).

113. *See* SEC Report, *supra* note 112, at ¶ 10. See *supra* note 17 and accompanying text for additional discussion of the importance of a close evaluation of counsel's independence before conducting an internal investigation.

114. *See* SEC Report, *supra* note 112, at ¶ 10; *cf. also* Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1000–01 (2005) (discussing the limitations imposed on the scope of Vinson and Elkins's investigation into Sherron Watkins's allegations at Enron).

115. *See* Lotchin, *supra* note 106, at 1140. Disclosure is sometimes required by law. *See* Thomas E. Holliday & Charles J. Stevens, *Disclosure of Results of Internal Investigations to the Government or Other Third Parties, in* INTERNAL CORPORATE INVESTIGATIONS, *supra* note 109, at 279, 281–85; Imperato, *supra* note 112, at 223–24.

116. Larry D. Thompson, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

117. *See id.* pt. VI(B).

118. *See* McLucas et al., *supra* note 105, at 639 (observing that use of private lawyers to perform investigations lessens the importance of governmental budget constraints, giving agencies "nearly unlimited opportunity . . . to find misconduct at a public corporation").

castigated the government for pressuring KPMG to cut off legal fees of employees, thereby violating their constitutional rights.[119]

In light of the criticism, the Department of Justice undertook review of the Thompson Memorandum, and on December 12, 2006, the department issued a memorandum authored by Deputy Attorney General Paul McNulty imposing certain restraints on the tactics followed by prosecutors under the Thompson Memorandum.[120] For example, the McNulty Memorandum states that prosecutors may seek waiver of the attorney-client privilege only where there is a "legitimate need" for the information, and that they should seek only the least intrusive waiver possible.[121] In addition, the memorandum discourages prosecutors from taking into consideration, when determining whether to indict the company, the company's advancement of employees' legal fees.[122] Of course, it remains to be seen how these changes will play out in practice, and in particular how they will impact companies' overall incentives to "cooperate" in federal investigations.

Managing the internal investigation process and the accompanying tensions has become a significant challenge for corporate counsel. As corporate counsel are more commonly used as arms of law enforcement, the natural tensions that attend an internal investigation are likely to become more disruptive.

V. Structuring the Legal Department: Compartmentalization and Decentralization

The general counsel should carefully consider the structure of the legal department and evaluate whether the department's organization is optimal for serving the client's legal needs. Over-compartmentalization of legal tasks and decentralization and dissipation of legal staff may have contributed to the problems at Enron and other companies.

The administrative decisions to spread legal work in discrete units over a large group of different lawyers and firms (compartmentalization) should focus on whether or not and to what extent this practice may inhibit the lawyers' ability to identify issues and solve them or bring them to the attention of the appropriate corporate agents. An individual lawyer or team of lawyers that is assigned a single piece of a complex deal may not know enough about the transaction's overall structure to recognize problems.[123] A variety of factors or motivations may lead corporate managers to compartmentalize legal work in this manner: inadvertence,

119. *See* United States v. Stein, 435 F. Supp. 2d 330, 336 (S.D.N.Y. 2006) (recognizing that the government's prosecution strategies under the Thompson Memorandum, whereby prosecutors "held the proverbial gun to [KPMG's] head," causing KPMG to "cut off all payments of legal fees and expenses" to indicted employees, violated the employees' constitutional rights).

120. Paul J. McNulty, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006), *available at* http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf.

121. *Id.* at 8–9. In addition, requests for waivers will now require the written approval of the Deputy Attorney General or the U.S. Attorney, depending on the type of information sought. *Id.* at 9.

122. *Id.* at 11 & n.3.

123. *Cf.* Regan, *supra* note 84 (discussing how such assignment of isolated legal tasks could have contributed to lawyers' failure to spot or address the issues at Enron).

a desire to reduce costs, a desire to seek particular legal expertise, social ties, or misfeasance (for example, to enable a deal by avoiding any lawyer's knowing "too much").[124] In this context, lawyers working on individual legal issues must carefully consider how much they should know about the matter as a whole in order to perform a legal task that the client limits in scope.[125] Likewise, ethics and policy issues must predominate, raising the practical question of how the lawyer must address these issues—in the field or at "headquarters."

General counsel should monitor the company's use of legal services for signs of compartmentalization and determine whether it raises any red or yellow flags indicating misfeasance or whether it could lead to problems in the future. Undertaking such monitoring may tend to strain the relationship with management and implicate the tension between counsel's role as advisor and advocate and counsel's role as gatekeeper or "watchdog."

