

Litigation Experts Warn That General Counsel Must Dive Deep Into New Technology Products

A former GC now at Crowell & Moring says in-house lawyers need a seat at the table, not just at the beginning of a tech product but throughout its lifetime, a topic discussed in the law firm's "Litigation Forecast 2020: What Corporate Counsel Need to Know for the Coming Year."

By Sue Reisinger

Making a new tech product? Then in-house lawyers need a seat at the table, not just at the beginning of it but throughout its lifetime, said Cheryl Falvey, former general counsel of the Consumer Product Safety Commission. She's now a partner in Crowell & Moring's mass tort, product, and consumer litigation group in Washington, D.C.

Falvey told Corporate Counsel that the legal team needs to understand the what, when and how the product will be used. That use can change as a product changes, especially if artificial intelligence is changing it as it's used, she added.

"Your lawyers can't give advice about the reasonableness of security measures, or on the privacy or safety of a product, if they don't know the what, when and how of the tech, and the lifespan of the product," she explained.

When a product's lifespan ends, she said, items like smartphones and computers can be scrubbed. But what about autonomous vehicles, smart refrigerators and other products?

Her comments came as part of the release this week of her law firm's "Litigation Forecast 2020:



Mark Klapow, left, and Cheryl Falvey, right, of Crowell & Moring.

What Corporate Counsel Need to Know for the Coming Year." The 36-page report includes sections ranging from antitrust to health care to false advertising.

Mark Klapow, co-chair of the firm's litigation group and editor of the report, said it's a forward-looking document, meant to "help general counsel not just do the work, but also look around the corner and predict what's coming down the pike so they can align their resources and efforts."

Like Falvey, Klapow also knows a little about the work of a general counsel. He serves as outside general counsel for the Hispanic Heritage Foundation and Temple Adat Shalom.

Klapow cited at least three main takeaways for general counsel from the forecast.

One significant lesson, he said, involves employee noncompete agreements "and challenges afoot in the courts in trying to enforce them around the country. In the media, in federal administrative circles, in state legislatures there is increasing skepticism about the value of noncompetes."

He noted the negative press that surrounded sandwich-making franchise Jimmy John's efforts to enforce noncompete clauses against low-wage employees. "Now the federal government and some states have considered banning noncompetes for lower-wage employees," he said.

He said now general counsel need to do two things: Make sure their agreements with employees are narrowly tailored and meet legal requirements in their jurisdiction, and be strategic about enforcement.

"Willy-nilly trying to enforce every noncompete, regardless of the circumstance, is not a winning scenario," he explained. "They will continue to be challenged in court."

Another lesson from the report, Klapow said, is its analysis of appellate courts' honoring stare decisis, that is, giving deference to past decisions. "There is value to continuity in the law. But it's starting to fall apart," Klapow said.

"There are increasing changes in the way both political parties and their schools of legal thought have changed over time," he explained. "It's a really interesting trend for general counsel to think about when if advancing arguments in an appellant setting."

But Klapow said the most significant takeaway lies in the report's first article. "The cover story," he said, "is the main event in anyone's litigation forecast."

The cover story, "A Tangled Web: How the Internet of Things and AI Expose Companies to Increased Tort, Privacy, and Cybersecurity Litigation," explores how the digital revolution is transforming not only high-tech companies but also traditional industries with products, business models and workforces. It discusses the impact on com-

panies of increased connectivity, artificial intelligence, and the ability to gather and use tremendous amounts of data, as well as the legal risks involved.

Falvey, who co-wrote the cover story, saw other significant lessons for general counsel in her article's look at the impact of interconnectivity.

"I practice in a space involving products and infrastructure that are connected," she said. "Increasingly it is being incorporated into other products, whether in the home or autonomous vehicles."

All her lessons dealt with the in-house lawyers better understanding their companies' products and the risks they bring.

"First, the legal department needs to know what rights it has to access the source code used. The company needs provisions in contracts to allow access to source code in the event of a security breach," Falvey said. "The lawyers need to understand the precise risk to consumer privacy, and even to consumer safety. ... As with an autonomous vehicle or a home security system, in the event of a breach, you need to understand if infiltration can affect the working of the product."

Falvey said the general counsel also needs to understand more than ever about what data has been created, how it is being stored, and how that data changes or what new data is being created when a product is used.

"It is increasingly difficult for lawyers to understand what data is being created as these products operate," she explained. "Tech products create data constantly. AI products not only create data, but change the way they perform based on that data."

In the future lawyers must know whether data is being overwritten continually and is no longer there, Falvey said.

"From a general counsel perspective, being proactive in understanding the data that is being created and how it is collected and stored is even more imperative than ever before," she said.

Falvey had one more caveat for legal departments. "Everyone talks about monitoring what's going on at the federal level" in terms of regulations, she said. "What's interesting, and what a general counsel needs to focus on is what's happening now at state and local levels." With some vehicles, she said, cities are becoming the first to regulate who gets on the roads and when, "while we wait for the federal government to act."

Falvey noted, "It's hard enough to monitor 50 states, but now cities too. For an in-house legal team, it's a lot to try to follow. And that's probably also true in health care and a whole variety of areas being affected by technology."

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