The Conscience Role: What Does It Mean?

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This article is the second 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.

The debate about whether lawyers are the "conscience of the corporation" has mostly looked right past the meaning of that phrase in the day-to-day life of a general counsel. As in all debates, compression of the subject matter into a tag line has made the world seem falsely binary. This distracts from the rich and complex ways lawyers must do their jobs every day, and it underestimates the persuasive power of the art and craft of lawyering. That tool set—an understanding of law and custom, a fact-based dispute resolution methodology, an ability to communicate concisely and delicately, and easy access to the centuries of wisdom handed down in the common law—helps define lawyers' special ethical role even as it helps us implement it.

Let's begin with what this is *not* about. Being the conscience of a corporation does not mean that one only thinks in terms of ethical roadblocks and problems. It does not mean that lawyers must become binary in their reactions to situations. It does not mean that lawyers who might prefer one outcome among many for ethical or fairness reasons need to "win" every situation or discussion, or somehow trump the considered views of others. In fact, being the conscience does not in any respect imply some kind of uber-authority to overrule management in situations where the corporate conscience is called into the discussion (or inserts itself into it).

Metaphors are always at risk of being overwrought, but let's start with one anyway. The conscience of a corporation mostly functions just like the human conscience in every one of us. Most days, it hardly needs to get up in the morning; most days are pretty free of significant conscience consultations, and a comfortable routine more or less prevails.

But that routine becomes easy and comfortable only through the creation of behaviors and habits and rules of the road that make action easy and uncomplicated. In a corporation, those habits and rules are called governance, and they are enormously affected by ethics, fairness, justice, and, in general, issues of conscience. So, one place in which the GC is unquestionably the "conscience of the corporation" is the creation of corporate governance in all its many forms, from shareholder democracy to board oversight to compliance functions to enforcement of rules against misbehavior. It is hardly an exaggeration to insist that in this space the role of the GC is absolutely critical, and that the role includes a large dose of the kind of overarching constituency-management thinking that lawyers excel at.

The conscience, whether in humans or in corporations, is also triggered in moments of conflict between competing objectives. Many of these competitions resolve themselves into resource-allocation questions and do not implicate a special role for lawyers or ethics. Others, however, play into the specific things that lawyers are specifically trained to understand, for example: the tension between immediate employee discipline and the desire for a fair hearing; the desire to not spread bad news and the mandate to disclose material information; the efficiencies associated with organizational delegation to the field and the risks associated with over-empowerment of far-distant employees. Where ethics seem to conflict with productivity (or any other worthy priority), lawyers tend to have a special role in the disposition of the problem.

More importantly, the debate about the phrase "conscience of the corporation" must not be allowed to overshadow the evident fact that GCs have a broad and deep array of tools to use to mediate ethical clash. A "stop sign" is just one of them, and it is perhaps the one most rarely used. Lawyers tend to be pretty good at articulating rationales, persuading and perhaps even brow-beating (once in a while), and putting seemingly abstract issues into very practical terms. We understand the levers of power and can pull those levers to move a situation back into balance, and we can do that (usually) without blowing things up or insulting people. We also have an array of personal-professional tools to use, which collectively go by the name of "credibility," and access to information sources outside of the corporation to help us make our case. We can bolster our case with the views of others, like outside counsel or a sentence in a judicial opinion. And we are uniquely positioned to put an ethical issue on to the corporate agenda where few others might even see it as an issue.

This too resembles the human conscience: Our conscience doesn't always win, but it always lurks and comments and moves us to think. For the big stuff, our institutional mission as lawyers becomes dominant in the conversation. It can be overruled, and often is, and it can be told it is being impractical, which it sometimes is. But much like a good GC, it is always there playing its part, assuring that the collective wisdom is, indeed, a form of wisdom and not foolishness.

In the end, the debate about the GC role tends to misdirect us. There is an almost universal consensus that, whatever the label, GCs must be a strong voice for ethicality and fairness in corporate environments where GCs are often the only people who will think of such considerations. The rest of the debate is about relative empowerment, as between lawyers and others, and that debate underestimates the rich texture of the organizational and political tools available to sophisticated GCs to move a corporate agenda toward the right and away from the wrong.