By the same token, some in-house legal departments in major multinational corporations are organized in a partially centralized and partially decentralized structure. In such a model, far-flung business units will have their own "in-house" counsel who report to the business heads of those units on legal matters of the units and report administratively to the general counsel. It is the general counsel who manages the tenure, compensation, and assignment of subordinate lawyers, as well as having a responsibility to "back up" the independence of the lawyers in the field. In providing such support to the lawyers in the field, the general counsel must emphasize to the subordinate lawyers that they must approach the general counsel directly if they experience pressure from management to do something that seems ethically or legally inappropriate. The general counsel must then assess the situation and ensure that the lawyers are providing uncompromised advice.

Lawyers in the field are often able to develop specialized skills to serve the particular needs of the business units in which they work. But it has been suggested that excessive decentralization may have contributed to the situation at Enron,[126] raising the question of the need for the general counsel to maintain an active role in managing all of the company's legal affairs, including, in particular, its relationships with outside counsel as well as the selection and management of in-house counsel. One of the general counsel's most difficult administrative tasks may be determining when to leave the delegation structure as it is and when to step in and get involved. The problem is that the general counsel cannot be

124. *See, e.g.*, Nicholson, *supra* note 1, at 599–600 ("The practice of spreading fragments of the business around to different outside law firms and different lawyers internally makes it easier for corporate managers to shop around for compliant lawyers who will approve complex transactions with little more than verbal assurances from the managers. . . . Some have argued that this fragmentation also leads to a lack of accountability on the part of the lawyers since no one ever would be fully informed about how his or her legal advice fits into the company's overall plans.").

125. *Cf.* Regan, *supra* note 84, at 1199–1201, 1212 (querying how lawyers should determine how much they need to know about a transaction in order to perform a specific legal task).

126. DeMott, *supra* note 3, at 977–79 (discussing "decentralization, distance, and mismatched expertise" in the legal department as contributing to Enron's situation); Kelley, *supra* note 13, at 1197 ("[P]ressures . . . exist in decentralized legal departments, where lawyers in the field usually find their principal reporting responsibility, in fact if not in structure, to be to an operating officer rather than to the general counsel.").

integrally involved in everything, but there may be times when the fact that the general counsel is not aware of an issue can result in damage to the corporation. So the lawyers operating within the business units should report to the general counsel. In turn, the general counsel and his or her centralized staff must stand up for those lawyers and ensure that they maintain their professional independence while providing the specialized legal services that their client requires.

Striking the correct balance between centralization and decentralization, in-house and outside counsel, is not an easy task. Richard Gruner has highlighted the difficulties encountered in tackling this organizational function. In particular, he has emphasized the challenges inherent in achieving a desirable balance between the "concentrated expertise" of centralized attorneys and the "superior operating contacts" of field attorneys.[127] As Gruner observes, "In this and other legal department design choices, the best organizational solution will often be determined only after experimentation with several work allocation and attorney assignment strategies."[128]

General counsel often are faced with the challenge of budget constraints limiting their ability to staff the legal department or to retain outside counsel in a manner they believe to be optimal in the best interests of the corporation. Counsel must resist budget pressures that have the effect of denying needed legal advice to some operations. General counsel may have a duty in certain circumstances to assert persuasive "lobbying" with the CFO and the CEO and, if necessary, take the matter up with the board. It may also be important to inform the board of directors, if necessary, that some needed legal advice has not been provided because of budget constraints.

The organizational hurdles of administering an in-house legal department may be difficult ones to maneuver, but it seems clear that the general counsel is in the best position to find the balance that will best serve the corporation's interests. And most of the ones we know do just that.

Conclusion

Corporate counsel, especially general counsel, face substantial professional challenges in managing the tensions created by various aspects of their positions. But successful navigation of these obstacles offers substantial rewards to corporate counsel and benefits to the corporations they serve. That said, one cannot gainsay the degree of difficulty faced by general counsel in navigating these challenges, reporting both to the CEO and to the board.

Moreover, the corporation's outside counsel, whether it is the regular outside counsel or special counsel, have complex responsibilities. The directors, as well

127. Gruner, *supra* note 9, at 1148–49.
128. *Id.* at 1149.

as management, need to understand the responsibilities of in-house and outside counsel.

As we said at the outset of this article, we have only scratched the surface. Not only lawyers but also directors and officers need to understand and appreciate the complexities and the ever-changing nature of the challenges faced by counsel for the corporation.