The Challenge for In-House Counsel

Benjamin W. Heineman
Former CLO and Senior Vice President for Public Affairs
General Electric

Faculty Biographies

Benjamin W. Heineman, Jr.

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

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

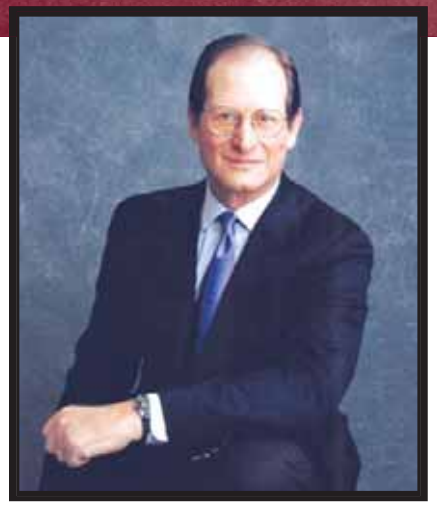
He is the author of books on British race relations and the American presidency as well as numerous articles. Mr. Heineman is on the boards of the Memorial Sloan-Kettering Cancer Center, the Center for Strategic and International Studies, Transparency International-USA, the Center for National Policy,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

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

This is the second of a two part interview; the first appeared in the October *ACC Docket*.

An Interview with
Ben W. Heineman, Jr.

Ben W. Heineman, Jr. the 2007 Annual Meeting's keynote speaker, sat down with ACC President Fred Krebs and Vice President and Deputy General Counsel Deborah House to discuss challenges facing corporate general counsel and current issues in the legal department community.



Ben W. Heineman, Jr., served as General Electric's senior vice president-general counsel from 1987-2003, where he was responsible for managing over 1,000 in-house counsel in over 100 countries. He retired from GE in 2005 as senior vice president for law and public affairs. He is a senior fellow at the Belfer Center for Science and International Affairs at the Kennedy School of Government at Harvard University. Heinemann is also the first distinguished senior fellow at Harvard Law School's Program on the Legal Profession, and a senior advisor to the Center for Strategic and International Studies. He also is senior counsel at WilmerHale.

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ACC: Today you see that some companies have compliance programs that are within the law department and report to the general counsel. Then you have other companies where the compliance function has been separated from the GC and often reports directly to the CEO. Do you see advantages or disadvantages of one over the other?

Heineman: I'm a prisoner of my own experience. And even though my dear friend Scott Gilbert, who was a stalwart member of the GE legal staff, is now the chief compliance officer at Marsh & McClennan [and reports to the President and CEO], I don't believe in a chief compliance officer separate from the CFO and GC who reports directly to the CEO. I think that the finance and legal functions have to be the key staff people for that activity. And I believe that at the end of the day, the business leaders both at corporate and in the divisions have to be ultimately responsible and accountable.

The problem with a compliance officer is that it can create confusion because the reality is that there's not general compliance. There is compliance with a whole series of different laws and regulations, whether it be the accounting rules, antitrust laws, export control laws, employment laws, environmental laws, or tax rules. You can't just say there is compliance. Each one is somewhat different and the likelihood is that you'll have specialists in either legal or finance who are what we at GE called "domain experts." They are the real knowledgeable

people on the substance and they have to work closely with the business leaders in developing compliance programs in each of those separate areas. There's no such thing as just general compliance.

There are certainly general rules and attitudes about the integrity of the company, and its general commitment to adhere to the spirit and letter of financial and legal formal requirements as well as ethical rules that it sets for itself. But the expertise properly falls either in legal or finance and the fewer direct reports the CEO has, the better. The more that the CEO can turn to people like the CFO or the general counsel who have both partner and guardian roles, the better and simpler and more effective it is. That isn't to say that there shouldn't be compliance specialists; I'm just saying that they're going to fall under different functions that will either be in finance or legal for the most part. Indeed, I believe the first job of both the CFO and the GC is compliance.

FREDERICK J. KREBS is the president of ACC. Prior to coming to the ACC in 1991, Mr. Krebs had extensive experience in the Washington, DC area as an association executive, an in-house attorney, and in private practice. He can be reached at *krebs@acc.com*.

DEBORAH M. HOUSE is ACC's vice president and deputy general counsel for legal resources and strategic initiatives. Prior to coming to the ACC, Ms. House was the vice president and deputy general counsel for multifamily legal services, and then compliance, at Fannie Mae. She can be reached at *house@acc.com*.

