



411 - General Counsel: Setting the Tone & the Message

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Faculty Biographies

Martin R. Castro

Martin R. Castro is the vice president of external affairs for Aetna in Chicago. Mr. Castro leads Aetna's diverse markets initiative and represents Aetna in all aspects of corporate and community. He is responsible for coordination of Aetna's regional philanthropic giving initiatives and the development of programs, products, and services to improve access to healthcare and reduce disparities for under-served communities.

Prior to joining Aetna, Mr. Castro was a partner with the law firms of Sonnenschein Nath & Rosenthal; Seyfarth Shaw; and Baker & McKenzie. He was also the vice president of Juritas, Inc., and thereafter, had his own firm, Castro Gomez Durbin & DeJesus, LLC. Mr. Castro has been an active civic leader. He is chair of the board of the National Museum of Mexican Art. He also serves on the boards of directors of DePaul University, the Adler Planetarium, and the Chicago Area Foundation for Legal Services. He is chair of the Juan Tienda scholarship fund of the University of Michigan Law School, chair of the Cook County State's Attorney's Hispanic advisory council and chair emeritus of the Hispanic lawyers scholarship fund of Illinois. He is one of the founders of Nuestro Futuro, a Latino philanthropy fund of the Chicago Community Trust. For his leadership, Mr. Castro has received numerous awards.

Mr. Castro received his J.D. from the University of Michigan Law School and a B.A. from DePaul University.

Michael A. Dillon

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Benjamin W. Heinman

Benjamin W. Heineman, Jr., is former chief legal officer and senior vice president for law and public affairs at General Electric (GE) in New Canaan, Connecticut. He will become the first distinguished senior fellow at Harvard Law School's program on the legal profession, beginning in the spring semester. At the same time, he will become a senior fellow at the Belfer Center for Science and International Affairs at Harvard's Kennedy School of Government. Mr. Heineman's primary activity at both schools will be to conduct research and write on a wide variety of public and private sector issues.

Mr. Heineman has worked as a partner in two law firms, both in Washington, DC. He began his legal career as a staff attorney for the Center for Law & Social Policy in Washington, DC, litigating to vindicate the rights of the mentally handicapped.

He is the author of books on British race relations and the American presidency as well as numerous articles. Mr. Heineman is on the boards of the Memorial Sloan-Kettering Cancer Center, the Center for Strategic and International Studies, Transparency International-USA, the Center for National Policy, and the National Constitution Center. He also serves as senior advisor to CSIS and senior counsel to the law firm of Wilmer Cutler Pickering Hale and Dorr LLP.

Mr. Heineman holds degrees from Harvard College, Oxford University, and Yale Law School. A former Rhodes Scholar, he served as editor in chief of the Yale Law Journal and law clerk to Supreme Court Justice Potter Stewart.

Clay Horner

Clay Horner is the Toronto based co-chair of Osler, Hoskin & Harcourt LLP. He served as lead counsel to the Wise Persons' Committee established by the Canadian Deputy Prime Minister to recommend the best securities regulatory structure for Canada. Its Report "Its Time" called for the establishment of a national securities regulator. He has acted as counsel in many of the most significant transactions involving Canadian companies, including recent engagements for Placer Dome Inc. in responding to the unsolicited offer by Barrick Gold; China National Petroleum Corp. International in its acquisition of Petrokazakhstan; Coors in its merger with Molson; and IPSCO, Inc. in connection with its acquisition by SSAB of Sweden. He is the immediate past President of the Alumni Association at the University of Toronto Law School; vice chairman of board of directors of Woodbine Entertainment Group and Deputy Chairman of the Board of Directors of Action Canada.

He holds degrees from Queen's University, The University of Toronto Law School and The Harvard Law School.

Samuel R. Reeves

Samuel M. Reeves is the vice president and division general counsel of corporate affairs and government relations Mr. Reeves joined Wal-mart as a senior division counsel in the tort section of the legal department's litigation division. Sam was promoted to senior assistant general counsel responsible for the management of outside counsel. His responsibilities were expanded to include oversight of attorney recruiting and the legal department's diversity initiatives. He was promoted to his current position of vice-president, division general counsel corporate affairs and government relations.

