

InfoPAKSM

Role of the General Counsel

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The purpose of this InfoPAKSM is to provide some definition of the role, scope and nature of the duties of a general counsel in a globalized, post-Enron, post-Parmalat, post-Satyam Sarbanes-Oxley world, further battered by a worldwide recession the likes of which have not been seen for more than a generation. By noting some of the issues that arise in the ordinary course of an in-house counsel's practice, this InfoPAK will help general counsel provide high-quality representation for their corporate client.

The information in this InfoPAK should not be construed as legal advice or legal opinion on specific facts, and should not be considered representative of the views of ACC or any of its lawyers, unless expressly stated. Further, this InfoPAK is not intended as a definitive statement on the subject and should not be construed as legal advice, but is intended to serve as a tool for readers, providing practical information to the in-house practitioner.

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I. Introduction: The Function of a General Counsel

A. General Overview

The role of the general counsel (“GC”) in a corporation¹ depends upon a number of factors about the client, such as the size of the company, the industry where it operates, even the states or countries where it operates. A manufacturing company needs different things from its general counsel than a service company and large companies may make more demands on their general counsels than small ones. Despite the differences in the client, the duties of a general counsel are consistent: deliver the highest possible level of legal services to the client.

Previous experience as a private practitioner of law may not necessarily be good training for a position as general counsel, since the work lives of general counsel and private practitioners are very different. For one thing, the general counsel of a corporation provides service to only one major client--the corporation--so business development of the general counsel’s law practice and strategies to avoid client conflicts are practically nonexistent issues. In some countries, the fact that the in-house attorney has only one client and is linked to that client by an employment contract puts the lawyer in a category distinct from outside attorneys and can vitiate the attorney-client privilege regarding communications between the general counsel and the corporation.² A general counsel who serves only one corporate client gets to know that client in depth, which allows the lawyer with a sense of business strategy to provide not only legal help but also business advice. The work of a general counsel is generally determined by the special needs of the client. The following are tasks that many general counsel are called upon to complete:

- Ensure the Corporation Has an Adequate Compliance Program in Place
- Design the Structure of the In-House Legal Department
- Control Legal Costs
- Identify and Assess Risk and Risk Management Programs
- Design a Crisis Management Program
- Conduct Oversight of Outside Counsel
- Manage Litigation
- Develop and Maintain Good Working Relationships with Senior Management
- Review the Corporation’s Licensing Practices
- Keep Informed of the Requirements of a Multi-Jurisdictional Practice
- Establish A Record Retention Policy.³

As a result of increased government regulation worldwide, among other things, general counsel are being asked with increasing frequency to participate directly in corporate management. Whether a corporation wants to organize itself in such a way that all the advice formerly provided by consultants is now provided in-house or because senior management feels comfortable involving the general counsel in all major business decisions from the outset, general counsel are increasingly being asked to play a dual role of legal advocate and corporate adviser.⁴ Considering the growing complexity of modern corporations, the general counsel's most important role is often that of a manager of a major set of risks faced by the company.⁵

A general counsel has to be more than just a legal technician who tries to guess which business strategies will pass muster with the courts. A good general counsel brings more than just good lawyering to the job; the general counsel adds value to the business. Accordingly, a good general counsel provides high-quality service at the most reasonable cost in a user-friendly way while scrupulously maintaining an unassailable record for integrity and ethical behavior.⁶ Is it any wonder that the positions are so difficult to fill?

B. Road Map

The purpose of Section I of this InfoPAK is to give a general overview of the different functions of a general counsel; where the subject requires a more in-depth analysis, additional resources are provided in the endnotes.

In Section II, the ethical considerations that a general counsel must address are outlined. As the rules of professional conduct differ from state to state in the US, from province to province in Canada, and from country to country, the analysis is based primarily on the American Bar Association MODEL RULES OF PROFESSIONAL CONDUCT (2009) ("Model Rules"),⁷ the RULES OF PROFESSIONAL CONDUCT OF THE LAW SOCIETY OF UPPER CANADA ("PC Rules"),⁸ and selected examples from other international jurisdictions.

Section III focuses on corporate compliance and security. Section IV covers record retention policies, including information on how to establish such a policy for a company that currently has none. Section V considers the types of reporting relationships for a general counsel that insures independence, flexibility, and accountability.

Section VI describes the internal structure of a legal department with a discussion of the advantages and disadvantages of a centralized and decentralized organization. Section VII offers methods that a general counsel can use to control costs. Sections VIII and IX cover risk identification and crisis management.

Section X discusses some principles of litigation that are important to a general counsel. Finally, Section XI covers outside counsel relations, and sample job descriptions are included in Section XII.

II. The Corporation as a Client

The primary role of the general counsel is to provide legal services to the corporation, not to the corporation's officers and directors. At times the corporation and its officers and directors will have conflicting interests, and a general counsel must be able to distinguish between the best interests of the corporation and the best interests of the officers and to communicate this duty effectively to the affected parties. The Model Rules provide a good starting point for this discussion and raise the issues that typically must be considered by in-house counsel in all jurisdictions. While some of the Model Rules address uniquely American issues, the non-US practitioner will recognize many situations which could indeed apply to him or her, and should investigate what the professional rules in his or her jurisdiction provide:

- MODEL RULES OF PROF'L CONDUCT R. 1.1: a general counsel must represent the client competently.
- MODEL RULES OF PROF'L CONDUCT R. 1.2: a general counsel cannot assist fraud or criminal activity.
- MODEL RULES OF PROF'L CONDUCT R. 1.6: disclosure of otherwise confidential information is allowed in certain circumstances in which harm to third parties will result from crime or fraud and in which the lawyer's services have been used in furtherance of crime or fraud.
- MODEL RULES OF PROF'L CONDUCT R. 1.7: without a waiver, a general counsel cannot represent a client in situations where a concurrent conflict of interest exists.
- MODEL RULES OF PROF'L CONDUCT R. 1.13: The organization is the client, which means that a general counsel may report potential or actual violations of law that are reasonably likely to be imputed to the organization and that are reasonably certain to result in substantial injury to the organization if the highest authority within the organization fails or refuses to act.
- MODEL RULES OF PROF'L CONDUCT R. 2.1: a general counsel must exercise independent professional judgment.⁹
- Under Securities and Exchange Commission ("SEC") Rule 205,¹⁰ a general counsel must report evidence of wrongdoing up the chain of command and receive "appropriate" response; he or she may, but need not, report out.

These Model Rules are discussed in more detail below. The PC Rules are fairly similar: the ethical concern that most relates to the general counsel is the need for independence in their rendering of legal advice, notwithstanding the fact that they become associated with the corporate goals of their employers and, in fact, their livelihood is dependent on the sole client they serve. In all jurisdictions it is crucial to note who the client is, whether there exists a conflict of interest between the client corporation and a human agent of the corporation (employee, director, shareholder), who the general counsel may be liable to (in addition to just the corporate client) and whether the attorney is acting in the capacity of legal adviser or business adviser.

In some European countries, the fact that a general counsel is employed by the corporation so “compromises” the independence of the in-house attorney that the attorney-client privilege does not exist for in-house attorneys (Italy, Austria, Belgium, Finland, France, Greece, and Sweden are examples of this.) While the notion of “privilege” is considered a point of rules of evidence for civil procedure in common law countries, and not strictly a point of professional responsibility, the lack of privilege reflects the position held in some countries that the practice of the profession of lawyer is to a certain extent incompatible with salaried employment. The in-house counsel is not considered in the same light as an outside attorney in such countries. For the general counsel who operates in a multi-jurisdictional world where only some of the jurisdictions provide for the attorney-client privilege to pertain to communications with the in-house counsel, this is an important point to be considered.¹¹

It is also interesting to note that in some countries, unlike in the U.S., there is a dichotomy between the training and qualifications of an outside attorney (typically has passed the local Bar exam and perhaps apprenticed with a law firm) and an in-house attorney, who may have not taken those additional steps to qualify to practice in front of a court of law. In the U.S. all in-house counsel have typically been admitted to the Bar (although not always in the jurisdiction where their corporate client is located).

A. Duty to the Client

Normally, a lawyer can readily identify his or her client. This task, however, is often complicated for a general counsel whose primary client is the corporation. A corporation can only speak through individuals employed by or acting on behalf of the corporation,¹² but these agents are not the client to whom the lawyer owes his duties.

I. Corporate Affiliates

In answering the question “Who’s the client” one needs to determine whether the general counsel has been hired to represent only one member of a corporate family, such as a subsidiary, or whether he represents all members of the corporate family. This is a particularly troublesome question when the general counsel oversees subsidiaries in different countries and each country has its own laws with respect to tax liabilities and the personal liability (even criminal liability) of directors and officers.

Corporate managers customarily think of a corporation as unified, that is, all affiliated parts fit together as one entity with each affiliate entitled to corporate counsel’s representation and loyalty.¹³ In many situations, particularly where all subsidiaries are wholly owned by the corporate parent and in the same country, a general counsel may represent the home office and all subsidiaries.¹⁴ However, when the ownership is less than identical or when one of the affiliates is in the kind of legal trouble that threatens the parent (such as bankruptcy), unified representation increases the potential for conflicts of interest.¹⁵ To avoid a situation where a general counsel’s representation of a subsidiary is directly at odds with the best interests of the parent, the corporation’s intentions should be made abundantly clear at the outset of the general counsel’s employment.

2. Actions that are Not in the Corporation's Best Interest

Problems arise when a general counsel believes that a certain course of action that management has selected for the corporation is not in the best interest of the corporation or might even result in serious adverse consequences for the company; even greater problems arise when the general counsel learns that a senior executive wants to take actions that further his own interests but harm the corporation. In both situations, a general counsel is required to take steps that protect the corporation, the general counsel's client.

The Model Rules are helpful on this point: MODEL RULES OF PROF'L CONDUCT R. 1.13(a) provides that "a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." MODEL RULES OF PROF'L CONDUCT R. 1.13 (b) specifies that a lawyer for an organization who "knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization and that is likely to result in substantial injury to the organization" must "proceed as is reasonably necessary [to protect] the best interests of the organization," not the people involved in the bad acts.

MODEL RULES OF PROF'L CONDUCT R. 1.13 requires a high degree of certainty, so if there is a question with reasonable arguments on both sides, MODEL RULES OF PROF'L CONDUCT R. 1.13 may not apply. In Canada, there is also the distinction between the client (the corporation) and the board of directors, employees and shareholders. PR Rule 2.02 (1) states that when the client is an organization the lawyer must always act for the organization, not for the "human agents of the corporation."¹⁶

a) Violation of a Duty to the Entity

Corporate fiduciaries are ordinarily considered to owe two duties to the corporation—the duty of loyalty and the duty of care.

i. Duty of Loyalty

The duty of loyalty is generally defined as a duty of the corporate fiduciary not to consider interests other than the best interests of the corporation in making a business decision.¹⁷ Thus, certain self-dealing and the usurpation of corporate opportunities is prohibited. Most jurisdictions have a similar concept of duty.

ii. Duty of Care

Corporate fiduciaries also have to act in good faith, with due care (*i.e.*, care that a reasonably prudent person in a like position would exercise under similar circumstances), and in the best interest of the corporation. Unlike the duty of loyalty, the duty of care is process-oriented. Under the business judgment rule there is a presumption that the corporate management acted in this manner, unless there is no rational business purpose at all. The general counsel ordinarily has to accept such decisions even if the utility or prudence of the action taken is doubtful. "Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province."¹⁸

b) Violation of Law

The Model Rules do not define “violation of law” but it is probable that the term can be interpreted as meaning scienter-based wrongs, criminal, civil, or regulatory. However, it is not likely that the term includes the violation of every law or regulation.¹⁹

c) Level of Certainty Required

For MODEL RULES OF PROF’L CONDUCT R. 1.13(b) to be invoked, a lawyer has to know that the action in question is a violation of a law or a duty owed to the corporation. According to the preamble of the Model Rules that means “actual knowledge of the facts in question.”

d) “Likely to Result in Substantial Injury to the Organization”

MODEL RULES OF PROF’L CONDUCT R. 1.13 and the accompanying commentary do not provide a definition for the term “substantial injury.” However, as “substantial” is described as “a material matter of clear and weighty importance” in the terminology section at the beginning of the Model Rules, general counsel could consider looking to securities law or even accounting principles for an idea of what that term means.²⁰

e) How Should the GC Respond?

In the event that all the requirements of MODEL RULES OF PROF’L CONDUCT R. 1.13(b) are met, the general counsel shall proceed as is reasonably necessary in the best interest of the corporation. Among other things, he should consider the seriousness and consequences of the violation, the scope and nature of the lawyer’s representation, the responsibility in the corporation and the apparent motivation of the person involved, and the organization’s policies concerning such matters.²¹ Depending on this analysis the general counsel may decide to (1) ask for reconsideration of the matter, (2) advise that a separate legal opinion be obtained and presented to appropriate person in the entity, or (3) refer the matter to a higher authority in the organization.²² If the highest authority of the corporation insists on the action, or refuses to act – that is, if senior management insists on going forward with a bad act that is clearly a violation of the law²³ and is likely to result in substantial injury to the corporation--the general counsel may resign in accordance with MODEL RULES OF PROF’L CONDUCT R. 1.16.²⁴

3. Contest for Control of the Corporation by Takeover

Generally speaking, the duties of the general counsel are no different in times of corporate control contests than in normal times, although control contests introduce an additional level of complexity and anxiety in the general counsel’s day-to-day activities.²⁵ The natural tension among the corporate constituencies in times of control contests, and the all-too-human tendency among senior executives to be blinded by the potential for a personal financial windfall in the event of a takeover, makes it even more difficult for the general counsel to keep executives focused on the best interest of the corporation.

Unless counsel concludes that management is breaching a duty to the corporation by opposing the takeover, corporate counsel must accept management's view of what is the company's best interest. In the rare case where corporate counsel is persuaded that management is pursuing only its own self-interest in opposing a takeover, corporate counsel should apply MODEL RULES OF PROF'L CONDUCT R. 1.13 which ultimately could require counsel to challenge management's decision by going to the board of directors or even the independent directors.²⁶

4. Derivative Litigation

If the company decides against pursuing the takeover the question might arise whether the general counsel or any other member of the legal department may represent the corporation and/or named defendants (typically corporate directors and officers accused of wrongdoing), as the ultimate recovery in a derivative action filed by the shareholders would go to the corporation.²⁷ To answer this question, one has to follow the analysis of what is in the best interest of the corporation. Where appropriate corporate representatives have decided on the corporation's best interests, corporate counsel is generally not required or even permitted to substitute his judgment on that point. If the corporation has decided against pursuing a derivative demand, then counsel can accept that pursuit of such a demand is not in the corporation's best interests. For that reason, corporate counsel, subject to several qualifications discussed below, would ordinarily be permitted to represent the corporation in a derivative action.²⁸

5. Dual Representation of Corporation and one or more Directors, Officers, Employees, or Agents

Paragraph (e) of MODEL RULES OF PROF'L CONDUCT R. 1.13 recognizes that the general counsel may also represent the constituencies of the corporation – the officers, directors, employees, and shareholders of the corporation-- provided consent, necessary under MODEL RULES OF PROF'L CONDUCT R. 1.7, has been given.