ACC: Much attention has been paid to the role of the board in this SOX era. Do you think that will continue or change?

Heineman: I have been doing a fair amount of writing about how the goals of contemporary capitalism are high performance with high integrity. One of the problems that we've had in the last six years, because so many of the problems with companies were at the CEO level, is we've spent too much time in these endless governance conferences talking about the role of the board. The reality is that high performance with high integrity is going to be carried out from the CEO down. It's what I call the third dimension—governance within the company, not between the board and senior management, or the shareholders and the company.

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I think that we need to have more discussion about how the gatekeepers can work inside the company and how the CEO can lead with integrity because it is a quite complex system. I'm not going to go into all the issues now. We need to have more discussion about all the techniques used to really govern at the CEO level down into the company. How these techniques create high performance with high integrity: an integrity culture, systems and processes, the proper resources, the proper people, the proper voice for employees, the proper metrics to reward performance with integrity, and key principles and practices.

I'm trying in my own small way to shift this debate through writing and speaking, and I would hope the members of ACC would try to shift the debate too. Let's worry less about what directors can do in their eight meetings a year and more about getting people to focus on internal best practices so companies can really achieve what I consider to be the twin goals of capitalism: high performance with high integrity.

ACC: What three pieces of advice would you give to a friend if he or she were going to become GC?

Heineman: As I mentioned previously [in Part 1 of this interview appearing in the October *ACC Docket*], I would clarify with the CEO and the board the scope and the role of the GC. That is number one.

Number two, I would try to answer the broad question: Is this a company where the responsibility for performance with integrity really rests with the business leaders and not with the staff? The staff can never ever do it. If the staffs have to do it, there's going to be endless conflict. The CEO has to tell the business leaders that they will be measured, compensated, and promoted or fired, if they don't hit their goals and if they don't hit them with integrity. It's not just pay for performance these days. We've got to pay for performance with integrity.

Point three would be to get the commitment to hire the best people. People speak of the GE revolution, but it was not really about me. It was about former GE CEO Jack Welch, and current CEO Jeff Immelt, being willing to hire way beyond me, deep into the company, outstanding lawyers and pay a market price for them. Without getting into the economics, I would argue that this is an investment well worth it for companies. It's still a fraction of overall costs. The rewards in many dimensions are enormous. The person considering the GC job should have a clear understanding about freedom to hire and what kind of people can be hired. Also, one of the basic rules of assuming these jobs is you have to have your own team. Maybe the people who were there are going to be part of your team, and you have to make a decision about that. But, it's often the case that you have to hire some critical people who are completely loyal to you and part of your team.

ACC: One Harvard business professor has asserted that transition periods are critical and new leaders must take charge within the first 90 days of their job. What three tips would you give to a new GC about what he or she should accomplish in the first 90 days?

Heineman: I have hired lots of people whom I sent to be GCs of a major GE division, which is the size of a Fortune 50 company. Often they would not know much about aircraft engines, health care, power generation, NBC, consumer finance, or whatever it was. As the hiring person I would say, here are my impressions of some of the issues. Here are the ongoing business issues that have legal dimensions. Here are the conflicts, the disputes, and the investigations. Here are the organization and personnel issues. Here are the public policies. Three or four clear subject matter areas. What I'd like you to do is to go in there for 90 days and get a feel by talking to everybody you can about the organization. I don't expect you right now to have a plan to do anything. But in 90 days I want to hear your preliminary views on: key legal issues in the business strategy; major disputes; personnel and organization; and public policy. Let's come back and talk.

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After that 90 day period, and basically in these four areas, I would then ask how certain of these are you of where you want to go and are you ready to act? Or, what other time do you need before you start giving me action plans with real time tables and sequencing on the key issues in these four categories? By the end of six months, I would expect them to have, if they're quick and smart, a pretty good feel for at least a first year set of actions. In their new legal house, I would expect them to have all the rooms fit together, know what the volumes should be, what the outside should look like.

ACC: In a multinational corporation, what are the three most important things a GC should do or watch for to encourage an ethical global culture?

Heineman: The first is, does the company have a uniform global culture on the fundamentals, which are basically the formal legal and financial rules and voluntarily adopted ethical standards, which go beyond these formal requirements? Is there a strong global culture whether they're in Brussels, Budapest, Beijing, Moscow, or Chicago? The same rules apply. Global companies have to have a uniform set of running rules that apply everywhere. Of course globalization through localization is the cliché. It's true in terms of products, sales, and lots of things where you need to adapt to the market. But on the fundamentals like honest books, adherence to the law, ethical behavior, they've got to be a global value that just never varies.

