

# GCs as Managers of the Evolution of the Rule of Law

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*This article is the sixth 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.*

Corporations are creatures of the law, virtual legal beings that assumed their form to achieve the economic purposes that drove their creation. Their most basic purpose is to limit the legal liability of the humans that inhabit them. But the corporate form has expanded far beyond that original purpose, as people have organized themselves and their work lives around these liability-limiting structures. The development of law and regulation, and in particular the evolution of the American tort system, has situated corporations at the intersection of all of the cross-currents of the world's social, economic and legal developments. This places corporations at the center—and at the mercy—of the development over time of a sensible and stable rule of law. And it places general counsel of those corporations at the center of that center.

It is perhaps unconventional to think of the “rule of law” as a dynamic social construction project, rather than as a static fidelity to the perceived meaning of words on a page of common law or legislation. But this dynamic model is what corporate GCs face every day as they try to manage the legal affairs of their enterprises. While internal corporate constituents want legal certainty and clarity as they try new things, the world beyond delivers mostly shadows and mere tendencies to work with. While some judges would insist on static definitions of words and laws, linguists and good lawyers know that there is no such thing. Language and laws evolve as societies change, and new sources of tension among meanings arise every day. Predicting outcomes on the edges of the law is, in the end, more art than science.

As far as real answers to seemingly simple questions, very often modern societies deliver, in their own good time, outcomes that must arise (if at all) only out of the complex workings of institutions that are built to take inputs from a vast array of conflicting constituencies with interests that might appear to be irreconcilable in economic, social, political and even psychological terms. At the edges of the law we must navigate a cacophony of interests and forces; in trying to predict outcomes in advance, we must understand those forces and the manner in which our system allows them to argue with each other. This process of prediction becomes, in a complex society, the very definition of the word “judgment”, and it is judgment that distinguishes the best corporate counselors from their peers.

The understandable yearning for certainty in advance of this multi-dimensional societal mediative process often misleads clients and can create enormous pressures on GCs. Our constituencies yearn for more clarity than the best “judgment” can provide. The simplest expression of this is the proverbial conflict between the “letter” and the “spirit” of the law. (Hint: “spirit” tends to win in court and on TV; “letter” tends to prevail when the CEO wants a simple answer.) That dichotomy, however, hides a more important truth: Outcomes under a democratic rule of law are as much influenced by process, reputation and human nature as they are by facts and precedents. As a result, the ultimate execution of the elements of a GC's strategic judgment will depend on his or her credibility with client constituencies, a credible track record that garners support, and an ability to adhere to a chosen pathway toward resolution while adjusting that pathway as events unfold.

At a meta-level, all of this depends on the existence of a viable rule of law that offers opportunities to resolve conflict in ways that diverse constituencies can accept. It requires, at least, a set of agreed processes designed to achieve some

form of outcome. In the absence of a viable rule of law, this is not possible; judgment becomes an absurdity and outcomes are always subject to re-negotiation or, worse, to corruption or violent intervention.

I have experienced this first-hand with regard to significant corporate investments in certain countries where, if there exists a rule of law at all, it is as malleable as the whims of the people who stand to benefit from outcomes, and as transient as the payouts required to achieve some sort of accommodation. In such environments, it is useless and perhaps deceptive to pretend to offer “legal advice”. It was somewhat depressing to decline to offer any “legal advice” in these circumstances, but in fact there was no legal advice to be had. In those situations, there may be the illusion of laws in existence, but outcomes turn on dynamics that are anything but lawful. A good lawyer has no business trying to judge outcomes in such systems, other than to make the same guesses as any other professional might make based on living in the world as it unfortunately actually is.

In more stable societies, the rule of law remains vulnerable to the passions and whims of all of the players in the system even as it has proven its solidity and value as a framework for argumentative chaos to play out. Lawyers in general, and GCs in particular, should be (and mostly are) the most important champions of the validity and necessity of the processes of law as the indispensable medium through which seemingly intractable problems can reach resolution.

Thus we come to main point of this article, and maybe of this series of articles. How do lawyers, and especially GCs, best cope with these cross-currents?

I would say, please, *live the paradox*. Embrace it; don’t pretend it isn’t there. Just about every day, you will find yourself in the midst of contradiction: short-term versus long-term; expedience vs. investment; exploitation of the defects in the rule of law versus correction of those defects; local sacrifice for larger gain. The rule of law is our home, our *only professional habitat*; let’s not destroy it for transient economics or the illusion of same. Promote the rule of law; stand up for the integrity of the process. Only there lies a future for enlightened and sustainable corporate capitalism.

In these six short pieces, we have touched upon the existential and the practical, from ethics to org charts, everything from the grand to the drearily mundane. Perhaps a mental model for lawyering starts to emerge.

Yes, stressful. Yes, controversial and oft-times personally risky. But suppressing the paradox does no good for anyone. The job just requires facing up to it, in one way or another. Perhaps there are ways to be a force for the rule of law, on a 50-or-500-year view of what makes sustainable economic sense *in addition to* immediate ethical sensibility. Perhaps we lawyers are on to something better and more solid than a transient entry on a quarterly income statement. Perhaps, with all our training in rhetoric and communication and the thousand years of the common law, we might well eventually persuade people that doing the right thing is the only thing that is truly significant.

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