Prior to joining Wal-Mart, Mr. Reeves practiced law in Bentonville, Arkansas for eleven years.

Mr. Reeves is a member of the ACC, ABA, Arkansas Bar Association, Minority Corporate Counsel Association, and In Legal Color – Advisory Board.

Mr. Reeves is a graduate of University of Arkansas with a B.A. and the University of Arkansas at Little Rock – School of law with a J.D.



SESSION 411: General Counsel: Setting the Tone and the Message
October 30, 2007; 9:00-10:30 a.m.
Hyatt Regency Chicago

Program Description

CLOs are increasingly asked to carry a new portfolio of responsibilities for their companies, including shared or sole responsibility for government relations, acting as media spokesperson, serving as guardian of the corporate ethical culture, managing shareholder relations, and counseling board advisors. Lawyers who were trained in legal theory and to serve back office "no comment" positions are now "setting the tone and delivering the message," both externally and internally for their corporate client. If you are a CLO who is increasingly relied on to act as the public face of the company, what skills and strategies should you employ? How do you best assure the success of your efforts? Our panelists will help the audience think more carefully about the breadth of possible roles, and what kinds of opportunities that these roles offer CLOs and their companies; we will also discuss how to navigate the complexities and challenges that will arise, helping you to create a stronger personal tool kit and a better understanding of general counseling in the world of "high scrutiny" executive leadership.

Session Materials

Attached are select background resources relating to the session topic.

Resource Bibliography

SESSION 411: General Counsel: Setting the Tone and the Message
October 30, 2007; 9:00-10:30 a.m.

Below is a sampling of resource materials pertaining to the 2007 ACC Annual Meeting Session 411. Resources within ACC's Virtual Library are available for further reference at www.acc.com/vl. Other resources include links, where available.

CLO's Role in Corporate Governance

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>

Seeing the Big Picture, Ben W. Heineman, Jr. (Law.com, March 29, 2007)

<http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1175072635697>

ACC CLO ThinkTank Executive Report: CLO's Role in Government Relations & External Affairs (2007)

<http://www.acc.com/protected/article/clo/montreal06.pdf>

ACC CLO ThinkTank Executive Report: Navigating the Complexities of C-Suite Relationships (2007)

<http://www.acc.com/protected/article/clo/execreportsd06.pdf>

General Counsel as Lawyer-Statesman (ACC Docket 2004)

<http://www.acc.com/protected/pubs/docket/may04/ideal.pdf>

Report: New York City Bar Association Task Force on the Lawyer's Role in Corporate Governance

http://www.abcnyc.org/pdf/report/CORPORATE_GOVERNANCE-Executive_summary.pdf

Success as General Counsel Requires Proactive Engagement (Metropolitan Corporate Counsel, August 2007)

<http://www.metrocorp.counsel.com/current.php?artType=view&artMonth=August&artYear=2007&EntryNo=7012>

Avoiding Integrity Landmines, Ben W. Heineman, Jr. (Harvard Business Review, April 2007)

CLO 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>

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>

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>

Media & Reputational Issues

CLO as Spokesperson with the Media (ACC CLO Executive Bulletin 2007)
<http://www.acc.com/protected/clo/mccartyinsights.pdf>

CLO's Role in Helping to Protect and Ensure the Company's Reputation (ACC CLO Executive Bulletin 2007)
<http://www.acc.com/protected/clo/rosterinsights.pdf>

Responding to Media Inquiries: In-House Counsel as Spokesperson (ACC Docket 2003)
<http://www.acc.com/resource/v4697>