However, the general counsel should always be aware of potential conflicts of interests that could prevent him from rendering unbiased legal services. For example, suppose a corporate officer (director or employee) contacts you and begins to discuss his or her own personal involvement in corporate activity. Here the general counsel should consider the following:

- If there is any reasonable prospect that the officer might believe that corporate counsel personally represents him, then the corporate counsel should preface the discussion with a reminder that she represents only the company.
- Is the conduct being described by the corporate officer, director, employee or agent adverse to the best interests of the corporation?
- If this is so, the discussion should be halted and the individual warned that:
 - the corporation's interests are adverse to those of the individual;
 - counsel does not represent him and is obliged to disclose to the corporation everything that the individual says;

- the corporation alone can decide whether to disclose to third parties (including the government) what is being disclosed here; and
- the individual should consider hiring separate counsel (although corporate counsel should not suggest that there is any prospect that the corporation will pay for that separate lawyer).

If, after receiving this warning – preferably in the presence of a credible witness who can later substantiate precisely what was said – the employee chooses to disclose more information, then counsel may and should use the information.

The same warnings should also be given in a situation where the officer describes his own personal conduct in the course of employment which may lead to corporate liability to third parties, or that may result in claims by other employees against the individual and the company. The discussion should be halted and the individual given the same warning as above except that corporate counsel may leave open the possibility that the corporation will pay for separate counsel for the individual. If the corporate employee begins describing his own personal conduct that is not directly related to his job but does reflect on his fitness as a corporate employee, personal criminal conduct or serious medical problems, then the discussion should be halted and the individual told that corporate counsel will be required to share the information with the corporate employer which may lead to personnel action including termination from employment. Thus, the individual must seek separate counsel and likely pay that lawyer personally.²⁹

B. Confidentiality

Generally, lawyers are under a duty of confidentiality to their clients. This is expressed in MODEL RULES OF PROF'L CONDUCT R. 1.6. The precise definition of that rule, however, varies rather extensively from state to state. The general counsel, thus, should be familiar with the exact standard under the applicable law.

In general, a general counsel must keep confidential all information relating to the representation of the client except such disclosures expressly permitted by the rules of professional conduct. In recent times, the question of whether ethical duties arise when the general counsel learns that the corporate client is engaged in material wrongdoing has become even more significant. The permissive behavior also varies from state to state, and might be altered by federal regulations.³⁰

C. Client Focus

The competent representation of the corporation demands a far greater understanding of the business of the corporation than would be required of an outside counsel who is engaged in a limited engagement. This, however, also places the general counsel in the unique position to render more than mere legal service.

In order to be fully knowledgeable about a company's business and therefore of maximum service to the client, the general counsel should study the following information:

- General operations;

- Sales and income history;
- Location of facilities;
- Description of products, Standard Industrial Classification (“SIC”) Codes;
- Manufacturing/distribution, transaction description and documents;
- Principal suppliers, purchasing relations;
- Principal customers;
- Principal competitors;
- Sales and marketing programs;
- Labor agreements;
- Environmental considerations; and
- Pending litigation and administrative proceedings.³¹

A corporation’s business units’ main complaints about the law department can be summed up by the four Ds: Distant, Diffident, Detached, and Darned Expensive.³² The solution to this lies in understanding the needs of your client. A good way to do this is by conducting regular client surveys.³³

III. Corporate Compliance and Security

A. Ethical Duties

I. Non-legal Business Activities

As the role has changed over the past decades from handling primarily routine legal matters to providing full-scale legal services, and increasingly being involved in major business decisions, the general counsel has to understand how the rules of ethics apply to non-legal business advice to the corporate client.³⁴ Pursuant to MODEL RULES OF PROF’L CONDUCT R. 8.4, a lawyer is prohibited from engaging in behavior which reflects moral turpitude or fraud even if he is not acting in a professional capacity.³⁵ Most of the rules of professional conduct only apply to professional conduct, *i.e.*, to services that are part of an attorney-client relationship. So what happens if the general counsel performs business functions in addition to providing legal services? In this case, MODEL RULES OF PROF’L CONDUCT R. 5.7 states that “[a] lawyer shall be subject to the Rules of Professional Conduct with respect to the provisions of law-related services ... if the law-related services are provided by the lawyer in circumstances that are not distinct from the lawyer’s provision of legal services to clients”

“Law-related services” are defined as “services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a non-lawyer.”³⁶ Some examples of law-related services are described in MODEL RULES OF PROF’L CONDUCT R. 5.7 cmt. 9 and include “providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.” Thus, for the general counsel to show that his behavior is not covered by the rules of professional conduct he has to show that: (1) he does not provide any legal services to the client, or (2) if he provides some legal services to the corporate client, the conduct is not “law-related” service as defined above, or (3) that even if the services are law related, under the special circumstances, the services are distinct from the lawyer’s provision of legal services to the client.³⁷

In Canada, the distinction between business adviser and legal adviser can arise in the context of whether communication with in-house counsel is privileged. The solicitor-client privilege only protects the communication of legal advice and not of business advice.³⁸ This is made clear in the Canadian Bar Association’s PC Code which states that the lawyer may be asked for or expected to give advice on non-legal matters such as the business, policy or social implications involved in a question, or the course the client should chose, and the lawyer’s experience will be such that his views on non-legal matters will be of real benefit to the client. However, in that case the CBA recommends that the lawyer should point out the lawyer’s lack of experience or other qualifications in the particular field and should clearly distinguish legal advice from such other advice.³⁹

2. General Counsel’s Role as Legal Advisor

Pursuant to MODEL RULES OF PROF’L CONDUCT R. 1.13, one of the primary roles of the general counsel is to step in when he learns that a corporate officer is engaged in action that is a violation of an obligation to the organization or a violation of a law that reasonably might be imputed to the organization and that is likely to result in substantial injury to the organization. But what should the general counsel do if he believes that a management decision, which was made in good faith, is not in the best interest of the corporation?

Under these circumstances, a general counsel has no duty to pass judgment on whether the business decision is negligent or erroneous. The commentary to MODEL RULES OF PROF’L CONDUCT R. 1.13 clearly indicates that second-guessing the business judgment of management is ordinarily not required. Furthermore, a corporate lawyer would likely not have the knowledge, experience, and training to conclude with the requisite level of certainty that a business judgment by a properly authorized corporate officer was clearly wrong, let alone grossly negligent or reckless.⁴⁰

a) Affirmative Duty to Offer Advice

Pursuant to MODEL RULES OF PROF’L CONDUCT R. 2.1, the general counsel is under no affirmative duty to offer advice, unless asked by the client.⁴¹ There is, however, an exception to MODEL RULES OF PROF’L CONDUCT R. 2.1 when the general counsel knows that certain conduct will cause a substantial adverse legal consequence.⁴²

3. General Counsel as Advocate

Generally, MODEL RULES OF PROF'L CONDUCT R. 3.1 through 3.7 impose ethical limitations on a lawyer's conduct as an advocate. While these rules apply to a general counsel who has entered an appearance in a case, they also apply if a general counsel is actively involved in the preparation of the defense.⁴³ Moreover, even where a general counsel merely monitors the litigation, the general counsel is still bound by MODEL RULES OF PROF'L CONDUCT R. 8.4 which requires the general counsel to take some remedial action if she learns that the company's outside litigation counsel is acting unethically. For this reason, the decision as to whether a general counsel is an "advocate" subject to MODEL RULES OF PROF'L CONDUCT R. 3.1 through 3.7 may carry little practical significance.⁴⁴

Further, the general counsel can be held accountable for another lawyer's violation of the Rules of Professional Conduct if the general counsel has direct supervisory authority over that lawyer.⁴⁵ In this case, the general counsel is required to make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.⁴⁶

4. General Counsel as Director

No direct or indirect prohibition in the ethical rules prevents a lawyer from serving as a director.⁴⁷ In fact, having the general counsel serve on the board of directors is advantageous to a corporation. However, this arrangement also presents a major ethical challenge involving the potential for a conflict of interest. For instance, a general counsel might be called upon to advise the corporation in a particular matter which involves actions of the directors. Because conflicts of interest can arise in these situations, the general counsel should consider the frequency with which such situations may occur, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation obtaining legal advice from another lawyer in such situations. If the general counsel comes to the conclusion that there is a risk that the dual role will compromise the lawyer's independent judgment, the general counsel should refrain from serving on the board.⁴⁸ In any case, the general counsel should inform the other members of the board about the potential conflict and the possibility that certain attorney-client privileges might be waived.

The Section 6.04 of PC Rules in Canada points out that acting as both a director and a legal professional of a corporation may cause a problem for the general counsel. If acting as director, the general counsel must make sure that the role does not conflict with his or her professional responsibility and must protect his or her independence. The Rules suggest retaining outside counsel to allow for prudent use of in-house counsel, who might need to remain a "team player" while giving dispassionate legal advice.⁴⁹

5. General Counsel as Media Liaison

Often the general counsel will be called upon to act as a media liaison. Here the general counsel should consider MODEL RULES OF PROF'L CONDUCT R. 3.6 and 1.6, which discuss contacts with the press.

(1) The general counsel is allowed to reveal information publicly only after first consulting the client.⁵⁰

(2) General counsel must determine whether public disclosure would violate ethics rules by prejudicing an adjudicative proceeding. Where a lawyer participated in an investigation or

litigation, extrajudicial statements are prohibited where there is substantial likelihood of materially prejudicing the proceeding. Objective information about the proceeding is permitted.

A general counsel may also reply to publicity not initiated by himself or his client, which has had an undue prejudicial effect on a client's rights.⁵¹

6. Conflict of Law

If the general counsel is practicing in two or more states, provinces or countries, the question arises as to which state's ethical rules will govern his conduct.⁵² In most situations no conflict will arise because the majority of states in the U.S. have adopted a version of either the ABA's Model Rules of Professional Conduct or the Model Code of Professional Responsibility. However, in some instances, the differences among the adopted versions are rather significant.⁵³

When dealing with conflict of law issues, the general counsel has to carefully review the rules applicable in the state where he is licensed and where he offers legal advice because the rule governing conflict⁵⁴ differs in some states. Generally, the general counsel must determine whether the conduct in question is connected to a court proceeding in a state where he is admitted to practice. If this question is answered in the affirmative, the rules of the jurisdiction in which the court sits will govern.⁵⁵ However, if these rules do not provide a basis for the decision and the lawyer is admitted in only one state, then the rules of the state where the lawyer is licensed will apply.⁵⁶ If the lawyer is permitted to practice in more than one state, the ethics rules of the state in which the lawyer "principally practices" apply unless the conduct has an effect in another jurisdiction in which the lawyer is licensed.⁵⁷ Note, however, that some states maintain that a lawyer is subject to the rules of a state in which he practices, even if he is not licensed to practice in that state.

Where the practice of law in a foreign country is concerned, the rules of the forum in which the involved court sits will govern.

- In any international litigation where a team of lawyers or investigators from several countries are working in a joint effort, the lawyers in the forum country should provide guidelines for handling documents and other evidence, contacting witnesses, and the like. At a minimum, all counsel and investigators must abide by those rules.
- Lawyers must also continue to abide by the ethical norms of their own jurisdictions. For example, even if the forum country did not have clear rules requiring the preservation of important evidence before it is formally requested by an opposing party, American counsel may not destroy such evidence without facing sanctions or possible disciplinary actions by local bar associations.⁵⁸

7. Individual Rights and Liabilities of Corporate Counsel

a) Employment Rights

Formerly, in regard to employment rights, corporate counsel in the U.S. were likened to private

lawyers. Thus, when corporate counsel were forced to resign employment for ethical reasons, they were afforded no legal recourse and were treated (when without contract) as “at-will” employees. However, recent case law has shifted this view and tends to treat corporate counsel more like a special class of employees with enhanced duties of confidentiality. This theory brings with it a considerable softening of the rule that lawyers who resign for ethical reasons are without legal recourse. Under this theory, corporate counsel can bring a wide range of employment based claims based upon federal anti-discrimination laws and even contract principles, provided that adequate precautions are implemented to avoid disclosure of corporate client confidences.⁵⁹ In many European countries, in-house counsel are clearly covered by the relevant employment laws, which tend to be more generous to employees than U.S. laws. If a general counsel had any difficulties that forced him to resign, his resignation would likely be deemed a constructive dismissal by the company.

Other rules concerning employment that are generally recognized include:

- A client may discharge an attorney at any time, with or without cause.
- MODEL RULES OF PROF’L CONDUCT R. 1.16(a) requires that lawyers resign or withdraw if their clients intend to commit certain illegal acts or cause the lawyers to act illegally or unethically.

The difficult question that follows is should in-house counsel should be afforded the same rights as other employees, or should the client be able to fire his employee/attorney at any time, with or without cause? Will in-house counsel be viewed as “second class” attorneys if they are afforded the right to sue for wrongful discharge?⁶⁰

*Balla v. Gambro, Inc.*⁶¹ involved a general counsel of a dialysis equipment distributor, who sued his employer for wrongful discharge, complaining that he had learned of major defects in machines that would put users at risk of poisoning. The general counsel advised his superiors to reject the shipment. The company officials, however, accepted the shipment for sale to a customer. The general counsel then confronted the company president and told him that he would do whatever necessary to stop the sale of dialyzers.⁶² After being fired two weeks later, the general counsel reported facts to the FDA. The *Balla* Court held that a client may discharge his attorney at any time, with or without cause, and indicated that this rule applies to in-house and outside counsel. Thus, in-house attorneys do not have a claim under the tort of retaliatory discharge. The court reasoned that employers might further limit their communication with their in-house counsel if these attorneys are granted a right to sue their employers for retaliatory discharge and that this should be prevented.⁶³

In a similar case, the court in *General Dynamics* disagreed with the *Balla* Court’s reasoning, arguing that *Balla* presented an anachronistic model of an attorney’s place and role in contemporary society and an inverted view of the consequences of the in-house attorney’s essential professional role.⁶⁴

Despite this holding, a different result might have been found if the discharge was based on discrimination.⁶⁵

b) Liability

The Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley”)⁶⁶ and SEC Regulations impose obligations on the general counsel that could give rise to liability in the event of a failure to comply.⁶⁷ These include:

- Document retention programs: Necessary to stave off obstruction of justice charges under 18 U.S.C. §§ 1519; 1512(c)(1) and (2). Most importantly, a corporation which does not have a document retention policy and then throws its hands up when prosecutors or the SEC come looking for documents risks an obstruction of justice charge. Not only does Sarbanes-Oxley impose a requirement that corporations implement a document retention program and effectively administer it, in-house counsel may be looking at sanctions for violating MODEL RULES OF PROF’L CONDUCT R. 3.4.
- Reporting up requirements⁶⁸: The SEC Rules implementing provisions of Sarbanes-Oxley require that an attorney practicing before the SEC must report material violations of securities laws and breaches of fiduciary duties to a supervisory attorney, the CLO or CEO of the issuer, and if the response is not appropriate in the view of the reporting attorney, the reporting attorney must bring the matter to the board of directors or a designated committee of outside directors.
- Breach of fiduciary duty: In-house counsel who also serve in business capacities, such as general counsel, run the risk of being held liable for breach of fiduciary duty rather than plain old malpractice.⁶⁹
- Obligation to implement a corporate code of conduct: Amendments to the Federal Sentencing Guidelines in § 82B.1 created a guideline entitled “Effective Compliance and Ethics Program.” Not only is the establishment of an internal safeguard to prevent and detect criminal conduct within corporations required, but it can serve as a mitigating factor which can reduce an organization’s fine punishment in the event of a criminal conviction. The guidelines also require that one individual at a high level of the organization have day-to-day responsibility for overseeing compliance with the internal ethics program, and precludes a reduction in the base offense level for organizations which do not have such programs.
- Director and officer liability: In-house counsel are increasingly exposed to legal malpractice claims. As corporations bring more work in-house, the exposure to legal malpractice claims expands. These malpractice claims typically arise, not from in-house counsel’s “client,” but rather from third parties or from statutory agents, such as bankruptcy trustees or the FDIC, who take over after the client fails. Although in-house counsel who also hold the position of a director or officer sometimes are protected by director and officer liability insurance, many policies have an exclusion for legal advice. This can expose in-house counsel to personal liability and may place them in the precarious position of having no coverage for many of their acts.

