

**THE PIVOTAL ROLE OF THE GENERAL COUNSEL IN  
PROMOTING CORPORATE INTEGRITY AND PROFESSIONAL  
RESPONSIBILITY**

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## INTRODUCTION

In the complex, highly regulated world in which business corporations operate, corporate general counsel play a key role in promoting organizational integrity and ethical lawyering. The fiduciary and professional responsibilities of the general counsel<sup>1</sup>—or chief legal officer<sup>2</sup>—are explicit in the rules adopted by the Securities and Exchange Commission (SEC) pursuant to section 307 of the Sarbanes-Oxley Act of 2002.<sup>3</sup> They are also implicit in the August 2003 amendments to Model Rule of Professional Responsibility 1.13<sup>4</sup> adopted by the American Bar Association's (ABA) House of Delegates<sup>5</sup> pursuant to the recommendations of the ABA Task Force on Corporate Responsibility.<sup>6</sup> The real power and potential influence of the men and women

1. While outside lawyers or law firms sometimes serve as general counsel to entities or their components, for purposes of this discussion the term "general counsel" refers to a lawyer employed by a corporation or other organization to serve as its chief legal officer with responsibility for overseeing legal matters pertaining to the entity, including its governance, finance, and operations.

2. The term "chief legal officer," customarily abbreviated "CLO," is employed in some organizations in lieu of the term "general counsel" because it is comparable to the terminology used for other executive functions, such as "chief executive officer," "chief financial officer," "chief operating officer," etc. "Chief legal officer" is also the terminology used by the Securities and Exchange Commission (SEC) in its Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. § 205 (2003).

3. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 11, 18, 28 and 29 U.S.C.). In section 307 Congress directed the SEC to issue rules:

setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule—

(1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and

(2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

*Id.* at § 307; 15 U.S.C. 7245 (2000 & Supp. II).

4. MODEL RULES OF PROF'L CONDUCT 1.13 (2003).

5. *See* ABA HOUSE OF DELEGATES, RESOLUTIONS OF THE ABA HOUSE OF DELEGATES (Aug. 11–12, 2003), *available at* <http://www.abanet.org/media/corpgov.pdf> [hereinafter AUGUST 2003 ABA RESOLUTIONS].

6. *See* AMERICAN BAR ASS'N, REPORT OF AMERICAN BAR ASSOCIATION TASK FORCE ON CORPORATE RESPONSIBILITY (Mar. 31, 2003), *available at* [http://www.abanet.org/buslaw/corporateresponsibility/final\\_report.pdf](http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf) [hereinafter CORPORATE RESPONSIBILITY TASK FORCE REPORT]. While the impetus for the SEC's Part 205 rules, much of the work of the ABA Task

who serve as corporate general counsel, however, goes far beyond the areas touched upon by these mandates. Enron and other corporate debacles illustrate all too well what happens when business managers fail to understand and honor their responsibilities. As advisors and liaisons to senior corporate officers, directors, boards, and board committees, general counsel have a great deal to do with the way business managers perceive both their particular legal obligations and corporate responsibility in general.<sup>7</sup> General counsel are ideally situated to serve as leaders in the struggle to define the parameters of corporate conscience. They can and should be held accountable for promoting integrity on the part of corporations and their constituents and for fostering professional responsibility on the part of corporate lawyers.

Despite the vital importance of general counsel in the corporate arena, a great deal remains to be explored about the nature of the office and the part general counsel will play in the emerging ethical landscape.<sup>8</sup> The purpose of

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Force on Corporate Responsibility, and the August 2003 amendments to the Model Rules of Professional Conduct, arose primarily out of concerns over the role of lawyers representing public corporations, many other entities, including those in the not-for-profit sector, are subject to similar concerns. These concerns merit inclusion in work on reporting up and reporting out requirements, even though only issuers registered under federal securities laws are subject to the relevant SEC rules. See, e.g., Susan Hackett, *It's Private Companies' Turn to Dance the Sarbox Shuffle* (Am. Corporate Counsel Ass'n, Washington, D.C.), Aug. 2003, available at [http://www.acca.com/public/article/corresp/sarbox\\_shuffle.pdf](http://www.acca.com/public/article/corresp/sarbox_shuffle.pdf). While the principal focus of this article is on general counsel in public corporations, much of the discussion also applies to general counsel employed by private business entities and not-for-profit organizations.

7. In addition to the challenges presented by the new regulatory measures, the renewed focus on legal compliance and corporate governance issues offers opportunities for corporate lawyers, particularly for general counsel, to raise attention to legal issues. "General counsel are both legal officers and corporate officers. Most of the time, General Counsel have to balance their legal roles and their business roles. Sarbanes-Oxley is a profound exception to this need for balance in the sense that, by rigorously applying their legal insight, general Counsel directly serve economic business objectives." Lawrence J. Stybel & Maryanne Peabody, *A New Balance of Power Means New Boardroom Opportunity for General Counsel*, OF COUNS., May 2004, at 9, 10.

8. There are, however, a few excellent recent articles. See, e.g., Deborah DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955 (2006); Carl D. Liggio, Sr., *A Look at the Role of Corporate Counsel: Back to the Future—Or is it the Past?*, 44 ARIZ. L. REV. 621, 621–28 (2002) [hereinafter Liggio, *A Look at the Role of Corporate Counsel*]; E. Norman Veasey & Christine T. Di Guglielmo, *The Tensions, Stresses, and Professional Responsibilities of the Lawyer for the Corporation*, 62 BUS. LAW. 1 (2006). The ethical obligations of chief legal officers were also discussed in the Section on Professional Responsibility panel on "Navigating Treacherous Waters: Initiating an Investigation, Going Up the Ladder and Reporting Out" at the American Association of Law Schools January 2007 meeting in Washington, D.C., and a number of thoughtful articles were written a decade ago in connection with Emory University Law School's 1997 Randolph Thrower Symposium on the Role of the General Counsel. See, e.g., Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057 (1997); Richard S. Gruner, *General Counsel in an Era of Compliance Programs and Corporate Self-Policing*, 46 EMORY

this article is to offer an overview of the role of contemporary general counsel, with a particular focus on the specific responsibilities assigned to these individuals as chief legal officers pursuant to the SEC's Part 205 rules and implicit in Model Rule 1.13. The discussion emphasizes three points. First, corporate general counsel play multifaceted roles in the corporate legal environment, and their influence extends across a vast spectrum of corporate activity. Consequently, the ability of general counsel to perform their functions successfully in the new ethical landscape will significantly impact the effectiveness of regulatory efforts designed to promote corporate integrity and professional responsibility.

Second, the article suggests that it is not only *what* general counsel do that matters, but also *how* they do it. Corporate lawyers constantly face pressure to compromise professional judgment and abandon internal moral standards in the interest of fitting into business environments. They are urged to be team players in a game where winning depends on wealth maximization—corporate and individual. Measures designed to require ethical vigilance on the part of general counsel need to support broader values and empower general counsel to act as “lawyer statesmen”<sup>9</sup> who offer insights that go beyond technical legal advice.

Third, given the importance of the general counsel function, in evaluating the efficacy of the rules governing corporate legal practice scholars, practitioners and regulators need to recognize the significance of the role of corporate general counsel and consider the impact of new legal rules and the practices they engender on those charged with so much of the responsibility for making these rules work.

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L.J. 1113 (1997); Geoffrey C. Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 EMORY L.J. 1011 (1997) [hereinafter Hazard, *Ethical Dilemmas*]; Geoffrey C. Hazard, Jr., *Three Afterthoughts*, 46 EMORY L.J. 1053 (1997) [hereinafter Hazard, *Three Afterthoughts*]; James F. Kelley, *The Role of the General Counsel*, 46 EMORY L.J. 1197 (1997); Carl D. Liggio, *The Changing Role of Corporate Counsel*, 46 EMORY L.J. 1201, 1201–02 (1997) [hereinafter Liggio, *The Changing Role of Corporate Counsel*]; Howard B. Miller, *Law Risk Management and the General Counsel*, 46 EMORY L.J. 1223 (1997); Timothy P. Terrell, *Professionalism as Trust: The Unique Internal Legal Role of the Corporate General Counsel*, 46 EMORY L.J. 1005 (1997); Sally R. Weaver, *Ethical Dilemmas of Corporate Counsel: A Structural and Contextual Analysis*, 46 EMORY L.J. 1023 (1997).

9. See Benjamin W. Heineman, Jr., *The Ideal of the ‘Lawyer Statesman’*, 22 ACC DOCKET 62, 64 (May 2004) (stating that general counsel “must have enough life experience, stature, and self-confidence to express honest, complex views even under the inevitable pressure for simple, short-term answers”); *Face Value: Where’s the Lawyer?*, THE ECONOMIST, Mar. 20, 2004, at 73 (discussing former General Electric Company General Counsel Benjamin Heineman’s view that an ideal general counsel is a “lawyer statesman” who “should be involved in everything from creating a ‘culture of compliance and integrity’ to engaging in public debate and fighting the current cynicism about business”).

Part I begins with an overview of the history of the corporate general counsel position and then outlines formal and informal roles contemporary general counsel play, concluding with a discussion of the importance of a broad vision of the role in fostering corporate integrity and professional ethics. Part II looks at the responsibilities of general counsel in connection with Sarbanes-Oxley and the 2003 amendments to the Model Rules of Professional Conduct.

In the interest of beginning a conversation, Part III focuses on two of the many areas that merit careful consideration concerning the role of general counsel in the struggle to promote corporate integrity and professional responsibility. The first section advocates caution with respect to the increasingly popular practice of retaining separate “independent” counsel to handle various corporate legal matters. It is clearly necessary for corporate boards to retain separate counsel in certain limited circumstances—e.g., in connection with special litigation committee decisions in shareholder derivative actions or internal investigations involving allegations of misconduct that implicates the general counsel. Overuse of this device, however, wastes resources, and, more importantly, threatens to undermine the authority and effectiveness of general counsel. Consequently, the article suggests consideration of an ethical rule pertaining to coordination of counsel absent extraordinary circumstances.

The second and final section of Part III turns to the critical need for ongoing attention to the relationship between general counsel and corporate directors. Lawyers and business managers alike need standards applicable to the intersection of their roles, both as a basis for guidance and as a source of authority to invoke as a bulwark against countervailing pressures that assault integrity and professionalism.<sup>10</sup> Accordingly, standards pertaining to general counsel attendance at board meetings and ongoing communication with independent directors have a great deal of merit. In addition, this article proposes a standard requiring chief legal officers to report to directors on the resignation or termination of in-house lawyers or outside counsel handling significant matters for a company and the reasons therefore.

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10. Cf. Veasey & Di Guglielmo, *supra* note 8, at 21 (observing that new up-ladder reporting requirements “provide counsel with leverage to cause . . . corporate constituents to ‘do the right thing’”).

## I. THE GENERAL COUNSEL IN CONTEMPORARY ENTITIES

The office of general counsel is an exciting and much sought-after position in the contemporary legal market.<sup>11</sup> General counsel function in the midst of the crossroads where business objectives, corporate governance standards, and rules of professional responsibility intersect. The following discussion briefly looks at some of the major historical trends that have defined the nature of the position and then turns to the role of general counsel in contemporary entities.<sup>12</sup>

### A. *Historical Trends in the Role of General Counsel*

Over time, the star of in-house lawyers in corporate entities has risen and fallen. As noted legal historian Lawrence Friedman reports, in the second half of the nineteenth century—the time period when the corporate form became a hallmark of big business in the United States<sup>13</sup>—corporate legal jobs were highly desirable.<sup>14</sup> “To be general counsel of a major railroad, after the Civil War, was to occupy a position of great prestige and enormous salary.”<sup>15</sup> The potential rewards inspired many of the bar’s best and brightest, including judges, to seek general counsel positions.<sup>16</sup>

Prestige and power continued to be associated with corporate counsel positions well into the twentieth century. Many senior corporate managers began their careers as in-house lawyers during this “golden age of corporate counsel.”<sup>17</sup> Gradually, however, business school graduates took over the leadership of corporate America.<sup>18</sup> At a time when both the regulatory environment and financial transactions were significantly less complex than

11. See, e.g., Liggio, *A Look at the Role of Corporate Counsel*, *supra* note 8, at 632 & n.28; Janet Stidman Eveleth, *Life as Corporate Counsel*, 37 MD. B.J. 16, 18 (Jan.-Feb. 2004) (stating that “over the last 20 years, the role of general counsel has emerged as a popular area of practice”).

12. In recent years the role of general counsel has become increasingly important in many different kinds of entities. Even large law firms now have general counsel. See Geoffrey C. Hazard, Jr., “*Lawyer for Lawyers*”: *The Emerging Role of Law Firm Legal Counsel*, 53 U. KAN. L. REV. 795, 795 (2005).

13. See Sarah H. Duggin & Stephen M. Goldman, *Restoring Trust in Corporate Directors: The Disney Standard and the “New” Good Faith*, 56 AM. U. L. REV. 211, 220–21 (2006).

14. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 490 (3d ed. 2005).