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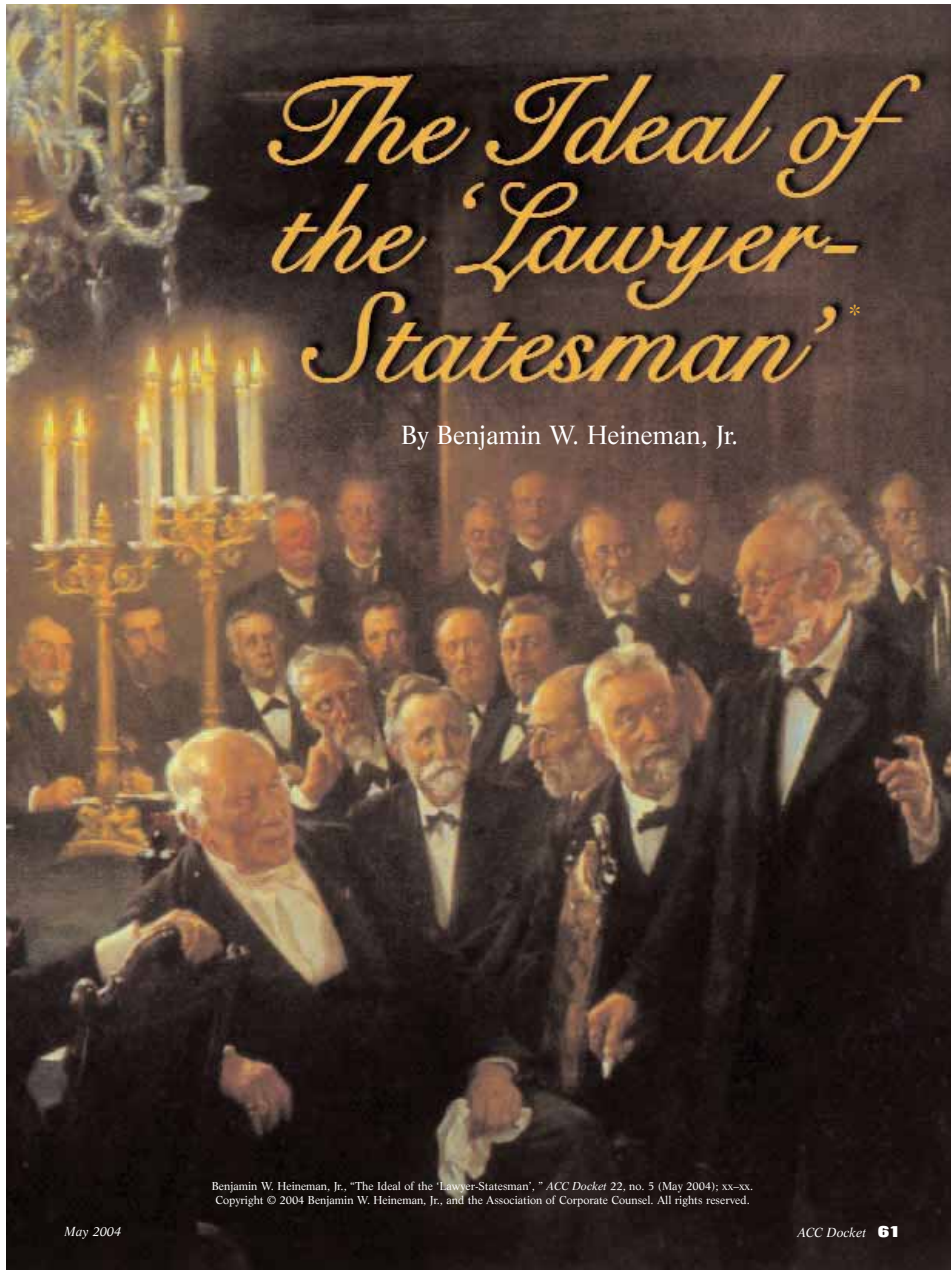
To paraphrase Charles Dickens' venerable opening sentence of *A Tale of Two Cities*, it is the best of times for general counsels, and it is the worst of times. It is obviously the worst of times due to the recent spate of corporate scandals:

- General counsels have been indicted.
- General counsels have headed departments charged by independent examiners with possible malpractice and breach of fiduciary duties—and these head lawyers may be sued personally for such alleged transgressions by their staffs.
- Still other general counsels are haunted by the question “Where were they?” as their companies collapsed under the weight of massive internal fraud and corruption, injuring shareholders, creditors, employees, retirees, communities, and other stakeholders.

I will return to these matters below.



* This article is adapted from remarks made at a roundtable of general counsel sponsored by *The Economist* and *Corporate Board Member* magazine, March 9, 2004.



The Ideal of the 'Lawyer-Statesman'

By Benjamin W. Heineman, Jr.