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Look at the cases of BP and Sieman's; both of them lost their highly regarded CEOs to integrity lapses. One of their problems was tremendous decentralization. BP didn't have a global safety culture. They talked about it, and it was written down, but it didn't work in practice. So they blew up a refinery in Texas, killing a number of people. Their pipelines in Alaska corroded and they closed down half the field. BP CEO John Browne, who was a brilliant businessman, was forced to retire early. The same thing was certainly true of Siemens, which is embroiled in a really quite systemic mammoth scandal about huge amounts of money being used for bribes; nearly $600 million dollars they themselves disclosed in December of last year. They have announced that it's likely to be much higher. But again, part of that was due to excessive decentralization of what should have been uniform, uncompromising global values. And a young star, CEO Klaus Kleinfield, was forced to leave for, at a minimum, not having systems in place to prevent such a widespread problem.

So, first thing is a uniform culture on the essentials applied truly across the globe, regardless of the business unit. No decentralization of that. No compromises.

Second, is really serious education and training and giving employees a voice. The employees run the company; not in the sense of managing it, but in the sense of making it go. They really need to understand what these

values are, what the disciplines are, and what they need to do. They learn first and foremost from their peers and their leaders. But on the many complex issues companies face, they need to be well-trained. We say education and training and our eyes glaze over. But if you think about it for a second, people go to great companies to get tremendous training in engineering, marketing, sales and finance, or whatever.

We ought to have the same skill in training people about integrity as we do about all these other things. We ought to make it interesting. We ought to check to make sure it is retained and we've got to retrain. We've got to make people sensitive and knowledgeable. Not that they know the answer, but so they are the ones that know when the problem exists. And the corollary to that is that they have to have a voice. You really need a system whereby they can come forward without fear. They can speak to the top of the organization about problems and those problems will be fairly investigated without fear of favor.

In every scandal that you've ever read about going back before Enron—such as Solomon Brothers or Beechnut in the last 20 years—employees knew all about it. They knew all about it long before it became public, but they were afraid. They had no voice. So, whether it's an ombuds system, or an internal independent audit staff, or proper compliance reviews, or the dotted or straight line between the local lawyers and the general counsel, people have to be unafraid of coming forward and talking about issues. The top of the company has to be committed to fair investigations even if good senior people get fired. This certainly happened at GE where senior officers got fired either for commission or for failure to create a compliant culture.

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Third, is that there can always be checks and balances at corporate, especially in the corporate audit staff, but you really need to build the checks and balances into the business processes. You've got to make it a business responsibility and there has to be accountability. You have to build it into the business process. In sales, if you're hiring a distributor in a tough country, you have to have a very significant due diligence routine that you go through and it is really followed. In creating products, where you go through many milestones, the legal requirements for product safety have to be baked in. Sometimes it happens, sometimes it doesn't. But that's a third thing you need to look for, recognizing, of course, that there also needs to be meaningful corporate systems and processes to ensure that the businesses are carrying out their tasks.

ACC: Now, we'll totally shift gears. Much has been said recently about skyrocketing associate salaries and the cost of outside legal services generally. How should the in-house legal community respond?

Heineman: I do think the profession has been in crisis for some time, and I certainly think its in crisis now. I think one of the great problems, which has been remarked upon for many, many years, is the transformation of law firms from professional associations to business associations. It has made the almighty dollar the goal. Now all firms will deny that and they'll say: We hold up professional standards; 'we're part of a noble profession.' But you go to the partner meetings and it's all about leverage and PPP [profits per partner] and the dollars. You've also got the problem that has afflicted sports that I think afflicts all law firms; you have free agency. The bonds of loyalty have snapped and so the great business getter, if he's in lock step or thinks that he is only getting a fraction of what he should be drawing, he goes off to the other firm.

It's an issue that I'd like to spend some time on with my colleagues at the Program on the Legal Profession at Harvard, trying to revisit the connections between the firms and the corporations and see if we can come to a better understanding of the cancer of money. Firms and corporations are joined together in the practice of great law, addressing many, many fabulous wonderful issues. Yet we're divided, seriously divided, over the completely different issue of our perspective on money. Firms don't seem to get that we live under budgets. We have to have productivity. They don't spend much time creatively thinking about how they can do that. They have their partner meetings. There they commit every sin that companies are accused of; they often don't think about the client's internal, not just legal, needs. They are very internally, not externally, focused on their economic needs.