15. *Id.*; see also, e.g., DeMott, *supra* note 8, at 958–59; Liggio, *A Look at the Role of Corporate Counsel*, *supra* note 8, at 621–22; Liggio, *The Changing Role of Corporate Counsel*, *supra* note 8, at 1201–02.

16. DeMott, *supra* note 8, at 958–59.

17. Liggio, *A Look at the Role of Corporate Counsel*, *supra* note 8, at 621 (observing that during the first decades of the twentieth century, “75% of the CEOs of the major companies were lawyers compared to less than 5% today”); see also Liggio, *The Changing Role of Corporate Counsel*, *supra* note 8, at 1202.

18. Liggio, *The Changing Role of Corporate Counsel*, *supra* note 8, at 1202.

today, few senior managers perceived the need to devote corporate resources to law departments.<sup>19</sup> In-house positions became less desirable as compensation lagged and advancement opportunities steadily decreased.<sup>20</sup> As business managers turned to outside lawyers for legal advice, the prestige of in-house positions plummeted.<sup>21</sup> In the 1970s, however, the tide began to turn,<sup>22</sup> and in-house lawyers once again emerged as significant players in the corporate world.<sup>23</sup> As the practice environment evolved, the importance of general counsel within corporate structures became clear.

### B. *Emergence of the Contemporary Model*

The ascendancy of the corporate law department during the last three decades resulted from the confluence of a variety of factors.<sup>24</sup> Professor Geoffrey Hazard notes that businesses experienced an increasing need for “continuous legal assistance, readily at hand and already familiar with the

19. See FRIEDMAN, *supra* note 14, at 490; see also Liggio, *A Look at the Role of Corporate Counsel*, *supra* note 8, at 623 (“Compared to today, the 1950s and early 1960s were the land of legal simplicity.”).

20. See Liggio, *A Look at the Role of Corporate Counsel*, *supra* note 8, at 622–23; Liggio, *The Changing Role of Corporate Counsel*, *supra* note 8, at 1202–03. During this time period “the term ‘house counsel’ was one of double disparagement.” Hazard, *Ethical Dilemmas*, *supra* note 8, at 1011. As Professor Regan points out, it was also during the first decades of the twentieth century that the “Cravath approach” sparked the development of the elite Wall Street firms that dominated corporate legal work for many years by providing high quality services to corporate clients, albeit at a high cost. MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* 23 (2004).

21. See Liggio, *A Look at the Role of Corporate Counsel*, *supra* note 8, at 622 (noting that “few companies had internal legal departments”). Mr. Liggio also notes that the resources necessary to support an adequate legal library, particularly the cost of the books themselves, reinforced the role of large law firm lawyers as “gatekeepers of legal knowledge.” *Id.* at 625. He cites the rapid development of technology during the last few decades as a tremendous leveling influence with respect to access to legal knowledge. *Id.* at 633–34.

22. Abram Chayes and Antonia Chayes wrote an influential article describing this trend in 1985. See Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277 (1985). They noted:

A striking development in the legal profession over the last decade has been the rapid growth in both importance and size of the in-house, or corporate counsel. The traditional house counsel was a relatively minor management figure, stereotypically, a lawyer from the corporation’s principal outside law firm who had not quite made the grade as partner. . . . The new breed of general counsel has left this stereotype behind.

*Id.* at 277 n.1.

23. As Chayes and Chayes noted in 1985, the shift to in-house legal departments was “most pronounced among the largest corporations in the American economy . . . those that [had] traditionally been the anchor clients of the large, elite law firms.” *Id.* at 278.

24. As Professor DeMott has observed, this renaissance resulted from both demand and supply side factors. DeMott, *supra* note 8, at 961.



corporation's operations and legal environment."<sup>25</sup> As former Chief Justice Rehnquist observed in *Upjohn Co. v. United States*,<sup>26</sup> "corporations, unlike most individuals, 'constantly [needed to] go to lawyers to find out how to obey the law'";<sup>27</sup> by the early 1980s, corporate legal compliance was "hardly an instinctive matter."<sup>28</sup> At the time of the *Upjohn* decision, SEC and Internal Revenue Service (IRS) enforcement initiatives pursuant to the Foreign Corrupt Practices Act<sup>29</sup> were in full swing, the Watergate scandal had opened the eyes of law enforcement authorities and the public to questionable domestic political contributions by major corporations and their constituents,<sup>30</sup> and a burst of legislative activity had given birth to comprehensive regulatory systems applicable to corporate actors.<sup>31</sup> This was also the era of the litigation explosion. The number of civil actions against corporations dramatically increased in areas ranging from employment to products liability,<sup>32</sup> and class actions and shareholders' derivative suits emerged as effective weapons against powerful corporate behemoths.<sup>33</sup> Corporate managers learned from experience, and they, too, began to use litigation as an offensive weapon to pursue business objectives and as a defensive tool to combat hostile takeover attempts.<sup>34</sup>

At the same time, external economic factors made law firm representation increasingly expensive.<sup>35</sup> Familiarizing outside counsel with the details

25. Hazard, *Ethical Dilemmas*, *supra* note 8, at 1012; *see also* Liggio, *The Changing Role of Corporate Counsel*, *supra* note 8, at 1210 (noting the numerous functional roles of corporate counsel).

26. 449 U.S. 383 (1981).

27. *Id.* at 392.

28. *Id.*

29. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977).

30. *See generally* Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COL. BUS. L. REV. 859, 872-73 (citing STEPHEN F. BLACK, INTERNAL CORPORATE INVESTIGATIONS § 1.01 at 1-1 (1998), and Arthur F. Mathews, *Internal Corporate Investigations*, 45 OHIO ST. L.J. 655, 655-56 (1984)).

31. *See* Liggio, *The Changing Role of Corporate Counsel*, *supra* note 8, at 1204 (noting growth of "'alphabet soup' agencies" and passage of several comprehensive new laws). *See generally* Duggin, *supra* note 30, at 881-83.

32. *See* Duggin *supra* note 30, at 881-83; Liggio, *The Changing Role of Corporate Counsel*, *supra* note 8, at 1203. *See generally* WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991).

33. Duggin, *supra* note 30, at 881-83.

34. Susanna M. Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, 68 TENN. L. REV. 179, 199-200 (2001) (discussing the recent increase in the number of in-house attorneys and the corresponding benefits to corporations); Liggio, *A Look at the Role of Corporate Counsel*, *supra* note 8, at 624; Liggio, *The Changing Role of Corporate Counsel*, *supra* note 8, at 1203.

35. Daly, *supra* note 8, at 1060 ("As the legal fees charged by law firms continued to rise, both corporate financial officers and general counsel perceived the fiscal and professional wisdom of making salaried lawyers responsible for the delivery of nonroutine, complex legal

necessary to effective representation required large cash outlays<sup>36</sup> and diverted human resources from more economically productive business tasks. As legal fees became a larger part of corporate expenditures, managers also clamored for utilization of business-oriented approaches to contain rapidly expanding legal risks and concomitant counsel fees.<sup>37</sup> Perhaps most importantly, many corporate managers began to recognize, albeit sometimes grudgingly, the usefulness of involving lawyers early on in business initiatives.<sup>38</sup>

During the same time period, lawyers, too, were beginning to see the promising possibilities of in-house positions. As law firms demanded longer and longer workdays, lawyers looking for ways to escape the tyranny of the billable hour and the pressure to become rainmakers<sup>39</sup> were attracted to in-house positions.<sup>40</sup> This trend accelerated as compensation and benefit packages became increasingly lucrative<sup>41</sup> and the “affirmative self-assurance of corporate counsel [was] manifested in their own organizations, publications and special identity.”<sup>42</sup> The creation of the American Corporate Counsel

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services, particularly those of a transactional character.”); Liggio, *The Changing Role of Corporate Counsel*, *supra* note 8, at 1204–05 (noting that “[e]scalating costs, coupled with a distaste for lawyers generally, were a critical catalyst in propelling employed counsel into the forefront of the modern corporate hierarchy,” and that many corporate executives believed that outside counsel overcharged for their services).

36. See Daly, *supra* note 8, at 1060–61; see also Kim, *supra* note 34, at 199–200.

37. Liggio, *The Changing Role of Corporate Counsel*, *supra* note 8, at 1206 (stating that “the business of the law is being addressed by a new breed of corporate counsel who are applying business techniques and tools to management of the legal process”) (citing Howard B. Miller, *Law Risk Management and General Counsel*, 46 EMORY L.J. 1223 (1997)); see also *id.* at 1204–05 (noting 1980s survey results reflecting high percentage of corporate executives who believed outside law firms overcharged their companies).

38. Kim, *supra* note 34, at 202–03.

39. See, e.g., Liggio, *A Look at the Role of Corporate Counsel*, *supra* note 8, at 628.

40. See generally Eveleth, *supra* note 11, at 18 (citing reports of more flexible hours, no need to bill time or compete to bring in clients, and better benefit packages as attractions of in-house counsel positions); Hazard, *Ethical Dilemmas*, *supra* note 8, at 1012 (noting the “growth of the large law firm, where the working environment for the average lawyer is not much different from, and often is worse than, that in corporate law departments” as one of several key factors); Liggio, *A Look at the Role of Corporate Counsel*, *supra* note 8, at 628. Professor DeMott discusses four hypotheses that may explain why general counsel positions have become far more attractive to members of the legal profession in recent years. DeMott, *supra* note 8, at 961. These hypotheses include (1) the “fit” between ability and position demands, (2) perceptions of in-house counsel positions as “launching pads” for transitions to other senior management positions, (3) increasing economic rewards, and (4) the contrast between the work experiences of law firm attorneys and their in-house counterparts. *Id.*

41. Eveleth, *supra* note 11, at 18; Liggio, *A Look at the Role of Corporate Counsel*, *supra* note 8, at 627–28; Liggio, *The Changing Role of Corporate Counsel*, *supra* note 8, at 1206.

42. Hazard, *Ethical Dilemmas*, *supra* note 8, at 1012.

Association<sup>43</sup> in 1982 by a group of prominent general counsel evidenced this phenomenon.<sup>44</sup> Further, in an environment of increasing specialization, “employment by a single client bec[ame] simply another form of specialization.”<sup>45</sup>

As companies began to hire lawyers and law firms for particular projects rather than affiliating with a few firms for nearly all of their work,<sup>46</sup> outside counsel “tend[ed] to become an executor of the general counsel’s instructions, with decreasing scope for originality or independent judgment.”<sup>47</sup> This phenomenon made in-house positions even more desirable for lawyers interested in opportunities to influence organizational behavior from the inside, rather than working as hired guns lining up for another shootout.<sup>48</sup> It is possible that the changing demographics of the legal profession—particularly the entry of large numbers of women and minority lawyers into the profession beginning in the 1960s—also made a difference.<sup>49</sup> In any event, as lawyers’

43. The Association of Corporate Counsel (ACC), originally called the American Corporate Counsel Association (ACCA), was formed on March 14, 1982. Liggio, *The Changing Role of Corporate Counsel*, *supra* note 8, at 1211. The principal founders were Carl Liggio of Ernst & Young, Robert Banks of Xerox Corporation, and S.T. Jack Brigham III of Hewlett-Packard. Daly, *supra* note 8, at 1063. The organization began with fifty members, Liggio, *The Changing Role of Corporate Counsel*, *supra* note 8, at 1211, but it now serves more than 20,000 members working in sixty-eight countries for more than 8,800 corporations, including all of the Fortune 100 companies and seventy-four of the Global 100 companies. Ass’n of Corporate Counsel, About ACC, <http://www.acc.com/php/cms/index.php?id=28> (last visited June 25, 2007).

44. See Daly, *supra* note 8, at 1063 (“They were determined to alter a perceived long-standing misallocation of power between legal departments and law firms in which in-house lawyers exercised little oversight or control over the outside attorneys whom they retained.”); see also Liggio, *The Changing Role of Corporate Counsel*, *supra* note 8, at 1211.

45. Hazard, *Ethical Dilemmas*, *supra* note 8, at 1012.

46. See, e.g., Liggio, *The Changing Role of Corporate Counsel*, *supra* note 8 (describing retention of outside counsel as “increasingly episodic”); see also Milton C. Regan, Jr., *Corporate Norms and Contemporary Law Practice*, 70 GEO. WASH. L. REV. 931, 933–40 (2002) (suggesting that expansion of in-house law departments and concomitant retention of outside counsel on a task basis rather than general retainer has had a major impact on large law firms and their lawyers).

47. Chayes & Chayes, *supra* note 22, at 298. In recent years, a number of corporations have sought to reduce the number of law firms handling their work as a means of lessening the managerial burden on in-house counsel and obtaining more favorable billing arrangements. See, e.g., Susan Hackett, *Inside Out: An Examination of Demographic Trends in the In-House Profession*, 44 ARIZ. L. REV. 609, 614 (2002). A return to the days of utilizing one or a few firms for the bulk of a corporation’s legal work is unlikely, however, given the complexity of contemporary corporate entities and the impact of globalization.

