211 – Top of Mind: What General Counsel Are Thinking/Worried About

Susan Hacket
Senior Vice President & General Counsel
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Faculty Biographies

Susan Hackett

Susan Hackett joined Association of Corporate Counsel (ACC), as senior vice president and general counsel. She is currently focused on ACC's advocacy efforts including ACC's amicus program, the development of in-house legal ethics and professionalism resources, testimony and representation before decision-making authorities, in-house corporate responsibility initiatives and, multijurisdictional practice (MJP) reform. She also focuses on attorney-client privilege protection, revision of the Federal Sentencing Guidelines, e-discovery evidentiary reform, and civil justice reform initiatives. Corporate pro bono and diversity initiatives, including diversity pipeline projects, and liaisons with the bars of color.

Before joining ACC, she was a transactional attorney at Patton Boggs, a large DC law firm, and clerked for several DC employers while in law school and sitting for the bar.

Ms. Hackett is a former member of the boards of directors of Equal Justice Works, Street Law, Inc., and the Minority Corporate Counsel Association (MCCA). She has been an appointed liaison to several ABA Presidential Commissions and task forces, including: the commission on the multijurisdictional practice of law, the commission on alternatives to the billable hour, the joint committee on lawyer regulation, the ABA task force on Sarbanes-Oxley Section 307, and the attorney-client privilege task force.

She is a graduate of a dual B.A. from James Madison College at Michigan State University, and a graduate of the University of Michigan Law School, where she served as President of Phi Delta Phi, the international honorary legal fraternity.

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SESSION 211
Chief Legal Officers- Top of Mind: What General Counsel are Thinking/Worried About
October 29, 2007; 2:30-4:00 p.m.
Hyatt Regency Chicago

Program Description
ACC compiled the concerns and unresolved challenges identified scores of CLOs of the largest public and private companies in the US and Canada, culminating in a report to the in-house profession of the concerns that keep CLOs awake at night, as well as their vision for the solutions that should be pursued to address them. Look into our unique crystal ball to view the emerging challenges that will occupy your law department's time and attention in the coming years. This session will provide insights on what top in-house thought leaders believe is around the corner, and how to best prepare to meet those challenges.

Session Materials
Session participants will receive ACC's Report on What General Counsel are Thinking/Worried About on site, and the Report will also be made available electronically. Attached is a Resource Bibliography highlighting select resources of interest. In addition, attached are a few select articles on topics relating to top of mind issues for today's General Counsel.

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Resource Bibliography

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Below is a sampling of resource materials pertaining to the 2007 ACC Annual Meeting Session 211. Resources within ACC's Virtual Library are available for further reference at www.acc.com/vl. Other resources include links, where available.

ACC's CLO ThinkTank Executive Reports

ACC's CLO ThinkTanks bring together a select group of top CLOs in an intimate "deep dive" into the controversial topics facing today's law department leaders. We've captured their fresh thinking in a series of executive summaries of these ThinkTank meetings, allowing you to share their ideas on best practices, challenges and opportunities for response. Following are Executive Reports from previous sessions, summarizing key takeaways and discussion highlights.

Corporate Business Information Management: E-Discovery & Beyond (2007)
http://www.acc.com/resource/getfile.php?id=8517

CLO's Role in Governance & Compliance (2005)
http://www.acc.com/protected/clo/governance.pdf

CLO's Role in Governance & Compliance- Canada (2006)
http://www.acc.com/protected/article/clo/montreal06.pdf

CLO's Role in Government Relations & External Affairs (20007)
http://www.acc.com/protected/article/clo/montreal06.pdf

Compensation & Career Advancement for Lawyers (2006)
http://www.acc.com/protected/clo/compensation.pdf

Corporate Liability- Prosecutorial Trends & Tactics (2005)
http://www.acc.com/protected/clo/liability.pdf

Hot Topics for Private Companies (2006)
http://www.acc.com/protected/clo/corpliability.pdf

Law Department's Role in Financial Compliance & Relationships with Auditors (2006)
http://www.acc.com/protected/clo/financialcompliance.pdf

Managing the Global Law Department (2006)
http://www.acc.com/protected/article/clo/atlanta06.pdf

Navigating the Complexities of C-Suite Relationships (2007)
http://www.acc.com/protected/article/clo/execreportsd06.pdf

Stemming the Tide of Privilege Erosion (2005)
http://www.acc.com/protected/clo/thinktank05.pdf

ACC CLO Executive Bulletins

In each issue of the CLO Executive Bulletin, ACC features the perspectives of a leading CLO on a hot topic of interest. The following are links to select feature articles on top-of-mind issues. To view ACC's web page for links to the current and past CLO Executive Bulletins, go to: http://www.acc.com/php/cms/index.php?id=266.

"CLO as Spokesperson with the Media: Be Responsive, Prepared and Proactive" (March 2007)
Don McCarty, CLO Imperial Tobacco Canada
http://www.acc.com/protected/clo/mccartyinsights.pdf

"Protecting Your Company's Reputation" (January 2007)
Mike Roster, Executive Vice President Golden West Financial
http://www.acc.com/protected/clo/rosterinsights.pdf

"Corporate Subsidiary Governance" (November 2006)
David Allgood, CLO Royal Bank of Canada
http://www.acc.com/feature/allgoodarticlelh.pdf

"CLO's Role in Financial Compliance" (August 2006)
Michael Fricklas, CLO Viacom Inc.
http://www.acc.com/protected/article/attyclient/cloperspectivemfricklas.pdf

ACC Leading Practice Profiles

ACC's Leading Practice Profiles are the resource to examine, through the eyes of in-house counsel, "best practices" at work in a variety of industries, situations, and legal departments of all sizes and structures. With Leading Practices Profiles, we intend to create an ACC network that facilitates sharing the knowledge and experiences of your peers. These profiles provide benchmarks and insights into how other companies and legal departments have invented a wheel that you may use to address problems that your company now faces or may face in the future.

Following is the web page listing ACC's Leading Practice Profiles:
http://acc.com/php/cms/index.php?id=231

ACC Surveys

ACC's Survey Home Page
http://acc.com/php/cms/index.php?id=222

2006 ACC CLO Survey
http://www.acc.com/resource/v7882

ACC/NACD Survey on General Counsel as Risk Manager
http://www.acc.com/resource/v4961

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

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

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

SEC and Criminal Proceedings Against Inside Corporate Counsel (ACC by John Villa, 2005)
http://www.acc.com/resource/v6063

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Following are selections from a Screen Shot of ACC's Law CLO ThinkTank Web Page

ACC CLO ThinkTanks

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Corporate Business Information Management: E-Discovery & Beyond

CLO Host Session Leader: J-P. Bisnaire (Manulife Financial Corporation)

Participants' Briefing Book
http://www.acc.com/resource/v8512

Executive Report
http://www.acc.com/resource/getfile.php?id=8517

CLO's Role in Governance & Compliance

CLO Host Session Leader: Laura Stein (The Clorox Company)

Participants' Briefing Book
http://www.acc.com/protected/program/clo/closroleinorporategovernanceparticipantsbriefing.pdf

Executive Report
http://www.acc.com/protected/clo/governance.pdf

CLO's Role in Governance & Compliance—Canada

CLO Host Session Leader: David Allgood (Royal Bank of Canada)

Participants' Briefing Book
http://www.acc.com/protected/clo/briefingtor06finalweb.pdf

Executive Report
http://www.acc.com/protected/article/clo/montreal06.pdf

CLO's Role in Government Relations and External Affairs

CLO Host Session Leader: Martine Turcotte (BCE Inc.)

Participants' Briefing Book
http://www.acc.com/protected/clo/briefingmontr06finalweb.pdf

Executive Report
http://www.acc.com/protected/article/clo/montreal06.pdf

Compensation & Career Advancement for In-House Lawyers

CLO Host Session Leader: Rick Palmore (Sara Lee Corporation)

Participants' Briefing Book
http://www.acc.com/protected/program/compliance/outlinecompensation.pdf

Executive Report
http://www.acc.com/protected/clo/compensation.pdf

Corporate Liability—Prosecutorial Trends & Tactics

CLO Host Session Leader: Bill Lytton (Tyco)

Participants' Briefing Book
http://www.acc.com/protected/program/compliance/outlineprosecutorialtrends.pdf

Executive Report
http://www.acc.com/protected/clo/liability.pdf

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Hot Topics for Private Companies—Liability & Beyond

CLO Host Session Leader: Steve Euller (Cargill)

Participants' Briefing Book
http://www.acc.com/protected/program/compliance/outlineprivate.pdf
Executive Report
http://www.acc.com/protected/clo/corpliability.pdf

Law Department's Role in Financial Compliance & The Relationships with Auditors

CLO Host Session Leader: Don Liu (Toll Brothers Inc)

Participants' Briefing Book
http://www.acc.com/protected/program/compliance/financialcomplianceoutline.pdf

Executive Report
http://www.acc.com/protected/clo/financialcompliance.pdf

Managing the Global Law Department

CLO Host Session Leader: Al Gonzalez (Tyson Foods)

Participants' Briefing Book
http://www.acc.com/protected/program/clo/managingglobalparticipantsbriefingbook.pdf

Executive Report
http://www.acc.com/protected/article/clo/atlanta06.pdf

Navigating the Complexities of C-Suite Relationships

CLO Host Session Leader: Gloria Santona (McDonald's Corporation)

Participants' Briefing Book
http://www.acc.com/protected/program/clo/outlinesdcsuitefrontcover.pdf

Executive Report
http://www.acc.com/protected/article/clo/execreportsd06.pdf

Stemming the Tide of Privilege Erosion

CLO Host Session Leader: Anastasia Kelly (MCI)

Participants' Briefing Book

http://www.acc.com/protected/clo/briefingdc05finalweb.pdf
Executive Report
http://www.acc.com/protected/clo/thinktank05.pdf

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2006 Association of Corporate Counsel Chief Legal Officer Survey

Following are the results from **ACC's Seventh Annual Chief Legal Officer Survey**. ACC received responses from 848 in-house counsel, who are the chief legal officer or general counsel for their client companies. The survey was conducted with the assistance of Huron Consulting.