The EU and Japan have laws similar to Sarbanes-Oxley, as does Canada.⁷⁰

c) **Malpractice Insurance**

When considering whether to purchase malpractice insurance, general counsel should think about the following points:

- The company may not be in existence to indemnify counsel.
- The company is in an industry where failure frequently results in suits against directors, officers, and lawyers.
- The company is in a highly volatile market spawning shareholder litigation;
- The company is involved in joint ventures.
- The general counsel often gives legal advice to third parties such as corporate insiders, pro bono clients, or others.
- The general counsel's malpractice coverage may overlap with directors' and officers' liability insurance. Such overlapping often provokes disputes between the carriers that paralyzes both carriers as they invoke the "other insurance" clauses in order to decline coverage.⁷¹

8. **Post Enron: Expanded Ethics Role of General Counsel under Sarbanes-Oxley**

Seeking to rein in corporate abuses that came to light in the recent corporate scandals, the U.S. Congress drafted the provisions of the Sarbanes-Oxley Act. The purpose of this legislation is to curb executives' behavior and to make them more accountable to investors.⁷² The act also regulates corporate governance by setting minimum standards of professional conduct and requiring the SEC to issue new standards for attorneys.⁷³ Pursuant to this requirement, the SEC adopted 17 C.F.R. pt. 205 ("SEC Rule 205"),⁷⁴ which prescribe standards of professional conduct for all attorneys who appear and practice before the SEC in the representation of public company issuers.

Under SEC Rule 205, lawyers are required to report evidence of a material violation of an applicable federal or state securities law, or a material breach of a fiduciary duty, to either a supervisory attorney or the company's chief legal counsel or chief executive officer. The CEO or general counsel, not the reporting attorney, must conduct an inquiry. When the attorney chooses to report such evidence directly to the CEO or general counsel, he or she must assess whether the officer responded appropriately. If the attorney does not believe the response was appropriate, he or she must report the violation up to the issuer's audit or other independent committee or to the full board of directors.

A reporting attorney who receives an appropriate and timely response will have satisfied the obligations under the rules. The rules do not impose a separate duty on the reporting attorney to investigate the evidence of a material violation. However, an attorney who has reported the matter all the way "up the ladder" and has not received an appropriate response must explain his or her reasons for this belief to either the CEO, general counsel, Board of Directors, or audit or

independent committee.

Many multinational corporations are subject to the Sarbanes-Oxley rules, whether directly or indirectly. Additionally, Canada and many European jurisdictions have enacted similar rules regarding corporate governance and disclosure. Accordingly, CEOs are looking more and more to the in-house legal department for guidance. Regulatory advice is sought by multinationals that operate in multiple jurisdictions and use the in-house department as a cost effective means of providing solutions to the business.

9. General Counsel Licensing and Multi-jurisdictional Practice (“MJP”)

As the number of U.S. companies operating in more states and countries increases, so does the need for legal services that cross state and national borders. Thus, the question arises whether a general counsel, licensed in one state, may also give legal advice in other jurisdictions without breaking the prohibition against unauthorized practice of law (“UPL”). Unfortunately, no uniform answer exists, as state and national laws and local bar associations’ interpretations differ on this issue.⁷⁵ Some states’ rules provide serious consequences, including disciplinary action, loss of the attorney-client privilege, and possible prosecution for a misdemeanor, if an attorney is not licensed in the state in which he or she is practicing. (See ACC’s Advocacy Page,⁷⁶ which lists MJP rules per state, for detailed information.⁷⁷)

10. Examples of General Counsel Violations

Generally, a general counsel may be liable to his own client if he fails to exercise the competence and diligence normally exercised by attorneys in similar circumstances.⁷⁸ If there is any message that has been delivered over the past three years, it is that honesty is the best policy. As Andrew Weissmann, head of the Justice Department’s Enron Task Force said: “Your constituencies are owed complete candor, if you violate that trust you will be brought to account.”⁷⁹

Some examples include the following:⁸⁰

- The Securities and Exchange Commission filed a civil action on August 3, 2009 against Kenneth Selterman the former General Counsel of video game maker Take-Two Interactive Software, Inc. (Take-Two), charging him with stock option backdating. The SEC's complaint alleges that Selterman enriched himself and others by knowingly or recklessly allowing Take-Two's former Chairman and CEO Ryan Brant to backdate Take-Two's stock option grants. The complaint alleges that Take-Two granted backdated stock options to senior officers, directors, and key employees without complying with its own stock option plans, and generally, without the Board or a committee thereof approving the grant dates and exercise prices. Take-Two also did not record or disclose the compensation expenses it incurred as a result of the "in-the-money" portions of the option grants.
- On August 14, 2008, the Securities and Exchange Commission announced that it had settled options backdating charges against Nancy R. Heinen, the former General Counsel of Apple, Inc. As part of the settlement Heinen, of Portola Valley, California, (without admitting or denying the Commission's allegations) agreed to

- pay \$2.2 million in disgorgement, interest and penalties, be barred from serving as an officer or director of any public company for five years, and be suspended from appearing or practicing as an attorney before the Commission for three years.
- The former general counsel of Computer Associates, Steven Woghin, pleaded guilty to two counts of conspiracy to commit securities fraud and obstruction of justice in September of 2004.
 - The plea before Eastern District Judge I. Leo Glasser followed a \$225 million settlement agreement between the Islandia, N.Y.-based software maker and government regulators. The money was slated to go to aggrieved shareholders. The maximum sentence for the two counts totaled 25 years and \$500,000 in fines. Actual penalty was one year and one day in the custody of the Bureau of Prisons and 12 months of home confinement followed by 3 years of supervised release. Woghin was the latest in a line of general counsels charged with criminal wrongdoing. In June of 2004, the Eastern District U.S. Attorney's Office brought charges against Leonard Goldner, general counsel of Long Island-based Symbol Technologies. In July 2004, Tyco International's former general counsel, Mark Belnick, was found not guilty of grand larceny, securities fraud and falsifying business records.
 - Bruce Hill of Inso Corporation was charged by the SEC in 2002 as participating in a fraudulent revenue recognition scheme. Hill, together with his colleagues, was charged with violating the antifraud, periodic reporting, books and records, and internal accounting controls provisions of the federal securities laws, in connection with a 1998 material overstatement of earnings. Among the charges were allegations that Hill knowingly withheld information with respect to financial transaction deficiencies from Inso's CFO, fully aware that the information would have voided Inso's ability to recognize income for the transaction. Hill's role, as transaction draftsman, thus changed from advisor to principal perpetuating the fraud. Inso restated its financial results in March 1999, after conducting an internal investigation. Hill was demoted, and later left Inso in 2000.
 - As opposed to the complicated accounting schemes at Enron, WorldCom took a simpler approach—it just lied. Specifically, WorldCom deleted hundreds of millions of dollars in expenses and inappropriately capitalized hundreds of millions of dollars of other expenses and losses. Most observers feel that WorldCom General Counsel Michael Salsbury was kept in the dark about the illegal accounting. Salsbury also received praise for guiding WorldCom through its settlements with the SEC. However, the bankruptcy judge handling the case felt that he did not do enough to keep the board of directors apprised of certain transactions. Salsbury resigned on June 10, 2003, and is currently under no public criminal investigation.

B. Forms – Compliance Plans and Policies for Your Company

An effective compliance program sets forth the operational methods that a company uses to ensure its activities adhere to legal requirements and broader company values. If correctly implemented, corporate compliance programs can help to prevent public harm and corporate injury resulting from corporate offenses and misconduct. They can also reduce the penalties for offences that occur despite the programs. Once compliance programs are established, the company must devote the

necessary resources to ensure that the standards set are met. The great risk is that these programs might be deemed non-effective due to lack of enforcement.⁸¹

Companies should implement written policies and procedures for all general corporate risk areas, including:

- Antitrust,
- Benefits,
- Competitive Behavior,
- Conflicts of Interest,
- E-mails,
- Employment,
- Environmental,
- Export Controls,
- False and Deceptive Advertising,
- Foreign Corrupt Practices Act,
- Fraud and Theft,
- Fraudulent Financial Reporting,
- Gifts and Gratuities,
- Government Contracting,
- Insider Trading,
- Lobbying, Political Contributions, and Other Political Activities,
- New Business "Alliances,"
- Procurement of Goods/Services,
- Records Management,
- Protection,
- Security/Wiretapping,

- Privacy of Communications,
- Sexual Harassment,
- Subcontractors and Contract Labor,
- Tax,
- Workplace Safety, and
- USA Patriot Act and other relevant, similar local laws.

Effective compliance training can help your corporate client reduce the risk of criminal and civil liability. Review useful information on establishing and implementing an effective compliance program for your client.⁸² Also learn how to navigate the United States Sentencing Guidelines Homepage.⁸³

Several informational sources can assist you in establishing a business code of conduct for your corporate client.⁸⁴ These resources set forth the best practices in the field for your review.⁸⁵

Are you are interested in establishing an e-learning solution to compliance training? If yes, gain expert insight on the purpose of the training and tips on how to create a compliance training intranet site.⁸⁶

A word of caution about trying to impose one single code of conduct on a global basis: different jurisdictions have unique sovereign laws and inconsistencies between different laws can raise concerns.⁸⁷

IV. Record Retention and Management Policies

A. Overview

All companies produce vast amounts of documents every single day, most of which have no use to the company after they have been prepared, used, and executed. While some documents can constitute a liability to a corporation, others can protect the corporation by providing it with useful evidence against an adverse party or with needed information in case of an emergency.⁸⁸ For example, the Securities and Exchange Commission has issued a regulation, pursuant to § 802 of Sarbanes-Oxley, requiring firms that perform audits on public companies to preserve all records relevant to the audit, including electronic records created, sent or received in connection with the audit. The records must be preserved for seven years after the audit is completed.⁸⁹

Executives from all levels agree that record retention and management policies are probably the one part of corporate governance that is uniformly neglected. Seventy-six percent of corporate counsel indicated that their company has a records policy; however, only eighteen percent said the policy is actually enforced.⁹⁰ Outside the U.S. and Europe, few countries have detailed record retention laws, other than with respect to tax returns.⁹¹

In order to defend a company against potential liability, an efficient document retention policy is

critical. A company should follow the three steps below when establishing a retention plan:

- (1) Understand the record situation at your company;
- (2) Develop simple and clear policies, procedures, and retention schedules; and
- (3) Apply the program systematically and non-selectively in the normal course of business.⁹²

In order to develop the best retention plan possible, a company must first become familiar with its document situation. A company should establish categories for the different types of documents used, e.g., routine correspondence, documents pertaining to intellectual property, letters establishing credit, or contracts. Next, a company must evaluate the statutory and/or regulatory requirements that apply to each type of document used. These retention rules typically vary from one year to permanent retention, pursuant to the contents of the document. A company must then develop retention cycles for these documents in compliance with the regulations. Finally, the company should incorporate the retention program into the normal course of business.

B. Requirements of Corporate Records Management Programs

There are five basic requirements for corporate records management programs, which when consistently applied will help a company mitigate risks, reduce costs and improve access to needed records.

1. Retain Records Long Enough to Meet Requirements

Records should be retained long enough to meet regulatory and “valid” business requirements. In most industries, only about 60 percent of records types must be retained under regulatory requirements; the rest default to accepted industry standards. To do this, a company must know what record types it has and how long each must be kept. Counsel should also understand the company’s current IT systems, and should consult with IT personnel on how to implement a complete system-wide hold if necessary under regulatory requirements.⁹³ In Europe many countries base their retention periods on statutes of limitations of relevant legal obligations and claims.⁹⁴ (Destroying these documents prior to the end of those periods can constitute criminal acts.)

2. Locate Records Quickly and Effectively

Companies need to be able to quickly locate records, regardless of physical location or media. Regulating authorities that believe a corporation has ready access to its records can quickly conclude that failure to produce records on demand amounts to corporate malfeasance.

3. Protect Records When They Are Subject to Litigation or Examination

Companies must be able to enact precise, immediate and documented hold orders on records subject to investigation, litigation or audit. This requires that companies be able to immediately identify the relevant records, notify the records’ owners, and protect the records from the regular destruction process.

4. Destroy Obsolete Records

Companies should systematically destroy records once the appropriate retention requirements and protection needs have been satisfied. Over-retention can be dangerous for the following reasons:⁹⁵

- Legal adversaries know how to effectively use obsolete records against their targets.
- Each unnecessary record represents a potential unnecessary production cost.
- Each unnecessary record represents a potential “smoking gun” in litigation.
- Each unnecessary record complicates media migration and content management costs, volumes and complexities.

5. Appropriately Tag Records According to Non-Retention Requirements

In addition to retaining records for the appropriate length of time, companies must also adhere to obligations that are unrelated to retention. These include:

- Rapid discovery obligations implied by Sarbanes-Oxley, SEC actions and similar measures;
- Privacy obligations under HIPAA during records’ lifecycle of use and retention and other legislation such as the EU Directive on Data Protection;
- Secure destruction obligations that necessitate ensuring that records are properly, completely and irreversibly destroyed when retention obligations have been met.

C. Establish a Defensible Policy

The next step after understanding the requirements of a corporate records program is learning how to meet them. A company that has successfully collected the following information can rapidly develop policy documentation.⁹⁶

1. Know What Types of Records Are Generated and Retained

Without knowing what record types are held, there is nothing to apply retention requirements, size, records-related systems, and maintenance against. If a company does not have this information captured, the records management program is not complete, thereby hindering a company’s ability to meet their legal, regulatory or cost objectives.

2. Know Who Owns and Controls Each Record Type

The official owner of each record type must be identified, as well as convenience users and custodial relationships, such as vendors who provide corporate benefits management, payroll processing, or background checks.

3. Know Where the Records Are Located

Records are often retained redundantly across departments and media throughout a company. It

is important to know where records are located geographically, as well as on what media and on which applications. This will help ensure that requirements and records practices are applied consistently across the organization, regardless of the systems or vendors used.