48. See *id.* at 294; Liggio, *The Changing Role of Corporate Counsel*, *supra* note 8, at 1209.

49. The impact of the dramatic increase in the number of women in the legal profession during the last part of the twentieth century on the evolution of in-house counsel positions remains to be explored. Legal historian Lawrence Friedman notes that women were

rare beasts in the bar until the 1960s. Then the tide turned, and dramatically. By the end of the century, about a quarter of the bar was made up of women, most of them rather

perceptions of successful career paths evolved,<sup>50</sup> members of the profession began to understand the potential power and influence of in-house counsel in the business world.<sup>51</sup>

During the latter part of the twentieth century, corporations themselves were also becoming increasingly integral to the economic, social, and political life of ordinary Americans. In 1900 fewer than one percent of Americans held corporate stock, and in 1980 only thirteen percent were shareholders.<sup>52</sup> By 1998, however, more than fifty-two percent of Americans owned shares in corporations in one form or another.<sup>53</sup> The media chronicled daily the parts major business entities and their leaders played—not only in the nation's economic life, but in politics, philanthropic endeavors, and social arenas. A number of corporate executives even became well-known celebrities.<sup>54</sup> The increasing prominence of corporations and their leaders in society undoubtedly further enhanced the allure of in-house legal positions.

As the twentieth century drew to a close, in-house opportunities, particularly general counsel and deputy general counsel positions, had become extremely competitive for lawyers at all professional levels. Law firm partners, government officials, and, once again, even judges joined the ranks of corporate general counsel.<sup>55</sup> Ironically, law firms even began to create their

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young; and there were so many women in the pipeline—half or more of the law students in many schools—that the percentage of women lawyers was bound to rise, perhaps to majority status in the twenty-first century.

FRIEDMAN, *supra* note 14, at 538. Professor Friedman also notes a significant increase in the number of lawyers from racial and ethnic minority groups over the same time period. *Id.*; see also Liggio, *A Look at the Role of Corporate Counsel*, *supra* note 8, at 628 & n.22 (citing AM. CORP. COUNS. ASS'N, AMERICAN CORPORATE COUNSEL ASSOCIATION'S CENSUS OF IN-HOUSE COUNSEL: EXECUTIVE SUMMARY (Dec. 2001) (noting demographic changes and paucity of relevant information)). Still, however, ACC reports that in its 2006 member survey, 89% of respondents identified themselves as Caucasian and approximately two-thirds as male. See ACC 2006 Census of In-house Counsel, [www.acc.com/resource/v8360](http://www.acc.com/resource/v8360) (last visited June 25, 2007).

50. See DeMott, *supra* note 8, at 960–61 & *supra* note 40.

51. See Kim, *supra* note 34, at 200–01; Liggio, *A Look at the Role of Corporate Counsel*, *supra* note 8, at 629; Liggio, *The Changing Role of Corporate Counsel*, *supra* note 8, at 1205.

52. See Duggin & Goldman, *supra* note 13, at 214 n.9 (citing THEODORE CAPLOW ET AL., *THE FIRST MEASURED CENTURY: AN ILLUSTRATED GUIDE TO TRENDS IN AMERICA, 1900–2000* 252–53 (2001), and U.S. Census Bureau, Statistical Abstract of the United States 2006, available at <http://www.census.gov/prod/2005pubs/06statab/income.pdf> (follow “Table 655” link)).

53. *Id.*

54. See, e.g., Geraldine Fabrikant & Shelby White, *Personal Business; How the Other Half Gives*, N.Y. TIMES, Dec. 20, 1998, at § 3, at 1 (describing attitudes of Bill Gates, Ted Turner, and other celebrities toward philanthropy); Randy Kennedy, *When Scraping the Sky Makes a City Bleed*, N.Y. TIMES, Oct. 23, 1998, at B1 (discussing Donald Trump and his plans for new buildings); *Who Did the Best Job?*, FORBES, Jan. 13, 1997, at 91 (examining the accomplishments of Jack Welch and other well known executives).

55. For example, in 2005, Sven Holmes, Chief Judge of the United States District Court for the Northern District of Oklahoma, left the federal bench to become vice chairman for legal

own internal general counsel positions.<sup>56</sup> As a result of this dramatic shift, during the last quarter of the twentieth century, “[g]eneral counsel, not law firm partners [became] the ‘statesmen’ to chief executive officers (CEOs), confidently offering business as well as legal advice.”<sup>57</sup>

### C. *The Multifaceted Roles of Contemporary General Counsel*

In a heavily regulated, litigious world, the way in which entities deal with legal issues is critical to their survival and success, whether they are global corporations, local charities, or government agencies. Although empirical evidence is limited,<sup>58</sup> it is apparent that the influence of in-house counsel generally has grown as the significance of legal considerations has escalated in the strategic planning process.<sup>59</sup> In 1985 Professors Abram and Antonia Chayes concluded that “the general counsel has a personal role in defining alternatives, in strategic decisions, and even in tactical choices.”<sup>60</sup> More recently, Professor Deborah DeMott suggested that, because his or her influence “may extend well beyond the bare bones of ensuring legal compliance,”<sup>61</sup> a corporate general counsel “may be uniquely well positioned

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affairs of KPMG, Inc. Lynnley Browning, *Openers: Suits, Here Comes the Judge*, N.Y. TIMES, Jan. 23, 2005, §3, at 2; Carrie Johnson & Brooke A. Masters, *KPMG Hires Federal Judge*, WASH. POST., Jan. 21, 2005, at E1; see also DeMott, *supra* note 8, at 962 n.33. Other companies have successfully sought out former government officials, and even prosecutors, to serve as general counsel or in other senior in-house positions. See, e.g., Emma Schwartz, *From Public to Private Employment: Companies Seek Exiting Government Lawyers for Hire*, LEGAL TIMES, Aug. 25, 2005; Joseph A. Slobodzian, *GCs for Tough Times: Companies Are Hiring Attorneys Who Have Been Prosecutors*, NAT’L L.J., Dec. 5, 2002, available at [www.law.com/jsp/article.jsp?id=1038966824667](http://www.law.com/jsp/article.jsp?id=1038966824667).

56. See generally Terry Carter, *Taking a Cue from the Corporate World, Law Firms Create Internal General Counsel Jobs*, ABA J., Aug. 2006, at 30; Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559 (2002); Hazard, *supra* note 12.

57. Daly, *supra* note 8, at 679.

58. The situation regarding general counsel today is little different from that in 1985 when Abram and Antonia Chayes noted that the empirical basis for analyses of the role of in-house counsel amounted to “little better than informed speculation.” Chayes & Chayes, *supra* note 22, at 299; see also DeMott, *supra* note 8, at 957 (“Scholars using sophisticated social science methodologies have yet to investigate the environment and performance of general counsel to the extent that social scientists have explored law firms and relationships between clients and external counsel.”). The ACC has perhaps the best compilation of information on the general counsel function in its “Virtual Library,” which is available to members and with permission through the ACC website, <http://www.acc.com>.

59. See, e.g., Chayes & Chayes, *supra* note 22, at 281–83; DeMott, *supra* note 8, at 960; Liggio, *The Changing Role of Corporate Counsel*, *supra* note 8, at 1209.

60. Chayes & Chayes, *supra* note 22, at 298.

61. DeMott, *supra* note 8, at 955 (pointing out that general counsel’s roles are “complex and interlinked”).

to champion a transformation of the organizational culture that shapes how the corporation addresses its relationships with law and regulation.”<sup>62</sup>

Commentators who have addressed the emerging contours of the general counsel function have described its component duties in terms of functional categories.<sup>63</sup> The following discussion takes a slightly different tack. It begins by delineating “formal” and “informal” responsibilities and then breaks down these functions into component parts. The purpose is to illustrate both the wide variety of the roles of contemporary general counsel and the many stages on which they play them.<sup>64</sup> Both formal and informal roles are important. While the formal tasks constitute the official responsibilities of general counsel, the ways in which general counsel operate informally—i.e., behind the scenes—can exert a great deal of influence on the attitudes of managers and employees toward lawyers and legal obligations.

### 1. Formal Functions

For purposes of this discussion, “formal” describes the kinds of tasks one might expect to find articulated in a general counsel’s job description, as well as other responsibilities typically associated with the position. Many aspects

62. *Id.* at 955–56. Professor DeMott also notes, however, that “[w]hile a lawyer who serves as general counsel of a large corporation holds the clearly defined power associated with a hierarchical position in a large bureaucratic organization, the position itself is ambiguous in many ways that may prove troubling.” *Id.* at 957; *see, e.g.,* Hazard, *Ethical Dilemmas*, *supra* note 8, at 1012 (noting that “clarity of the role does not necessarily imply clarity in ethical responsibilities”). Professor DeMott suggests that the tensions inherent in the general counsel position are often difficult to resolve, particularly when ethical demands require a general counsel to maintain professional independence from the entity he or she serves. *See id.* at 981; *see also, e.g.,* Sara A. Biro, Martine Petetin & Anthony E. Wales, *Identity Crisis: Managing a Legal vs. Business Role*, ACC EUROPE, 2005, at 10, available at <http://www.acca.com/resource/index.php?key=7214> (noting that “[a] modern in-house lawyer expects to cope with paradoxes, inconsistencies and changing scenarios arising in a business . . . and needs to wear a different hat at different times”); Veasey & Di Guglielmo, *supra* note 8, at 10 (discussing tensions inherent in general counsel’s relationships with other corporate agents).

63. *See, e.g.,* JULIE A. BELL ET AL., IN-HOUSE COUNSEL AS MULTI-DISCIPLINARIAN 4, available at [www.acca.com/resource/v6922](http://www.acca.com/resource/v6922) (describing “[e]xpanding [r]ings of [r]esponsibility” ranging from traditional responsibilities to “the convergence of management of compliance, risk and legal affairs—the ‘Chief Risk Officer’”); Daly, *supra* note 8, at 681 (identifying typical roles as: barrister, solicitor, business advisor, and statesman); DeMott, *supra* note 8, at 957 (identifying four principal roles as: legal advisor, officer, administrator, and corporate agent); Veasey & Di Guglielmo, *supra* note 8, at 5 (discussing roles of “legal advisor,” “corporate officer and member of senior executive team,” “administrator of the in-house legal department,” and “corporate agent in dealings with third parties, including outside counsel”).

64. *See* Ass’n of Corporate Counsel, Chair’s Forum: Wearing More Hats Than a Hydra Has Heads—In-House Practitioners in Today’s Corporate Environment . . . Anticipating the Challenges and Meeting the Demands in Today’s Corporate Practice, Oct. 2004, available at <http://www.acca.com/resource/v5570> (describing in-house counsel as lawyers “wearing more hats than a hydra has heads”).

of a general counsel's work are those traditionally expected of lawyers. Others, described here as "quasi-legal" roles, encompass less traditional tasks—e.g., compliance monitoring. These functions are often assigned to or undertaken by general counsel in response to evolving demands generated by regulation, litigation, and other changes in the milieu in which corporations operate. Yet another type of formal function encompasses managerial duties and non-legal business responsibilities.

a. Traditional Lawyering Roles

i. Legal Advisor

Perhaps the most widely recognized and far-reaching duty of contemporary general counsel is to provide legal advice to officers, directors, and other constituents acting on behalf of entities. Typically, this advice spans a broad spectrum of issues ranging from internal matters such as corporate governance, to external affairs such as transactions, litigation, and regulatory issues. In providing advice to entities and their constituents, general counsel have an obligation to know the business of their client entities intimately.<sup>65</sup> General counsel are often the first lawyers to hear of matters requiring legal input and the last to sign off before proposed actions become a reality.<sup>66</sup> In providing advice to the client, a general counsel "must be a futurist, a seer . . . us[ing] . . . legal foresight to discern trends in the law and to predict how those trends will impact the company's business over time."<sup>67</sup>

In the course of their advice work, general counsel necessarily develop direct working relationships with senior managers. The quality of these relationships almost certainly affects the influence a general counsel exerts over an entity and its business managers. At the same time, there is an inherent danger that relationships that become too close may compromise the ability of general counsel to give objective legal advice, particularly when the advice appears to raise barriers to the accomplishment of business objectives.<sup>68</sup> There

65. See Liggio, *The Changing Role of Corporate Counsel*, *supra* note 8, at 1208; Irma S. Russell, *Keeping the Wheels on the Wagon: Observations on Issues of Legal Ethics for Lawyers Representing Business Organizations*, 3 WYO. L. REV. 513, 517 (2003).

66. This is particularly true for the many general counsel who serve on corporate management or executive committees. See *infra* Part I.C.1.c.iv. General counsel are ultimately responsible to corporate boards, but ordinarily their line reporting relationships are with CEOs or other senior corporate managers. See ASS'N OF CORPORATE COUNSEL, *ROLE OF THE GENERAL COUNSEL* 24 (2005), available at <http://www.acca.com/resource/v6685>; Hackett, *supra* note 46, at 614; Veasey & Di Guglielmo, *supra* note 8, at 10.