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

Response	Response %	Response Total
Yes	33.7%	284
No	**52.9%**	**446**
Not Sure	13.4%	113
Total Respondents		**843**
(skipped this question)		**5**

2. Within the next 12 months, do you plan to increase or decrease your use of outside counsel?

Response	Response %	Response Total
Increase	25.5%	215
Decrease	15.4%	130
No Change	**54.3%**	**458**
Not Sure	4.9%	41
Total Respondents		**844**
(skipped this question)		**4**

3. How many law firms do you currently work with on a regular basis?

Response	Response %	Response Total
Less than 5	**43.1%**	**363**
6-15	41.8%	352
15-30	9.6%	81
31-100	4.5%	38
101-250	0.6%	5
More than 250	0.4%	3
Total Respondents		**842**
(skipped this question)		**6**

4. Have you fired any of your law firms this year?

Response	Response %	Response Total
Yes	32%	268
No	**68%**	**569**
Total Respondents		**837**
(skipped this question)		**11**

4a. If yes, did any of the firms you fired qualify as a significant relationship?

Response	Response %	Response Total
Not applicable	**62.3%**	**467**
Yes	19.7%	148
No	18%	135
Total Respondents		**750**
(skipped this question)		**98**

4b. Please indicate the primary reason for firing this (or these) firm(s):

Response	Response %	Response Total
Not applicable	62.6%	451
Cost management (fees/expenses)	8%	58
Mishandling one or more critical matters	7.8%	56
Lack of responsiveness	7.2%	52
Poor quality of work	6.5%	47
Other (please specify)	4.4%	32
Preferred counsel at the firm no longer available	1.7%	12
Firm could not provide needed expertise	1.2%	9
Firm could not provide service in necessary jurisdictions	0.3%	2
Lack of diversity within firm	0.3%	2
Total Respondents		**721**
(skipped this question)		**127**

"Other" Answers:
Disagreement on strategy or lack of strategic input – 8
Consolidation of firms – 5
Personality conflicts – 4
Improper billing – 3

5. Please describe any new or noteworthy initiatives implemented by your outside firms to improve the relationship with your law department:

Initiative	Response %	Response Total
Seminars / Training / CLE Sessions	20.8%	21
Improved Reporting / Status Updates / Communication	12.9%	13
Alternative / Fixed Fees	11.9%	12
Client Relationship Manager/Team	7.9%	8
Invitations to Firm Events / Networking Opportunities / Contact Referrals	7.9%	8
Desire to Understand Business	5.0%	5
Discounted Rates	5.0%	5
Updates on Developments in Applicable Areas of Law	5.0%	5
Flexible Billing Structure	4.0%	4
Joint Initiatives	4.0%	4
On-site Visits	4.0%	4
Detailed Budgeting and Planning	3.0%	3
Online Database/Intranet/Extranet	3.0%	3
eBilling	2.0%	2
Non-billable Advice	2.0%	2
Post-Performance Reviews	2.0%	2
Total Respondents		**101**
(skipped this question)		**747**

6. Please identify any technology that you have implemented, which has created significant cost/time efficiencies for your department (select all that apply):

Initiative	Response %	Response Total
Matter management	25.3%	100
eBilling	12.7%	50
Document management	**44.6%**	**176**
Contract management systems	37.7%	149
Extranets with law firms	9.9%	39
Client-facing intranets	14.7%	58
Other (please specify)	14.2%	56
Total Respondents		**395**
(skipped this question)		**453**

"Other" Answers:
Document scanning tool – 5
Content/Knowledge management system – 4
IP management – 3
Blackberry – 1
Departmental e-tracker and e-rooms – 1
Document assembly tool – 1
EFT payments – 1
Electronic law encyclopedias – 1
Electronic signatures (EchoSign) – 1
Ethics programs – 1
Instant messaging – 1
Online mock juries – 1
Web forms for internal client requests – 1

7. What is the single most positive outcome of Sarbanes-Oxley and/or other governance reforms of the past several years?

Initiative	Response %	Response Total
Board members are more engaged	**36.3%**	**289**
Shareholder confidence is improved	2.9%	23
Decision-makers are more informed	14.3%	114
Markets are more transparent	3.8%	30
Shareholders are better served	1.9%	15
Boards are more effective	3%	24
Don't know/nothing	28.9%	230
Other (please specify)	8.9%	71
Total Respondents		**395**
(skipped this question)		**453**

"Other" Answers:
Company increased focus on improving processes, controls, compliance, and risk – 11
Legal department has more prominent role – 4

Organizational culture has more focus on more transparency and accountability – 4
Processes documented – 2
Whistleblowers have more support – 2
Employees are better trained on processes and more aware of ethics – 1
Information is more complete and reliable – 1
Lawyers and accountants salaries have increased – 1

8. In which areas do you expect to spend the greatest amount of your time in the next 12 to 18 months (list top three)?

Response	Most Time	2nd Most	3rd Most	Response Average
Transactional work	**66% (353)**	23% (121)	12% (62)	**1.46**
Compliance	34% (142)	**37% (157)**	29% (123)	**1.95**
Board relations	22% (53)	**39% (95)**	39% (93)	**2.17**
Outside counsel management	17% (36)	39% (82)	**44% (93)**	**2.27**
Litigation	31% (69)	**35% (80)**	34% (77)	**2.04**
Government affairs/External relations	25% (24)	31% (29)	**44% (42)**	**2.19**
C-suite relations	**36% (35)**	**36% (35)**	29% (28)	**1.93**
Mergers & Acquisitions	31% (57)	**36% (65)**	33% (59)	**2.01**
Cost control	10% (6)	41% (24)	**49% (29)**	**2.39**
Staff retention and development	12% (12)	39% (38)	**49% (48)**	**2.37**
Information technology and management	5% (3)	35% (19)	**60% (33)**	**2.55**
Document/Records management	8% (13)	32% (54)	**60% (100)**	**2.52**
Other	33% (27)	32% (26)	**35% (28)**	**2.01**
Total Respondents				**831**
(skipped this question)				**17**

9. We know you are currently dealing with issues like compliance, governance, and eDiscovery. What is the next big issue you will face?

Issues	Response %	Response Total
International expansion/globalization issues (transactions, competitors, regulations)	11.1%	45
Document/Records management/retention	10.1%	41
Executive compensation	4.2%	17
Changing/new government regulations	4.0%	16
Privacy/security/fraud	3.7%	15
Cost control	3.5%	14
Staff retention and development	3.5%	14
IP management	3.0%	12
Patent issues ("Trolls", frivolous class actions)	2.7%	11
Risk management	2.2%	9
eDiscovery	2.0%	8
Company growth w/o growth of legal department	1.7%	7
Litigation management	1.7%	7
M&A	1.7%	7
Succession planning	1.7%	7
Internet/technology issues	1.5%	6
Application of SOX to non-profits and private companies	1.2%	5
Contract management	1.0%	4
Shareholder relations	0.7%	3
Changing perception of legal department	0.5%	2
Compliance programs	0.5%	2
Ethics	0.5%	2
Import/Export issues	0.5%	2
Legal department metrics	0.5%	2
Multi-state taxation	0.5%	2
Outside counsel costs	0.5%	2
Automation of legal department	0.2%	1
Changing dynamics with outside accounting firms (more conservative)	0.2%	1
European Competition Law (Block Exemption Regulation)	0.2%	1
European Union records retention	0.2%	1
Executive compliance	0.2%	1
Immigration	0.2%	1
Labor/union issues	0.2%	1
Land use development restrictions	0.2%	1
Outsourcing	0.2%	1
Plagiarism	0.2%	1
Preparing for a monetizing event	0.2%	1
Public relations	0.2%	1
Six Sigma process improvements	0.2%	1
Updating master agreements	0.2%	1
Nothing / Don't know	**31.7%**	**128**
Total Respondents		**404**
(skipped this question)		**444**

10. How would you characterize your relationship with outside auditors over the past few years?

Response	Response %	Response Total
Improved	12.9%	105
More difficult	33.7%	275
Stayed the same	**53.4%**	**435**
Total Respondents		**815**
(skipped this question)		**33**

10a. If the relationship has become more difficult, please identify the primary reason for this change:

Initiative	Response %	Response Total
Not applicable	**55.1%**	**341**
Non-negotiable terms	5%	31
Relationship more adversarial (less trusting) post Sarbanes-Oxley	26.8%	166
Demands for disclosure of privileged information	5.8%	36
Other (please specify)	7.3%	45
Total Respondents		**619**
(skipped this question)		**229**

"Other" Answers:
Inflexible/formulaic/risk adverse reviews, instead of advising/consulting solutions – 6
Dislike auditor's attitudes (arrogant, "we hold the keys", greedy) – 4
Lack of business/industry knowledge – 4
Dislike auditor's staff – 3
Poor performance/inefficient – 3
High costs – 2
Can't meet technical demands/requirements – 1
Local inability to respond – 1
Poor billing structure – 1
Require public company's level of scrutiny even though a private company – 1

11. Which, if any, of the following issues are important to you as the leader of an in-house legal department (select all that apply)?