Benjamin W. Heineman, Jr., "The Ideal of the 'Lawyer-Statesman'," *ACC Docket* 22, no. 5 (May 2004): xx-xx. Copyright © 2004 Benjamin W. Heineman, Jr., and the Association of Corporate Counsel. All rights reserved.



Benjamin W. Heineman, Jr. is General Electric's Senior Vice President for Law and Public Affairs. In this position, he focuses on major public issues facing the Company. From 1987-2003, he was GE's Senior Vice President and General Counsel. He can be reached at ben.heineman@corporate.ge.com.

THE GENERAL COUNSEL AND IDEAL OF THE LAWYER-STATESMAN

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

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

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

Similarly, in his book *The Lost Lawyer*,² Yale Law Dean Tony Kronman tried to rehabilitate the concept of the lawyer-statesman and noted that the leaders of in-house legal departments might play such a role.

Both Gordon and Kronman are, however, describing a role model they view as in decline. Dean Kronman says, "the ideal is now dying in the American legal profession." Such pessimism about the lack of leadership on the private side of the legal profession has been voiced consistently during the past decade—in such books as *The Betrayed Profession*³ by former Xerox General Counsel and CEO Sol Linowitz and *A Nation Under Lawyers*⁴ by Harvard Law Professor Mary Ann Glendon.

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

vate lawyers to engage in public service.)

For Gordon, the statesman-advisor is one who represents his client's interest "with an eye to securing not only the client's immediate benefit, but his long range social benefit."⁵ For Kronman, it is:

- practical wisdom, not just technical mastery;
- broad judgment based on a knowledge of history, culture, human nature and institutions, not just a sharp tactical sense;
- the ability to understand long term implications, not just achieve short-term advantage;
- a deep concern about both the private good and the public interest—and a deep concern about building durable institutions which achieve their aims in a fair and honest way even under stress.⁶

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

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

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

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

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

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

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

Responsibility Accompanies Potential

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

This is so for at least two reasons.

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

The simplistic public view of a company is symbolized by overpaid executives grubbing for that most suspect of all goals, corporate profits. But the reality is far different. For example, GE's \$15 billion in 2003 profits, when converted into cash, are used almost exclusively for three purposes: distributions to an extraordinarily broad base of shareholders; investment in organic growth; and acquisitions

to strengthen existing business and geographies or move into new ones. Cash compensation for the top 35 executives is a fraction of one percent.

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

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

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

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

Challenges

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Worst of Times

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

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

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

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

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

PROVING KRONMAN WRONG

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

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

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

Second, Kronman says, "The lawyers on a company's in-house staff, though familiar with its day-to-day activities, are unlikely to be involved in the handling of their employer's most extraordinary problems, which today, as in the past, are assigned to outside specialists."⁸ He does acknowledge that this may not be true of the general counsel and his or her top assistants. But since Kronman wrote, corporate practice has shifted toward in-house specialization and toward bringing more and more of the difficult problems in-house or, at a minimum, having inside-outside partnerships of equals to address the company's most challenging issues. This is the real answer to Kronman's concern.

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



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

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

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

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

NOTES

1. Robert Gordon, "?????????" 35 CONN.L.REV. 85 (?????).
2. Tony Kronman, *The Lost Lawyer* (Harvard University Press 1995).
5. Sol Linowitz, *The Betrayed Profession* (Charles Scribner's Sons 1994).
4. Mary Ann Glendon, *A Nation Under Lawyers* (Farrar, Straus and Giroux 1994).
5. Gordon, *supra*, at __ [please fill in]
6. Kronman, *supra*, at 11-53.
7. Art Okun, *Equality and Efficiency: The Big Tradeoff* (Brookings Institution).
8. Kronman, *supra*, at 308.

CLO AS SPOKESPERSON WITH THE MEDIA: BE RESPONSIVE, PREPARED AND PROACTIVE

Insights from Don McCarty, Vice President, Law- General Counsel and Secretary, Imperial Tobacco Canada

"In-house lawyers tend to have a natural tendency to shy away from the media during trial or on legal issues generally—to say 'no comment' or to comment minimally. While this adheres to the historical conservative paradigm, not being proactive can give rise to 'urban myths,' which then take more time and energy to debunk than addressing the issues in the first place," explains Don McCarty, Vice President, Law- General Counsel and Secretary for Imperial Tobacco Canada. As a better and preferred practice, McCarty advocates taking a more proactive approach: putting out the first story and getting the company's message out early and accurately. Following are tips shared by McCarty for CLOs as spokespersons and for effectively implementing practices to be proactive with the media and get the company's message out.