67. Liggio, *The Changing Role of Corporate Counsel*, *supra* note 8, at 1208.

68. See *infra* Part I.D.; Russell, *supra* note 65, at 517–18 (noting that inside counsel "should recognize the inherent tendency to identify with his corporate client and guard against loss of independence"); DeMott, *supra* note 8, at 967–68; Veasey & Di Guglielmo, *supra* note 8, at 8–11 (discussing lawyer independence and related tensions); Weaver, *supra* note 8, at 1034 (observing

is evidence, however, that business managers realize the importance of seeking out candid legal advice in the post-Sarbanes-Oxley environment. A number of businesses have hired former prosecutors and even judges for their top legal positions in efforts to achieve better legal compliance.<sup>69</sup>

Part of the complexity of the role of legal advisor arises out of the general counsel's obligation to provide advice to directors as well as to officers. Despite the trend toward retention of independent counsel to advise boards and board committees on particular matters,<sup>70</sup> the general counsel is still the primary provider of legal advice to corporate boards and board committees as well as to the CEO and other senior corporate officers. This dual reporting responsibility can create tensions in situations that require general counsel to advise against actions recommended by senior managers, or to report troublesome acts or omissions by officers. The general counsel's ultimate responsibility, however, is always to the client, and the highest authority capable of speaking on behalf of a corporate client is ordinarily its board of directors.<sup>71</sup>

One of the principal areas in which general counsel provide advice is the corporate governance arena. While they are not "gatekeepers" in the same sense as accountants who perform audits,<sup>72</sup> general counsel often have the practical ability to change an entity's direction by raising objections to a planned course of action.<sup>73</sup> Even in the pre-Enron era, it took an unusually determined group of directors to vote to consummate a major transaction or proceed on other key matters when confronted with directly contrary advice by a company's general counsel—particularly in situations in which the general counsel was instrumental in structuring a major transaction or obtaining the legal opinions necessary for it to proceed. As Delaware's former Chief Justice E. Norman Veasey notes, "The finest service that the corporate lawyer can perform for the board is to guide it toward the adoption and consistent

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that "Corporate counsel often acknowledge the increased effectiveness that they enjoy when senior management believes that they are 'team players,'" but noting potential downsides to "team player" role).

69. See *supra* note 55 and accompanying text.

70. See *infra* Part III.A.

71. See MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2003). From a structural standpoint, general counsel ordinarily report to their company's CEOs, but they necessarily have a parallel reporting *obligation* to the board of directors as the company's highest authority. See DeMott, *supra* note 8, at 34; Hackett, *supra* note 46, at 614; Veasey & Di Guglielmo, *supra* note 8, at 8–9.

72. See CORPORATE RESPONSIBILITY TASK FORCE REPORT, *supra* note 6, at 22. See generally John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293 (2003); Veasey & Di Guglielmo, *supra* note 8, at 28–30.

73. See Chayes & Chayes, *supra* note 22, at 281 (discussing general counsel's "right and responsibility to insist upon early legal involvement in major transactions that raise significant legal issues").



implementation of best practices that consistently ensure loyalty, good faith and due care” on the part of all constituents.<sup>74</sup>

ii. Educator

Another critical task of general counsel is to educate corporate constituents.<sup>75</sup> General counsel serve as educators at the highest levels of their organizations and set in motion the programs designed to alert employees at all levels to their legal obligations.<sup>76</sup> Education of client constituents is a core element of proactive lawyering<sup>77</sup> in American corporations that “animates entire legal departments.”<sup>78</sup> As the principal in-house legal advisor for the client, a general counsel has the responsibility to find ways to inform business managers and constituents throughout the company about what they can and cannot lawfully do as they pursue business objectives.<sup>79</sup> This function is

74. E. Norman Veasey, *Separate and Continuing Counsel for Independent Directors: An Idea Whose Time Has Not Come as a General Practice*, 59 BUS. LAW. 1413, 1417 (2004).

75. See, e.g., Chayes & Chayes, *supra* note 22, at 284; Eveleth, *supra* note 11, at 18.

76. The part lawyers play in educating constituents of client organizations is too seldom emphasized in law school courses.

77. See Kim, *supra* note 34, at 202; see also, e.g., Robert J. Haft & Michele H. Hudson, *Specific Due Diligence Standards Imposed by SEC and Professional Rules*, in ROBERT J. HAFT, DUE DILIGENCE § 6:15 (2006) (citing *Pereira v. Cogan*, 294 B.R. 449 (S.D.N.Y. 2003), *vacated*, *Pereira v. Farace*, 413 F.3d 330 (2d Cir. 2005) (discussing a holding where a corporate general counsel breached his duty to advise the board of its obligations with respect to management and evaluation of corporate officers)). Dean Daly locates the origins of proactive lawyering early in American history. She cites Alexis de Tocqueville’s 1831 account of observations that lawyers were the “American aristocracy,” “naturally called upon to occupy most of the public stations.” Daly, *supra* note 8, at 1068 (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 357 (Henry Reeve trans., 1862)). Professors Abram and Antonia Chayes connected proactive lawyering with what they call “programmatically prevention,” an approach they believed could be effectively undertaken only by in-house lawyers. See Chayes & Chayes, *supra* note 22, at 284.

78. Daly, *supra* note 8, at 1071; see also, e.g., *id.* at 1080 (observing that in global entities it is critical for U.S. lawyers to educate foreign constituents on proactive legal practice); John H. McGuckin, Jr., *The Ethical Dilemma of the In-House Counsel*, 25 L.A. LAW. 31 (2002) (discussing the proactive role of in-house counsel versus reactive position of outside counsel).

79. See Eveleth, *supra* note 11, at 18 (observing that, among other tasks, most general counsel “train and educate company employees on legal issues”); Kelley, *supra* note 8, at 1198 (suggesting that the general counsel’s role in the compliance area is primarily to educate corporate managers). During the last several years, many law firms, trade associations, and other groups have provided a great deal of information through internet sites. See, e.g., Gibson, Dunn & Crutcher LLP, Gibson Dunn Sarbanes-Oxley Resource Center, <http://www.gibsondunn.com/news/firm/detail/id/762/?pubItemId=6638> (last visited June 25, 2007); Jones Day, Jones Day Memorandum, The Sarbanes-Oxley Act of 2002, [http://www.jonesday.com/pubs/pubs\\_detail.aspx?pubID=S2368](http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S2368) (last visited June 25, 2007). It is unclear, however, whether and to what extent non-lawyer corporate constituents read these kinds of materials.

particularly important when major new legal obligations—e.g., those created by Sarbanes-Oxley<sup>80</sup>—come into existence.

The educative responsibilities of general counsel, like those of all in-house lawyers, arise in a variety of settings. As Professor Hazard has observed, in-house lawyers are particularly well suited to acquire “back channel” information.<sup>81</sup> Access to such information not only creates unique challenges,<sup>82</sup> it offers important opportunities to engage proactively in identifying potential legal problems and educating constituents about relevant legal obligations. In these and other circumstances, general counsel and staff members aware of potential problems arising in the conduct of daily corporate business and alert to out-of-the-ordinary events can engage in the kind of on-the-spot client education that can prevent major legal problems. In 1985 Professors Abram and Antonia Chayes described educative efforts as components of “programmatic prevention.”<sup>83</sup> Today, “programmatic prevention” efforts usually are encompassed in compliance programs, but client education remains an integral part of proactive lawyering in all areas.

### iii. Transactions Facilitator

The daily life of a modern business includes mergers, acquisitions, sales of assets, spin-off businesses, joint ventures, acquisition and transfer of intellectual property, real estate deals, procurement of goods and services, and a host of other transactions. These transactions often entail complex business structures and highly sophisticated financing arrangements with extensive legal consequences.<sup>84</sup> “[A]s key advisers to senior management [general counsel] usually participate in the negotiation, structuring and documentation of the corporation’s significant business transactions.”<sup>85</sup> As chief legal officers, they are responsible for managing inside lawyers and outside counsel working on transactions.<sup>86</sup> It is also the general counsel’s role to advise directors whether shareholder approval is needed and, if so, what mechanisms will suffice to obtain the requisite approval.

80. See Roger C. Cramton, George M. Cohen & Susan P. Koniak, *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725 (2004).

81. See Hazard, *Ethical Dilemmas*, *supra* note 8, at 1019 (“To put the point bluntly, a lawyer in independent practice is sheltered from the informal, back-channel information that flows around the company water cooler.”); Weaver, *supra* note 8, at 1028.

82. See Hazard, *Ethical Dilemmas*, *supra* note 8, at 1018–19.

83. Chayes & Chayes, *supra* note 22, at 284.

84. For example, tax considerations, regulatory clearances, and governance issues are just a few of the myriad questions that often arise in the context of corporate transactions.

85. CORPORATE RESPONSIBILITY TASK FORCE REPORT, *supra* note 6, at 20.

86. Chayes & Chayes, *supra* note 22, at 281, 289–90.

The existence of corporate law departments should promote early legal involvement in proposed transactions.<sup>87</sup> While most business lawyers undoubtedly would like to be involved in significant transactions from their inception, simply having lawyers on hand does not necessarily produce this result. Even within an entity, the extent to which lawyers have access to business planning information is a function of both corporate culture and the degree of trust managers have in the capabilities of their in-house lawyers. However, the ready availability of in-house counsel at least puts these lawyers in position to get involved at earlier stages of transactions than outside lawyers.

iv. Advocate

When it comes to advocacy work, general counsel captain both the defensive and offensive teams for their client entities and marshal the resources to respond to legal actions ranging from routine civil claims to criminal investigations. To do so effectively, a general counsel must make predictions about the outcome of litigation and regulatory proceedings in many different jurisdictions.<sup>88</sup> The general counsel must safeguard the entity's interests and take steps to ensure that its lawyers adopt coherent and consistent stances in tribunals across the nation and throughout the world,<sup>89</sup> while simultaneously managing the costs of advocacy responsibly from an institutional point of view. In these endeavors, a general counsel bears responsibility for overseeing the ethical propriety of litigation on the entity's behalf and for requiring responsible, professional behavior on the part of the lawyers who represent the company.<sup>90</sup>

A general counsel's advocacy function also includes the role of liaison with governmental authorities. Many routine interactions between entity and government personnel take place without lawyers,<sup>91</sup> but others—for example, in situations in which government approval may make or break a business activity—should involve counsel. Participation of counsel is critical in those situations in which government actions may result in significant sanctions, especially when criminal proceedings are a risk.<sup>92</sup>

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87. See *id.* at 281; DeMott, *supra* note 8, at 960–61; Hazard, *Ethical Dilemmas*, *supra* note 8, at 1019 (discussing availability of “back-channel information” to in-house counsel).

88. See *supra* text accompanying note 67.

89. See *infra* note 126 and accompanying text. See generally JOHN K. VILLA, CORPORATE COUNSEL GUIDELINES §§ 4:1–4:24 (2005); Chayes & Chayes, *supra* note 22, at 293–94.

90. See MODEL RULES OF PROF'L CONDUCT R. 3.1–3.7, 8.4 (2003); see also ASS'N OF CORPORATE COUNSEL, *supra* note 66, at 15.

91. For example, routine discussions with customs officials, ordinary inspections by regulatory agencies, and many interactions in the environmental area all take place without a lawyer present.

92. See Veasey & Di Guglielmo, *supra* note 8, at 6–7 (noting the government affairs role of some general counsel). Cf. Evan A. Davis, *The Meaning of Professional Independence*, 103

#### v. Investigator

The valiant prosecutors and intrepid defense attorneys of novels, television, and the silver screen often succeed because of their uncanny ability to unearth the critical facts that save the day and ensure that justice is done. While the reality may be far less glamorous, finding and sorting out the relevant facts is a key ingredient of all legal representation. When suspicions of significant problems with potentially serious legal consequences arise within organizations it is often the general counsel who persuades corporate constituents of the need to pursue the matter and initiates an internal investigation. The general counsel determines whether the inquiry will be handled in-house or by an outside law firm, a decision that is far more nuanced than is often appreciated. Key factors include ability to access information, an understanding of its significance in the context of the corporation's business and operations, and preservation of attorney-client privilege and work product protections. Even choosing among outside law firms requires thoughtful consideration. Thorough investigation and candid advice are essential, but some investigators pursue their charges so aggressively that they are more likely to destroy a company than cure its ills.<sup>93</sup> It is ordinarily the role of the general counsel to strike the necessary balance.

When lawyers conduct internal investigations for the purpose of providing legal advice and preparing for anticipated litigation, corporations and other entities have an opportunity to invoke attorney-client privilege and work product protections to safeguard the confidentiality of investigative findings.<sup>94</sup>

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COLUM. L. REV. 1281, 1281 (2003) (suggesting that "the ethical rules for protecting the professional independence of the bar need to take into account the role of the legal profession as an independent bulwark between individuals or organizations and the political branches of government").