Response	Response %	Response Total
Participation in pro bono services	18.4%	108
Diversity within department	43.4%	255
Diversity within outside firms	24.8%	146
Participation in company-wide public service efforts	**60.4%**	**355**
Total Respondents		**588**
(skipped this question)		**260**

11a. For each of the following issues please indicate if you have an established program in place to support:

Response	Yes	No	Response Average
Participation in pro bono service	8% (58)	**92% (667)**	**1.92**
Diversity within department	23% (167)	**77% (568)**	**1.77**
Diversity within outside counsel firms	11% (75)	**89% (639)**	**1.89**
Participation in company-wide public service efforts	36% (265)	**64% (473)**	**1.64**
Total Respondents			**773**
(skipped this question)			**75**

DEMOGRAPHICS

12. How many in-house attorneys are in your department (in all locations):

Response	Response %	Response Total
1	33.1%	263
2-5	**46.4%**	**369**
6-10	9.9%	79
11-20	5%	40
21-30	3.5%	28
30 or more	3.5%	28
Total Respondents		**795**
(skipped this question)		**53**

13. Please indicate the rough percentage of your in-house legal staff in the following regions:

Response	Response %	Response Total
United States	**96.2%**	**738**
Canada	7.8%	60
Central/South America	5.3%	41
Eastern Europe	5.1%	39
Western Europe	13.8%	106
Africa/Middle East	4.6%	35
Asia/Pacific	8.7%	67
Total Respondents		**767**
(skipped this question)		**81**

14. What are your organization's annual revenues?

Response	Response %	Response Total
Under $.5B	**58%**	**456**
$.5B to $2B	25.6%	201
$2B to $10B	11.7%	92
$10B or more	4.7%	37
Total Respondents		**786**
(skipped this question)		**62**

15. Is your organization:

Response	Response %	Response Total
Public	33.6%	268
Private	51.5%	411
Non-profit	8.8%	70
Partnership	0.6%	5
Other (specify)	5.5%	44
Total Respondents		**798**
(skipped this question)		**50**

16. What is the size of your 2006 law department budget in US dollars (indicate total, inside expense and outside counsel expense)?

Item	Statistical Average
Inside Expense	$2,007,512
Outside Expense	$3,919,658
Total Budget	$7,494,821

About the Association of Corporate Counsel

The Association of Corporate Counsel (ACC) is the in-house bar association[SM], serving the professional needs of attorneys who practice in the legal departments of corporations and other private sector organizations worldwide. 2007 marks the 25th anniversary of ACC. The association promotes the common interests of its members, contributes to their continuing education, seeks to improve understanding of the role of in-house attorneys, and encourages advancements in standards of corporate legal practice. Since its founding in 1982, the association has grown to 21,000 members in more than 55 countries who represent over 8,000 corporations. ACC has 47 chapters and 14 committees serving the membership. Its members represent all of the Fortune 100 companies. Internationally, its members represent 42 of the Global 50 and 74 of the Global 100 companies. For more information, go to www.acc.com.

GENERAL COUNSEL AS RISK MANAGER SURVEY RESULTS 2004

Executive Summary

In an effort to further understand the impact of Sarbanes-Oxley, ACC and the National Association of Corporate Directors (NACD) collaborated to better understand implications for industry, the profession and board-management relations. The chief finding from the survey shows that General Counsel and Corporate Directors believe their liability for their organization's misconduct has increased now some two years after enactment of the Sarbanes-Oxley corporate governance legislation.

The survey also found that responsibility for ensuring ethical business conduct is shared between senior management, Corporate Directors and General Counsel who traditionally have not been the focus for fiduciary liability. Over eighty (80%) percent of Corporate Directors responding to the Risk Manager survey thought General Counsel have a great deal of responsibility in ensuring good corporate governance. This is an increase of almost thirty percent (30%) over last year's findings of the same topic.

Other key findings include:

- **Sarbanes-Oxley Benefits Corporate Culture.** General Counsel and Corporate Directors agree paying closer attention to all aspects of company activities has made favorable changes in organizational management. More than 80 percent (80%) report that stricter board management resulted in improved relations between senior management and Board of Directors.

- **Whistle Blowing Encourages Good Corporate Governance.** Sixty-two percent (62%) of those responding believe the whistleblower provision improved the climate of discussion between Corporate Counsel and Board of Directors. In keeping with the trend toward General Counsel as a more integral member of the business team, support for the General Counsel reporting up the ladder to the Board of Directors after repeated ignored attempts by senior management to ensure compliance remains consistent from last year's survey.

- **Improved Relations with the Organizational Stakeholders: Board of Directors, Senior Management and Regulators.** Findings further demonstrate support for General Counsel attending board meetings at all times to better manage company-wide risk with more than seventy percent (70%) of respondents casting an affirmative vote.

The results of the survey substantiate earlier anecdotal evidence of a new trend toward more engaged and proactive "decision making" practices that involve General Counsel during early stages to help navigate today's business complexities and escalating risks.

ACC's 2007 ANNUAL MEETING Enjoying the Ride on the Track

General Counsel As Risk Manager Survey Results

The Risk Manager survey is the second conducted by Association of Corporate Counsel, in conjunction with National Association of Corporate Directors, to develop its clearinghouse of information to inform best practices for its membership, which is comprised of publicly traded, privately held companies and non-profit organizations. The first survey conducted last year provided baseline information to begin trend analysis about the full term impact of Sarbanes-Oxley.

1. Is your client public, privately held, or non-profit? Total Responses: 753

	Corporate Directors	General Counsel
Public	55.08% (141)	44.47% (221)
Private	29.30% (75)	46.28% (230)
Non-Profit	15.63% (40)	9.26% (46)

2. In 2004, general counsel and directors are working in a new environment because of the past corporate scandals. The bankruptcies of Enron and WorldCom led to the Sarbanes-Oxley law re internal controls, and to new stock exchange rules re board composition and operations. Given the past scandals and the new reforms, how important a role do you think the following now play in ensuring good corporate governance? Total Responses: 767

Corporate Directors

	Great Deal	Some	Not Much	None
CEOs/Senior Management	97.03% (261)	2.60% (7)	0.37% (1)	0.00% (0)
Accounting Firms	65.06% (175)	30.11% (81)	4.46% (12)	0.37% (1)
Audit Committees	93.68% (252)	6.32% (17)	0.00% (0)	0.00% (0)
Board of Directors	93.68% (252)	6.32% (17)	0.00% (0)	0.00% (0)
General Counsel	81.41% (219)	17.47% (47)	0.37% (1)	0.74% (2)
Wall Street Analysts	16.73% (45)	30.86% (83)	40.15% (108)	12.27% (33)
Outside Counsel	42.75% (115)	42.75% (115)	13.38% (36)	1.12% (3)
Major Investors	27.51% (74)	43.87% (118)	23.05% (62)	5.58% (15)

General Counsel

	Great Deal	Some	Not Much	None
CEOs/Senior Management	96.18% (479)	3.41% (17)	0.20% (1)	0.20% (1)
Accounting Firms	2.85% (313)	30.72% (153)	6.02% (30)	0.40% (2)
Audit Committees	86.55% (431)	10.84% (54)	1.81% (9)	0.80% (4)
Board of Directors	88.96% (443)	9.64% (48)	1.00% (5)	0.40% (2)
General Counsel	93.37% (465)	6.43% (32)	0.20% (1)	0.00% (0)
Wall Street Analysts	0.24% (51)	25.30% (126)	47.39% (236)	17.07% (85)
Outside Counsel	27.91% (139)	52.21% (260)	16.67% (83)	3.21% (16)
Major Investors	20.28% (101)	42.57% (212)	28.11% (140)	9.04% (45)

3. How has the recent focus on stricter board governance affected the relationship between the senior management and the Board of Directors? Total responses: 750

	Corporate Directors	General Counsel
Improved	41.02% (105)	28.14% (139)
Strained	23.44% (60)	16.60% (81)
Not Changed	35.55% (91)	55.28% (274)

4. How often do you think the General Counsel should attend board meetings? Total Responses: 751

	Corporate Directors	General Counsel
All of the time	**56.86% (145)**	**82.06% (407)**
Most of the time	21.57% (55)	11.49% (57)
Some of the time	8.63% (22)	2.62% (13)
Only when requested	12.94% (33)	3.83% (19)
Never	0.00% (0)	0.00% (0)

5. Does the General Counsel make regular reports on legal or compliance activities to the board? Total Responses: 746

	Corporate Directors	General Counsel
Yes	**80.24% (203)**	**76.88% (379)**
No	19.76% (50)	23.12% (114)
If yes,	Corporate Director	General Counsel
Reports are made to the full board	**69.17% (175)**	**56.80% (280)**
To the audit or a similar committee of independent directors	53.75% (136)	49.09% (242)
In executive session	33.99% (86)	26.77% (132)
In writing, oral reports only, etc.	31.23% (79)	27.18% (134)