PREVENTING URBAN MYTHS- BEING PROACTIVE IS BETTER THAN DIGGING OUT

McCarty describes 'urban myths' as messages put out by detractors or opponents and repeated often enough in the media so that they acquire perceptions of truth in the public opinion even when the messages are not true. These 'urban myths,' if they get out in front of the public first and are allowed to fester, require more time and energy to address and correct in reactive mode than handling the issues head-on and up front would. Past experience with de-bunking 'urban myths' has led McCarty to believe that being proactive is the preferred path.

"We've worked hard to try to distinguish the Canadian Tobacco Industry because we have our own story. We're telling our story more and fighting these urban myths, and in-house lawyers have a real and valued role to play," says McCarty.

CLO AS SPOKESPERSON

While most companies have a public affairs team on point for media relations, McCarty shares that sometimes-- particularly when reporting on a litigious issue or matter that's in trial-- the media resists being given a spokesperson from public affairs and instead wants to speak directly with the CLO as the 'person in charge of the litigation.' Asked whether outside counsel might be a good choice as spokesperson on trial issues, McCarty expresses his view that he prefers for his lawyers in court "to concentrate on what is happening in court" and to take on the proactive role of working with the media as the company's CLO. There can of course be exceptions to this

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rule, particularly when an external counsel has for historical reasons been dealing with a case for longer than anybody and has a deep knowledge of the issues. In this case, the external counsel should be briefed on what the company's messages are.

McCarty shares that CLOs can enhance their effectiveness in their role as company spokesperson by implementing the following practices:

- *Media Training is a Must:* Training may be through an outside company, in-house from public affairs or a combination of both. McCarty shares that the training is difficult, and can be customized and tailored to the types of issues a company may face and might entail several half-day sessions. Training often involves filming and feedback.
- *Be Accessible & Responsive:* "When the media calls, you have to call back by their publishing deadline or you won't get your messages in and they'll go to print without you," says McCarty. Remember however that the media, particularly television media, needs material for its programming, whether video footage, quotes or the like and this can be used to your advantage.
- *Be Proactive:* As important as being accessible and responsive when the media calls first, is being proactive when a story is about to break or a large matter is going to trial. McCarty explains, "the 'day of' a case going to trial is not always the best time to speak with the media. In important cases, it's often best to send briefing materials and speak with the media beforehand so that you can provide information in a relaxed and unhurried fashion."
- *Spend Time with the Media & Explain Issues:* "Be in a position, from time-to-time, to spend time with the media and explain your company's issues. This can be helpful on both non-litigated issues and on issues that are in litigation," says McCarty. For litigated matters, McCarty will often meet with the media to present the company's point of view. On other matters, it is not uncommon for people from different sectors of the company, particularly public affairs and the CEO, to meet with an editorial panel, for example. Getting the message out can include written materials, holding a press conference, or holding a media 'scrum' where several media outlets are present and are asking questions. The 'scrum' has pros and cons: while it can be unnerving to have a large room of reporters present and all asking questions, it can save time in getting the message out and allow the CLO to communicate with the press in a single meeting rather than via separate phone interviews.
- *Develop Professional Relationships:* McCarty shares that it is important to be professional and to cultivate rapport with the media. "I want to have a sense of comfort knowing that when I speak with the media, they will report it accurately. This is the exception rather than the rule. They want to know that if they call, I will get back to them in a timely manner," says McCarty.
- *Reach out to Several Media Outlets:* While getting the message out can be time consuming and CLOs are often crunched for time with their regular press of work and responsibilities, McCarty shares that getting the company's message out effectively often entails working with the company's public relations team to reach out to a range of media outlets and then taking the time to speak with those solicited who will provide coverage.

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- *Use Retired Judges to Help Develop Messages and Inform Strategy:* Judges who are retired from the bench can provide useful expertise in trying to develop case strategies for the underlying litigation and in identifying key messages to communicate to the media. While sitting judges are uninfluenced by what happens in the media, using retired judges to provide consultation on media relations planning can help with getting solid messages out and staving off urban myths before they get started.