93. See Letter from Board of Directors of the American Corporate Counsel Association to Johnathan G. Katz, Secretary, SEC (Apr. 7, 2003), *available at* [www.sec.gov/rules/proposed/s74502/acca040703.htm](http://www.sec.gov/rules/proposed/s74502/acca040703.htm). As the ACC has pointed out:

CLO's [chief legal officers] regularly voice their concern that outside counsel hired by [a board committee] might have little guidance or commitment to working sensitively and productively with managers to uncover and remedy allegations. Such firms can mistakenly believe that their retention by a group of directors indicates a presumed hostility to any cooperation with or presumption of good faith behavior on the part of management. In the pursuit of their mission to uncover evidence of the reported allegations, they may employ scorched-earth investigation tactics that could unnecessarily degrade employee morale and dignity, inappropriately disrupt the business of the organization, or permanently burn bridges to any future relationship between "surviving" managers and lawyers who seek to work cooperatively with them.

*Id.*; see also Veasey & Di Guglielmo, *supra* note 8, at 31 (noting potential risks of initiating internal investigations).

94. See Thomas G. Bost, *Corporate Lawyers After the Big Quake: The Conceptual Fault Line in the Professional Duty of Confidentiality*, 19 GEO. J. LEGAL ETHICS 1089, 1118 (2006); Duggin, *supra* note 30, at 892-93 and sources cited therein.

The United States Supreme Court confirmed the availability of these protections to corporations in *Upjohn Co. v. United States*<sup>95</sup> in adjudicating a dispute over the confidentiality of the fruits of an internal investigation of potential Foreign Corrupt Practices Act<sup>96</sup> violations by Upjohn's general counsel.<sup>97</sup> Since then, the subject of corporate attorney-client and work product protections has sparked tremendous controversy, particularly in the context of federal prosecution of business entities and other organizations.<sup>98</sup> Nevertheless, because of the special skills lawyers bring to bear in investigating potential legal violations and the concomitant availability of attorney-client and work product protections, the role of initiating and supervising internal investigations has become a recognized responsibility of general counsel.<sup>99</sup>

95. 449 U.S. 383 (1981).

96. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977).

97. *Upjohn*, 449 U.S. at 386.

98. See generally Sarah Helene Duggin, *The Impact of the War Over the Attorney-Client Privilege on the Business of Health Care*, 22 J. CONTEMP. HEALTH L. & POL'Y 301, 304-27 (2006) (recounting struggle between the United States Department of Justice (U.S.D.O.J.) and other federal agencies with the ABA and an alliance of business associations and civil right groups over government insistence on corporate waiver of attorney-client and work product protections, because of the impact on individuals as well as entities). There were extensive ongoing protests over the policy embodied first in a memorandum from Deputy Attorney General Eric Holder. Memorandum from Eric H. Holder, Jr., Deputy Attorney General on Bringing Criminal Charges Against Corporations (June 16, 1999), available at <http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html>. The policy was later incorporated and made mandatory in a memorandum from Deputy Attorney General Larry Thompson. Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components, United States Attorneys on Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm). The U.S.D.O.J. retreated to some extent with respect to the Department's position on corporate waiver of these protections in response to the protests, Congressional inquiries, and a federal court decision excoriating the Department for its role in causing accounting powerhouse KPMG, Inc. to decline to advance counsel fees to executives unless they cooperated with prosecutors in a government investigation of the company. *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006); see also Memorandum of Deputy Attorney General Paul J. McNulty to Heads of Department Components, United States Attorneys on Principles of Federal Prosecution of Business Organizations, Dec. 12, 2006, available at [http://www.usdoj.gov/dag/speech/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf). For discussion of the McNulty Memorandum and its impact, see Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 312-28 (2007); Veasey & Di Guglielmo, *supra* note 8, at 32-33; John K. Villa, *The McNulty Memorandum: A Reversal in Practice or in Name Only?*, 25 ACC DOCKET 90 (2007).

99. However, when the conduct of the general counsel or other senior lawyers is at issue or when there is a concern that problems may be pervasive among senior managers, it is clearly appropriate to call in independent counsel reporting directly to the board or a board committee. See Veasey & Di Guglielmo, *supra* note 8, at 30-33.

vi. Client Representative

In addition to doing the kinds of work lawyers find most familiar on behalf of corporations, general counsel often sit on the other side of the table as the embodiment of their organizational client. The role of client is not a part lawyers generally play. Like any other role it presents a unique set of challenges. As the client representative, a general counsel must focus on business objectives and other organizational goals, manage the costs of outside legal services in relation to their benefits, and ensure that the many different individual lawyers and law firms who represent the corporate client utilize strategies that make sense in terms of overall client objectives rather than focusing solely on particular cases or transactions.<sup>100</sup>

b. Quasi-Legal Roles

In recent years many general counsel have taken on new formal responsibilities consonant with the evolution of the legal environment in which corporations and other entities operate.<sup>101</sup> These tasks require a combination of skills, including both legal acumen and managerial ability. Two significant examples—compliance and ethics roles—are discussed below.<sup>102</sup>

i. Compliance Officer

Law enforcement actions against corporations and other entities were infrequent prior to the last few decades of the twentieth century. The incidents that led to the passage of the Foreign Corrupt Practices Act,<sup>103</sup> the Watergate scandal,<sup>104</sup> and a host of other events that took place during the tumultuous years of the late 1960s and 1970s, however, focused attention on the power of

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100. Coordination is critical to large corporations, because it is all too easy for lawyers focused on success in discrete matters to pursue a strategy or take a position in litigation that may foreclose a different path in a more important matter. *See infra* note 126 and accompanying text.

101. *See, e.g.,* BELL ET AL., *supra* note 63, at 4; DeMott, *supra* note 8, at 961–62.

102. It is important to emphasize that ethical obligations apply to lawyers engaged in business activities and other extra-legal duties related to their representation of the client. *See* VILLA, *supra* note 89, at § 3:3 (“To be safe, a lawyer who provides any legal services to the corporate client must assume that all of his conduct is governed by the ethical rules [of the legal profession].”). *See generally* GEOFFREY HAZARD, JR. & WILLIAM HODES, *THE LAW OF LAWYERING* §§ 17.7, 17.23, 17.24 (3d ed. 2001) (noting that in-house counsel are co-agents with entity managers and employees and “that in some situations an entity lawyer may have to exercise independent professional judgment to determine what is truly in the client’s best interest—setting aside, if need be, the views of other highly placed agents”). For additional discussion of this point from the perspective of general counsel, see ASS’N OF CORPORATE COUNSEL, *supra* note 66, at 14–15.

103. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95–213, 91 Stat. 1494 (1977).

104. *See* WILLIAM MEADE FLETCHER ET AL., *FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS* § 5.12 (2006) (discussing the impact of the Watergate scandal on public corporations).

major corporations and the far-reaching consequences of corporate wrongdoing.<sup>105</sup> In response, the SEC and the IRS, followed by the Department of Justice and several other federal agencies, began to pursue civil sanctions against corporations and other entities.<sup>106</sup> Criminal prosecutions soon followed.<sup>107</sup> In 1991, the United States Sentencing Commission's publication of its Organizational Guidelines<sup>108</sup> made it quite clear that corporations and other entities were likely to be scrutinized by law enforcement officials and subjected to criminal sanctions where appropriate.<sup>109</sup>

As noted earlier,<sup>110</sup> a general counsel's responsibility for initiating compliance efforts and assisting corporations to develop resources and implement programs is an essential part of what Professors Abram and Antonia Chayes recognized in 1985 as "programmatically prevention."<sup>111</sup> A number of factors have contributed to the prominent place corporate compliance programs now occupy in corporate practice. First and foremost, of course, is the opportunity to deter and, if deterrence fails, discover wrongdoing.<sup>112</sup> Perhaps even more significant is the impact of the dramatic increase in civil enforcement actions and criminal prosecutions against corporations and their constituents that began in the late 1970s, and the importance of institutional compliance programs in persuading law enforcement officials not to prosecute, as well as the potential mitigating impact pursuant to the Organizational Guidelines.<sup>113</sup>

In many corporations, the general counsel serves as chief compliance officer.<sup>114</sup> In others, the compliance function is separate from the law department, and the role of the general counsel ranges from providing legal advice pertaining to compliance functions to hiring compliance officers and

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105. See generally Duggin, *supra* note 30, at 871–74.

106. *Id.* at 871–73.

107. *Id.* at 874–75.

108. U.S. SENTENCING GUIDELINES MANUAL ch. 8 (2007).

109. The number of corporations prosecuted by federal authorities increased dramatically during the 1980s, see Mark A. Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988–90*, 71 B.U. L. REV. 247, 252 & n.12 (1991), and continued to increase steadily throughout the 1990s. U.S. SENTENCING COMMISSION, 2000 ANNUAL REPORT 45 (2000), available at <http://www.uscc.gov/ANNRPT/2000/ar00toc.htm>.

110. See *supra* text accompanying note 83.

111. Chayes & Chayes, *supra* note 22, at 284–89; see also, e.g., Gruner, *supra* note 8, at 1124–26, 1142–46, 1157–58 (discussing “crime prevention” and information components of compliance function).

112. See Gruner, *supra* note 8, at 1143–62.

113. See U.S. SENTENCING GUIDELINES MANUAL, *supra* note 108, at § 8C2.5(g); see also Griffin, *supra* note 98, at 317–20; Gruner, *supra* note 8, at 1143–62.

114. A 2003 ACC survey reflected that a significant percentage of general counsel oversee risk management and compliance functions. See ASS'N OF CORPORATE COUNSEL, *supra* note 66, at 26; see also Veasey & Di Guglielmo, *supra* note 8, at 6.

briefing senior managers and directors on compliance matters.<sup>115</sup> Whether or not the formal corporate compliance function reports directly to the general counsel,<sup>116</sup> the general counsel and other in-house lawyers play a major role in ensuring legal compliance throughout the entity. The “conception of the lawyer as a promoter of corporate compliance with law emanates from the basic values of the legal profession,”<sup>117</sup> and it is a vital responsibility of contemporary general counsel.

ii. Corporate Ethics Officer

Many general counsel also have primary responsibility for resolving ethics issues relevant to corporate policies that go beyond legal compliance. For example, general counsel are often key contributors to the development of business conduct codes and other corporate ethics standards—e.g., rules governing the acceptance of gifts and gratuities or use of corporate vehicles and other resources.<sup>118</sup> Codes of conduct and business ethics policies require proactive education if they are to be effective. Employees must be informed about ethical requirements relevant to their jobs, including internal grievance procedures, limitations on personal matters such as financial investments, nepotism issues, and rules pertaining to interactions with people and entities outside the company.<sup>119</sup> In many corporations, the general counsel sets up a process for responding to ethics inquiries; acts as the ultimate arbiter of conflict-of-interest matters, questions involving business, and other ethics issues; and establishes procedures for notifying the company of ethics violations and disciplining errant constituents. Even when another official performs this function with respect to employees, because of their stature within the entity general counsel often handle issues pertaining to directors and senior managers.

c. Management and Other Extra-Legal Business Roles

The third category of duties often formally assigned to general counsel encompasses managerial responsibilities and extra-legal business roles. Examples of these kinds of functions are described below.

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115. *See id.*

116. There are a number of reasons to separate the two functions. The most compelling is that, depending on how they are structured, attorney-client and work product protections often do not apply in the context of compliance programs.

117. CORPORATE RESPONSIBILITY TASK FORCE REPORT, *supra* note 6, at 21.

118. *See* Gruner, *supra* note 8, at 1156–58; Veasey & Di Guglielmo, *supra* note 8, at 7 & n.14 (citing Daly, *supra* note 8, at 1084).