Corporations don't help because we're always forcing them to compete ferociously. So I think we've got to kind of break the mold and begin to focus on all these tensions and see if we can reason our way to a better solution. I think the people who are being hurt in the process are really the young people. They're leaving law firms very, very early in their careers; very few are staying. It's not much fun because of the money chase. Both sides bear responsibility and we've got to address it.

I'll give you one issue. Who should pay for training? The corporations will say the law firms should, yet the corporations do so by paying the fees. We need to think

that through a little bit. What does it mean? Does it mean paying them to go sit in the basement and go through emails? Or does it mean giving them real training? Letting them go to depositions, court hearings, meetings, and things like that? So, without answering the question of what a company should do, I would just say that we have a real issue on both sides of the equation. We have to deal with the cancer of money as we join in the noble practice of law.

With respect to companies, I guess having tried everything under the sun, from options to flat fees to discounts to everything else, I tend to think that budgeting is still the right answer even though it is hard to do. But it should be budgeting in increments. If you have a big matter you take a similar approach, just as I was saying about how you initiate a new general counsel into a division. You say, well let's budget for the first three months. What are you going to look at and when you come back and you have a better sense, we all have a better sense of what the matter is, then we'll budget for the next six months. It is hard work and in a big corporation with busy lawyers, the inside lawyers don't do it very well and the outside lawyers don't like to do it. So, it may be a solution, but it certainly isn't a popular one.

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ACC: Just for the record, what do you see as the top advantages, the reasons why you would go in-house?

Heineman: Do you have another hour?

ACC: Just give me the condensed version.

Heineman: Everybody in this audience is going to know. Being in law firms isn't always much fun because of the ceaseless hunt for clients and money. But if you're a senior officer in a major company, involved in global business, you have an enormous array of interesting issues, you have an infinite "to do" list ranging across the world, covering most areas of law and policy, and working with great people in different disciplines. It is an enormously challenging, creative job where not only are you the client, but you're really the decision maker. At GE I was staff to the chairman and to the board, but I basically spent 90% of my time running an operation. I hired, I fired. I made all sorts of decisions that affected the corporation in a very important way. So ultimately, it is being a leader as opposed to being an advisor. It is being able to decide or being at the very center of activity in a great enterprise, in a nutshell.

ACC: That is an eloquent exposition about the advantages. Let me ask this additional follow-up question. Certainly the situation for general counsel today has changed: the potential exposure to liability, personal liability, all of the challenges that have evolved out of Enron, and then the backdating scandals, and all that has happened. Knowing all of that, would your advise somebody to go in house?

Heineman: Of course. It depends on your appetite for risk and there certainly is risk. It's safer being a firm lawyer. You can fire the client. You rarely get in trouble. If you look at all the scandals, the outside firms with very few exceptions, pretty much escaped unscathed. Not all, but most did. They have all sorts of deniability. I just gave advice. Blah, blah, blah.

But, I don't happen to think that these jobs are that risky if you are a person of courage, intelligence, and integrity. And you are willing to do the right thing, willing to make the tough call. You do the best you can under the circumstances. And as long as you're not corrupted, I don't think they're that risky. But, as we've discussed, there may be the moment of truth when you have to resign.

Plus, all of ACC's members know that sometimes you have to make decisions very quickly and you don't know all that you'd like to know, and you can make mistakes. That's just part of it. But it is also part of what is challenging, exciting, and fun.

ACC: This has been great. You've been very generous with your time and very insightful. Thank you very much.

Have a comment on this article? Email editorinchief@acc.com.

How to Say NO to Your CEO

This is the first of a two part interview; the second will appear in the November *ACC Docket*.

An Interview with
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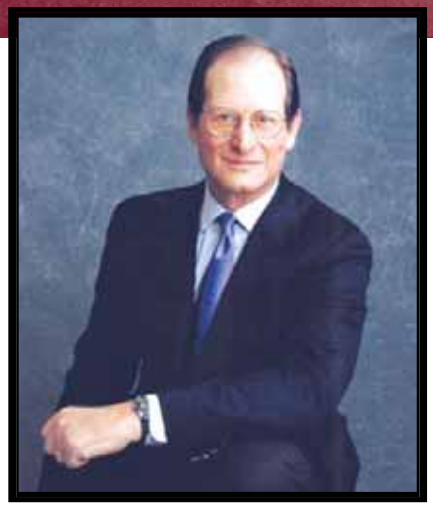

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ACC: One difficult question that plagues in-house counsel is "How do you say 'No' to the CEO?" Investigations into many of the recent scandals at major companies reflect that the general counsel or the legal department were either purposefully excluded from the table, or more subtly, not included at the table. This is a complaint we often hear from our members. How do you get to the table as a meaningful partner who always receives an invitation, even in areas that clients may traditionally consider non-legal or in areas where clients may not wish you to venture?