4. Know When Records Can Be Destroyed

Once records have been retained long enough to meet a regulatory or valid business requirement, they start to become a liability and should be disposed of in a consistent manner. Determining the correct retention requirement goes beyond regulations. It includes a careful evaluation of business/risk decisions, tax needs, operational needs, and the consideration of accepted industry standards. Information is available to assist in the understanding of State and Federal requirements, in addition to requirements for other countries. These sources can also help in devising a Record Retention Policy for your company.⁹⁷ Proper document maintenance can assist in the avoidance of criminal liability.⁹⁸ Information is also available relative to improving your information management system by becoming more organized, efficient, and technologically compatible.⁹⁹

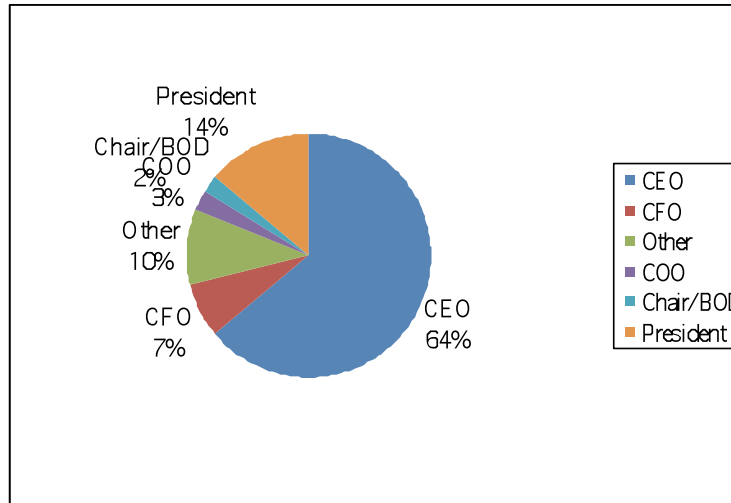
V. Reporting Structure

A. To Whom Does the General Counsel Report?

To whom the general counsel reports bears greatly on the structure of the legal department and discloses much about the status of the legal functions within the company. This reporting chain also sends a message from the General Counsel's Office to both outside counsel and other corporate employees. Most general counsel report to: the board of directors, the CEO (or President), the Chief Financial Officer, or the Chief Operating Officer.

Studies have shown that the general counsel almost invariably reports to the top corporate officer.¹⁰⁰ This finding coincides with the fact that most general counsel also bear the responsibilities of corporate secretary.¹⁰¹ Having the general counsel directly report to the top corporate officer provides several advantages. For instance, this gives the legal department more weight and allows the department to be more involved in the business planning of the company. On one hand, by allowing the legal team to be more involved in business decisions, the attorneys are better able to anticipate and prevent legal complications. On the other hand, too much involvement of the general counsel in business decisions can lead to ethical conflicts. See Section III-A-4, "Role as Director," for more information.

General Counsel Reporting Relationships

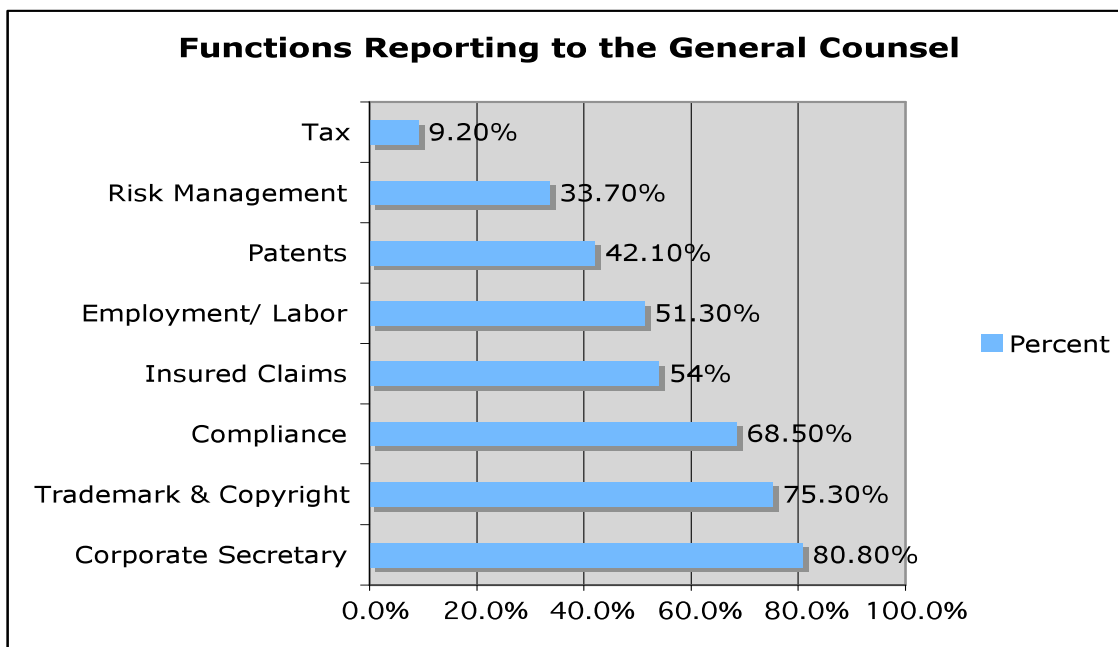


Source: 2007 ACC Chief Legal Officer Survey Results¹⁰²

B. Functions Reporting to the General Counsel

The most common function or department that reports to the General Counsel is the Corporate Secretary (see Diagram IV below). In addition to having other departments or functions report to the general counsel, there is also direct reporting from within the law department.

Functions Reporting to the General Counsel



Source: Altman Weil 2006 Law Department Metrics Benchmarking Survey¹⁰³

VI. Internal Legal Department Structure

A. Different Models

One of the most visible distinctions of corporate legal departments is their internal structure. Until lately, most legal departments have been organized along corporate hierarchical lines, with several levels between the general counsel and staff attorneys.¹⁰⁴ A great variety of titles are often used to differentiate attorneys by seniority and specialization. In fact, the Aspen Law & Business Directory of Corporate Counsel lists a staggering 5,558 different titles.¹⁰⁵ This number prompted a commentator to joke that it is easier in the corporate setting to reward a lawyer with a new title, than to increase his salary.¹⁰⁶

Recently, companies have begun to adopt a “flattened” organizational style in their law department and to de-emphasize titles. This organizational model allows senior-level executives to become more involved in decision-making from the beginning and is especially important in the post-Enron environment, as too much structural complexity can cripple a department’s ability to respond quickly or effectively to a crisis or to new, strategic imperatives.¹⁰⁷

In general, legal departments can either be characterized as centralized, decentralized, or as a hybrid form thereof. The term “centralized” can refer to the geographical location of the lawyers, as well as to the reporting structure of the lawyers within the legal department. Thus, a legal department could be geographically decentralized but have a centralized reporting structure.¹⁰⁸

Each type of model has distinct advantages and disadvantages: see the chart below:¹⁰⁹

Department Type	Potential Advantages	Potential Disadvantages
Centralized: physically centralized, with practice groups organized according to area of law	<ul style="list-style-type: none"> ■ Limits duplication of effort ■ Enhances and develops legal expertise ■ Good for internal law department communication ■ Easier for general counsel to manage his team ■ Good for building shared vision and working practices ■ Helps the sharing of information and resources ■ Simplifies budgeting and cost control 	<ul style="list-style-type: none"> ■ Distant relationship with clients ■ Clients may not have a single point of contact ■ Lawyers are less likely to develop good knowledge of businesses

	<ul style="list-style-type: none"> ■ Cheaper than decentralized model 	
<p>Centralized: physically centralized with practice groups mirroring business unit structures</p>	<ul style="list-style-type: none"> ■ Develop good knowledge of business ■ Good for internal law department communication ■ Easier for general counsel to manage his team ■ Good for building shared vision and working practices ■ Helps the sharing of information and resources ■ Simplifies budgeting and cost control ■ Cheaper than decentralized model 	<ul style="list-style-type: none"> ■ Distant relationship with clients ■ Does not help to develop legal specializations
<p>Centralized: physically centralized, but with practice groups for different geographical regions</p>	<ul style="list-style-type: none"> ■ Good for internal law department communication ■ Easier for general counsel to manage his team ■ Good for building shared vision and working practices ■ Helps the sharing of information and resources ■ Simplifies budgeting and cost control ■ Cheaper than decentralized model 	<ul style="list-style-type: none"> ■ Distant relationship with clients ■ Less likely to develop good knowledge of businesses ■ Does not help to develop legal specializations
<p>Centralized: lawyers geographically dispersed in business units, but with strong centralized reporting lines to general counsel</p>	<ul style="list-style-type: none"> ■ Lawyers close to clients ■ Lawyers are members of the business team ■ Lawyers develop good knowledge of business ■ General counsel still has overall control of the team ■ Helps to build shared 	<ul style="list-style-type: none"> ■ Physically distant from other in-house counsel ■ Potential objectivity issues ■ Lack of economies of scale ■ Potential for duplication of work and varying work practices

	<p>vision and working practices</p> <ul style="list-style-type: none"> ■ Aids the sharing of information and resources 	
<p>Regional: each region has a legal department, reporting to regional business head</p>	<ul style="list-style-type: none"> ■ Lawyers close to clients in that region ■ Lawyers are members of the business team ■ Develop good knowledge of business 	<ul style="list-style-type: none"> ■ Potential objectivity issues ■ Lack of economies of scale ■ May increase use of external counsel at local level ■ Lack of overall coordinated strategy ■ Isolated from colleagues in main/other legal departments ■ Varying work practices and duplication of work ■ Does not help to develop legal specializations ■ More difficult for general counsel to manage team ■ Does not aid sharing of information and resources
<p>Decentralized: each business unit has a legal department, reporting to head of business unit</p>	<ul style="list-style-type: none"> ■ Lawyers close to clients ■ Lawyers members of the business team ■ Develop good knowledge of business 	<ul style="list-style-type: none"> ■ Potential objectivity issues ■ May increase use of external counsel at local level ■ Lack of economies of scale ■ Lack of overall coordinated strategy ■ Isolated from colleagues in main/other legal departments ■ Varying work practices and duplication of work ■ Does not help to develop legal

		specializations <ul style="list-style-type: none"> ■ More difficult for general counsel to manage team ■ Does not aid sharing of information and resources
Combination of any of the above: for example, decentralized - each business unit has a legal department; but lawyers are also members of virtual practice groups and advise the whole group in this area	<ul style="list-style-type: none"> ■ Depends on the combination chosen (See relevant sections above) 	<ul style="list-style-type: none"> ■ Depends on the combination chosen (See relevant sections above)

B. Legal Recruitment and Staffing¹¹⁰

Attracting qualified professionals and motivating them to give their best are top concerns for today’s corporate legal departments. These offices must locate attorneys, paralegals, and administrative staff with the right expertise to address the changing array of legal issues that companies face. After a first-rate team is assembled, general counsel and supervisors must encourage them to strive for peak performance and to work effectively together to accomplish common goals. Despite a general counsel’s best efforts, sometimes he will be faced with problem employees or other difficult situations. Knowing how to promptly and appropriately react allows a general counsel to minimize the impact of adverse circumstances to his staff.

I. Recruiting Top Talent

Before beginning the hiring process, a general counsel develop a comprehensive recruiting strategy. Developing a recruitment plan should include forecasting possible workload peaks and valleys, which will help determine the type of employee required -- full-time, part-time, or project – or whether the company needs a new hire at all. After creating a plan, the general counsel should prepare a job description and research compensation trends in the area.

2. Hiring the Best People

A well-prepared job description can help to evaluate the quality of the resumes received. After determining which candidates to interview, the job description can also be helpful for developing questions to ask during these meetings. Once a top candidate has been selected, his references should be checked thoroughly in accordance with the company’s policies and procedures. Finally, after new hires are on board, a proper orientation should be scheduled so they can hit the ground running.

3. Providing Orientation

An employee's first few weeks on the job are especially formative. Therefore, it is essential to get new hires off to a solid start with a quality orientation. The best orientation programs are well-planned, ongoing processes tailored to the department's corporate culture and its unique employee base. The general counsel's objectives should be to:

- Clearly define responsibilities of new hires;
- Educate new members on the department's overall mission and business practices;
- Provide an overview of policies and procedures, giving new hires a sense of the prevailing culture at the company;
- Ensure new employees have the tools they need in order to be productive; and
- Engender a sense of camaraderie, collaboration and teamwork.

4. Motivating and Managing People

Sustaining the legal team's productivity levels and minimizing turnover requires that the general counsel effectively manage and inspire employees to give their very best. Providing a supportive work environment that offers open communication and honest feedback are among the best ways to elicit peak performance from legal staff.

Taking advantage of the following strategies can significantly increase employee productivity and satisfaction:

- Encourage creative decision-making. Allow as much flexibility as possible in order to enhance business processes and achieve project objectives. While everyone assigned to a particular case or project shares the common goal of a successful outcome, the means to the end may not be the same for everyone. Recognizing this allows the general counsel to capitalize on the creativity of the workforce to improve best practices.
- Provide necessary information. Provide the legal team with the facts necessary to make informed decisions. Communicate openly about the department's big picture. Discuss information such as progress on cases and long-term strategies.
- Allow room for error. When people are challenged to become more resourceful and responsible – which inevitably entails risk taking – a certain amount of error will occur. Do not abandon empowerment strategies but, instead, assess what went wrong and incorporate changes that will prevent problems from reoccurring.

5. Handling Difficult Situations

Even the strongest companies can face difficult times that make staff reductions necessary.¹¹¹ Moreover, managers who employ the best hiring strategies and supervisory styles¹¹² are not immune from the problems presented by under-performing team members. How a general

counsel deals with a variety of challenging workplace situations -- including layoffs and terminating employees -- will determine whether he is able to protect the company as well as the morale of the rest of the legal team.¹¹³

C. Developing & Maintaining Good Working Relationships

Taking steps to maintain good working relationships is key to the development of quality staff.¹¹⁴

VII. Controlling Legal Spending

A. Cost Control

One of the most cited functions of the general counsel is controlling costs in a corporation. For effective cost control strategies, consider the following three *C*'s:¹¹⁵

1. Communication

- Discuss Cost Expectation
- Use an Outside Counsel Retention Policy
- Clarify Expectations about Bills
- Insist on Budgets from Firms
- Address Cost Overruns

2. Contemplation

- Analyze Case Timing and Consequences
- Create a Consortium of Co-participants
- Evaluate Individual Benefits in a Consortium
- Analyze Corporate Histories, Insurance, and Contracts
- Bid Projects Selectively
- Explore Creative Contingency and Bonus Arrangements
- Investigate Alternatives to Opinions of Counsel
- Analyze Firm Staffing and Rates

3. Capitalization

- In-source Work
- Produce and Protect Revenue
- Explore Internship Programs
- Get Tough with Lender's Counsel

B. Compensation of Lawyers

Organizational compensation policies and practices often define the framework for compensating in-house lawyers. The general counsel, however, should try to promote and achieve an equitable position for the in-house legal team.¹¹⁶

C. Billing

1. Task-Based Billing

Task-based billing is a system for managing legal services whereby the invoice is formatted to categorize time and dollars charged according to the nature of the services performed. It involves assigning a relative value to the services performed by outside counsel by subject matter and task. Using this system, attorneys record their time spent using specific task codes that describe the processes involved in a case or matter, as opposed to the traditional hourly figures with corresponding text descriptions.¹¹⁷

2. Alternative Billing Arrangements

Increasingly, corporations want to pay for results, not just the time of lawyers. They want predictable costs, not surprises. Additionally, in the event of a poor result or cost overrun, corporations want their lawyers to share at least some of the burden. In today's competitive market, many law firms are attempting to satisfy these needs by replacing the billable hour method with an alternative billing approach.