6. Do you think it is a good idea for the General Counsel to meet with the Board or a Board committee without the CEO or other senior management present? Total responses: 750

	Corporate Directors	General Counsel
Yes, on a regular schedule	32.16% (82)	29.09% (144)
Yes, as requested by the Board or General Counsel	**59.22% (151)**	**52.32% (259)**
No	5.88% (15)	9.70% (48)
Don't know or unsure	2.75% (7)	8.89% (44)

7. Does your company have an appointed compliance or ethics officer? Total responses: 750

	Corporate Directors	General Counsel
Yes	**61.33% (157)**	**54.86 % (271)**
No	38.67% (99)	45.14 % (223)

(Question 7 continued)

If yes,	Corporate Directors	General Counsel
While appointed to this function, our compliance officer doesn't carry a formal title such as CCO	**26.17 % (67)**	19.43% (96)
Our compliance officer is a member of the law department (and that person is the CLO or reports to the CLO)	23.05 % (59)	**33.60% (166)**
Our compliance officer reports to someone other than the CLO or CEO	10.55 % (27)	10.32% (51)
Our compliance officer has his/her own budget and/or dedicated staff to help accomplish his/her work	21.09 % (54)	15.59% (77)
Our compliance office relies on an interdisciplinary team of senior managers from across the company	25.78 % (66)	23.68% (117)

8. If the CEO and the General Counsel disagree regarding a significant issue, which of the following should the General Counsel bring to the Board of Directors without the concurrence of the CEO? Total responses: 767

	Corporate Directors	General Counsel
When a senior executive is suspected of suspected of involvement in possible fraud or material violation of the securities law	66.91% (180)	63.05% (314)
When an allegation involves a material breach of securities law	57.62% (155)	53.82% (268)
When an allegation has not been addressed by senior management after repeated attempts to get them to act	**73.23% (197)**	**71.29% (355)**

(Question 8 continued)

When an allegation of fraud or material violation could result in harmful litigation	55.39% (149)	41.37% (206)
When the amount of money involved is significant or represents a predetermined percentage of net worth or other index	40.15% (108)	34.94% (174)
When an allegation of fraud or material violation could negatively impact stock price	42.38% (114)	31.93% (159)
When an allegation of fraud or material violation could result in negative media coverage	40.15% (108)	27.51% (137)
When a serious allegation of sexual harassment is made	39.03% (105)	20.48% (102)
When a serious allegation of racial discrimination is made	39.03% (105)	20.28% (101)
Only when the allegation is so important that the General Counsel would consider resigning over it	13.01% (35)	15.46% (77)

9. **Has the General Counsel in your company been in a situation that required "up the ladder" reporting within the company to the Board of Directors on a significant issue without the consent of the CEO?** Total responses: 745

	Corporate Directors	General Counsel
Yes	7.14% (18)	8.52% (42)
No	**92.86% (234)**	**91.48% (451)**
If yes, did by passing the CEO result in the appropriate outcome?		
	Corporate Directors	General Counsel
Yes	**77.78% (14)**	**78.57% (33)**
No	5.56% (1)	16.67% (7)
Don't know/unsure	16.67% (3)	4.76% (2)
If no, have you ever encountered a situation in which it would have been appropriate for the General Counsel to bypass the CEO and go directly to the Board of Directors?		
	Corporate Directors	General Counsel
Yes	14.91% (34)	16.17% (71)
No	**70.61% (161)**	**77.68% (341)**
Don't know/unsure	14.47% (33)	6.15% (27)

10. **Under the whistleblower provision of Sarbanes-Oxley, legal counsel may report questionable corporate activities directly to regulators under certain conditions. Has the whistleblower provision changed the climate of discussion between counsel and the board?** Total responses: 636

	Corporate Directors	General Counsel
Yes	11.72% (30)	8.92% (44)
No	**71.09% (182)**	**77.08% (380)**
If yes, has the change, been positive for corporate governance:		
	Corporate Directors	General Counsel
Yes	**63.33% (19)**	**62.79% (27)**
No	20.00% (6)	20.93% (9)
Not Sure	16.67% (5)	16.28% (7)

11. **Since Sarbanes-Oxley became law has the General Counsel become more or less integrated member of the client's business team?** Total responses: 742

	Corporate Directors	General Counsel
More	41.90% (106)	29.04% (142)
Less	2.37% (6)	3.48% (17)
Same	**55.73% (141)**	**67.48% (330)**

12. **As a result of Sarbanes Oxley, has your board or a committee retained outside counsel (as opposed to outside counsel hired by the GC) as counsel to the board or a committee?** Total responses: 742

	Corporate Directors	General Counsel
Yes	30.28 % (76)	13.65 % (67)
No	**62.95 % (158)**	**80.86 % (397)**
Don't know/unsure	6.77 % (17)	5.50 % (27)

13. **Do you believe your liability for your company's wrongdoing has increased since Sarbanes-Oxley became law?** Total responses: 737

	Corporate Directors	General Counsel
Yes	**66.40 % (166)**	**53.80% (262)**
No	24.00 % (60)	34.29% (167)
Don't know/unsure	9.60 % (24)	11.91% (58)

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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

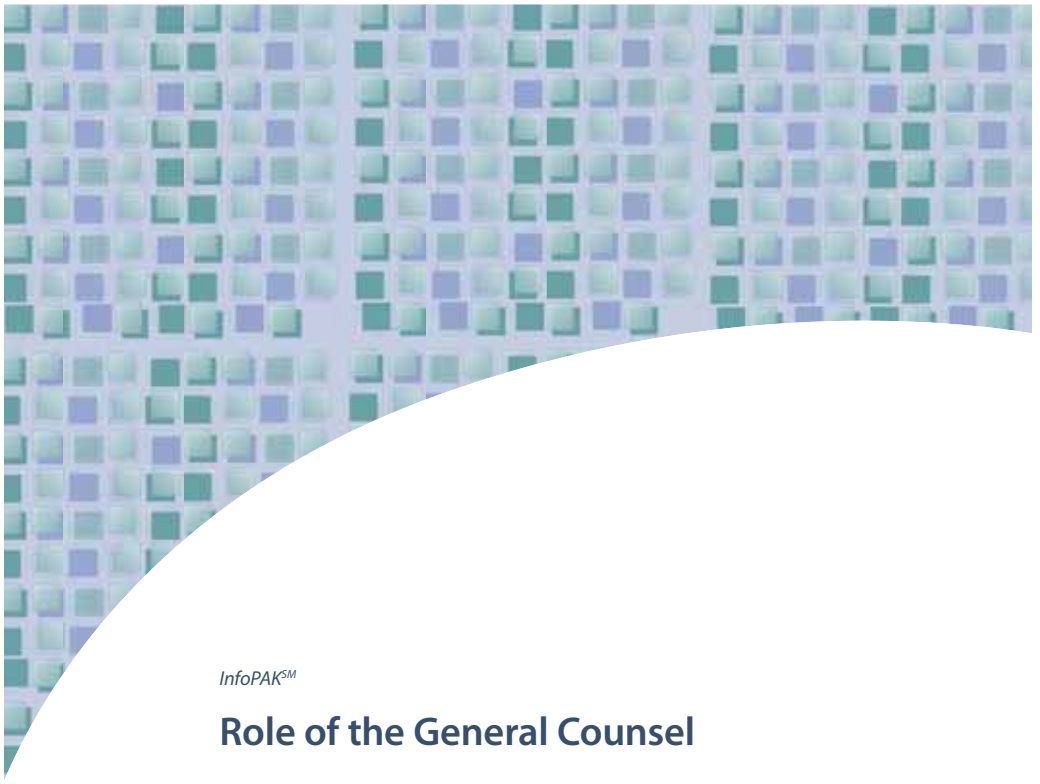
to be welcoming and not lose her/his temper during that preliminary meeting, but instead to acknowledge the seriousness of the matter and to thank the individual for coming forward. In this way, the CLO maintains the relationship with the client as a trusted legal advisor while preserving his/her responsibilities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

CLO AS PRACTIONER 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.

For more information search for "risk assessments" in the Virtual Library: www.acc.com/vl



InfoPAK℠

Role of the General Counsel

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Role of the General Counsel

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

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

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&

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Contents

I. Introduction: Function of General Counsel

A. General Overview

The role of the general counsel (GC) in a corporation[1] depends on a number of factors about the client, such as the size of the company, the industry where it operates, even the states or countries where it operates. A manufacturing company needs different things from its general counsel than a service company and large companies may make more demands on their general counsels than small ones. Despite the differences in the client, the duties of a general counsel are consistent: deliver the highest possible level of legal services to the client.