Heineman: If you're starting the job, you should define the scope of your role first, both with the CEO and with the board of directors. In this day and age it is appropriate that the board of directors or members of the executive committee interview the final candidate for the general counsel's position. The general counsel's role is as a key player in the corporation's quest for performance with integrity. The general counsel must have a job that is broad enough in scope to address the myriad business and society issues facing modern corporations. The GC, either as a lead or as a supporting actor, should be involved in complying with laws and regulations across the world, establishing global values and standards beyond what financial and legal rules require, and shaping the company's governance, public communications, reputation, and role as a corporate citizen. It also includes ultimately being involved in addressing the question of how to balance the company's private interests with the public interests affected by the corporation's actions.

A different way of saying this is that the general counsel, as a member of senior management, should on most matters facing the company, assess them for legal, ethical, reputational, and, when knowledgeable, commercial risk. And then to take it to another level, this then involves being both a business partner to the business leadership, but most importantly being a guardian of the company. And as readers of the *ACC Docket* know, the general counsel's duty is to the company and not to the CEO. But clearly, to be effective, you have to be a partner to the CEO as well as a guardian of the corporation. Simultaneously resolving that tension is what the job, in essence, is all about.

I think the way you ensure this is that you establish this understanding when you are interviewing with the CEO and with the board, if you have the courage to raise these issues and you should. You should define and describe the scope and the kinds of risks you expect to evaluate. You describe the partner-guardian tension, and that you expect to be involved in virtually all fundamental decisions of the company. Now, in a large company you can't be everywhere. But you certainly should say that you ought to be involved in first order matters, even when they have legal dimensions but are not primarily legal—or have reputational, or ethical dimensions. And that is virtually everything from new products to new geographies to the business strategy.

And I think that if you clarify that going in with both the CEO and the board, you have a chance of being included in business matters, to be consulted as a business partner to get things done. But also you have the opportunity to speak as a guardian of the corporation with respect to, at a minimum, legal, ethical, and reputational risk, and conceivably commercial risk as well. But opportunity at the outset must, of course, be matched by subsequent performance.

FREDERICK J. KREBS is the president of ACC. Prior to coming to the ACC in 1991, Mr. Krebs had extensive experience in the Washington, DC area as an association executive, an in-house attorney, and in private practice. He can be reached at *krebs@acc.com*.

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ACC: In a recent article, you commented that the GC for Hewlett-Packard Corporation was "incurious" and that she failed to probe the legality and propriety of pretexting to secure confidential information. Ultimately that failure caused her to lose her job and another law department colleague to be indicted. Implicitly then, before a GC can come to the determination that they ought to be saying "Yes" or "No" to the CEO, he or she should have exercised appropriate curiosity in identifying and drawing conclusions about the relevant issues. How would you describe or define the appropriate level or scope of that curiosity?

Heineman: Let me talk about Hewlett-Packard. First, my comments on the general counsel were based on news reports; I have no personal knowledge about that situation.

What I think is instructive is that this was a case where the board of directors and senior management wanted something done. I don't think there's any question that this was a matter of the first order for the corporation. And, on those matters where the board asks the company to do something, or it's a priority of the CEO, those are quintessentially the kind of matters when the general counsel—as opposed to any of the general counsel's subordinates—should understand the legal, ethical, and reputational dimensions in some detail and with some care.

The second way to think about the question is: how big is the company? In a large company, there obviously will be division general counsel and corporate experts in tax, environment, employment transactions, IT, and other specialty areas. But even then, everyone should have the same orientation in terms of the scope of the job and the partner guardian role—the job of assessing legal, reputational, and ethical risk, as well as commercial risk. Then this flows down, again depending on how big the legal staff is, and how you're organized, to even the more junior lawyers. They all have basically the same role and responsibility and, if there are issues with respect to any of these dimensions, there needs to be a reporting relationship back up to the top legal officers, including the general counsel, depending on the magnitude of the issue.

A third dimension of this is problematic—and it certainly caused us problems at GE—accounting. One of the salient phenomena of the past five years, certainly since Enron, has been what I call the "legalization" of accounting. Obviously, lawyers are involved in what a company discloses in its 10Qs, 8Ks, public relations statements, etc., in terms of vetting it with disclosure committees for accuracy. But there are many complex accounting decisions that may be made at the end of the quarter or the end of the year, in terms of exercising judgments about how to treat things like revenue recognition.