Alternative billing refers to any billing method not directly tied to the number of hours outside counsel spends on a matter. Although traditional hourly billing remains the primary basis outside counsel use to charge their clients, the continual increase in hourly rates is providing an incentive for counsel to explore other billing options. Some of the newer methods of billing include: discounted hourly rates, blended hourly rates, value (task-based) billing, contingency billing, and incentive billing.¹¹⁸

3. Electronic Billing

Law departments with e-billing report savings of 5 to 15 percent or more of their outside legal spending. Law departments gain control by having instant access to what they are spending and where. E-billing generates up-to-date reports with a few mouse clicks and can be used to create more realistic budgets, including projected legal spending for specific projects or business units. In addition, a well-designed e-billing system covering the legal department and all of its outside firms can provide accurate, complete and auditable information so that the law department can certify to upper management that it satisfies Sarbanes-Oxley and other compliance requirements.¹¹⁹

D. Financial Reporting

General counsel must understand their clients' businesses in order to render the best possible legal services and to offer management advice on business issues from a legal perspective. However, in order to understand a client's business, attorneys must first learn the fundamentals of financial reporting and the principles of financial statements.

Interestingly, when general counsel are asked what they would do differently if they could start over again, the answer often is to take more business classes in school.¹²⁰

VIII. Risk Identification and Assessment

A. Developing a Risk Assessment Plan

Risk management can be defined as the total process of identifying, reducing, and minimizing the impact of uncertain events.¹²¹ Every company faces different risks. As a result each business should design its own unique risk assessment plan. Avoiding standardized checklists can be beneficial, as they tend to prevent a detailed analysis of a company's overall risks.

During the initial development of a risk assessment plan, companies may find this simple five-step model helpful:

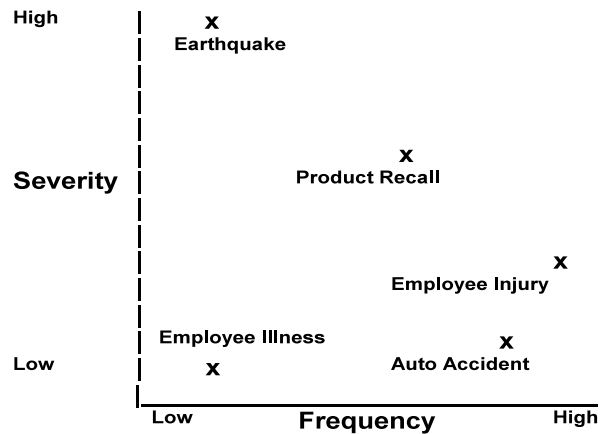
- Identify, assess, and measure the potential risks;
- Analyze risk management techniques;
- Create a carefully drafted implementation strategy for managing these risks within acceptable parameters;
- Implement the risk management strategies; and
- Report and monitor risk and risk management action plans.

The first step of any risk assessment plan is identifying the risks. Potential risks may include the loss of real or personal property or loss of net income. Another potential risk for any company is the loss of key personnel through death, disability, or retirement. Liability of a company through its exposure to lawsuits must also be considered.

In a recent study conducted by Marsh Incorporated and Risk and Insurance Management Society ("RIMS"), successful risk managers from a number of organizations were asked what strategies they use to identify risks. The majority of the respondents identified three routes to detecting risks: (1) meetings with managers of various operating units within the company; (2) analysis of claims; and (3) integration of risk management with business unit planning processes. In addition to these methods, a company may choose to utilize surveys or questionnaires in order to identify potential risks. Additionally, reviewing documents such as a company's financial statements or flow charts will likely provide some insight into possible exposure to loss. A company may also want to consider hiring outside experts to analyze potential risks and to develop a report on such risks.

For every type of risk identified, a company must then determine: (1) the value exposed to loss; (2) the event causing the loss; and (3) the financial consequences of the loss. In making this determination, a company should consider developing a risk map. A risk map is a graph that provides a snapshot of the company's identified risks in terms of severity and frequency of each exposure. Severity equals the intensity of a peril should it materialize, and frequency measures the likelihood that a certain risk will occur. This map will help the company to see the overall picture regarding potential risks and then to develop risk management strategies that address each potential risk. The following is an example of a risk map:

A Simple Risk Map



The next step in the development of a risk assessment plan is analyzing risk management techniques. During its analysis, a company should prioritize risks by assessing their impact on the income statement and consider strategies in which to effectively control loss. In addition to analyzing loss control programs, companies must recognize that these plans may not always provide a total safeguard against loss. For this reason, in addition to loss control plans, a company must also consider methods for financing losses. Finally, when making loss retention and loss transfer decisions, a company should establish a dollar value for the organization's risk-tolerance level, to which each potential loss can be compared. Based on the risk-tolerance, a company may choose: (1) to retain certain risks by establishing a reserve or by placing the risks in captives or risk pools; or (2) to transfer risks through contracts or commercial insurance policies.

The third step in developing a risk assessment plan is selecting and designing the strategy that best suits the company. Loss control policies and procedures should be selected that would address each potential risk identified in step one. This decision will likely be driven by financial considerations. Next, a company must develop a plan to implement their risk assessment program. Finally, the company must design a process to monitor its risk assessment plan in order to ensure proper implementation and to detect and adapt to change.

Once a strategic plan is in place, the company must then determine whether the plan is being implemented and everyone is in compliance with the plan. For effective oversight of plan implementation and compliance, the following elements must be coordinated:¹²²

- Internal resources. Primary internal resources will likely be the risk manager and legal counsel.
- Strategic partners. These will usually be the company's insurance broker and outside consultants.
- Communication. It is crucial that employees learn what to do and why doing this is important. The company must establish effective written policies and protocols for controlling risk.

- Culture. The company should foster a culture that appreciates risk management and must enforce its risk control policies and hold employees accountable if they violate them.
- Proactive claims management. Claims must be managed to avoid escalation into big cases. Outside counsel must be closely managed; the company should be aware of how outside counsel are handling matters assigned to them, particularly what the counsel are saying in court proceedings. Positions taken in one case can affect the company in other cases.

B. The Risk Management Team

Risk management teams are generally housed in a company's legal department as this group is in a unique position to understand the big picture within an organization. Furthermore, the legal department is in the best position to understand the reporting requirements of Sarbanes-Oxley and to ensure that those requirements are met in a timely manner. Additionally, business personnel will likely be more willing to disclose information to attorneys because of confidentiality. Furthermore, because the legal department already manages litigation and has relationships with outside counsel, this group is most suited to also direct the organization's risk management programs.

The number of professionals on the risk management team varies depending on the size of the company. While the risk management department within small companies may only include the General Counsel, larger publicly traded companies often involve corporate players in the risk management team, including the Vice President of Risk Management, the Chief Information Officer, the Chief Financial Officer, the Sarbanes-Oxley Compliance Officer, and the General Counsel. Regardless of the size of the company or the risk management team, risk managers have relationships with various professionals, both internally and externally. For instance, risk management professionals often interact with senior management as well as the finance, audit, and human resources departments within a company. Externally, risk managers communicate regularly with insurance brokers, underwriters, outside counsel, and professional organizations.

When asked what roles risk management professionals should play within a company in order to be successful, participants in the Marsh/RIMS study identified three key responsibilities. First, risk managers serve as an insurance and claims administrator. The next role is that of a competent risk manager. In this position, risk managers identify risks and design plans to prevent or control loss. Finally, risk management professionals serve as strategic players. Through this role, they influence the company's bottom line as well as culture. In order to be an effective strategic player, companies must ensure that risk managers have access to senior management and have the information necessary to understand the financial, accounting, and tax implications of the risk management programs.

C. General Counsel as Risk Manager

In this post-Enron world, risk management is becoming an increasingly important aspect of a general counsel's role. According to a 2003 CORPORATE LEGAL TIMES article,¹²³ seventy-three percent of CEOs interviewed indicated that they want their General Counsels to spend more time managing risk. This figure is up from just twenty-three percent in 2001. Similarly, a 2004 survey indicated that more than eighty percent of corporate directors placed a great deal of importance on

their general counsel in ensuring good corporate governance.¹²⁴ This figure has increased almost thirty percent from last year's results on the same topic.¹²⁵ "Compliance, litigation, and the cost of insurance have forced general counsel to focus on understanding those parts of the business that drive up costs."¹²⁶ For this reason, general counsel are often viewed as business executives in addition to legal advisors and are becoming more involved in companies' strategic planning. Through their involvement in strategic planning, general counsel "help a company's leadership team identify risks and opportunities that they might not perceive otherwise."¹²⁷

This evolution in the role of general counsel, however, presents ethical challenges. For instance, general counsel must balance their responsibility as independent legal advisors and their role as part of the executive team. Because new whistleblower laws¹²⁸ can have a chilling effect on general counsels' relations with management, attorneys must "clarify with executives what is expected on both sides, and [manage] compliance and ethics matters in a way that does not threaten working relationships."¹²⁹ "Effectively managing the tension in these roles will distinguish leading general counsel in the years and decades to come."¹³⁰

D. How to Achieve Excellence in Risk Management?

The continuing increase in health care costs, threats of terrorism, and the enactment of Sarbanes-Oxley are just a few examples of why the role of a risk manager today is much different than just ten years ago. While the focus of a risk manager in 1994 tended to be on purchasing hazard insurance and processing claims, a proficient risk manager today "needs to have a finger on the pulse of the organization as a whole, maintaining a multidimensional view of risk across lines of business, operations, and geography."¹³¹

With this evolution in the role of a risk manager, companies must determine what type of person would best fill the position of risk manager. In making this determination, companies may find a recent study conducted by Marsh Incorporated and Risk and Insurance Management Society ("RIMS") useful.¹³² The objective of this study was to identify the personal, professional, and organizational characteristics of a successful risk manager. The findings were based on an "Excellence in Risk Management" survey, which was completed by thirty risk managers who had previously been recognized by BUSINESS INSURANCE magazine as a "Risk Manager of the Year" or named on its "Risk Manager Honor Roll."¹³³

The Marsh/RIMS study reveals the following key findings:

- More than two-thirds of the participants held advanced degrees, including MBAs, JDs, or both.
- When asked what concerns they had about moving forward, almost all of the participants expressed a need for a greater understanding of financial, accounting, and tax issues.
- Participants identified the following as keys to success as risk managers:
 - Technical and analytical skills;
 - Ability to interact with senior management;

- Ability to communicate, persuade, and motivate; and
- Ability to understand the financial, accounting, and tax implications of risk management strategies and programs.
- Most all of the participants view the broker relationship as a key to success. Forty-three percent of participants viewed selected brokers as trusted advisors, while forty percent viewed them as an actual extension of the risk managers' organizations.

Participants prioritize risk by:

- Assessing the potential risk's impact on their company's income statement;
 - Developing policies and procedures to address each potential risk; and
 - Establishing effective loss control plans.
- Participants rely on information including claims, loss data, trend data, internal benchmarking, and specific cost allocations to individual operating units to assess risk. Additionally, participants agree that continual feedback from the field to the risk manager is important and necessary.
 - A little more than one-third of participants stated that they have "innovative risk management technology."¹³⁴

Based on its findings, the Marsh/RIMS study offers some advice on ways to improve risk management programs. First, the study points out that because the risk manager ultimately affects the company's bottom line and culture, the company should elevate the visibility and the reporting relationship of the risk manager. The study concludes that this change will enhance the risk manager's effectiveness. Additionally, the company's board of directors should consider forming a risk management committee, which would function similarly to the audit or compensation committee. Next, the study emphasizes the importance of implementing effective risk-identification and risk-mitigation plans. Because the success of loss control initiatives depends on identifying and mitigating risk, the study encourages companies to implement a strategy to closely monitor these programs. The study also recommends that a company incorporate their industry's best practices into their risk management programs in order to maximize the benefits of those programs. Moreover, the study suggests that risk tolerance be analyzed regularly in order to determine if more aggressive risk-retention strategies should be adopted.

Furthermore, the study emphasizes the importance of technology as it relates to risk management and encourages companies to make installation of integrated data systems and analytical tools a priority. When asked what the ideal risk management information system would include, study participants stated that the system should integrate the following channels: (1) a claims database fed by brokers, insurers, and third-party administrators; (2) operating-unit data on claims, costs, and mitigation of risk; and (3) staff-unit reporting on litigation, claims, risk identification, prioritization, and risk costs.

In addition to these recommendations, the study offers a number of ideas for ensuring the success of risk management professionals. For instance, companies are encouraged to develop programs that focus on the career development of risk managers. Key managers that have shown commitment and ability should be identified and given greater responsibility. Additionally, the study suggests that risk managers gain substantial benefit from continuous interaction with senior management. Similar to this conclusion, a more recent survey by ACC and the National Association of Corporate Directors suggests that when general counsel regularly attend board meetings, organizations are better able to manage company-wide risks.¹³⁵ For these reasons, the Marsh/RIMS study recommends that companies encourage interaction between these key players.

The study also recommends that companies ensure that their risk managers have a good understanding of finance, tax, and accounting issues. Because this expertise is necessary in order to impact a company's bottom line, resources and educational opportunities should be made available to risk managers. Additionally, the study suggests that by providing risk managers with the opportunity to gain an understanding of the organization as a whole as well as the financial implications of various risks, they will be more effective in their role. For this reason, companies are encouraged to expose risk management professionals to various operating units within the company. Finally, in order to ensure that technology is used most efficiently, companies should provide adequate training for risk managers.¹³⁶

IX. Crisis Management

The general counsel should assess whether the company has an efficient crisis management plan¹³⁷ and discover ways to improve it.¹³⁸

A. Internal Investigations

The internal investigation is a tool used by companies to look into facts after they have received information suggesting that some form of misconduct has been committed either by, or against, the business organization.¹³⁹

B. Government Investigations

Generally, government investigations, if not mandated by law in a particular industry, are initiated in response to reports of wrongdoing on the part of a corporation or its agents. Factors government prosecutors consider in deciding whether to investigate a corporation to combat corporate fraud include:¹⁴⁰

- Nature and seriousness of the offense;
- Pervasiveness of corporation's wrongdoing;
- Corporate history of criminal conduct;
- Corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation;

- Existence and adequacy of corporation's compliance program;
- Corporation's remedial actions; and
- Collateral consequences, including disproportionate harm to shareholders.¹⁴¹

Additionally, an increased emphasis has been placed on: (1) "the authenticity of corporation's cooperation"; and (2) "the efficacy of the corporate governance mechanisms in place within a corporation, to ensure that these measures are truly effective rather than mere paper programs."¹⁴² Clearly, the focus hinges on the design of a company's compliance program.¹⁴³ An essential question the government may ask is whether the program is geared towards preventing and detecting wrongdoing by a company's directors or employees and effective management.¹⁴⁴ Thus, prosecutors may consider the following questions in evaluating a compliance program and ultimately deciding whether to prosecute:

- Are effective mechanisms in place to detect and prevent misconduct?
- Are directors well-informed and equipped to exercise independent judgment?
- Does the company have internal audit functions that are independent and accurate?
- Does the company have an information and reporting system to provide management and the board of directors a mechanism for determining the organization's compliance with the law?¹⁴⁵

C. Media Relations

In the event of a company crisis, it is important for the legal team to prepare for its response in a media-savvy manner.¹⁴⁶

X. Litigation

The cost of litigation has risen dramatically over the past years. Thus, an efficient litigation strategy to manage the risks posed by litigation is indispensable for the corporate client. Therefore, managing litigation is one of the major tasks the general counsel has to oversee and communicate to the management. In meetings with the business leaders of the company, the general counsel has to decide what approach the company should take to the litigation (e.g., defending the corporation to the end irrespective of cost or settling a case early).