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

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

- Ensure that the corporation has an adequate compliance program in place
- Design the Structure of the In-House Legal Department
- Control Legal Costs
- Identify and Assess Risk and Risk Management Programs
- Design a Crisis Management Program
- Conduct Oversight of Outside Counsel
- Manage Litigation
- Develop & Maintain Good Working Relationships with Senior Management
- Review the Corporation's Licensing Practices
- Keep Informed of the Requirements of a Multi-Jurisdictional Practice
- Establish A Record Retention Policy[2]

As a result of increased government regulation, among other things, general counsel are being asked with increasing frequency to participate directly in corporate management. Whether a corporation wants to organize itself in such a way that all the advice formerly provided by consultants[3] is now provided in-house or because senior management feels comfortable involving the general counsel in all major business decisions from the outset, general counsel are increasingly being asked to play a dual role of legal advocate and corporate adviser. Considering the growing complexity of modern corporations, the general counsel's most important role is often that of a manager of a major set of risks faced by the company.[4]

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

Additional Resources:

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

B. Road Map to This InfoPAK

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

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

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

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

II. The Corporation as a Client

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

- Model Rule 1.1: a general counsel must represent the client competently.
- Model Rule 1.2: a general counsel cannot assist fraud
- Model Rule 1.6: disclosure of otherwise confidential information is allowed in certain circumstances in which harm to third parties will result from crime or fraud and in which lawyer's services have been used in furtherance of crime or fraud.
- Model Rule: 1.7: without a waiver, a general counsel cannot represent a client in situations where a concurrent conflict of interest exists.
- Model Rule 1.13: The organization is the client, which means that a general counsel may report potential or actual violations of law that are reasonably likely to be imputed to the organization and that are reasonably certain to result in substantial injury to the organization if the highest authority within the organization fails or refuses to act.
- Model Rule 2.1: a general counsel must exercise independent professional judgment.[5]
- Under SEC Rule 205[6], a general counsel must report evidence of wrongdoing up the chain of command and receive "appropriate" response; may, but need not, report out.

These rules are discussed in more detail below.

A. The Duty to the Client

Normally, a lawyer can readily identify his or her client. This task, however, is often complicated for a general counsel whose primary client is the corporation. A corporation can only speak through individuals employed by or acting on behalf of the corporation[7] but these agents are not the client to whom the lawyer owes his duties.

1. Corporate Affiliates

In answering the question "Who's the client" one needs to determine whether the general counsel has been hired to represent only one member of a corporate family, such as a subsidiary, or whether he represents all members of the corporate family.

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

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

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

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

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

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

a. Violation of a Duty to the Entity

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

- Duty of Loyalty

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

- Duty of Care

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

b. Violation of Law

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

For more information see:

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

c. Level of Certainty Required

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

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

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

e. How should the GC respond?

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

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

For a detailed description of the ethical implications, see:

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

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

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

Additional resources:

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

3. Contest for Control of the Corporation by Takeover

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

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

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

4. Derivative Litigation

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

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

For more information on this topic see:

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

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

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

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

Here the general counsel should consider the following:

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

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

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

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

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

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

B. Confidentiality

Generally, lawyers are under a duty of confidentiality to their clients. This is expressed in Model Rule 1.6. The precise definition of that rule, however, varies rather extensively from state to state. The general counsel, thus, should be familiar with the exact standard under the applicable law.
In general, a general counsel must keep confidential all information relating to the representation of the client except such disclosures expressly permitted by the rules of professional conduct. In recent times, the question of whether ethical duties arise when the general counsel learns that the corporate client is engaged in material wrongdoing has become even more significant. The permissive behavior also varies from state to state, and might be altered by federal regulations.

For more information also see:

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

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

C. Client-Centeredness

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

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

For more information on this topic see:

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

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

For information on how to conduct client surveys see:

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

Other ACC Resources:

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

III. Corporate Compliance and Security

A. Ethical Duties

1. Non-legal business activities

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

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

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

2. GC's Role as Legal Advisor

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

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

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

For more detailed analysis of this topic see:
- *In-house Counsel Ethics*, ACC InfoPAK, (March 2004), available at www.acca.com/infopaks/ethics.html

3. GC as Advocate

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

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

For information on the role of the business advisor and legal advocate, see:
- *A Company's First General Counsel*, ACC InfoPAK, (June 2006), available at http://www.acca.com/infopaks/firstgc.html

4. GC as Director

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

For more discussion and practical advice on the issue of participation on the board of directors and its ethical implications, the following sources might be helpful:
- ABA Formal Opinion No. 98-410: *"Lawyer Serving as Director of Client Corporation"* (February 27, 1998).
- Felix J. Bronstein, *The Lawyer as Director of the Corporate Client in the Wake of Sarbanes-Oxley*, 23. J.L. & Com. 53
- James D. Cox, *The Paradoxical Corporate and Securities Law Implications of Counsel Serving on the Client's Board*, 80 Wash. U. L.Q. 541 (2002).

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

5. General Counsel as Media Liaison

Often the general counsel will be called upon to act as a media liaison. Here the general counsel should consider Model Rules 3.6 and 1.6 which discuss contacts with the press.
(1) The general counsel is allowed to reveal information publicly only after first consulting the client.[34]
(2) General counsel must determine whether public disclosure would violate ethics rules by prejudicing an adjudicative proceeding. Where a lawyer participated in an investigation or litigation, extrajudicial statements are prohibited where there is substantial likelihood of materially prejudicing the proceeding. Objective information about the proceeding is permitted.

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

Additional Resources:

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

6. Conflict of Law

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

When dealing with conflict of law issues, the general counsel has to carefully review the rules applicable in the state where he is licensed and where he offers legal advice because the rule governing conflict (Model Rule 8.5) differs in some states. Generally, the general counsel must determine whether the conduct in question is connected to a court proceeding in a state where he is admitted to practice. If this question is answered in the affirmative, the rules of the jurisdiction in which the court sits will govern.[37] However, if these rules do not provide a basis for the decision and the lawyer is admitted in only one state, then the rules of the state where the lawyer is licensed will apply.[38] If the lawyer is permitted to practice in more than one state, the ethics rules of the state in which the lawyer "principally practices" apply unless the conduct has an effect in another jurisdiction in which the lawyer is licensed.[39] Note, however, that some states maintain that a lawyer is subject to the rules of a state in which he practices, even if he is not licensed to practice in that state.

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

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

7. Individual Rights and Liabilities of Corporate Counsel

Employment Rights:

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

Other rules concerning employment that are generally recognized include:

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

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

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

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

Case Bibliography:

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

Articles:

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

For information on Whistle-Blower Protection Statutes, see:

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

Liability:

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

- Document retention programs: Necessary to stave off obstruction of justice charges under 18 U.S.C. §1519; 1512(c)(1) and (2). Most importantly, a corporation which does not have a document retention policy and then throws its hands up when prosecutors or the SEC come looking for documents risks an obstruction of justice charge. Not only does the Sarbanes-Oxley Act impose a requirement that corporations implement a document retention program and effectively administer it, in-house counsel may be looking at sanctions for violating Model Rules of Professional Conduct 3.4.
- Reporting up requirements: The SEC Rules implementing provisions of Sarbanes-Oxley require that an attorney practicing before the SEC must report material violations of securities laws and breaches of fiduciary duties to a supervisory attorney, the CLO or CEO of the issuer, and if the response is not appropriate in the view of the reporting attorney, the reporting attorney must bring the matter to the board of directors or a designated committee of outside directors.
- Breach of fiduciary duty: In-house counsel who also serve in business capacities, such as general counsel, run the risk of being held liable for breach of fiduciary duty rather than plain old malpractice.[49]
- Obligation to implement a corporate code of conduct. Amendments to the Federal Sentencing Guidelines in §82B.1 created a guideline entitled "Effective Compliance and Ethics Program." Not only is the establishment of an internal safeguard to prevent and detect criminal conduct within corporations required, but it can serve as a mitigating factor which can reduce an organization's fine punishment in the event of a criminal conviction. The guidelines also require that one individual at a high level of the organization have day-to-day responsibility for overseeing compliance with the internal ethics program, and precludes a reduction in the base offense level for organizations which do not have such programs.
- Director and officer liability. In-house counsel are increasingly exposed to legal malpractice claims. As corporations bring more work in-house, the exposure to legal malpractice claims expands. These malpractice claims typically arise, not from in-house counsel's "client," but rather from third parties or from statutory agents, such as bankruptcy trustees or the FDIC, who take over after the client fails. Although in-house counsel who also hold the position of a director or officer sometimes are protected by director and officer liability insurance, many policies have an exclusion for legal advice. This can expose in-house counsel to personal liability and may place them in the precarious position of having no coverage for many of their acts.

Malpractice Insurance:

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

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

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

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

Seeking to rein in corporate abuses that came to light in the recent corporate scandals, Congress drafted the provisions of the Sarbanes-Oxley Act of 2002.[51] The purpose of this legislation is to curb executives' behavior and to make them more accountable to investors.[52] The act also regulates corporate governance by setting minimum standards of professional conduct and requiring the Securities and Exchange Commission ("SEC") to issue new standards for attorneys.[53] Pursuant to this requirement, the SEC adopted 17 C.F.R. pt. 205 ("SEC Rules"),[54] which prescribe standards of professional conduct for all attorneys who appear and practice before the SEC in the representation of public company issuers.

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

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

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

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

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

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

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

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

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

10. Examples of GC Violations

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

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

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

B. Forms – Compliance Plans and Policies for your Company

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

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

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

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

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

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

See also:

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

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

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

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

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

IV. Record Retention and Management Policies

A. Overview

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

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

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

A company should follow the three steps below when establishing a retention plan:
(1) Understand the record situation at your company;
(2) Develop simple and clear policies, procedures, and retention schedules; and
(3) Apply the program systematically and non-selectively in the normal course of business.[65]

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

B. Requirements of Corporate Records Management Programs

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

1. Retain Records Long Enough to Meet Requirements

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

2. Locate Records Quickly and Effectively

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

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

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

4. Destroy Obsolete Records

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

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

5. Appropriately Tag Records According to Non-Retention Requirements

In addition to retaining records for the appropriate length of time, companies must also adhere to obligations that are unrelated to retention. These include:

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

C. Establish a Defensible Policy

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

1. Know What Types of Records Are Generated and Retained

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

2. Know Who Owns and Controls Each Record Type

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

3. Know Where the Records Are Located

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

4. Know When Records Can Be Destroyed

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

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

- *Record Retention*, ACC InfoPAK, (July 2006), available at www.acca.com/infopaks/recretent06.html.