I wouldn't want the chief financial officer telling me how to handle a merger clearance in Washington. So, what's the role of the legal function now that the SEC has made so many accounting issues fraught with le-

gal implications? This is an area where there is special expertise elsewhere in the company—in finance—and yet the implications are far different than they were 10 years ago. Ten years ago, if there were an accounting issue, most of the time the chief accountant of the SEC would talk to the comptroller of the company. They'd discuss it, and if the company agreed, they would change the matter prospectively on many questions. It would be a question of accounting judgment. Today, you're much more likely to have an investigation and the SEC enforcement division is going to be involved.

Take Fannie Mae. I'm not trying to judge that case, but Fannie Mae did have two accounting firms and a former head of the SEC enforcement division saying that their way of dealing with FAS 133—which is an accounting for derivatives rule that is hundreds of pages long and quite complex—was correct. But both OFHEO [the Office of Federal Housing Enterprise Oversight, Fannie Mae's regulator] and the SEC viewed it differently. It had enormous consequences.

That's a long way of saying that this is a particularly problematic area where 10 years ago there was church and state. Legal did the law; finance did the accounting. But now this particular area, because it has caused so much legal activity in companies, raises hard issues. I think one solution is to build stronger forensic accounting capacity into the finance function so it can deal with emerging legal trends relating to accounting, and not have the legal function involved in every controversial accounting decision.

I cite that as a special problem. But, as a general matter, I go back to what I said a moment ago: the legal function, from the general counsel down, should have a very broad scope of activity. It should be involved in discussing various kinds of risk, not just legal risk, and it should be involved in most of the major decisions as a member of the senior management team.

ACC: Legal advice is usually provided in gray situations, not black and white ones. For example, it is generally easy to tell a CEO that he or she cannot fix prices. It is a little more difficult if the proposed action is not *per se* illegal under the antitrust laws, but where a rule of reason comes into play. Perhaps then your advice is "maybe." In the latter scenario, how does your advice differ and how do you present that advice?

Heineman: When it's grey, it's not that the answer is "maybe." It is a question of time. CEOs are always in a hurry. They always want the answer tomorrow. In a fast-moving corporation, the first tension you've got to deal with is how much time do we really have to look at this problem? Let's assume that you can get a reasonable amount of time, even though a reasonable amount of time in a company is not necessarily what a law firm would consider a reasonable amount of time. Then your job is not to give the "maybe" answer. Your job is to say, look, here are the assumed facts, the essential facts as we know them today. This requires really being concise, precise, and knowing how to speak to business people, not an hour and a half later when they've fallen off their chairs and are asleep. Very concisely, but fairly, state what are the key facts and the key legal considerations. What are the legal risks that we have under options A, B and C. This may involve some discussion with business people to generate those options.

So basically what you're saying to the CEO is not "yes" or "no," you're saying "look, here's the line."

So basically what you're saying to the CEO is not "yes" or "no," you're saying "look, here's the line." We're in a gray area. How close to the line, how much legal risk do we want to take in a world where the law's unsettled and the regulators are uncertain? I'm going to give you, let's say, three options. One is risky because the law's uncertain here and we're going to be in this or that regional office of this or that regulatory agency and the person there has this reputation. I'm going to give you another one that's a little further away from the line. I'm going to give you still another one that's quite a bit away from the line. How much risk do we want to take? And that analysis of different levels of risk, all of them being legal but each one with lesser or greater risk, is really the first job on these gray area issues.

Then, the second job is to give your recommendation. In fairness to the CEO, unless it's illegal in which case the GC has a different obligation, the GC should give his or her advice as to which of the options described is, in the GC's judgment, the right one to follow. That doesn't necessarily mean the most conservative option because this might be extremely expensive; it might be quite onerous. You'll have to use judgment and explain why and you have to lay out the considerations.

Now, that's the ideal. And if you've got 24 hours to do it, you may not be able to do that much. There are very few things in companies though, that have to be decided with that rate of speed, even though a CEO likes to say that they have to be decided that quickly. They will press hard for your decision that quickly. So, to some extent, without being obstructionist, without losing the deal, or without having the newspaper write the story that demolishes you before you can respond, you have to be timely. All deliberate speed is a pretty good watchword.