119. *See* Gruner, *supra* note 8, at 1152–59 (exploring compliance function of general counsel); Regan, *supra* note 46, at 934 (discussing corporate internalization of dispute resolution processes in areas such as sexual harassment); Veasey & Di Guglielmo, *supra* note 8, at 7 & n.14 (discussing role of general counsel as ethicist).



i. Manager of Law Department and Related Functions

Whatever other duties they have, virtually all general counsel serve as senior managers of corporate legal departments. They supervise financial and administrative functions and, most importantly, oversee the hiring and training of the in-house legal staff. It is the general counsel who sets the tone for the law department and who is ultimately responsible for setting the standards that govern how in-house lawyers represent the corporate client and deal with its constituents. As a department manager, the general counsel often has considerable leeway in establishing compensation and benefit packages for subordinate lawyers. He or she is the principal advocate for lawyers and other law department personnel within the corporation, and his or her willingness to support staff inevitably has a major impact on the respect other constituents accord to members of the law department and the extent to which they value their input. From an ethical standpoint, the general counsel is a supervisory attorney within the meaning of the SEC's Part 205 rules and Model Rule 5.1.<sup>120</sup> As Professor Hazard noted a decade ago, a general counsel can profoundly affect the attitudes of in-house counsel by being open to talking with subordinates about "ethically troublesome situations . . . [and] taking responsibility for resolving" them.<sup>121</sup>

Depending on the structure of the particular organization, the functions a general counsel supervises may include document retention, equal employment opportunity, disciplinary proceedings, intellectual property management, risk management, and a host of other matters related to quasi-legal organizational functions. In many organizations the role of the law department is to oversee

120. See 17 C.F.R. § 205.4 (2003); MODEL RULES PROF'L CONDUCT R. 1.0(c) & 5.1 (2003). Rule 1.0(c) defines "firm" or "law firm" to include "lawyers employed in the legal department of a corporation or other organization." *Id.* Rule 5.1 provides:

- (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
- (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
  - (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
  - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

*Id.*

121. Hazard, *Ethical Dilemmas*, *supra* note 8, at 1022.

the provision of advice in these areas, but in other entities these functions report directly to the general counsel.<sup>122</sup> In recent years, the position of law department manager also has included encouraging and supporting pro bono work and bar activities by corporate counsel.<sup>123</sup>

#### ii. Manager of Outside Legal Resources

As the organization's chief legal officer, the general counsel oversees the retention and management of the outside lawyers and law firms engaged to represent the entity or to assist in legal matters. The general counsel has a great deal to do with setting the tone for outside counsel relationships.<sup>124</sup> General counsel establish policies and practices that directly impact the terms and conditions of engagements, interactions with in-house lawyers and client constituents, billing practices, and many other aspects of the relationship of outside counsel to the client entity and its constituents.<sup>125</sup> These policy-making and oversight functions are particularly important in an era when few law firm lawyers are intimately familiar with client corporations. As Professor DeMott observes, "[T]he diffusion of corporate work among multiple law firms limits the breadth of any one firm's knowledge of the client, empowering general counsel in dealings with firms but reducing the capacity of any one firm to bring judgment to bear when more comprehensive insight into the corporation may be desirable."<sup>126</sup>

#### iii. Corporate Officer

Many, perhaps most, general counsel are corporate officers. Titles such as "vice president and general counsel" or "vice president, legal affairs" are common. A high percentage of general counsel also hold the office of

122. According to a recent survey, employment/labor functions reported to 51.30% of general counsel surveyed, trademark and copyright functions to 75.4%, and patent functions to 42.1%. See ASS'N OF CORPORATE COUNSEL, *supra* note 66, at 26 (citing ALTMAN WEIL, ASS'N OF CORPORATE COUNSEL, 2003 SURVEY OF LAW DEPARTMENT BENCHMARKS SURVEY (2003)). Risk management functions reported to 33.7% of those surveyed. *Id.*; see also Veasey & Di Guglielmo, *supra* note 8, at 6–7 (describing roles of general counsel and noting that a number of general counsel also act as government affairs officers for their companies).

123. See Hackett, *supra* note 46, at 616–17; see also Liggio, *The Changing Role of Corporate Counsel*, *supra* note 8, at 1211–13 (discussing the role of general counsel in encouraging lawyers to engage in bar activities).

124. DeMott, *supra* note 8, at 970. Conversely, a general counsel's decision to retain or terminate an outside lawyer as counsel for an important, ongoing engagement may make or break a lawyer's career.

125. ASS'N OF CORPORATE COUNSEL, *supra* note 66, at 32–34.

126. DeMott, *supra* note 8, at 972; see also Chayes & Chayes, *supra* note 22, at 294; Eveleth, *supra* note 11, at 20; *supra* note 100. Depending on one's perspective, the net result of such changes may or may not be of overall benefit to the corporate client. See, e.g., Regan, *supra* note 46, at 933–36.

corporate secretary.<sup>127</sup> As vice presidents and secretaries, in addition to their professional obligations, general counsel owe fiduciary allegiance to the corporation as officers.<sup>128</sup> In the performance of their duties, however, they may well be held to the ethical standards of conduct applicable to lawyers.<sup>129</sup>

iv. Management Committee Member

General counsel routinely sit on corporate management or executive committees. In this capacity, they are part of an elite group whose members guide both significant day-to-day management decisions and long-range planning. General counsel who function in this capacity have opportunities to learn about the operational issues and financial questions critical to client corporations. They also have the stature to gain access to the Chief Executive Officer (CEO), Chief Financial Officer (CFO) and other members of a company's senior management team. Consequently, this role offers the opportunity to influence significant corporate decisions as they are formulated and implemented.

v. Strategic Planner

For public corporations the strategic planning process necessarily involves consideration of legal issues.<sup>130</sup> Corporate initiatives may rise or fall on legal questions, and profits may depend heavily on tax consequences and other legal aspects of particular ventures or financing structures. As Professor Irma Russell notes, "[G]oal-setting and the evaluation of goals in light of legal consequences . . . [is an] integral part" of the strategic planning process for major corporations.<sup>131</sup> Both legal feasibility and risk levels are critical factors in the calculus of whether or not to proceed with new projects or redesign existing programs.<sup>132</sup> Involvement in the strategic planning process therefore affords general counsel and the in-house lawyers they supervise a chance to help shape business initiatives to meet legal requirements.

127. One recent survey reported that 80.80% of general counsel also serve as corporate secretaries. See ASS'N OF CORPORATE COUNSEL, *supra* note 66, at 26 (citing ALTMAN WEIL, ASS'N OF CORPORATE COUNSEL, 2003 SURVEY OF LAW DEPARTMENT BENCHMARKS SURVEY (2003)); see also Veasey & Di Guglielmo, *supra* note 8, at 8, 18 (discussing dual roles as well as the need for coordination between general counsel and secretary in companies in which different individuals perform these functions).

128. See, e.g., MODEL BUS. CORP. CODE § 8.42 (2005).

129. See *supra* note 102.

130. See Chayes & Chayes, *supra* note 22, at 282 (discussing formal participation of counsel in strategic planning); Liggio, *The Changing Role of Corporate Counsel*, *supra* note 8, at 1209–10; Russell, *supra* note 65, at 521–23.

131. Russell, *supra* note 65, at 522.

132. Liggio, *The Changing Role of Corporate Counsel*, *supra* note 8, at 1209 (discussing the role of general counsel in the corporate planning process).

## vi. Director

Some general counsel serve as corporate directors for the entities that employ them.<sup>133</sup> Service as a director of a client corporation, however, is “[a]mong the most controversial of the legal/business activities that U.S. lawyers undertake”<sup>134</sup> because lawyer-directors must navigate an ethical minefield.<sup>135</sup> A general counsel can bring a great deal of insight to a corporate board as a result of his or her intimate familiarity with the organization and sensitivity to the legal ramifications of business matters. At the same time, a general counsel who serves as a director risks losing the independent judgment that makes counsel valuable to the entity and becoming entangled in conflicts between the role of legal advisor and corporate decision maker.<sup>136</sup> The ability of the board to invoke the attorney-client privilege in seeking legal advice from the general counsel is also imperiled when the general counsel is a director.<sup>137</sup> In a 1998 formal opinion pertaining to the dual role of counsel and director, the ABA declined to prohibit lawyers from serving on the boards of client corporations.<sup>138</sup> The opinion, however, cautioned of the hazards of this role and the potential need to resign from the board and/or withdraw from the representation in the event of a conflict of interest.<sup>139</sup> General counsel are especially vulnerable to these ethical traps because their primary responsibility is to serve as their corporations’ chief legal officers.

## 2. Informal Roles of General Counsel

One of the reasons that general counsel can be so influential in organizations is that, in addition to fulfilling their formal or official duties, they frequently play a variety of informal parts that have a less visible but

133. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 98-410 (1998); ASS’N OF CORPORATE COUNSEL, *supra* note 66, at 15; VILLA, *supra* note 89, at § 3.32; Kim, *supra* note 34, at 182.

134. Daly, *supra* note 8, at 1097.

135. For a comprehensive analysis of the risks and benefits of lawyers’ dual service as counsel and board members, see Kim, *supra* note 34. Professor Kim concludes that service as both counsel and director is risky because “[l]awyers who attempt to fill both roles simultaneously risk a loss of professional independence that can impair their ability to perform either role well.” *Id.* at 260; see also, e.g., ASS’N OF CORPORATE COUNSEL, *supra* note 66, at 15; VILLA, *supra* note 89, at §§ 3:32, 6:23; Terrell, *supra* note 8, at 1006–07 (identifying ethical issues attendant upon a general counsel’s service on his or her employer’s board); Veasey & Di Guglielmo, *supra* note 8, at 15–17.

136. See Kim, *supra* note 34, at 221–45.

137. *Id.* at 239–42.

138. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 98-410 (1998).

139. See *id.* But see Hazard, *Three Afterthoughts*, *supra* note 8, at 1053 (reflecting on possible benefits of lawyers’ service on client boards); Kim, *supra* note 34, at 204 (discussing the upside of lawyers’ service as directors); Veasey & Di Guglielmo, *supra* note 8, at 15 & nn.41–43 (noting that there are benefits as well as disadvantages to service on client boards).

sometimes even more powerful impact on client corporations and the way constituents view the corporation's lawyers. The following discussion focuses on these kinds of informal roles—those that do not appear in any job description but often comprise an important part of what a general counsel does and account for much of his or her influence.

a. Legal Services Marketer

As Carl Liggio, former General Counsel of Ernst & Young and a founder of the Association of Corporate Counsel, has observed, “Within the corporate hierarchy, the legal department is a cost center, not a profit center.”<sup>140</sup> This is one reason lawyers are not always popular with corporate constituents. Many business managers—even those who hold to the highest standards of personal and corporate integrity—resent the cost of legal services and too often perceive lawyers as creators of obstacles rather than facilitators of business objectives.<sup>141</sup> Yet lawyers cannot successfully represent clients who do not seek their services and willingly confide in them. Consequently, to function effectively within a corporate structure, general counsel must persuade senior managers and others within their organizations that it makes sense to seek legal services early and often.<sup>142</sup> This task has evolved into an internal marketing function that necessitates both educating managers as to why early legal input makes sense and demonstrating the ability of lawyers to “add value” in business contexts.<sup>143</sup> While the sobering revelations of the corporate debacles of recent years should heighten awareness of the need for good legal counsel in business matters, internal marketing of legal services still remains an important component of in-house lawyers’ responsibility, particularly for general counsel.

b. Ad Hoc Planning Advisor

Prior to World War II, before a Masters in Business Administration from an elite business school had become an important qualification for senior managers of major corporations, many organizations valued a legal education as a credential for business leaders.<sup>144</sup> Presumably this was because of respect

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140. Liggio, *The Changing Role of Corporate Counsel*, *supra* note 8, at 1219.

141. *See id.* (explaining that management often looks to corporate counsel to draw the difficult lines necessary to cut costs without jeopardizing “either the quality of service or the outcome of legal issues”).

142. *See* Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 *LAW & SOC’Y REV.* 457, 477 (2000) (reporting that 43% of lawyers in a survey of forty-two attorneys “indicated that they market the law and lawyers to others in the corporation”); *see also* Veasey & Di Guglielmo, *supra* note 8, at 28–30 (discussing importance of general counsel as “persuasive counselor”).

143. *See* Kim, *supra* note 34, at 199–200; Weaver, *supra* note 8, at 1027.

144. *See* FRIEDMAN, *supra* note 14, at 165–70.

for the rigorous approach to thinking that law schools instilled in their students and a belief that those capable of disciplined, logical analysis were well equipped to make business decisions.<sup>145</sup> Unfortunately, as noted earlier, during the middle decades of the last century the general view of the acumen and value of in-house lawyers diminished considerably.<sup>146</sup> In recent years, however, in-house lawyers have emerged as influential legal advisors to corporations and their constituents.

Today, general counsel and many other in-house lawyers, like their predecessors in the early part of the last century,<sup>147</sup> have become important resources for informal, as well as formal, corporate planning.<sup>148</sup> As in-house lawyers have earned respect for their ability to offer perceptive insights on a variety of subjects important to the business planning process, constituents have come to consult their in-house lawyers early in the course of corporate initiatives, often seeking their advice before a new project is formally proposed.<sup>149</sup> The exchanges that make these kinds of preliminary contacts possible arise out of a shared working environment that involves contacts in company meetings and social events, as well as chance encounters “at the water cooler.”<sup>150</sup>

### c. Ethics Counselor

Whether or not a general counsel serves as the official ethics officer for his or her company, as in the informal planning context, general counsel often serve as trustworthy advisors or “wise counselors”<sup>151</sup> when thorny issues arise. Many ethical dilemmas have legal ramifications, but, even in corporate settings, not all ethical issues involve legal questions.<sup>152</sup> It is not at all

145. *See id.*

146. *See supra* Part I.A.

147. *See id.*

148. Chayes & Chayes, *supra* note 22, at 283.

149. *See* Chayes & Chayes, *supra* note 22, at 283–84 (noting importance of corporate counsel’s role in the informal planning process—“a noteworthy extension of the development of anticipatory law”—as a result of regular contact with senior business managers).

150. *See* Hazard, *Ethical Dilemmas*, *supra* note 8, at 1017–18; Weaver, *supra* note 8, at 1028.

151. *See* Bruce A. Green, *Thoughts About Corporate Lawyers After Reading the Cigarette Papers: Has the “Wise Counselor” Given Way to the “Hired Gun”?*, 51 DEPAUL L. REV. 407, 407 & n.1 (citing Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 410 (1985) (concerning the image of an “independent and influential counselor”)).