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

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

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

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

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

Sample Retention Policies:

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

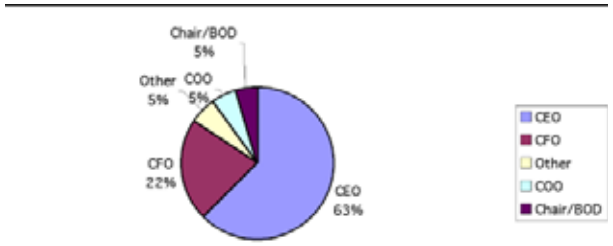
V. Reporting Structure

A. To Whom does the General Counsel Report?

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

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

General Counsel Reporting Relationships



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

Compare with:

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

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

Additional Resources

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

B. Functions Reporting to the General Counsel

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

Functions Reporting to the General Counsel

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

VI. Internal Legal Department Structure

A. Different Models

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

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

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

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

Department Type	Potential Advantages	Potential Disadvantages
Centralized: physically centralized, with practice groups organized according to area of law	- Limits duplication of effort - Enhances and develops legal expertise - Good for internal law department communication - Easier for general counsel to manage his team - Good for building shared vision and working practices - Helps the sharing of information and resources - Simplifies budgeting and cost control - Cheaper than decentralized model	- Distant relationship with clients - Clients may not have a single point of contact - Lawyers are less likely to develop good knowledge of businesses
Centralized: physically centralized with practice groups mirroring business unit structures	- Develop good knowledge of business - Good for internal law department communication - Easier for general counsel to manage his team - Good for building shared vision and working practices - Helps the sharing of information and resources - Simplifies budgeting and cost control - Cheaper than decentralized model	- Distant relationship with clients - Does not help to develop legal specializations
Centralized: physically centralized, but with practice groups for different geographical regions	- Good for internal law department communication - Easier for general counsel to manage his team - Good for building shared vision and working practices - Helps the sharing of information and resources - Simplifies budgeting and cost control - Cheaper than decentralized model	- Distant relationship with clients - Less likely to develop good knowledge of businesses - Does not help to develop legal specializations
Centralized: lawyers geographically dispersed in business units, but with strong centralized reporting lines to general counsel	- Lawyers close to clients - Lawyers are members of the business team - Lawyers develop good knowledge of business - General counsel still has overall control of the team - Helps to build shared vision and working practices - Aids the sharing of information and resources	- Physically distant from other in-house counsel - Potential objectivity issues - Lack of economies of scale - Potential for duplication of work and varying work practices
Regional: each region has a legal department, reporting to regional business head	- Lawyers close to clients in that region - Lawyers are members of the business team - Develop good knowledge of business	- Potential objectivity issues - Lack of economies of scale - May increase use of external counsel at local level - Lack of overall coordinated strategy - Isolated from colleagues in main/other legal departments - Varying work practices and duplication of work - Does not help to develop legal specializations - More difficult for general counsel to manage team - Does not aid sharing of information and resources
Decentralized: each business unit has a legal department, reporting to head of business unit	- Lawyers close to clients - Lawyers members of the business team - Develop good knowledge of business	- Potential objectivity issues - May increase use of external counsel at local level - Lack of economies of scale - Lack of overall coordinated strategy - Isolated from colleagues in main/other legal departments - Varying work practices and duplication of work - Does not help to develop legal specializations - More difficult for general counsel to manage team - Does not aid sharing of information and resources
Combination of any of the above: for example, decentralized - each business unit has a legal department; but lawyers are also members of virtual practice groups and advise the whole group in this area	- Depends on the combination chosen - (See relevant sections above)	- Depends on the combination chosen - (See relevant sections above)

For additional info rmation on this issue see:

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

B. Legal Recruitment and Staffing[78]

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

1. Recruiting Top Talent

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

2. Hiring the Best People

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

3. Providing Orientation

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

- Clearly define responsibilities of new hires;
- Educate new members on the department's overall mission and business practices;
- Provide an overview of policies and procedures, giving new hires a sense of the prevailing culture at the company;
- Ensure new employees have the tools they need in order to be productive; and
- Engender a sense of camaraderie, collaboration and teamwork.

4. Motivating and Managing People

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

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

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

5. Handling Difficult Situations

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

For additional resources see:

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

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

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

Program Materials

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

C. Developing & Maintaining Good Working Relationships

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

For more information see:

- *Recruiting and Retaining In-House Staff*, ACC InfoPAK (May 2004), available at http://www.acca.com/infopaks/recruit.html
- Bruce J. Hector, Lori A. Middlehurst and Lori L. Siwik, *Recruiting, Hiring, and Retaining Employees*, ACCA 2001 Annual Meeting, available at http://www.acca.com/education2k1/am/cm/104CD.pdf
- *Achieving Diversity in Law Departments*, ACC InfoPAK, (September 2004), available at http://www.acca.com/infopaks/infopaks/diversity.html
- Peter M. Phillipes, **"Small Law Departments can Achieve Sustainable Diversity,"** ACCA Docket 18, no. 6 (June 2001), available at http://www.acca.com/protected/pubs/docket/jj01/achieve1.php

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

VII. Controlling Legal Spending

A. Cost Control

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

(1) Communication
- Discuss Cost Expectation
- Use an Outside Counsel Retention Policy
- Clarify Expectations about Bills
- Insist on Budgets from Firms
- Address Cost Overruns

(2) Contemplation
- Analyze Case Timing and Consequences
- Create a Consortium of Co-participants
- Evaluate Individual Benefits in a Consortium
- Analyze Corporate Histories, Insurance, and Contracts
- Bid Projects Selectively
- Explore Creative Contingency and Bonus Arrangements
- Investigate Alternatives to Opinions of Counsel
- Analyze Firm Staffing and Rates

(3) Capitalization
- In-source Work
- Produce and Protect Revenue
- Explore Internship Programs
- Get Tough with Lender's Counsel

B. Compensation of Lawyers

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

For leading practices in this area see:

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

For more information, see also:

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

C. Billing

1. Task-Based Billing

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

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

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

2. Other Alternative Billing Arrangements

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

For more information on this topic, see

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

3. Electronic Billing

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

For more information on this topic, see

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

D. Financial Reporting

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

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

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

VIII. Risk Identification and Assessment

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

A. Developing a Risk Assessment Plan

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

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

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

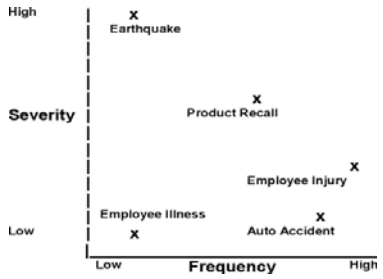
The first step of any risk assessment plan is identifying the risks. Potential risks

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

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

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

A Simple Risk Map



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

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

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

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

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

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

B. The Risk Management Team

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

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

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

C. General Counsel as Risk Manager

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

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

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

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

For more information on this topic, see:

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

D. How to Achieve Excellence in Risk Management?

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

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

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

The Marsh/RIMS study reveals the following key findings:

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

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

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

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

Participants prioritize risk by:

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

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

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

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

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

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

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

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

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

IX. Crisis Management

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

The following material may be helpful:

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

A. Internal Investigations

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

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

- Internal Investigations, ACC InfoPAK (September 2004), available at: http://

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

B. Government Investigations

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

Factors government prosecutors consider in deciding whether to investigate a corporation to combat corporate fraud include:[87]
- Nature and seriousness of the offense;
- Pervasiveness of corporation's wrongdoing;
- Corporate history of criminal conduct;
- Corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation;
- Existence and adequacy of corporation's compliance program;
- Corporation's remedial actions; and
- Collateral consequences, including disproportionate harm to shareholders.[88]

Additionally, an increased emphasis has been placed on: (1) "the authenticity of corporation's cooperation"; and (2) "the efficacy of the corporate governance mechanisms in place within a corporation, to ensure that these measures are truly effective rather than mere paper programs."[89] Clearly, the focus hinges on the design of a company's compliance program.[90] Essential questions the government may ask is whether the program is geared towards preventing and detecting wrongdoing by a company's directors or employees and effective management. Thus, prosecutors may consider the following questions in evaluating a compliance program and ultimately deciding whether to prosecute:
- Are effective mechanisms in place to detect and prevent misconduct?
- Are directors well-informed and equipped to exercise independent judgment?
- Does the company have internal audit functions that are independent and accurate?
- Does the company have an information and reporting system to provide management and the board of directors a mechanism for determining the organization's compliance with the law?[91]

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

C. Media Relations

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

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

X. Litigation

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

A. Initial Planning, Assessment and Strategic Evaluation

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

For further information, see also:

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

B. Staffing

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

C. Periodic Reporting

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

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

Periodic Meetings and Regularly Scheduled Conference Calls

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

D. Trial Book

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

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

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

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

E. Discovery Planning

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

An effective discovery plan should identify:

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

F. Prior Approval of Litigation Tasks

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

G. Decisions on Experts, Consultants, and Others:

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

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

H. When Officers or Employees are Defendants[101]

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

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

I. Relationships with Outside Counsel[103]

Use the following checklist to manage outside counsel in litigation:

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

For additional information, see:

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

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

J. Settlement

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

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

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

ACC Resources:

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

For general information, see:

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

For ethical implications, see:

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

K. Role of Inside Counsel at Trial

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

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

Restrictions on Access of Inside Counsel to Confidential Information

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

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

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

For more information, see:

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

Additional Resources:

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

XI. Outside Counsel Management

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

A. The Selection Process

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

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

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

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

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

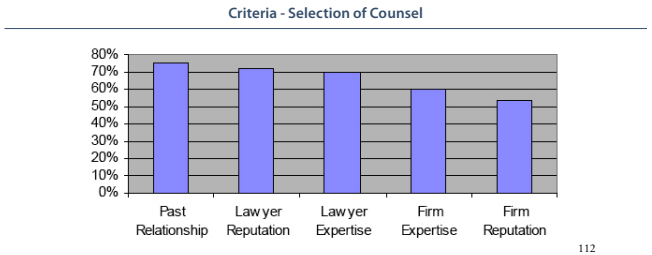
- "The decision to retain outside counsel, as opposed to handling the matter within-house staff, is driven by three main factors: geography, the need for specialized expertise, and a lack of inside resources."[108]
- "Geography refers to the need to obtain local counsel when the location of the legal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

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

- How much internal work is to be outsourced?
- What is the cost of providing legal services internally, and is that cost competitive with outside firms?
- What benefits does the company's law department bring to the organization by handling the work?
- Are there particular services or areas of law that would be better handled by outside counsel?
- Does the company's law department have or want to develop the necessary skill sets to efficiently handle specific areas of work?

2. Which outside counsel should be retained?

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



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

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

pricing; and
- Use of technology to enhance the efficiency of outside counsel.

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

3. The Interview Process

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

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

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

Whether using the "beauty contest" or more formal approach, a company should consider exploring the following issues during an interview:
- Law firm's experience;
- Matter at issue – Ask the lead attorney to provide an initial evaluation of the case and discuss what the strategies the firm would use to prepare the case and how the firm would staff the matter;
- Billing rates, alternative billing arrangements, and discounts for early bill payment; and
- Overall operation and management of the firm.

4. The Engagement Letter

Upon choosing to hire an outside law firm, the general counsel must create the working agreement that will govern the relationship between the firm and the company. This document, known as an engagement letter, defines the obligations and responsibilities of each party and the scope of the assignment. The letter should include the following:
- Role of in-house and outside counsel;
- Scope of work;
- Conflict waiver;
- Process for engaging new work;
- Responsible attorney and lead attorney;
- Persons qualified to handle matters;
- Objectives and measurements;
- Methods of communication;
- File retention;
- Type of compensation/Fee arrangement; and
- Billing Guidelines, including required levels of billing detail, requirement for timely submission of bills, and details of allowable expenses.

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

To obtain better results from outside counsel, a GC should also consider including the following items in the engagement letter:[117]
- Bills from outside counsel must be provided on a regular, timely basis.
- All bills are to go to a specified billing address.
- There shall be no general matters or billings.
- Outside counsel will accept no work directly from someone in a business unit. All work must come from the legal department.
- Only pre-approved lawyers can work on a matter. If a lawyer leaves the firm, the firm must absorb the time incurred in bringing a replacement lawyer up to speed on the file – this time is nonbillable.

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

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

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

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

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

B. Building a Long-Lasting Partnership with Outside Counsel

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

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

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

Furthermore, authentic trust includes the following elements and characteristics:

- Continuing process;
- Dynamic growth;
- Means by which organizations maintain their business relationships;
- Existing only when both parties believe in the concept and actively participate;
- Mutual commitment;
- Continually adapting to changing goals and challenges;
- Making and keeping commitments; and
- Ethical approach to a business relationship.

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

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

For more information on this topic, see:

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

C. Strategies for Effectively Managing Outside Counsel

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

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

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

Traits of an Ideal Outside Counsel:

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

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

Traits of an Ideal In-house Counsel:

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

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

D. Strategies for Monitoring and Reducing Outside Counsel Spending

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

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

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

1. Case Management Systems

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

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

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

2. Convergence Projects

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

The process of convergence involves the following four steps:
- Choosing the nominees;
- Requesting proposals;
- Evaluating the responses; and
- Selecting the final list.

For more information on convergence projects, see:
- *Outside Counsel Management*, ACC InfoPAK (September 2004), available at www.acca.com/infopaks/ocm.html.

Understanding the role of in-house versus outside counsel is vital to deciding whether to hire outside resources. For more information, see:
- James R. Buckley, *Welcome to Lawyerland: Why Even Brilliant Outside Counsel Cost Too Much*, ACC Docket 23, no. 1 (January 2005), available at www.acca.com/protected/pubs/docket/jan05/lawyerland.pdf
- Ronald F. Pol and Patrick J. McKenna, *The Quest for Seamless Service: Ensuring Consistency with MultiOffice Law Firms*, ACC Docket 23, no. 1 (January 2005), available at www.acca.com/protected/pubs/docket/jan05/seamless.pdf
- *Leading Practices in Strategic Outsourcing and Alternative Service Models: What Companies Are Doing*, ACC Leading Practice Profile, available at www.acca.com/protected/article/lawdman/lead_outsource.pdf
- *Outside Counsel Management*, ACC InfoPAK (March 2006), available at www.acca.com/infopaks/ocm.html
- *A Company's First General Counsel*, ACC InfoPAK (June 2006), available at www.acca.com/infopaks/firstgc.html
- Teresa T. Kennedy, *"In-house and Outside Counsel: The Trust Factor,"* ACC Docket 22, no. 1 (January 2004), available at www.acca.com/protected/pubs/docket/jan04/trust.pdf
- ACC/Serengeti Managing Outside Counsel Survey: Assessing Key Elements of the In-house Counsel/Outside Counsel Relationship (2006), available at http://acc.com/resource/v7665
- Ronald F. Pol, *Get More Value for Outside Counsel: Show them the Flipside*, ACCA Docket 21, no. 4 (April 2003), available at www.acca.com/protected/pubs/docket/am03/flipside1.php
- Susan Hackett, *Conflicts of Interest: Do you understand how your outside counsel assess conflicts-or do you just trust them to act in your client's best interests? It's a growing crisis that needs your attention*, Vol. 25 Legal Times No.3, Jan. 21, 2002.
- Julie S. Congdon and Patricia M. Hamill, *Managing Outside Counsel in Litigation: A Primer*, ACCA Docket (April 2003), available at www.acca.com/protected/pubs/docket/am03/primer1.php
- Jeffrey W. Carr and Daniel S. Hapke Jr., *Retaining Outside Counsel Online at Market Price*, ACCA Docket (October 2001) available at www.acca.com/protected/pubs/docket/on01/retain1.php
- Thomas M. Yih, *Six Steps to Better Foreign Counsel Relationships*, ACCA Docket 18, no. 5 (May 2000), available at www.acca.com/protected/pubs/docket/mj00/foreign.html

E. Methods for Improving Outside Counsel Performance

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

1. Create a Formal Panel

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

2. Identify Common Goals

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

3. Have a Formal Intake Procedure

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

4. Watch the Budget

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

5. Have a Formal Review Process

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

6. Debrief after Completion

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

XII. Sample Form and Policy

A. General Counsel Job Description[122]

Mission

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

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

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

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

Role

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

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

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

Other General Counsel roles include:

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

7. **Seeking input from operating unit management as to the quality, timeliness, and responsiveness of legal support.**

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

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

B. General Counsel Job Description[123]

Summary

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

Status

Exempt

Reporting Relationship

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

Authority

- Clients

Advises clients, in keeping with the firm's principles, with respect to all aspects of case management.

- Outside Agencies

Represents the firm in dealings with outside law firms, government representatives and agencies, independent technical experts, court representatives, and others in the legal profession.

Professional Activities

A member of appropriate professional organizations. Fees and expenses related to such activities are paid by the firm.

Specific Responsibilities

- Corporate Strategies

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

- Legal Issues

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

- Budget

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

- Board of Directors

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

- Policies and Records

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

- Special Projects

Undertakes special projects as assigned dependent upon knowledge or experience.

XIII. Additional Resources

ACC Docket Articles

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

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

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

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

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

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

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

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

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

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

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

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

ACC InfoPAKS

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

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

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

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

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

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

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

Records Retention (Corporate Records Management — New Issues and Solutions in Records Management), ACC InfoPAK (July 2006), available at http://www.acc.com/infopaks/rcrdsretention/recretent06.html and Records Retention (Voices: Critical Considerations Surrounding Records Management) ACC InfoPAK (July 2005), available at http://www.acc.com/protected/infopaks/records/recretent05.pdf.

Responding to Government Investigations, ACC InfoPAK, available at http://www.acca.com/infopaks/govtinvest.html

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

Practice Profiles

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

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

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

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

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

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

ACC Annual Meeting Materials

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

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

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

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

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

Endnotes

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

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

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

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

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

[6] 17 C.F.R. 205.

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

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

[9] See Md. Ethics Op. 87-19.

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

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

[12] Rule 1.13, Cmt. 3.

[13] Id.

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

[15] Model Rule 1.13(b)(1),(2),(3).

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

[17] Id. at § 3.09.

