

The Art and Craft of Corporate General Counselship

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This article is the first in a six-article series discussing the changing and dynamic role of general counsel and the realities they face as they create strategies to facilitate profitable and compliant business practices.

Since the creation of the corporate legal department, in-house counsel have struggled to define their jobs within the criss-crossing and often contradictory mandates of corporate profitability, on the one hand, and the ethical rules and standards applicable to lawyers and others in an increasingly regulated world, on the other. There is no agreed model for the GC role, and there can be no model that defines such a role universally in the context of tens of thousands of very different corporate endeavors. By its nature, the role is dynamic and adaptive.

That being said, lawyers and society do have to agree on a few of the basic tenets of a general counsel job description that, in turn, will define the very nature of what GCs will be held accountable for. By basic tenets, I do not mean how one deals with outside counsel, or how one may create efficiencies in legal department processes. I don't even mean how one defines success in terms of outputs, be they litigation results, or budgetary savings.

We have to define the role of GCs in terms of ethical mandate.

This dense issue has been boiled down into the phrase "conscience of the corporation," which has served to attract certain legal profession commentators and to repel others. Some GCs believe that in-house lawyers must be the champions of corporate ethicality and must deploy the many hard-learned skill sets of the legal profession in the cause of good governance. Others hold the view that because lawyers hold no monopoly on ethics or honesty, or on wisdom more generally, general counsels do violence to the cause of good governance by declaring it their own exclusive domain. It is perhaps a sign of how muddled the question has become that some of the most experienced general counsels of our largest companies can, with great earnestness, take what appear to be diametrically opposed positions on such an elemental aspect of their own job description.

Those who sponsor a special role for lawyers in all questions of ethics, governance, social responsibility, and fairness in corporate decision-making largely make their case by elevating the societal role of lawyers in a presumed corporate quest for a better world. They point to the ethical rules at the heart of the practice of law, and to the societal responsibilities that the American model of legal practice imposes, as creating a unique lawyer worldview that is broader and perhaps less self-interested than others'. The case these commentators make is as much aspirational as it is practical. Lawyers should be thoughtful and fair and empathetic and therefore, the argument goes, lawyers must be the voice of thoughtfulness and fairness and empathy.

Those who express their trepidation about such a role are far less aspirational, of course, and quite a bit more practical. They point to the evident fact that CEOs and CFOs also have consciences and the capabilities of thoughtfulness, fairness and empathy. They worry that a declaration of a special role for lawyers will merely isolate lawyers from their partners in other professions, and perhaps cause everyone to suppress their own consciences by delivering ethical challenges over to someone else. To a great degree such arguments are based on the aggrandizement of a "special" role for lawyers into an "exclusive" or "monopolistic" role, which few if any of us would sponsor. But the view that lawyers are not in fact any better at resolving ethical, governance or fairness issues than anyone else does get traction in a world where so many lawyers seem to have lost their way.

We need to re-attach this debate to some market and societal realities that are sobering and that, I believe, leave the legal profession with no choice but to accept its “special” role. In this unprecedented age of corporate responsibility and transparency—where companies and all of the executives who lead them are the increasing target of regulators and activists—I believe that it is, in the end, impossible for a GC to shun a special responsibility as the “conscience of a corporation.” Virtually all internal and external corporate constituencies now expect this from general counsels, and our training in governance, dispute resolution and the common law situates us well for the job.

Those who would prefer to minimize this role are, I believe, more worried about how hard the general counsel job becomes than they are concerned about which is the best corporate policy. Fears around questions of lawyer arrogance, or suppression of the consciences of others, or detachment from the rest of corporate society, are all rooted in the notion that GCs should make their own jobs easier by deflecting notions of a “higher calling.” There is no question that this higher calling makes the job ethically complex and politically dangerous. But, so what? If that is the job, that is the job. And if it is, then practitioners with the right mix of intelligence, integrity, and humility will succeed at it, and arrogant self-aggrandizers will fail or struggle.

But should it be the job? I believe that there is no way around it. Commentators have often noted the unique importance (and difficulty) of legal compliance in the corporate scheme of things, and the overtly anti-competitive, anti-efficiency nature of such compliance. Who else in the executive suite is going to be given the specific mission of slowing everyone else down in order to get it right? The more acute observers have also noted the absence of a meaningful tension between “wisdom” and the particular form of “wisdom” that a good lawyer brings to bear, i.e., the ability to see and empathize with all sides of an issue. Being the conscience of a corporation implies no monopoly on wisdom, and it involves nothing that resembles an arrogant ethical dictatorship. It is simply what we have been trained over years to do. It is what we get hired for, and it is different from other professions.

And, in practice, there is no meaningful distinction between being *the* conscience of the corporation and simply being *one such* conscience among many. By virtue of training in the common law and its disposition of competing claims to fairness and justice, and by virtue of lawyers’ immersion in rules and principles of ethics that govern few others in the executive suite, lawyers are uniquely positioned to provide wise counseling on matters of conscience. And matters of procedure and decision-making. And governance. And conflicts of interest. And anything else that requires an emotional detachment from the day to day ambitions of revenue and profitability. Our nature and our training has defined an institutional mission for lawyers. And if our mission does not include a central involvement in the portfolio of ethical questions, then all that training does little service to anyone.

And there is one more aspect. Whether we want it or not, society outside the corporate suite has charged us with a special role to play in keeping a client’s ethics on track. People expect lawyers to play in this arena, and to play hard. When something breaks ethically, society looks for the lawyers. This tendency has already infiltrated many regulatory regimes, not least the canons of ethics and their requirement of independence. I am afraid that, even if we wanted to make every corporate discipline the keeper of its own conscience, our customers, our shareholders, and our regulators are no longer buying it. They expect the lawyers to be the defender of “doing the right thing” and the empowered enemies of ethical misconduct. They expect us to have authority, and scope to do that job. For them, this ship has sailed.

And for that reason, perhaps most of all, GCs disclaim their role of being the corporate conscience at great peril to their livelihoods and their licenses. The key is to know how to do it well, and to find a way to advance the business goals in the process.

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