A. Initial Planning, Assessment, and Strategic Evaluation

As litigation generally brings with it turmoil, randomness, and uncertainty, it poses particular challenges for the corporation. The general counsel, therefore, has to help the corporation to keep clear of the hazards on the way. Careful planning at the onset of the lawsuit is necessary to prevent the corporation from harm. Additionally, the strategic significance of the case to the company and the objectives sought should be carefully reviewed.¹⁴⁷ General counsel must also keep in mind the company's goals, the significance of the case to the corporation, and the time frame needed to resolve the dispute. In order to conceive a strategy, however, the general counsel

has to form a preliminary assessment of the facts of the case and the governing legal principles. Considering these factors, proper staffing and the appropriate approach to budgeting should be determined.¹⁴⁸

B. Staffing

Based on the needs of the corporate client, the general counsel has to determine whether to keep the matter in-house, or to hire an outside law firm. Thus, the general counsel has to decide how much control and direct involvement he wants to have in the litigation. In making this determination, general counsel should consider the following factors: (1) Does your personality require you to make even small decisions; (2) Do you have expertise in litigation, negotiation, and the subject matter of the dispute; (3) Time constraints from your business schedule; (4) The company's budget for resolving disputes; and (5) Can other departments in your company help you with the dispute.¹⁴⁹

C. Periodic Reporting

The efficient management of litigation depends on the information received from all persons involved. If in-house counsel obtain the help of outside counsel, they should insist on a comprehensive written analysis at the outset of the case and periodic reports thereafter while keeping in mind that such reports can be time-consuming and expensive. Because of the costs associated with written analysis, the benefit from a written report may not justify its cost in smaller cases. In general, however, such reports can help the legal team to handle the case more effectively and will also force the litigator to analyze the case at a very early stage. If requested, a report should include the following items:

- Background facts;
- Summary of claims and defenses;
- Significant witnesses;
- Issues of law and fact expected to be pivotal in the resolution of the case;
- Anticipated motions and the assessment of the likelihood of success for each motion;
- Projected timetable for discovery, motions, and trial;
- Document discovery and deposition discovery anticipated by the company and by the adversary and reasons for the company's discovery;
- Staffing;
- Experts needed;
- Budget for (i) each of the next two quarters, (ii) through the end of discovery, and (iii) through end of trial;
- Damages;

- Counterclaims;
- Likelihood of prevailing at the motion stage and at trial and limitations on analysis;
- Availability of insurance; and
- History of settlement discussions.¹⁵⁰

D. Periodic Meetings and Regularly Scheduled Conference Calls

Scheduling and holding regular meetings or conference calls with the litigators enables the general counsel to stay informed about the development of the case. Such meetings or conference calls are also an important tool in monitoring the progress of previously assigned tasks. To be effective, meetings should be scheduled well in advance and agendas circulated at least three business days prior to the meeting.¹⁵¹

E. Trial Book

Preparing a trial book will help general counsel to collect important information about the case and can be valuable to understanding the key elements of the case. The following documents should be included in the trial book and kept current:

- To do lists;
- Complaint, answer, and a summary of them if they are voluminous;
- Local rules of court;
- Significant scheduling orders or pretrial orders;
- Key legal research memos;
- Chronology of major events;
- Periodic analyses of the case (or relevant portions of them);
- Cast of characters;
- Summary of key documents;
- Plaintiffs' and defendants' experts;
- Tentative witness lists;
- Tentative exhibit lists;
- Major themes for opening statements;

- Possible jury instructions;
- Points to be made in the major witness examinations; and
- Possible motions: E.g., FED. R. CIV. P. 12(b), FED. R. CIV. P. 56 and in limine.¹⁵²

F. Discovery Planning

Strategic conclusions about the direction of the case are very important to tactical planning. The general counsel should estimate the likelihood of (1) whether the company will ultimately try the case and (2) what the probability is of settling the case. These decisions will also affect the discovery phase of the case.

An effective discovery plan should identify:

- witnesses that the company intends to depose;
- an explanation of why those witnesses are being deposed and the expected revelation in the deposition;
- whether the deposition is for discovery or introduction at trial;
- the lawyer expected to take the deposition;
- the timing in the discovery process;
- witnesses that the opposing party can be expected to call (plus plans to contact them);¹⁵³ and
- third parties from whom documents should be subpoenaed and at what point in the discovery process those documents will be sought.¹⁵⁴

G. Prior Approval of Litigation Tasks

Micromanaging litigation tasks, such as legal research, travel, initiating specific discovery, and the filing of routine discovery-related motions, adds little to the effective management of a case. Mandatory prior approval of such tasks can be unwieldy because the general counsel frequently is unavailable when such a decision must be made or he is not sufficiently knowledgeable about the importance of a particular issue. Outside lawyers usually are selected because the general counsel has confidence in them; therefore it is not prudent to impose excessive constraints on the tactical methods by which they seek to achieve their agreed-upon goals.¹⁵⁵

H. Decisions on Experts, Consultants, and Others

The goal in deciding whether to hire experts, consultants, and others is to manage litigation rather than react to it. With this in mind, in-house counsel should ask outside counsel to include a list of

areas in which expert testimony is expected, the names of several experts, and recommendations in the initial report. Jury consultants are another possible resource during litigation. These consultants can help to determine the type of person most suited for the jury and what arguments, witnesses, or facts that will likely be best received by the jurors. Additionally, in very large or highly technical cases, as well as in cases involving a series of similar cases, document imaging and database development can be helpful and very cost effective. However, careful preparation, analysis, judgment, and trial skill, not demonstrative tricks, will win cases.¹⁵⁶

I. When Officers or Employees are Defendants

As discussed earlier, the general counsel has to bear in mind that the corporation, not the officers or employees of the corporation, is the client. Consider following operative presumptions:

- A corporate employee should not be represented by the same lawyer representing the company if the employee is being prosecuted criminally.
- In civil litigation, dual representation is possible although not always prudent because it involves a risk of a conflict developing that will result in disqualification of the company's counsel.¹⁵⁷

J. Relationships with Outside Counsel¹⁵⁸

Use the following checklist to manage outside counsel in litigation:

- When you identify a dispute, determine the time frame for resolving it and your company's ultimate goal(s) in order to decide whether and when to hire outside counsel.
- If you are not experienced in negotiating, litigation, and the subject matter of the dispute, contact outside counsel immediately.
- Before meeting with prospective outside counsel, assess your company's budget and internal dispute resolution resources and your personal management style.
- To find potential attorneys, get recommendations from within your company and from contacts in the relevant legal and business communities.
- If you are an experienced litigator, consider playing a role in shaping discovery and motion practice to reduce costs, but do not deprive outside counsel of experience with witnesses, the adversary, and the court.
- Consider participating in settlement negotiations and know the case as well as outside counsel does.
- Select a role at trial that will accommodate your desired level of participation and time availability.
- Develop a collegial relationship with outside counsel that will benefit your company in this dispute and in any further disputes.¹⁵⁹

K. Settlement

The general counsel should plan for the event of settlement even if it seems remote. Consider such factors as:

- Timing of settlement discussions;
- Persons involved in the negotiation on both sides of the litigation;
- Structure of the settlement discussion; and
- Goals and needs of both parties.

Furthermore, the ultimate decision-maker in the settlement process should be involved from an early point, unless the general counsel has unrestricted authority to approve the settlement. This will help to avoid redundant negotiations if one party is not happy with settlement. Also, offers and counter-offers should be documented in order to avoid confusion at a later stage.¹⁶⁰

L. Role of Inside Counsel at Trial

In-house counsel can perform many functions a trial lawyer cannot, thus her presence at trial is very important. Inside counsel can:

- Provide a more objective view of evidence;
- Establish a (less adversarial) relationship with the opposing parties' lawyers;
- Observe the performance of the trial lawyers;
- Act as intermediary between lawyers and company witnesses; and
- Act as mediator to resolve disagreements over the strategy of the case.¹⁶¹

M. Restrictions on Access of Inside Counsel to Confidential Information

A general counsel overseeing or conducting corporate litigation involving a business competitor frequently is confronted with a protective order foreclosing him from obtaining access to competitive information. Such information, however, might be necessary to fully understand the issues presented in the litigation. This problem arises especially when intellectual property is involved.

Generally, FED. R. CIV. P. 26(b)(1) permits broad discovery into any matter not privileged that is relevant to the subject matter or to any claim or defense. As proprietary information usually is not deemed privileged, it can be discovered.¹⁶² Therefore, the producing party often seeks a protective order pursuant to FED. R. CIV. P. 26(c)(7), asking that the information shall not be shown to company executives involved in the competitive decision-making. This restriction, as a result, would also apply to general counsel who are involved in business decision-making or who work closely with those who do.

Whether an unacceptable opportunity for inadvertent disclosure exists cannot be determined by classifying the general counsel as in-house counsel. Rather the general counsel must be involved in “competitive decision making.” This term can be defined as the general “counsel’s activities, associations, and relationship with a client that are such as to involve counsel’s advice and participation in any or all of the client’s decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor.”¹⁶³ A mere contact between the general counsel and other corporate officers involved in corporate decision-making is not enough.¹⁶⁴

XI. Outside Counsel Management

A. The Selection Process

When considering whether to hire outside counsel, two important questions must be answered:

- Should outside counsel be hired for this particular matter?
- If yes, which outside counsel should be retained?¹⁶⁵

I. Should Outside Counsel Be Hired for this Particular Matter?

A company must consider multiple factors in its analysis of whether to hire an outside law firm.¹⁶⁶ First, the company’s in-house counsel should determine whether the company would benefit from a relationship with an outside firm considering the cost associated with such a relationship. When making this decision, in-house counsel should consider the following factors:

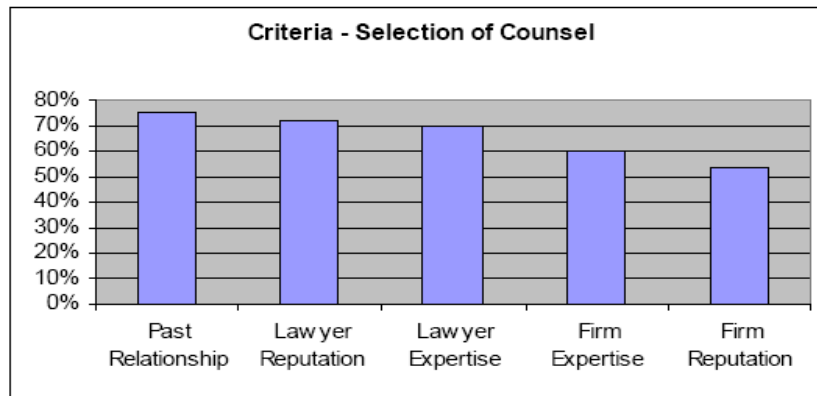
- “The decision to retain outside counsel, as opposed to handling the matter with in-house staff, is driven by three main factors: geography, the need for specialized expertise, and a lack of inside resources.”¹⁶⁷
- “Geography refers to the need to obtain local counsel when the location of the legal matter is at some distance from the corporate law department and is most often an important factor with respect to litigation.”¹⁶⁸
- “The need for outside counsel provision of specialized legal expertise is an obvious situation for most in-house counsel. But the attempt to mesh specialized outside counsel with available in-house counsel knowledge can be a management challenge. This is especially so when an outside firm is providing only part of the legal advice for a transaction or when several outside firms are providing advice concerning the transaction. In such instances, the expertise of in-house counsel in identifying legal issues and coordinating their resolution is particularly necessary.”¹⁶⁹
- “Finally, in-house counsel sometimes require outside counsel, if due to the press of time and other matters, staff resources are simply unavailable even where geography and specialized knowledge are not an issue.”¹⁷⁰

Next, when considering whether to hire outside counsel, in-house counsel should ask the following key questions:

- How much internal work is to be outsourced?
- What is the cost of providing legal services internally, and is that cost competitive with outside firms?
- What benefits does the company's law department bring to the organization by handling the work?
- Are there particular services or areas of law that would be better handled by outside counsel?
- Does the company's law department have or want to develop the necessary skill sets to efficiently handle specific areas of work?

2. Which Outside Counsel Should Be Retained?

Once the decision has been made to utilize outside counsel, the company and in-house legal department must analyze the information available to them in formulating a set of criteria with which they can evaluate prospective law firms. In making this decision, companies often rely on past relationships or a firm or lawyer's reputation and their expertise.



While skills sets will vary depending on the company and nature of the work (litigation versus contract development), the following are general attributes of a firm that companies should consider before making a decision to hire outside counsel:

- Highest quality work product;
- Lowest costs;
- Name and reputation;
- Fastest response;
- Ease to work with;

- Efficiency;
- Accessibility;
- Areas of expertise;
- Strong technical legal skills;
- Result: outside counsel should be focused on the outcome to the company rather than on the dollar value of the work;
- Innovative-value added services;
- Solid project management: outside counsel should work efficiently and complete tasks in a timely manner;
- Amount and flexibility of resources within firm;
- Location;
- Predictable pricing: companies must communicate their expectations about pricing; and
- Use of technology to enhance the efficiency of outside counsel.¹⁷¹

3. The Interview Process

Before selecting a particular law firm, companies should request and check the firm's references. Additionally, companies should talk to clients of the firm and meet with the lead attorneys who would be working on the organization's matters. Companies should also conduct interviews with the law firms that they are most interested in hiring in order to ensure that the firm is willing to consider the organization's interest and not just the bottom line on their bill.

Several methods can be used when conducting interviews with potential law firms. One strategy is called the "beauty contest" approach. This method requires a company to interview several firms and then compare their presentations, rather than asking only the lead firm to make a presentation. By forcing the firms to compete, the company maximizes the services they receive while minimizing the legal costs.

A more formal way of interviewing is preparing a document similar to a "request for a proposal" ("RFP"), which is often used in government procurement processes. This method is most commonly used for matters involving special expertise, large litigation cases, or business transactions.¹⁷² The RFP should be comprehensive and specifically describe the nature and extent of the assignment. Additionally, the RFP should not only solicit information from the prospective firm that is necessary to select a firm, but it should also describe the factors that will determine the successful candidate. Although the RFP method provides a number of advantages for companies, this practice is not gaining as much momentum as expected and this may be due to lack of law firm responses to such requests.¹⁷³ For instance, the 2006 ACC/Serengeti survey showed that for

every RFP issued less than two responses were received from law firms.¹⁷⁴ Despite this trend, about two-thirds of in-house counsel responding to this survey reported that they would issue the same number of RFPs in 2007 and about one-fourth indicated that they would increase the number issued.¹⁷⁵

Whether using the “beauty contest” or more formal approach, a company should consider exploring the following issues during an interview:

- Law firm’s experience;
- Matter at issue: ask the lead attorney to provide an initial evaluation of the case and discuss what strategies the firm would use to prepare the case and how the firm would staff the matter;
- Billing rates, alternative billing arrangements, and discounts for early bill payment; and
- Overall operation and management of the firm.

4. The Engagement Letter

Upon choosing to hire an outside law firm, the general counsel must create the working agreement that will govern the relationship between the firm and the company. This document, known as an engagement letter, defines the obligations and responsibilities of each party and the scope of the assignment. The letter should include the following:

- Role of in-house and outside counsel;
- Scope of work;
- Conflict waiver;
- Process for engaging new work;
- Responsible attorney and lead attorney;
- Persons qualified to handle matters;
- Objectives and measurements;
- Methods of communication;
- File retention;
- Type of compensation/fee arrangement; and
- Billing guidelines, including required levels of billing detail, requirement for timely submission of bills, and details of allowable expenses.