PRESS KITS; MESSAGES; WORKING WITH PUBLIC RELATIONS

In addition to sometimes being the company spokesperson on litigious or legal issues, the CLO and in-house lawyers within the law department can add value by working with the company's public relations group to educate them on the legal issues, develop 'press kits' and key messages, and to review public statements and press releases before they're issued.

- *Press Kits:* may include a statement of the issues for a matter, a Q & A document tailored to the most anticipated questions relating to the matter, and a statement of basic facts on the company. Providing information on the company and the matter to the media in advance helps to educate them and provide context in advance of providing personal interviews or quotes.
- *Key Messages:* often, companies develop certain key messages relating to public initiatives and high profile matters. These messages are then picked up by the media and communicated to the public. Preparing and delivering these key messages effectively is the best way of ensuring that the proper message gets out, and then has the best chance of influencing the reader.
- *Public Statements:* while specific communications and public relations policies may vary from company to company, in-house lawyers can play a key role in reviewing and drafting public statements to help ensure accuracy on legal issues, evaluate for potential risks or inconsistencies with legal strategies, and provide input on reporting requirements.

MOVE TOWARDS THE MEDIA FOR BEST RESULTS

Taking a proactive approach with the media involves moving towards the media to get the company's messages out. While CLOs are busy and have not historically been viewed as public spokespersons, they can play a very valuable leadership role in speaking directly with the media - particularly when they have the best knowledge on the topic and when the media wants a direct line to the company's top lawyer. Effective media relations require training, preparation, skills, accessibility and expertise. "I've seen a media training film of a guy running from the camera with the camera focused on his back watching him run away. That sends a real and very unfortunate message of fear and weakness. It's not the type of message and impression I'd ever want to send," says McCarty.

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CLO's Role in Helping to Ensure & Protect the Company's Reputation: Assessing Risks, Managing Client Confidences, and Being a Front-line Practitioner

Insights from Michael Roster, Executive Vice President, Golden West Financial

"The time when CLOs really earn their stripes is when they advise clients in situations when there isn't a clear answer. This requires a very good understanding of the company and very close rapport with the others in senior management. It also means putting in place processes to monitor legal developments that might clarify the situation going forward, and to continually monitor the risks that are created until there is clarity. Lawyers who take the view that there can be no risk and require absolutes are doing their clients a disservice," explains Mike Roster, who since 2000 has been the Executive Vice President and General Counsel of Golden West Financial Corporation/World Savings. "But this also means, don't get too cute and don't push the envelope. At the end of the day, it all turns on professionalism and good judgment."

Roster's experience as an in-house legal leader and leading private practitioner also includes his roles as general counsel for Stanford University (including the Stanford Medical Center) and, prior to that, managing partner of Morrison & Foerster's Los Angeles office and co-chair of the firm's banking group world-wide. Roster is set to retire from Golden West in mid-February and has graciously shared below his key insights on assessing and advising on risks, managing client confidences, and being a front-line practitioner.

ASSESSING AND ADVISING ON RISKS: A MUST FOR CLOS AND IN-HOUSE LAWYERS

"When faced with a tough set of circumstances, too many lawyers tell their clients 'it's a business decision for them to make.' This is a cop-out," says Roster, who relays his view that in today's business environment, there is too much concern about personal risk. "Lawyers need to know the law and to explain the law to their clients, but they should also know the business well enough to be able to share their views on what they would do if they were in the client's shoes," explains Roster.

Steps that CLOs can take to help promote this important advisory role include:

- *Set the right 'tone at the top':* Communicate to your legal staff the importance of understanding the business and the company's internal clients, and bringing professional judgment to the table in addressing difficult issues.
- *Implement Processes to Monitor Legal Developments & Identify Risk:* Track legal developments, and marry substantive expertise with knowledge of the company's business, in order to help identify what risks there may be. And then, be ready to advise on implementing further changes where necessary.
- *Create a culture that encourages in-house lawyers to be trusted advisors:* During law department staff meetings, talk about client needs for guidance and input on risk, and encourage idea exchanges during meetings with senior business leaders. CLOs can

- convey to their lawyers that the company culture supports engagement with business clients and offering real counsel without imposing burdensome bureaucratic processes.
- *Watch out for the lone ranger:* Having this kind of interaction with clients means no lawyer should go it alone. As part of the process, lawyers need to talk with the CLO and other in-house attorneys about the tougher issues and ways to handle them.