[18] Id. at § 3.10.

[19] Id. at 3.14.

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

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

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

[23] See also ABA Formal Opinion 74-336.

[24] Model Rule 5.7 (b).

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

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

[27] Id. at § 3.13.

[28] Id. at § 3.18.

[29] Id.

[30] See Model Rule 5.1(c)(2).

[31] See Model Rule 5.1(b).

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

[33] Model Rule 1.7, cmt. 1.

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

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

[36] Cf. e.g. different versions of Model Rule 1.6 governing confidentiality.

[37] Model Rule 8.5(b)(1).

[38] Model Rule 8.5(b)(2)(i).

[39] Model Rule 8.5(b)(2)(ii).

[40] John K. Villa, Corporate Counsel Guidelines, § 3.02 (2003 ed.)

[41] General Dynamics Corp. v. Superior Court, 876 P.2d 487 (Mass. 1984)

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

[43] 584 N.E. 2d 104 (Ill., 1991).

[44] Id. at 106.

[45] Id. at 110.

[46] See General Dynamics Corp. at 499.

[47] John K. Villa, Corporate Counsel Guidelines, vol. 2 § 6.09 (2003 ed.).

[48] New to In-house Practice, ACC InfoPAK (June 2007), available at www.acca.com/infopaks/inhouse.html.

[49] In-house Counsel Must Take Initiative in Managing Risk, BNA's Corporate Counsel Weekly (March 17, 2004), available at www.bna.com.

[50] John K. Villa, Corporate Counsel Guidelines, vol. 2 § 6.13 (2003 ed.).

[51] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, (hereinafter referred to as SOA), available at http://www.acca.com/legres/enron/srbanesoxley.pdf.

[52] John F.X. Peloso & Stuart M. Sarnoff, The Sarbanes-Oxley Act of 2002: Whom Does it Affect and How?, 8/14/2002 N.Y.L.J. 3 (col.1).

[53] See Section 307 SOA.

[54] Securities and Exchange Commission Final Rule: Implementation of Standards of Professional Conduct for Attorneys, 17 C.F.R. pt. 205 (2002), available at http://www.sec.gov/rules/final/33-8185.htm.

[55] John K. Villa, Corporate Counsel Guidelines, § 3.02 (2003 ed.).

[56] See FDIC v. Mmahat, 907 F.2d 546 (5th Cir. 1990).

[57] See Kurt Eichenwald, Warning to Executives: Honesty is the Best Policy, New York Times, July 10, 2004, Section C, Page 1 Column 2.

[58] Excerpted from: Randy S. Segal and Richard K.A. Becker, "Through The Looking Glass," ACC Docket 22, no. 5 (May 2004), available at www.acca.com/protected/pubs/docket/may04/glass.pdf

[59] Corporate Compliance, ACC InfoPAK (October 2004), available at www.acca.com/infopaks/compliance.html.

[60] Corporate Compliance Programs in the Aftermath of Sarbanes-Oxley – or- "The Time has come, the Walrus Said…," Program of the Ad Hoc Committee on Corporate Compliance, ABA Business Section Spring Meeting (April 2003).

[61] See Carole L. Basri, Corporate Compliance and Ethics after the Sarbanes-Oxley Act, 1417 PLI/Corp 1211.

[62] See Kenneth B. Abel & Benjamin J. Rubin, Advising Business Clients On Document Retention Policies, 37-FEB Md. B. J. 30 (January/February 2004).

[63] See New to In-house Practice, ACC InfoPAK (January 2007), available at www.acca.com/infopaks/inhouse.html.

[64] Corporate Chronicles: How to Do Records Management for Maximum Protection, ACC Docket 23, no. 6 (June 2005).

[65] See Records Retention, ACC InfoPAK (February 2005), available at www.acca.com/infopaks/recretent.html.

[66] Corporate Chronicles: How to Do Records Management for Maximum Protection, ACC Docket 23, no. 6 (June 2005).

[67] See Records Retention, ACC InfoPAK (July 2006), available at www.acca.com/infopaks/rcrdsretention/recretent06.html.

[68] Id.

[69] Altman Weil/ACC 2003 Survey of Law Department Management Benchmarks survey, available at http://www.altmanweil.com/products/surveys/ldcbs.cfm

[70] Id. According to the 2003 survey results, 52% of General Counsel surveyed also function as Corporate Secretary.

[71] The percentages do not total 100% because some General Counsel report to more than one person.

[72] Carole Basri and Irving Kagan, Corporate Legal Departments, § 2:4 (PLI 2001).

[73] Rees W. Morrison, Law Department Benchmarks, Myths, Metrics, and Management, Ch. 9 (2nd Edition), at 243.

[74] Sean Carter, Corporate Law, And The Livin' Is Easy, 3 No. 18 A.B.A. J. E-Report 6.

[75] Id. at § 2:5.3

[76] Rees W. Morrison, Law Department Benchmarks, Myths, Metrics, and Management, Ch. 2 (2nd Edition), at 41. Frequent surveys show that more than 85 percent of legal departments consider themselves to be a "centralized" department in one of the above mentioned ways. Id.

[77] Excerpted from: Adam Frederickson, Global Counsel best practice indicators: law department structures and reporting lines, Vol. III, Global Counsel Magazine (March 2003) available at http://www.acca.com/protected/gc.php?key=20030424_8126.

[78] The following is an excerpt form the ACC InfoPAK - Recruiting and Retaining In-house Staff, (July 2006), available at http://www.acca.com/infopaks/recruit.html

[79] See Lorri Salyards and Mary Matthies, Hiring, Maintaining, and Retaining the Best Employees, 31-Jan Col. Lawyer 61.

[80] See Marc R. Jeske, Controlling Legal Costs: The Three C's Theory of Action, ACCA Docket 20, no. 8 (September 2002) available at www.acca.com/protected/pubs/docket/so02/costs2.php

[81] Rick Lavers, James Sheets, and Rob Thomas, Electronic Billing Enters the Mainstream, ACC Docket (May 2006).

[82] John C. Yates & Paul H. Arne, Balancing the Scales – Managing Risks in IT Projects, 780 PLI/Pat 105.

[83] Risk Management Issues for Privately Held Companies, ACC Docket (May 2006).

[84] General Counsel as Risk Manager Survey Results, ACC & Urbanomics Consulting Group (2004), available at http://www.acca.com/Surveys/gc_risk.pdf.

[85] Id.

[86] General Counsel as Risk Manager Survey Results, ACC & Urbanomics Consulting Group (2004), available at http://www.acca.com/Surveys/gc_risk.pdf.

[87] Memorandum from Larry D. Thomson, U.S. Department of Justice Deputy Attorney General, to Heads of Department Components & United States Attorneys (hereinafter "Thompson Memo") (January 20, 2003), available at: http://www.acca.com/education03/am/cm/611.pdf

[88] Id. at 3.

[89] Id. at 1. See also, Angela F. Williams, "Corporate Compliance: Now They're Getting Serious!" White Paper, pg. 6-7 (Bryan Cave LLP: June 2003), available at http://www.acca.com/protected/legres/corpresp/corpcompliance.pdf

[90] See generally, T. Banks & F. Banks (eds), Corporate Legal Compliance Handbook, Chapter 8, Components of an Effective Compliance Program, excerpted in ACCA 2003 Annual Meeting Program Material, pg. 23, http://www.acca.com/education03/am/cm/311.pdf.

[91] See Angela F. Williams, Corporate Compliance: Now They're Getting Serious!, at 7.

[92] John K. Villa, Corporate Counsel Guidelines, § 4.02 (2003 ed.).

[93] See Julie S. Congdon and Patricia M. Hamill, Managing Outside Counsel in Litigation: A Primer, ACCA Docket 21, no. 4 (April 2003), available at http://www.acca.com/protected/pubs/docket/am03/primer1.php

[94] John K. Villa, Corporate Counsel Guidelines, § 4.08-4.10 (2003 ed.).

[95] Id. at § 4.11.

[96] John K. Villa, Corporate Counsel Guidelines, § 4.12 (2003 ed.).

[97] If ethically permissible under Model Rule 4.2.

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

[99] Id. at § 4.16.

[100] See id. at § 4.17.

[101] See infra p. 4.

[102] Id. at § 4.18.

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

[104] Id. at § 4.23.

[105] Id. at § 4.24.

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

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

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

[109] Id.

[110] Id.

[111] Id.

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

[113] Id. at 22.

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

[115] Id.

[116] Id.

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

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

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

[120] Id. at 23.

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

[122] Obtained from Sun Company, Inc

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

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.

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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."[1]

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 private 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 BECOMMING A LAWYER-STATESMEN

Responsibility Accompanies Potential

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

This is so for at least two reasons.

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

The simplistic public view of a company is symbolized by overpaid executives grubbing for that most suspect of all goals, corporate profits. But the reality is far different. For example, GE's $15 billion in 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 formulation[7], 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 violations; 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.

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 COUSELOR/ADVISOR

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 experience 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 1993).
3. Sol Linowitz, *The Betrayed Profession* (Charles Scribner's Sons 1994).
4. Mary Ann Glendon, *A Nation Under Lawyers* (Farrar, Straus and Giroux 1994).
5. Gordon, *supra*, at __ [please fill in]
6. Kronman, *supra*, at 11-53.
7. Art Okun, *Equality and Efficiency: The Big Tradeoff* (Brookings Institution).
8. Kronman, *supra*, at 308.