Additionally, the engagement letter should include the methods to be used to resolve future disputes, limit the nature of the work to be performed by the firm, and address potential issues of conflict. The company should also address the following issues in the engagement letter: case evaluation and disclaimer of results, dispute resolution clause, confidentiality waiver, press release provision, and termination. Finally, the engagement letter should address both current and future conflicts of interests between the client and the law firm.

To obtain better results from outside counsel, a GC should also consider including the following items in the engagement letter:¹⁷⁶

- Bills from outside counsel must be provided on a regular, timely basis.
- All bills are to go to a specified billing address.
- There shall be no general matters or billings.
- Outside counsel will accept no work directly from someone in a business unit. All work must come from the legal department.
- Only pre-approved lawyers can work on a matter. If a lawyer leaves the firm, the firm must absorb the time incurred in bringing a replacement lawyer up to speed on the file – this time is non-billable.
- Specify how and when outside counsel should communicate with in-house counsel concerning progress on a matter. Make sure communications are comprehensive.
- After initial communications on a new matter, outside counsel will deliver, within a specified number of days, a written plan and budget for the matter.¹⁷⁷

B. Building a Long-Lasting Partnership with Outside Counsel

In order to ensure a successful, long-lasting relationship between in-house and outside counsel, both parties must demonstrate a commitment to the partnership and to the pursuit of new opportunities and strategies. Furthermore, in-house as well as outside counsel must strive to understand each other's interests and goals and to maintain open lines of communication. The key, however, to achieving the ideal relationship between in-house and outside counsel is what one expert has called "authentic trust." "If we can build and maintain authentic trust, we set a solid foundation for an effective and long-lasting partnership."¹⁷⁸ Authentic trust is based on in-house counsel's confidence in the following factors in their relationship with outside counsel:

- Communication - "I can trust that my partner understands my values, drivers, and objectives."
- Credibility - "I can trust what my outside counsel says."
- Reliability - "I can trust that the firm will follow through by delivering the right

product at the right time in the right way.”

- Commitment - “I can trust that outside counsel is focused on my best interests and goals and will continually work with me to create innovative ways to deliver legal services more efficiently.”

Furthermore, authentic trust includes the following elements and characteristics:

- Continuing process;
- Dynamic growth;
- Means by which organizations maintain their business relationships;
- Existing only when both parties believe in the concept and actively participate;
- Mutual commitment;
- Continually adapting to changing goals and challenges;
- Making and keeping commitments; and
- Ethical approach to a business relationship.

In order to build authentic trust, companies should follow four simple steps. The first step is communicating information and expectations to the other party. In-house counsel should consider sharing their companies’ mission statements and invite outside counsel to do the same. This will ensure that each party understands the other’s core values. Additionally, in-house counsel may want to consider inviting outside colleagues to a social function or company training or educational programs in order to encourage more open communication. The second step required for building authentic trust is the focus stage. In this step, parties are encouraged to openly discuss the issues, problems, and challenges facing the relationship without assessing blame to the other.

The next step of achieving authentic trust requires in-house and outside counsel to “examine the gaps between each other’s expectations and to figure out how to close the gaps.” “The key here is to envision win-win solutions and to identify the benefits to both sides.”¹⁷⁹ The final step of this process focuses on each party’s commitment to the relationship. Both in-house and outside counsel must be committed to creating new ways to deliver legal services, adding greater value, achieving business objectives, and advancing common goals in order to achieve the ideal relationship.¹⁸⁰

C. Strategies for Effectively Managing Outside Counsel

According to the ACC/Serengeti survey, in-house counsel report spending about one-quarter of their time managing outside counsel.¹⁸¹ In order to be more effective in this role and to ensure that a company is benefiting from a relationship with outside counsel, in-house counsel should implement a policy for evaluating the outside firm’s performance on a regular basis. Evaluation can be done by regularly reviewing bills and work product. Additionally, in-house counsel may

wish to do an “end of matter assessment” or periodic assessment of the firm’s performance.

In addition to conducting reviews, in-house counsel can monitor a hired firm’s performance by comparing it with the traits of the ideal outside counsel. The presence of the following traits in outside counsel will help to ensure an effective partnership between a company and a law firm.

Traits of an ideal outside counsel include:

- Has recognized expertise and experience in the field;
- Clearly translates/applies legal advice into the context of what it means for the client’s business and delivers it in a way that helps the client meet legitimate business needs;
- Anticipates client needs;
- Proactively solves problems;
- Is a creative, strategic thinker, and an effective communicator;
- Is timely, available, responsive, and result-oriented;
- Identifies what adds value to the client, delivers that value, and demonstrates that he has done so; and
- Consistently exceeds the client’s expectations.

Additionally, in order to promote a good, working relationship with outside counsel, in-house counsel should strive to achieve the following, ideal traits.

Traits of an ideal in-house counsel include:

- Communicates to outside counsel the reasons he was selected over other attorneys in order to help him understand in-house counsel expectations;
- Reminds outside counsel of the company budget and gives suggestions for minimizing costs;
- Expands on personal management styles and explains exactly how he wants to participate in the dispute resolution process;
- Explicitly records corporate goals and objectives at the outset of transactions and encourages other in-house counsel and managers to discuss this with outside firms;
- Invites outside counsel as observers to selected internal meetings, particularly those relating to corporate strategy;
- Includes outside counsel on distribution lists of corporate and industry publications;

- Invites outside counsel to identify three ways to help achieve corporate objectives and three ways to add more value aside from simply doing the assigned work; and
- Invites outside counsel to identify three ways and circumstances in which they might charge other than hourly billing to more accurately reflect value to the client.

In addition to these traits, companies should consider using other methods to help ensure a win-win relationship with outside counsel. For instance, preparing engagement agreements together can strengthen relations between the two parties and can help outside counsel to better understand the client's needs. Companies should also encourage in-house and outside counsel to develop a case strategy and work collaboratively as a team with clearly delineated division of work. Additionally, the two parties should schedule reporting and review meetings on a regular basis. These meetings build open communication, help keep track of budget and objectives, and facilitate forward planning. Companies should also make sure that communication between the two parties is centralized through the in-house counsel in order to ensure appropriate briefing on a matter's status and progress and to protect privileged information. Finally, companies should reward efficient representation through repeat hiring.

D. Strategies for Monitoring and Reducing Outside Counsel Spending

The 2006 ACC/Serengeti survey indicates that the most effective methods for reducing outside counsel spending include:

- Case/matter budgets (60.7%);
- Discounted/alternative fees (57.1%, an average saving of 10.1%);
- Billing guidelines/spending rules (45.7%);
- Re-allocation of work to firms with lower rates (45%, an average saving of 12.6%); and
- Evaluations of outside counsel (24.3%, an average saving of 11.9%).¹⁸²

Other methods that can be used to control outside counsel spending include the use of case management systems and convergence programs, which are discussed below:

I. Case Management Systems

In-house counsel may also want to consider using a Case Management System ("CMS") in order to more effectively manage outside counsel. These systems have three primary functions that can be adapted to meet the unique analytical needs of a company's law department:

- Primary Economic Denominators – This aspect of a CMS can point out factors that have the greatest impact on costs. For instance, these systems assist in-house counsel in tracking outside counsel billing habits. Additionally, the systems can turn invoice information into legal cost reports which provide a comparison of the amount spent with each outside law firm in a specified time frame.

- Budget Burn Analysis – This feature identifies matters that are using up their budget too quickly by comparing the actual amount spent and the budgeted amount. Because in-house counsel generally do not have time to constantly compare actual spending for a particular matter to the budget, this function is helpful in that it alerts counsel if spending for a particular matter is likely to exceed the budget before this actually happens.
- Standardization of Decision-making – This feature assists in-house counsel in hiring outside law firms by ensuring that outside firms are selected based on standardized criteria rather than a gut feel. The system makes a recommendation on which firm to hire based on the criteria established by the legal department during implementation.

2. Convergence Projects

In order to reduce spending on outside law firms, a company's legal department may want to consider conducting a convergence project. Convergence is a method by which companies reduce the number of outside firms with which they do regular business. The benefits of this strategy include: establishing a network of preferred legal providers, lowering outside counsel fees, increasing the quality of work and responsiveness of law firms, and reducing duplication of efforts common to companies that use multiple law firms. According to a recent survey of in-house counsel, seventy-three percent of those who had conducted convergence projects expressed satisfaction with the method, stating that it met their expectations for reducing their number of outside law firms.¹⁸³

The process of convergence involves the following four steps:

- Choosing the nominees;
- Requesting proposals;
- Evaluating the responses; and
- Selecting the final list.¹⁸⁴

Understanding the role of in-house versus outside counsel is vital to deciding whether to hire outside resources.¹⁸⁵

E. Methods for Improving Outside Counsel Performance

This section details some practices that can help implement new ideas and processes to improve the performance of outside counsel.¹⁸⁶ It is vital to formalize these practices, document them, and distribute them to all appropriate personnel within the organization.

I. Create a Formal Panel

One common method for improving performance is to establish a formal panel of selected, pre-approved outside counsel. In order to be included on this panel, each of the law firms must satisfy selected criteria. Each of the selected firms should have a single designated lawyer through whom

all work is to be funneled and who has formally accepted the role of managing the company's files throughout the firm.

2. Identify Common Goals

Work with outside counsel to identify some common goals. A typical goal is for the law firm to develop a solid understanding of the company's business. Another goal is for the firm to understand how the company wants to approach certain types of matters. In almost all instances, one of the goals will be to create and maintain a collaborative, long-term relationship.

3. Have a Formal Intake Procedure

Establish a formal intake procedure for each new matter. This subjects the matter to a standard review and approval process, but the process may vary according to the nature of the matter and the anticipated fees. For example, if a new matter is expected to have fees that exceed a certain amount, work should not begin until the firm has submitted a budget that has been accepted in writing by the general counsel.

4. Watch the Budget

While a matter is ongoing, in-house counsel should regularly compare actual activity and billings against the matter's plan and budget. This should be done on an informal basis every thirty days.

5. Have a Formal Review Process

A formal review of the work and billings of outside counsel allows the GC to assess outside counsel's performance and also provides an opportunity to reconsider a particular matter and develop further strategies. When confronted with questions such as "How can we be only this far along when we've spent so much money?" a law firm may become more creative and more open to new suggestions for resolving a particular matter.

6. Debrief after Completion

After a matter is resolved, in-house counsel may want to have a post-completion debriefing from outside counsel. Work with outside counsel to assess how well they performed on the particular matter. Compare the original plan and budget with the actual, final one to determine if there were any significant discrepancies. Such information can be used to provide more accurate plans and budgets in the future.

XII. Sample Form and Policy

A. Sample General Counsel Job Description¹⁸⁷

I. Mission

As a senior vice president of Sun and a member of the executive management team, the general counsel is functionally responsible for legal affairs for the entire enterprise.

The general counsel acts as the legal advisor to the board of directors, the chairman of the board and chief executive officer, the president, chief operating officer, the executive vice president, and other senior executives of Sun Company, Inc.

Pursuant to the "Management Control Process," he or she has the responsibility and obligation to identify, develop, communicate, and monitor policies which will ensure compliance with law by the entire enterprise.

The incumbent has the responsibility for assuring the availability, continuity and quality of competent, timely, and cost-efficient legal services throughout the function.

2. Role

A dual role exists which consists of being the principal legal advisor for the Sun Company board of directors and senior management and being responsible for the corporate-wide legal function.

This position has a major role in providing legal advice in areas of significant company-wide impact, in the formulation of the corporate strategic plan, in the evaluation of new ventures, acquisitions, mergers, divestments, and in major investment proposals.

The general counsel must maintain oversight responsibility in law-related areas of significant company-wide impact, as well as direct involvement in policy matters outlined in the "Management Control Process." Also, where overlap or irreconcilable conflict involving legal matters occurs between two or more operating units, the general counsel by necessity must become involved in assuring that an acceptable resolution is achieved.

Other General Counsel roles include:

- Reporting manager of the assistant general counsel and the corporate secretary;
- Formulation and involvement in administration of corporate policies involving law, such as "Conflict of Interest" and "Standards of Business Conduct";
- Assurance to directors and officers of corporate legal compliance per "Management Control Process";
- Counseling on legislation and government relations;
- Ensuring of career development for corporate-wide legal staff;
- Inputting to operating unit management in the performance appraisal and salary administration of operating unit chief counsel;
- Seeking input from operating unit management as to the quality, timeliness, and responsiveness of legal support;
- Seeking input from operating unit chief counsel as to the quality, timeliness, and responsiveness of Radnor law department legal support.

The general counsel concentrates his activities on providing advice and guidance to the senior executive staff and board of directors. To properly fulfill these responsibilities, there is a need for the general counsel to delegate numerous tasks to the assistant general counsel such as the management of the Radnor law department and ongoing communication with subsidiary chief counsels.

B. Sample General Counsel Job Description¹⁸⁸

I. Summary

The General Counsel shall possess an LLB or JD from an accredited law school and at least twenty years of professional experience. He or she will be responsible for ensuring that firm business strategies, policies, and programs are developed and applied in full recognition of all legal implications and risks. The general counsel will act as the manager of the Legal Department while providing legal services as a practicing counsel, and managing relationships and matters with outside counsels. He or she will ensure that the legal affairs of the firm are attended to in an effective and efficient manner and that all legal records are properly compiled and securely maintained for the required time period.

2. Status

Exempt.

3. Reporting Relationship

Reports and is responsible to the Board of Directors and executive management.

4. Authority

a) Clients

Advises clients, in keeping with the firm's principles, with respect to all aspects of case management.

b) Outside Agencies

Represents the firm in dealings with outside law firms, government representatives and agencies, independent technical experts, court representatives, and others in the legal profession.

5. Professional Activities

A member of appropriate professional organizations. Fees and expenses related to such activities are paid by the firm.

6. Specific Responsibilities

a) Corporate Strategies

Defines and develops corporate strategies, policies, procedures, and programs. Provides counsel and guidance on legal implications of all matters to the Board of Directors and members of executive management. Converts firm strategies and policies into specific objectives for subordinate areas of responsibility and monitors the accomplishment of such objectives.

b) Legal Issues

Reconciles and determines the legal position in major legal matters. Reviews, evaluates, and comments on other obligations of the firm, and advises the appropriate function head of the degree of legal risk associated with such contracts and obligations prior to the firm becoming a party or otherwise becoming legally bound. Assesses the merits of major court cases filed against the firm and approves, with the advice of the appropriate function head, settlement of such court cases where warranted.

c) Budget

Determines the budget for the Legal Department and monitors the administration of the current budget. Evaluates the legal risks to which the firm may be exposed in order to allow these risks to be accurately reflected in the firm's financial statements.

d) Board of Directors

Advises the Board of Directors and other members of executive management of the impact on the activities and proposed activities of the firm of proposed local, state, and federal laws and regulations and judicial and administrative decisions.

e) Policies and Records

Provides legal consulting in policy development and training with regard to preventative law. Guides and directs the preparation and maintenance of the records of the firm.

f) Special Projects

Undertakes special projects as assigned dependent upon knowledge or experience.

XIII. Additional Resources

I. ACC Docket Articles

D.C. Toedt III and Robert R. Robinson, "250 Things (and Counting) That I'm Glad I Knew-or Wish I'd Known-During My First Year as General Counsel," *ACCA Docket* 19, no. 10 (Dec. 2001), available at <http://www.acc.com/legalresources/resource.cfm?show=147953>.