152. *See* CORPORATE RESPONSIBILITY TASK FORCE REPORT, *supra* note 6, at 4 (noting that “the term ‘corporate responsibility’ also embraces ethical behavior beyond that demanded by minimum legal requirements”); Harold Williams, *Corporate Accountability and the Lawyer’s Role*, 34 BUS. LAW. 7, 16 (1978) (observing that “[w]e tend to resort to legality often as a guideline; in that sense, ethics is on the wane and the age of the legal technician is in full flower,” but “in . . . practices in which our justification is that they are ‘legal,’ we are in a position we can no longer defend”).

uncommon for others to turn to a general counsel seeking moral or ethical guidance because of respect for his or her personal integrity and ability to think clearly. As Professor Russell observes, “Lawyers are routinely called upon to exercise moral judgment in advising clients. In the corporate setting, lawyers often become trusted advisers not only for their legal knowledge, but also for the practical wisdom they offer.”<sup>153</sup>

#### d. Crisis Manager

From industrial accidents to security breaches, from insider trading to workplace violence, every organization has crises that range along a continuum from minor incidents to financial debacles to terrible human tragedy. Crises inevitably generate unwelcome consequences for organizations and the individuals connected with them. For public companies, media attention frequently creates adverse publicity, and adverse publicity often impacts stock prices. Depending on the nature of the underlying event, government investigators may arrive before it is even possible to sort out exactly what has happened. Customers and employees may require immediate assistance, and psychological, as well as physical, needs must be addressed. At times, human lives may be in danger, and the very survival of the entity may be at issue.

In crisis situations, while operations managers deal with physical events and financial personnel assess the extent of monetary harm, immediate steps must be taken to obtain accurate information, inform directors, employees, and other key stakeholders, coordinate media statements, deal with government authorities, investigate what happened, and take steps to mitigate damage to the entity’s interests. Each of these steps has significant legal ramifications. In light of their legal expertise and leadership skills, general counsel are usually found in the midst of the fray, identifying what must be done and marshalling the resources necessary to do it.<sup>154</sup>

153. Russell, *supra* note 65, at 518–19. But see DeMott, *supra* note 8, at 981 (noting that a CEO could reasonably believe that an outside attorney might be better able to serve in this counseling capacity because of the perception that he or she would “bring[] a greater measure of detachment to the exercise of judgment”).

154. “Counsel who are able to balance the company’s legal needs with the company’s public relations, business operations, and other needs, . . . are vital to success” in addressing a crisis. John R. Parker, Jr., *Hard Tale of a Soft Drink: Dealing With a Corporate Crisis—It’s the Real Thing*, BUS. L. TODAY, Jul.-Aug. 2004, available at <http://www.abanet.org/buslaw/blt/2004-07-08/parker.shtml>. For discussion of the roles counsel play in crisis situations, see, for example, ASS’N OF CORPORATE COUNSEL, *supra* note 66, at 40 (citing seven sources therein); Jay G. Martin, *Developing an Effective Crisis Management Plan for a Corporation*, 65 TEX. BAR J. 233, 237–38 (2002); Harvey L. Pitt & Karl A. Groskaufmanis, *When Bad Things Happen to Good Companies: A Crisis Management Primer*, 15 CARDOZO L. REV. 951, 956 (1994).

e. Arbitrator

Yet another informal role that general counsel often play is that of arbitrator among corporate factions.<sup>155</sup> While many different people may serve in this capacity within an organization, lawyers often have a skill set uniquely suited to identifying the issues at the core of internecine disputes and negotiating workable resolutions. As chief legal officers, general counsel are ideally situated to appreciate the impact of factionalization and the damage that it can do, particularly when disgruntled employees fairly or unfairly believe that their rights have been violated or that another group within the entity has engaged in inappropriate behavior. As lawyers trained in the art of negotiation, general counsel also have skills that often prove invaluable in resolving intracorporate disputes among business units or administrative departments.

D. *The Desirability of a Broad Vision of the Role of General Counsel*

Given the multifaceted roles contemporary general counsel play and the influence they exert, *how* these lawyers approach their responsibilities is at least as important as *what* they do. Professor Ralph Cramton notes that “compliant lawyers” contributed significantly to the corporate debacles of the last several years.<sup>156</sup> As Professor Thomas Bost writes, many lawyers lost their way because of a “dual failure of vision.”<sup>157</sup> They lost sight of the corporation itself as their true client and they saw “their role in unacceptably narrow terms—as mere implementers or transaction engineers, rather than as broadly-gauged corporate counselors or advisers.”<sup>158</sup> One of the principal goals of Sarbanes-Oxley, the Model Rules amendments, and other regulatory changes is to hold corporate lawyers more accountable and to prompt them to take a broader view of their responsibilities. Lawyers willing to help dishonest managers clothe improper actions in legalistic trappings betray the very foundations of the profession; those who willingly turn their heads away from improprieties are little better. Lawyers need to be proactive ethical actors capable of looking beyond the cribbed confines of technical legal questions and willing to respond assertively to safeguard the integrity of their client

155. See Veasey & Di Guglielmo, *supra* note 8, at 6 (discussing general counsel as mediator) (citing Michele D. Beardslee, *If Multidisciplinary Partnerships Are Introduced Into the United States, What Could or Should Be the Role of General Counsel?*, 9 FORDHAM J. CORP. & FIN. L. 1, 24 (2003)).

156. See, e.g., Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 BUS. LAW. 143, 144 (2003) (“[C]ompliant lawyers as well as greedy executives, lazy directors and malleable accountants are necessary for large corporate frauds to come to life and persist long enough to cause major harm.”).

157. Bost, *supra* note 94, at 1090.

158. *Id.*



entities when they encounter evidence of wrongdoing.<sup>159</sup> This is particularly true for general counsel, for they are invariably on the front lines in the corporate legal arena.

Empirical studies of the way in which in-house counsel function are scarce; however studies specifically focused on general counsel and their impact on the entities they serve are virtually non-existent,<sup>160</sup> but recent studies of in-house counsel generally, as well as a recent analysis of the ethical behavior of lawyers in large law firms, offer useful, if troubling, insights. For example, an article published shortly before the collapse of Enron, Robert Nelson, and Laura Nielson suggested that “inside counsel construct different professional roles for themselves depending on the circumstances.”<sup>161</sup> They observed a reluctance to constrain business managers, despite general acceptance of this function as a necessary element of counsel’s role in safeguarding the corporation.<sup>162</sup> Nelson and Nielson also found substantial behavioral reciprocity—i.e., the ways in which business people treated lawyers influenced lawyers’ behavior and the attitudes of lawyers affected the behavior of other corporate constituents.<sup>163</sup>

Professors Nelson and Nielson reported that in-house lawyers “were eager to be seen as part of the company, rather than as obstacles to getting things done.”<sup>164</sup> They were willing to “discount[] their gatekeeping function in corporate affairs” to do so,<sup>165</sup> although they did not wish to give up their identity as lawyers or the professional status accompanying this identity.<sup>166</sup> More than a year before Enron collapsed, Professors Nelson and Nielson presciently suggested that in-house lawyers too often “are subservient to management prerogatives. . . . despite profound changes in the structural

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159. See *infra* note 178 and accompanying text.

160. Professors Hugh and Sally Gunz have conjectured that the scarcity of studies may be a function of the employment of different methodologies by researchers in the sociology of the professions, ethics, and law. As a result, researchers have worked in “silos” with “little cross-fertilization.” Hugh P. Gunz & Sally P. Gunz, *The Lawyer’s Response to Organizational Professional Conflict: An Empirical Study of the Ethical Decision Making of In-House Counsel*, 39 AM. BUS. L.J. 241, 244–45 (2002).

161. Nelson & Nielson, *supra* note 142, at 457. Professors Nelson and Nielson focused on four dimensions: “(1) the gatekeeping functions of corporate counsel; (2) how lawyers and executives view each other within the corporation; (3) the blending of legal and business advice; and (4) the distinctiveness of lawyers’ identities,” utilizing three ideal types: “cops,” “counsel” and “entrepreneurs.” *Id.* at 460, 462. Nelson and Nielson found that in-house counsel most frequently play the role of “counsel,” but that they also acted from time to time as “cops” policing other corporate constituents or as “entrepreneurs” emphasizing business values and seeking to use law aggressively to generate profits. *Id.* at 464–66.

162. *Id.* at 471.

163. *Id.* at 490.

164. *Id.* at 477.

165. *Id.*

166. Nelson & Nielson, *supra* note 142, at 477–78.

position of inside counsel, in the presence of law in the corporate environment and the ideology of management itself.”<sup>167</sup>

Given the similarities between sizable corporate law departments and large law firms,<sup>168</sup> an ongoing study by Professor Kimberly Kirkland also offers relevant insights. Utilizing the work of sociologist Robert Jackall on corporate bureaucracies, Professor Kirkland conducted an empirical analysis of choices of norms by associates in large law firms.<sup>169</sup> She concluded that, much like corporate managers, large-firm lawyers tend to follow highly mutable norms: “the appropriate norms . . . are those of the people the lawyer is working for . . . at the time.”<sup>170</sup> Professor Kirkland found that the “habit of mind” of these lawyers “is to discern the norm[s] ‘appropriate’ to the situation, not to judge the merits of any given norm.”<sup>171</sup> Like Professor Jackall, Professor Kirkland warns that “[a] habit of mind that focuses on identifying what norms others would follow rather than on the content of the norms themselves will ‘convert principles into guidelines, ethics into etiquette, [and] values into tastes.’”<sup>172</sup>

In the absence of specific research pertaining to general counsel, the observations of Professors Nelson, Nielson, and Kirkland offer some of the best available information. They suggest that lawyers in organizations are heavily influenced by the demands and objectives of the powerful players in their environments. Consequently, despite their sense of professional independence, it is sometimes difficult for lawyers to separate themselves and their professional ethical obligations from organizational objectives and the norms elevated by the most powerful players in those organizations. After a

167. *Id.* at 486.

168. *See generally id.* (analyzing the changes in law firms and in-house counsel).

169. *See* Kimberly Kirkland, *Ethics in Large Law Firms: The Principle of Pragmatism*, 35 U. MEM. L. REV. 631, 635–36 (2005).

170. *Id.* at 638. Professor Kirkland applies Robert Jackall’s approach to analyzing ethical decision by corporate managers in the context of ethical decision-making by lawyers employed as associates by large law firms. *Id.* at 635–36. She concludes that in large law firms, as in corporate settings, “morality becomes indistinguishable from the quest for one’s own survival and advantage.” *Id.* at 729 (quoting ROBERT JACKALL, *MORAL MAZES: THE WORLD OF CORPORATE MANAGERS* 204 (1988)).

171. *Id.* at 638–39.

172. *Id.* at 639 (quoting JACKALL, *supra* note 170, at 204). Another study reported by Mark Suchman, although focused primarily on large-firm corporate litigators, noted that in-house counsel involved in the exercise

exhibited only passing concern for legal norms of any kind and focused, instead, on the often challenging task of reconciling managerial ideals . . . with the vagaries of a court system that operates on starkly different principles. . . . [A]lthough they were often more willing than outside counsel to link ethics and morality, in-house counsel rarely framed this linkage as a question of their professional obligations *as lawyers*.

Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 FORDHAM L. REV. 837, 845 (1998) (emphasis added).

time, the line between ethical and unethical behavior becomes harder to see and easier to cross. It seems likely that general counsel are subject to the same kinds of influences.<sup>173</sup>

However, there is also some good news. As Professors Abram and Antonia Chayes observed, “The General Counsel sits close to the top of the corporate hierarchy as a member of senior management.”<sup>174</sup> Consequently, a general counsel should have the authority necessary to set high standards for the lawyers employed by his or her company. A strong general counsel who is a person of integrity is ideally situated to moderate the choice-of-norm phenomenon, create a positive role model, and require high ethical standards on the part of both the members of his or her department and the outside counsel the company retains. As Professor Timothy Terrell suggested several years before the most recent rash of corporate debacles,

[w]hat every corporation needs is [a] sophisticated lawyer who respects not only the strong foundations of the law but the nature and significance of its constraints as well. . . . who can, in a very special . . . way, be trusted by everyone to bring a troublingly expansive sense of the law and our legal system . . . when corporate decisions are made.<sup>175</sup>

With this perspective in mind, the following discussion examines the role of general counsel pursuant to the professional conduct rules of the SEC’s Part 205 and the amendments to Model Rule 1.13.

## II. THE GENERAL COUNSEL AND THE TONE AT THE TOP IN THE POST-ENRON/SARBANES-OXLEY ERA

The events of the past several years have highlighted the importance of corporate general counsel with respect to legal compliance,<sup>176</sup> especially the role of the general counsel in responding appropriately to evidence of possible

173. The debate continues over whether in-house lawyers, including general counsel, are more likely to succumb to client pressures than outside counsel. See, e.g., DeMott, *supra* note 8, at 967–68; Veasey & Di Guglielmo, *supra* note 8, at 11–13; c.f. Hazard, *Ethical Dilemmas*, *supra* note 8, at 1019 (noting the possibility that constituents may retain outside counsel to provide advice on the basis of “selected facts”).