MANAGING CLIENT SECRETS

"To be an effective lawyer—whether in-house or outside counsel—and definitely to be an effective CLO, you need to have sufficient standing with your clients so that the clients feel they may come to you and share information early on," explains Roster. The 'upside' of this kind of open exchange is that lawyers receive important information on difficult and challenging issues at very early stages. The 'downside' is that lawyers receive highly sensitive confidential information—information that clients believe is too preliminary to share further up the chain but which they are seeking advice on.

Overlaying all of this is the ethical responsibility that the CLO has to the company: the client is the company, not the individual executive. However, the realities are that lawyers work with people, and so experience, judgment and people skills are critical to successfully navigate these situations. The end goal is to encourage internal clients to come to the CLO and other in-house lawyers with their concerns; to help the executives see possible solutions early on; and obviously to encourage the executives to communicate these sensitive company problems to their bosses, including the CEO, sooner rather than later.

Roster suggests that CLOs create in advance a methodology for handling these sticky situations. More specifically, one of the first things that CLOs should consider when they join a new company or take on the role of CLO is to work with their CEOs to determine in advance how they can best work together to approach certain types of situations. Following are Roster's thoughts on how to successfully manage interactions in a few real life situations.

- *Scenario 1: Sexual Harassment Matters:* Roster describes these situations as among the hardest to navigate, since they almost always involve a 'he said-she said' syndrome. The company needs the alleged offender to cooperate, but at the same time everyone is trying to figure out what really happened and bring the complaint to solution. Roster adds that most CLOs are fortunate to have CEOs who understand the importance of protecting the company in these situations, and that the company needs to admit any wrongdoing, if appropriate, but also to defend against unreasonable complaints. Here, relationships between CLOs and their clients are of fundamental importance, and talking through these issues in advance can go a long way towards successfully handling these difficult situations. And once the matter is resolved, it often is helpful for a senior officer personally to call the alleged offender into her/his office without lawyers present and have a stern and serious conversation about the situation and the ramifications if ever there were to be a repeat incident, assuming the alleged offender is still with the company at the end of it all.
- *Scenario 2: Environmental Incident or Financial Mismanagement Allegation:* Of fundamental importance to successfully resolving these types of matters is the need for business clients to feel comfortable coming to the CLO to talk about something major that has gone wrong. Roster says that sometimes it's possible to resolve the situation during these initial discussions, and then go together to the CEO to discuss the problem and the proposed resolution.

"A good CLO can and should put the business client at ease, and should communicate the propriety of going together to the CEO immediately to provide a heads up," says Roster. In addition, if the CLO has the right relationship with the CEO, an approach for handling these situations has been worked out in advance so that the CEO knows

to be welcoming and not lose her/his temper during that preliminary meeting, but instead to acknowledge the seriousness of the matter and to thank the individual for coming forward. In this way, the CLO maintains the relationship with the client as a trusted legal advisor while preserving his/her responsibilities to the company.

CLO AS PRACTITIONER VERSUS MANAGER: ROSTER'S 80/20 RULE

Roster wants lawyers within his law department to practice law instead of being bureaucrats, and he believes this imperative helps assure an effective in-house law department. He notes that at many companies, in-house lawyers, including the CLO, spend 80% of their time managing others and only 20% actually practicing law. Roster insists on reversing that percentage, for himself and the rest of his department. That is, he believes CLOs and their lawyers should spend at least 80% of their time practicing law, and no more than 20% of their time on administrative matters, including managing others.

"If people's administrative time is limited to 20% or less, they can't invent unnecessary processes that create bureaucracies. When lawyers practice less and manage more, they also get cut off from the realities of the business and the needs of the clients," says Roster. "When companies impose so many processes and bog down their lawyers in administrative functions, they also lose out on the experience and expertise that their lawyers have to offer. I've held firm on the 80/20 rule, and think it has been effective in preserving the role of in-house lawyers as true legal counselors," explains Roster.

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