Deborah L. Edwards ET AL., "What to do When the Whistle Blows: Do's and Don'ts of Internal Investigations," *ACC Docket* 22, no. 5 (May 2004), available at <http://www.acc.com/legalresources/resource.cfm?show=17030>.

Jeffrey W. Carr and James Lovett, "Getting Closer to the Business: How to Foster Innovation and Value Through Culture and Philosophy," *ACCA Docket* 19, no. 1 (Jan. 2001), available at <http://www.acc.com/legalresources/resource.cfm?show=142691>.

John H. Ogden, "Synchronizing Business and Legal Priorities-A Powerful Tool," *ACCA Docket* 18, no. 9 (Oct. 2000), available at <http://www.acc.com/legalresources/resource.cfm?show=84709>.

John K. Villa, "Hidden Storms for Those in Safe Harbors: The SEC's Professional Conduct Rules and the Federal Preemption Doctrine," *ACC Docket* 22, No. 2 (Feb. 2004), available at <http://www.acc.com/legalresources/resource.cfm?show=17054>.

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Julie S. Congdon and Patricia M. Hamill, "Managing Outside Counsel in Litigation: A Primer," *ACC Docket* 21, no. 4 (Apr. 2003), available at <http://www.acc.com/legalresources/resource.cfm?show=150341>.

Ronald F. Pol, "Get More Value for Outside Counsel: Show them the Flipside," *ACC Docket* 21, no. 4 (Apr. 2003), available at <http://www.acc.com/legalresources/resource.cfm?show=150303>.

Stephen J. Friedman and C. Evan Stewart, "The Corporate Executive's Guide to the Role of the General Counsel," *ACCA Docket* 18, no.5 (May 2000), available at <http://www.acc.com/legalresources/resource.cfm?show=85920>.

Steven N. Machtinger and Dana A. Welch, "In-House Ethical Conflicts: Recognizing and Responding to them," *ACC Docket* 22, no.2 (Feb. 2004), available at <http://www.acc.com/legalresources/resource.cfm?show=17060>.

Teresa T. Kennedy, "In-House and Outside Counsel: The Trust Factor," *ACC Docket* 22, no. 1 (Jan. 2004), available at <http://www.acc.com/legalresources/resource.cfm?show=17064>.

Teresa T. Kennedy ET AL., "Achieving Balance: A Recipe for High-Quality Work Life for In-House Counsel," *ACC Docket* 22, no.2 (Feb. 2004), available at <http://www.acc.com/legalresources/resource.cfm?show=17059>.

2. ACC InfoPAKS

Achieving Diversity," *ACC InfoPAK*, (June 2006), available at <http://www.acc.com/legalresources/resource.cfm?show=19670>.

"Alternative Billing," *ACC InfoPAK* (Aug. 2008), available at <http://www.acc.com/legalresources/resource.cfm?show=19678>.

"Attorney-Client Privilege," ACC InfoPAK (Jan. 2006), *available at* <http://www.acc.com/legalresources/resource.cfm?show=19681>.

"Client Surveys," ACC InfoPAK (June 2005), *available at* <http://www.acc.com/legalresources/resource.cfm?show=19680>.

"In-House Counsel Standards under Sarbanes-Oxley," ACC InfoPAK (Jan. 2006), *available at* <http://www.acc.com/legalresources/resource.cfm?show=19652>.

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"New to In-house Practice," ACC InfoPAK (Jan. 2007), *available at* <http://www.acc.com/legalresources/resource.cfm?show=19651>.

"Outside Counsel Management," ACC InfoPAK (Jan. 2006), *available at* <http://www.acc.com/legalresources/resource.cfm?show=19673>.

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"Recruiting and Retaining In-House Staff," ACC InfoPAK (Aug. 2008), *available at* <http://www.acc.com/legalresources/resource.cfm?show=19663>.

"Responding to Government Investigations," ACC InfoPAK (Aug. 2008), *available at* <http://www.acc.com/legalresources/resource.cfm?show=77637>.

"Technology Primer," ACC InfoPAK (Apr. 2008), *available at* <http://www.acc.com/legalresources/resource.cfm?show=19671>.

<http://www.acc.com/legalresources/resource.cfm?show=19671>.

3. Practice Profiles

"Leading Practices in Board Governance and the Role of In-House Lawyers post Sarbanes-Oxley: What Companies are Doing," ACC Leading Practices Profiles (Feb. 2004), *available at* <http://www.acc.com/legalresources/resource.cfm?show=16812>.

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"Leading Practices in Providing In-House Legal Support to the CFO & Finance Functions," ACC Leading Practices Profiles (June 2004), *available at* <http://www.acc.com/legalresources/resource.cfm?show=16809>.

"Leading Practices in Using Non-Lawyer Personnel to Help Perform Legal Functions," (Apr. 2004), *available at* <http://www.acc.com/legalresources/resource.cfm?show=16811>.

"Leading Practices in Sarbox 307 Up-The-Ladder Reporting and Attorney Professional Conduct Programs," (Aug. 2007), *available at* <http://www.acc.com/legalresources/resource.cfm?show=16817>.

4. ACC Annual Meeting Materials

“Corporate Legal ROI: A Strategic Tool that Corporate Management Understands,” ACC 2003 Annual Meeting, Session 105, *available at* <http://www.acc.com/legalresources/resource.cfm?show=20481>.

“Document Retention & E-Discovery in a Post-Enron/ Andersen World,” ACC 2003 Annual Meeting, Session 704, *available at* <http://www.acc.com/legalresources/resource.cfm?show=20505>.

“Establishing and Maintaining an Effective Best Employment Practices Audit Program,” ACC 2003 Annual Meeting, Session 506, *available at* <http://www.acc.com/legalresources/resource.cfm?show=20523>.

“Expanding Your Influence, Not Your Father’s (or Mother’s) GC Role,” ACC 2007 Annual Meeting, Session 709, *available at* <http://www.acc.com/legalresources/resource.cfm?show=19888>.

“Leadership and Management Skills for the Attorney/Manager,” ACC 2003 Annual Meeting, Session 209, *available at* <http://www.acc.com/legalresources/resource.cfm?show=20548>.

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“Top of Mind: What General Counsel are Thinking/Worried About,” ACC 2007 Annual Meeting, Session 211, *available at* <http://www.acc.com/legalresources/resource.cfm?show=19954>.

“Understanding and Maximizing the Protection of Legal Professional Privilege,” ACCE Program Material, Session 601 (Aug. 2007), *available at* <http://www.acc.com/legalresources/resource.cfm?show=20014>.

XIV. Endnotes

¹ Throughout this InfoPAK, the terms “corporation” or “company” refer to typical employers of ACC members.

² Antonio Lordi, *The Attorney-Client Privilege in the European Union and Italy: Time for a Change*, 11-1 DUQ BUS. L.J., 47-60 (2009).

³ See Rees W. Morrison, LAW DEPARTMENT BENCHMARKS, MYTHS, METRICS, AND MANAGEMENT (2nd ed., Glasser LegalWorks 2001) at Ch. 10.

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⁵ Steven J. Friedman & Evan Stewart, “The Corporate Executive’s Guide to the Role of the General Counsel,” *ACCA Docket* 18, no. 5 (May 2000): 58, available at <http://www.acc.com/legalresources/resource.cfm?show=85920>.

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⁷ MODEL RULES OF PROF’L CONDUCT, available at http://www.abanet.org/cpr/mrpc/mrpc_toc.html.

⁸ THE RULES OF PROFESSIONAL CONDUCT OF THE LAW SOCIETY OF UPPER CANADA, available at <http://www.lsuc.on.ca/regulation/a/profconduct/>.

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¹⁰ 17 C.F.R. § 205.1 (2008).

¹¹ “In-House Counsel & the Attorney Client Privilege,” Lex Mundi Multi-jurisdictional Survey (2002), available at <http://www.acc.com/legalresources/resource.cfm?show=16748>.

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¹³ John K. Villa, “Corporate Counsel Guidelines,” Vol. 1 § 3.08 (2003 ed.) [hereinafter “Corporate Counsel Guidelines, Vol. 1”].

¹⁴ Md. State Bar Ethics Op. 87-19 (1987).

¹⁵ Corporate Counsel Guidelines, Vol. 1, *supra* note 13, at § 3.08. See also “The Attorney Client Privilege in the Parent Subsidiary Context,” *ACC Docket* 25, no. 10 (Dec. 2007), available at <http://www.acc.com/legalresources/resource.cfm?show=14411>. For more information on conflicts of interest practice and programs, see “Leading Practice in Conflicts Management Programs: What Companies and Law Firms are Doing,” ACC Leading Practices Profile (Nov. 2003), available at <http://www.acc.com/legalresources/resource.cfm?show=16815>.

¹⁶ Catherine Pawluch, Partner, Gowling, Lafluer, Henderson, LLP, Panelist on “Ethical Issues Facing General Counsel Globally,” The ABA Forum on Air & Space Law and McGill University’s Institute of Air & Space Law (Sept. 18, 2008).

¹⁷ *Id.* See also R. Franklin Balotti & Jesse A. Finklestein, THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 4.10 (2d ed. 1996).

¹⁸ MODEL RULES OF PROF’L CONDUCT R. 1.13 cmt. 3.

¹⁹ Corporate Counsel Guidelines, Vol. 1, *supra* note 13, at § 3.07; “Business Crimes and Compliance Criminal Liability,” A Lex Mundi Global Survey Publication (Feb. 2008), available at <http://www.acc.com/legalresources/resource.cfm?show=16288>. See also Article 2.1 of the Italian Lawyers Deontological Code; PC Rules.

²⁰ *Id.*

²¹ Ronald D. Rotunda, LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY, § 14-2.2 (West Publ’n 2002).

²² MODEL RULES OF PROF’L CONDUCT R. 1.13(b)(1),(2),(3).

²³ For violations of international codes of conduct, review ACC International Practice Almanacs, available at <http://www.acc.com> (giving country by country descriptions of the statutory or administrative rules pertaining to the practice of law by in-house counsel).

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³⁵ See also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 74-336 (1999).

³⁶ Model Rule 5.7 (b).

³⁷ Corporate Counsel Guidelines, Vol. 1, *supra* note 13, at § 3.03.

³⁸ Catherine Pawluch, *supra* note 16.

³⁹ CAN. BAR ASSOCIATION'S CODE OF PROFESSIONAL CONDUCT, Commentary, Ch. III, "Advising Clients" at 11-14.

⁴⁰ Corporate Counsel Guidelines, Vol. 1, *supra* note 13, at § 3.07.

⁴¹ *Id.* at § 3.13.

⁴² See also Andrew Olek, "When an In-House Counsel Must Say 'No'," *ACC Docket*, 25 no. 9 (Nov. 2007): 12, available at <http://www.acc.com/legalresources/resource.cfm?show=14431>.

⁴³ Corporate Counsel Guidelines, Vol. 1, *supra* note 13, at § 3.18.

⁴⁴ *Id.*

⁴⁵ See MODEL RULES OF PROF'L CONDUCT R. 5.1(c)(2).

⁴⁶ See MODEL RULES OF PROF'L CONDUCT R. 5.1(b).

⁴⁷ Corporate Counsel Guidelines, Vol. 1, *supra* note 13, at § 3.32. See also Lawyer Serving as Director of Client Corporation, ABA Formal Op. 98-410 (Feb. 27, 1998).

⁴⁸ MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 1.

⁴⁹ Law Society of Alberta, ALBERTA CODE OF PROFESSIONAL CONDUCT, available at <http://www.lawsocietyalberta.com/files/Code.pdf>.

⁵⁰ MODEL RULES OF PROF'L CONDUCT R. 1.6(a) ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation ...").

⁵¹ MODEL RULES OF PROF'L CONDUCT R. 3.6(C). See also Beth A. Wilkinson & Steven H. Schulman, *When Talk is Not Cheap: Communications with the Media, the Government and Other Parties in High Profile White Collar Criminal Cases*, 39 AM. CRIM. L. REV. 203 (2002).

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⁵⁵ MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(1).

⁵⁶ MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(2)(i).

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⁶³ *Id.* at 110.

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⁷³ See Sarbanes-Oxley, *supra* note 66 at §307.

⁷⁴ SEC Final Rule: Implementation of Standards of Professional Conduct for Attorneys, 17 C.F.R. Part 205 (2008) (2002), *available at* <http://www.sec.gov/rules/final/33-8185.htm>.

⁷⁵ Corporate Counsel Guidelines, Vol. 1, *supra* note 13, at § 3.02.

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¹⁴⁵ See *Corporate Compliance: Now They’re Getting Serious!* at 7. See also Mark J. Fucile ET AL., “Timing is Everything: When Document Retention Policies and Related In-House Counsel Advice Intersect with Government Investigations and Litigation,” *ACCA Docket* 20, no. 5 (May 2002), available at <http://www.acc.com/legalresources/resource.cfm?show=149507>; Victor A. Warnement ET AL., “When the SEC Comes Calling: Tips for Dealing With an Enforcement

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¹⁴⁶ Jim Patton ET AL., “Responding to Media Inquiries in a Crisis: In-House Counsel as Spokesperson,” *ACC Docket* 21, no.7 (June 2003), available at <http://www.acc.com/legalresources/resource.cfm?show=17085>; Sara Church Dinkler and Richard S. Levick, “Effectively Managing Public Relations for High Profile Litigation,” ACC 2003 Annual Meeting, Session 804, available at <http://www.acc.com/legalresources/resource.cfm?show=20497>; Peter J. Brennan ET AL., “Litigation Public Relations,” ACC 2000 Annual Meeting, available at <http://www.acc.com/legalresources/resource.cfm?show=145293>.

¹⁴⁷ Corporate Counsel Guidelines, Vol. 1, *supra* note 13, at § 4.02.

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¹⁵⁰ Corporate Counsel Guidelines, Vol. 1, *supra* note 13, at § 4.08-4.10.

¹⁵¹ *Id.* at § 4.11.

¹⁵² *Id.* at § 4.12.

¹⁵³ If ethically permissible under MODEL RULES OF PROF’L CONDUCT R. 4.2.

¹⁵⁴ Corporate Counsel Guidelines, Vol. 1, *supra* note 13, at § 4.14.

¹⁵⁵ *Id.* at § 4.16.

¹⁵⁶ See *id.* at § 4.17.

¹⁵⁷ Corporate Counsel Guidelines, Vol. 1, *supra* note 13, at § 4.18.

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¹⁵⁹ *Id.* See also “Conflict and Waivers,” ACC InfoPAK (Mar. 2007), available at <http://www.acc.com/legalresources/resource.cfm?show=19665>.

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¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See Richard C. Stewart II ET AL., “Outside Counsel Selection Process: Preparing for Success,” *ACC Docket* 22, no. 1 (Jan. 2004), available at <http://www.acc.com/legalresources/resource.cfm?show=17063>; “Best Practices in Hiring Outside Counsel,” ACC

2003 Annual Meeting, Session 504, available at <http://www.acc.com/legalresources/resource.cfm?show=20527>.

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¹⁷³ ACC/Serengeti, “Managing Outside Counsel Survey: Assessing Key Elements of the In-house Counsel/ Outside Counsel Relationship” (2006), available at <http://acc.com/resource/v7665>. The response rate has remained steady in the past few years, with the exception of responses in 2004.

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¹⁷⁵ *Id.*

¹⁷⁶ See “Benchmarking the Performance of Outside Counsel,” *ACC Docket* 24, no. 5 (Apr. 2006), available at <http://www.acc.com/legalresources/resource.cfm?show=14683>.

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