I want to emphasize that good lawyers are good analysts. A wise businessman once said to me: "If I know the facts, every decision is pretty easy." It is getting the facts and asking the right questions. And that's the problem whether you're in finance, or law, or tech, or engineering, or whatever. There's always this time pressure in companies. That's what makes them fun. You're in a real world with real competitors with all sorts of things happening, with a real organization, people waiting to hear. Time is a really vital dimension in thinking about how to answer the question that you've posed.

I want to emphasize that good lawyers are good analysts.

ACC: There's the time issue and there's also just the sheer volume of information and detail that's available. So, to get to those facts you have to have an ability to sift through them.

Heineman: That's good lawyering. If you're going to trial and you've got three years of interrogatories and depositions and documents, what's the story that you're telling to the jury? You're certainly not going to tell three years worth. One of the things everybody learns, as they get older, is to make it simpler in the mathematical sense of "powerful and elegant." When you come out of law school you've been trained to see every issue and run every rabbit down its hole. That's how you get good grades on exams. When you're practicing, it is different. The difference between academics and practitioners is practitioners have to make complex things simple and sometimes academics make simple things complex.

ACC: On a practical basis, lawyer and statesman Elihu Root advised that sometimes you just need to tell clients that they are "damn fools and should stop." Can you comment on the advisability of that approach, particularly if it is outside the legal arena, and how you give such advice?

Heineman: There are three dimensions of this that we should discuss. The first dimension is the place that you give this advice, the second is the form, and the third is the style. Let's just take them in order.

The place. If you're in a group, most CEOs are testing ideas. There is a kind of debate. But if you're there with your peers in a group of seven or eight senior leaders, it is very hard to basically contradict the CEO if that's what saying "no" is. If there's an open debate and the CEO is taking his or her counsel and hasn't yet taken a position, then you can state the position quite clearly. If you're in a group, at least in my experience and certainly with [former GE CEO] Jack Welch, it was very hard to beard the lion in his den when the other lions and tigers were around the room and he was pretty dug-in on something. For obvious reasons, CEOs view their authority as being very important. They don't want it directly challenged. So, saying "no" in a big group can be done and sometimes needs to be done, but it's sometimes better if you can go in afterwards or find a place where you can be one-on-one to express the concern.

On the other hand, there was a danger, at least with Welch: he would say, "We're going to decide this by 4:00." He was a very shrewd person and had been around the bureaucracy a million times. He would say, "I don't want to have any end runs. I don't want to have you come in later. I don't want any sort of letters for the record. Say it all now or shut up." And that was fine, but when he was under full sail it was hard to get him to turn around sometimes at a meeting. So, one question is the place—group or alone.

The second dimension is the form. This goes back to the question of options. If you have the time and you can lay out different options with different kinds of risk, sometimes it will be pretty obvious, without saying "no," which is the right option. In other words, without saying "Mr. CEO, you jerk, you suggested an option X which is flat unlawful. We can't do that. And even option A which is close to the line has got way too much risk because of where the law's going or where we're going to be having this fight." And then you lay out B and C. Sometimes the option exercise can be a useful form, especially since you can engage without lobbying your colleagues.

You have to disagree without being disagreeable.

The last dimension of your delivery is the style. Sorry for the cliché—but they are true sometimes. You have to disagree without being disagreeable. CEOs can be very confrontational. Their strongest weapon, given that they have to be generalists, is hard questioning. They're used to playacting, including pushing the person to the wall in an aggressive way. People just have to understand and keep their eye above the mouth that is speaking across the

table at them somewhat aggressively. Just count to 10 and speak in a way you know may be disagreeing, but not in a disagreeable or angry way. It is hard to do under a lot of pressure and in tight situations, especially if the person is being close to abusive. But you normally don't win those kinds of fights with the CEO if you lose your cool.

Welch was the kind of person who heard everything. He was a brilliant man. So, after a while I learned that you could take him on and contest with him even though he had taken a different position and even though he had said the decision had to be made at 4:00. He would hear what you were saying. You didn't have to say it seven times. You could say it once or twice and he got it. And he would think about it and three days later he might end up where you or someone else was without ever saying "Oh thank you Mr. CFO for that great insight. You changed my mind." That wouldn't happen, but it didn't matter. Not all CEOs are able to hear that well. Some CEOs, obviously, when they have a position, they're just going to repeat it over and over again and not hear. That wasn't the case with him.

So much of this is really the delicate relationship that exists between the CEO and the top people. How much tension can there be without you being banished beyond the pale? And part of that is the judgment—if you're lucky enough to make a judgment going in and doing diligence going in—about what kind of person the CEO is. Many of them, even though they're going to be brusque and tough cross-examiners and push you, absolutely want you to push back. Some may not.

ACC: We discussed how you go about doing the best to establish your position, your responsibilities, and your role as an incoming general counsel. But how about the general counsel who are already in place, and who may be struggling to change a culture, struggling to make certain that their advice is heeded, or that it's safe to deliver unpopular advice. Do you have any advice for these GC? Or suggestions about how to bring about a culture change in the organization or to stop a bad culture change so they can do the right thing?

Heineman: I'm not big on advice because everyone faces their own circumstances and has to make their own judgments. I would just make the observation that there are two obvious places to go if the world's changing. The first is to your senior colleagues: the head of HR, the head of finance, or whatever the case may be. Talk privately about what's happening and what, if anything, you can do to help shape the CEO's thinking to change direction and go in a better way, a higher integrity way. If they are creatures of the CEO and part of the palace guard, you're sunk. But they may not be.

The second obvious place to go is to the board, if that is possible. One of the important changes because of Enron, and I think most of the changes after Enron have been good, is that the boards are, in reality, more independent. They are concerned about their reputations. Having independent directors is a good thing. The general counsel can always go talk to friends who are directors if they've been there awhile. Because I was secretary, I was at every board meeting. I was part of the board culture. Over time, I became extremely good friends with virtually all the directors. I never had to go see them, but I could have if I had a problem that I couldn't solve inside myself. I could go talk to them.

You have to look in the mirror and not be corrupted by the money.

But you do face the question of when do you have to resign and when do you have to give up your non-vested financial interests that are significant. That is the conflict and that is the hardest question, maybe one of the hardest questions for general counsel. You have to look in the mirror and not be corrupted by the money.

ACC: That's a perfect segue. Where should a general counsel draw the line or how should a general counsel draw a line in the professional sand at which time they depart from the company that fails to heed their advice? And what should they do before they finally go?

Heineman: One way to think about this is three simple scenarios.

First scenario, is good board, good CEO. Normally you can work it out. You may have had honest differences of agreement, but assuming that the company hasn't crossed over into the clear area of wrongdoing, to some extent it's a command structure. As long as you think you've had due process and issues have been presented fairly, it shouldn't be a problem staying even if you disagree with the decision as long as it is not illegal or grossly unethical. But there can be a lot of tension even in the good board, good CEO situation, just because of the speed, size, and complexity of these gray area decisions which come up all the time.

Second scenario is bad CEO, good board. The CEO has just gone over the deep end. The CEO wants to do things that are clearly improper, either in a legal, ethical, or reputational sense. At that point, let's say it has crossed the threshold for a U.S. general counsel. You can go talk to the board, but normally you won't win an argument with the CEO because killing the king is pretty tough. But you may be able to work out a deal of leaving with some honor. Just say, look we've come to differences. Here's the issue; I personally feel it's wrong. It is time for me to go home. And, depending, you may have a chance to work out an arrangement where you get a package and you go away quietly, assuming you don't have a obligation to report an illegality. Normally, just talking to the board is enough even though it is far more likely you leave because trust with the CEO has been shattered, even if the board tries to address the underlying issue with outside counsel. I should hasten to add for your readers, that anyone who is a general counsel and gets in these situations needs a lawyer. The rules in this area about when lawyers are obligated to overcome the privilege and report to outside authorities are about as complicated as any I've ever seen: when you have to report and to whom you report. There are local bar rules and special SEC rules if you're an SEC practitioner. It is an area fraught with ambiguity requiring counsel to get counseling.

Then the third scenario is bad board and bad CEO. You may have to report to the authorities under these different rules. But I wouldn't want to live my life in this compromised situation because what's happening is just wrong. Sadly, I'm afraid I don't have any good answer other than the resignation. I think people who go into the general counsel position, if they take a chance on a company that's on the edge, they need to have thought through what they're going to do if the situation arises. They could go and say hopefully it's a turnaround situation. New CEO. Bad culture. But if the new CEO doesn't change the culture, indeed is captured by it, they've got to be prepared. They're naïve if they haven't thought about the doomsday scenario of the flat resignation without the financial benefits.

ACC: Thank you so much. This has been very helpful and I am sure will be helpful not only to our general counsel who advise the CEO, but for all ACC members who sometimes have to deliver difficult advice to their client.

Part two of this interview will run in the November issue.

Have a comment on this article? Email editorinchief@acc.com.