174. Chayes & Chayes, *supra* note 22, at 277; DeMott, *supra* note 8, at 964.

175. Terrell, *supra* note 8, at 1009; see also Liggio, *A Look at the Role of Corporate Counsel*, *supra* note 8, at 630 (describing the “leader” model of general counsel); see also, e.g., *Face Value: Where’s the Lawyer?*, *supra* note 9 (discussing former General Electric Co. general counsel Benjamin Heineman’s ideal of general counsel as a “lawyer statesman”).

176. For discussion of the infamous corporate debacles at the beginning of the twenty-first century and their impact on lawyers, see, for example, Bost, *supra* note 94, at 1090; Cramton, Cohen & Koniak, *supra* note 80; Cramton, *supra* note 156; Lisa H. Nicholson, *Sarbox 307’s Impact on Subordinate In-House Counsel: Between a Rock and a Hard Place*, 2004 MICH. ST. L. REV. 559 (2004).

corporate wrongdoing.<sup>177</sup> A number of scholars and practitioners, including those who have served as in-house lawyers, would argue that corporate counsel have always had a responsibility to seek out and address entity failures to comply with the law.<sup>178</sup> It is also true, however, that earlier incarnations of Model Rule 1.13 and state rules based on its provisions allowed leeway for corporate counsel to view their responsibilities much too narrowly, thereby closing their eyes to problems.<sup>179</sup> The amendments to Rule 1.13 and, for

177. See, e.g., Bost, *supra* note 94, at 1111; Cramton, *supra* note 156, at 186; DeMott, *supra* note 8, at 979.

178. For example, in an article written several years before the Enron debacle and the subsequent enactment of Sarbanes-Oxley and the 2003 amendment to Model Rules 1.13 and 1.6, Professor Geoffrey Hazard stated:

In a properly run law department, the general counsel is alert to back-channel information as well as to “official information” within the corporation. The general counsel knows that early interception of legally improper conduct is much easier than cleaning up a mess after the fact. The general counsel has made it clear, by deed as well as pronouncement, that his or her door is open for confidential discussion with any lawyer down the line who confronts an ethically troublesome situation. *The general counsel has also made it clear, by deed as well as pronouncement, that he or she will take to the CEO, or to the Board of [D]irectors if necessary, any matter requiring such a reference.* The general counsel must further make clear in the same way that, assuming the staff lawyers have been able to refer difficult problems to the head legal office, the incumbent in the office will take responsibility for resolving them. The general counsel knows that being open but tough-minded about ethical problems is much more effective than being sanctimonious.

Hazard, *Ethical Dilemmas*, *supra* note 8, at 1021–22 (emphasis added); see also Cramton, *supra* note 156, at 154–55 (suggesting that “[a]lthough the [pre-August 2003] Rule [did] not explicitly require an organization’s lawyer to take a problem up the corporate ladder, that response [was] required in circumstances in which [the] action [was] the only one that [was] in the ‘best interest of the organization’”). Professor Thomas Morgan stated:

[S]ome critics of attorney conduct seem to assume that there was virtually no effective regulation of corporate attorneys prior to the federal Sarbanes-Oxley legislation. This is simply not true. . . . At least seven [of the Model Rules of Professional Conduct on which most state rules are based], taken individually and together, define what state law has understood to be a corporate attorney’s duties in dealing with possible corporate crime or fraud.

*The Role of Attorneys in Corporate Governance: Hearing Before the Subcomm. on Capital Markets, Ins. and Gov’t Sponsored Enterprises*, 108th Cong. 71–72 (2004) (statement of Professor Thomas D. Morgan). But see Bost, *supra* note 94, at 1089 (“[T]he past four years or so have witnessed a convulsion and consequent seismic shift in the roles, duties, expectations, and liabilities of corporate lawyers.”).

179. See Cramton, Cohen & Koniak, *supra* note 80, at 738 (discussing confusing language and structure of MRPC 1.13 prior to the August 2003 amendments); Cramton, *supra* note 156, at 145 (noting that as of 2002, ethical rules were “controverted, often ambiguous and provide[d] insufficient guidance to lawyers and inadequate protection to the public interest in preventing corporate frauds and illegalities.”). As Professor Cramton has pointed out:

The conduct of the inside and outside lawyers who represented Enron, Arthur Andersen, and the many financial institutions involved in the Enron scandal tell the same

public companies, the SEC's Part 205 rules impose specific requirements that make it very difficult for lawyers who represent entities—particularly general counsel—to close their eyes and ears to problems.<sup>180</sup> Concomitant developments, such as the perception that corporate counsel are increasingly being named as defendants in civil enforcement proceedings, shareholder derivative actions, and even criminal prosecutions,<sup>181</sup> have also raised the stakes for the lawyers who hold these positions.

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story that has been told to us by a long string of major financial frauds for fifty years: the professional ideal of “independent professional judgment” does not inform the behavior of some lawyers who represent large corporations in major transactions and high-stakes litigation. These lawyers take the position that they must do everything for the client that the client's managers want them to do, providing the conduct is permitted by law. The problem is that by constantly going to the edge of the law and taking a very permissive view of what the law permits, these lawyers gradually adopt a mindset that ignores and may eventually assist the client's managers in illegality that harms third persons and the client entity. These lawyers have confused the role of advocates in litigation or adversary negotiation with the need of corporate clients for independent, objective advice in the course of corporate decision-making. Current practices have resulted in a widespread problem, not just a failure of individual law firms.

Cramton, *supra* note 156, at 173 (citations omitted). But see Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097, 1097 (2003) (concluding that the “Sarbanes-Oxley approach to corporate governance reform is flawed”); Thomas D. Morgan, *Sarbanes-Oxley: A Complication, Not a Contribution, in the Effort to Improve Corporate Lawyers' Professional Conduct*, 7 GEO. J. LEGAL ETHICS 1, 2–11 (2003) (questioning the value of new ethics mandates).

180. See, e.g., ASS'N OF CORPORATE COUNSEL, *supra* note 66, at 18–19 (noting “[e]xpanded ethics role of General Counsel under the Sarbanes-Oxley Act”); *After Sarbanes-Oxley: A Panel Discussion on Law and Legal Ethics in the Era of Corporate Scandal*, 17 GEO. J. LEGAL ETHICS 67 (2003); Susan D. Carle et al., *The Evolving Legal and Ethical Role of the Corporate Attorney after the Sarbanes-Oxley Act of 2002, Panel Three: Ethical Dilemmas Associated with the Corporate Attorney's New Role*, 52 AM. U. L. REV. 655 (2003); Karl A. Groskaufmanis, *Climbing “Up the Ladder”: Corporate Counsel and the SEC's Reporting Requirement for Lawyers*, 89 CORNELL L. REV. 511 (2004); Morgan, *supra* note 179; Terry F. Moritz & Robert M. Oberlies, *Up the Ladder and Beyond: Attorney Conduct and Reporting Duties with Respect to Issuers, Auditors and the Commission under SEC Implementing Rules to the Sarbanes-Oxley Act of 2002*, 1402 PLI/CORP 307 (2004).

181. See, e.g., Janet Langford Kelly, Susan R. Sneider & Kelly A. Fox, *The Relationship Between the Legal Department and the Corporation*, 1 SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 16:36.3 (Feb. 2006) (describing general counsel as “the new white collar criminal”). For a detailed analysis of information available with respect to targeting of in-house counsel, see JOHN K. VILLA, *SEC AND CRIMINAL PROCEEDINGS AGAINST INSIDE CORPORATE COUNSEL* (2005), available at <http://www.acca.com/resource/v6063>. See also DeMott, *supra* note 8, at 974–75 (discussing recent enforcement actions against general counsel and the specific predicaments of Franklin C. Brown, General Counsel of Rite Aid and James V. Derrick, Jr., General Counsel of Enron). A 2006 Washington Post article suggests, however, that “lawyers serving fraud-ridden companies have emerged relatively unscathed.” Carrie Johnson, *Legal Penalties in Corporate Frauds Seldom Paid by Legal Advisers*, WASH. POST, Aug. 31, 2006, at D1.

Since the dust began to settle in the aftermath of Enron's collapse, many corporate counsel have engaged in far-reaching efforts to establish internal controls designed to safeguard their clients both internally and externally.<sup>182</sup> Of course, Sarbanes-Oxley and SEC initiatives pursuant to the statute have provided powerful incentives for upgrading corporate integrity efforts. As the Association of Corporate Counsel's materials, trade publications, and other legal and general media articles reveal, compliance with Sarbanes-Oxley is a major concern for many corporate lawyers, especially general counsel.<sup>183</sup> A number of excellent scholarly articles and practical pieces have explored the nature and impact of the standards set forth in the SEC's Part 205 rules and the August 2003 amendments to Model Rules 1.13 and 1.6,<sup>184</sup> as well as the noisy withdrawal provisions the SEC proposed but never put into effect.<sup>185</sup> The following discussion highlights key points pertaining to the role of general counsel as chief legal officers.

In this context, it is important to realize that we are dealing not simply with professional ethics, but corporate governance issues as well. As the Report of the ABA Task Force on Corporate Governance emphasized, "Lawyers are and should be important participants in corporate governance and important contributors to corporate responsibility. . . . a prudent corporate governance program should call upon lawyers—*notably the corporation's general counsel*—to assist in the design and maintenance of the corporation's procedures for promoting legal compliance."<sup>186</sup> In a similar vein, in August 2003, the ABA House of Delegates resolved:

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182. See, e.g., ASS'N OF CORPORATE COUNSEL, EMERGING AND LEADING PRACTICES IN SARBOX 307 UP-THE-LADDER REPORTING AND ATTORNEY PROFESSIONAL CONDUCT PROGRAMS: WHAT COMPANIES AND LAW FIRMS ARE DOING 1 (2003), available at <http://www.acca.com/legres/corpresponsibility/attorney.php>.

183. See, e.g., *id.*

184. See, e.g., Carle et al., *supra* note 180; Cramton, Cohen & Koniak, *supra* note 80; Groskaufmanis, *supra* note 180; Morgan, *supra* note 180; Russell, *supra* note 65. For an earlier discussion of relevant issues, see Cramton, *supra* note 156. The SEC also received extensive commentary on its proposed Sarbanes-Oxley Rules that affords insights from a variety of perspectives. See SEC Final Rule: Implementation of Standards of Professional Conduct for Attorneys, Release Nos. 33-8185, 34-47276, IC-25919 (issued Jan. 29, 2003, effective Aug. 5, 2003) (reporting receipt of 167 timely comment letters).

185. See Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release, 67 Fed. Reg. 71670-71 (proposed Nov. 21, 2002), available at <http://www.sec.gov/rules/proposed/33-8150.htm>. In January 2003 the SEC proposed an alternative to the original noisy withdrawal provision that would have required issuers to inform the SEC of attorney withdrawals. See Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release, 68 Fed. Reg. 6824 (proposed Jan. 29, 2003), available at <http://www.sec.gov/rules/proposed/33-8186.htm>.

186. CORPORATE RESPONSIBILITY TASK FORCE REPORT, *supra* note 6, at 20-21 (emphasis added).

Providing information and analysis necessary for [corporate] directors to discharge their oversight responsibilities, particularly as they relate to legal compliance matters, *requires the active involvement of general counsel for the public corporation.*<sup>187</sup>

The critical question is whether the applicable rules effectively empower general counsel to do what is asked of them.

*A. The Role of the General Counsel Pursuant to SEC Provisions and the Model Rules*

Following the Enron fiasco, there was a general consensus that some corporate lawyers were confused about the identity of their true client—the entity itself. In reality, of course, it simply may be that corporate lawyers were engaging in the kinds of choice-of-norm behavior described by Robert Jackall and Kimberly Kirland.<sup>188</sup> The SEC and the ABA have devoted a great deal of effort to devising ways to prod lawyers to report problems to corporate actors with the power to address and resolve them. General counsel—as chief legal officers—qualify as report recipients and are featured prominently in the SEC’s Part 205 rules. The ABA Task Force on Corporate Responsibility, chaired by James Cheek of Tennessee, also discussed the role of general counsel, although the Model Rules amendments recommended by the Task Force and adopted by the ABA House of Delegates do not specifically refer to general counsel or chief legal officers.<sup>189</sup> This section offers a brief overview of the Part 205 rules and Model Rule 1.13, as amended in August 2003, from the perspective of the general counsel.

*1. General Counsel as Chief Legal Officers under the SEC’s Part 205 Rules*

The SEC’s Part 205 rules apply to attorneys who represent registered issuers—i.e., publicly traded companies—and who are “appearing and practicing before the Commission.”<sup>190</sup> The “appear or practice” language sweeps quite broadly, drawing in lawyers involved in many aspects of corporate representation, both in-house and outside.<sup>191</sup> Pursuant to the Part 205 rules, attorneys who appear or practice before the SEC, except those retained by chief legal officers or Qualified Legal Compliance Committees (QLCC) to investigate or assert a colorable defense to an alleged material

187. AUGUST 2003 ABA RESOLUTIONS, *supra* note 5, at ¶ 4 (emphasis added).

188. *See supra* Part III.B.

189. *See* CORPORATE RESPONSIBILITY TASK FORCE REPORT, *supra* note 6, at 34–40.

190. 17 C.F.R. § 205.1 (2003).

191. *See id.* at § 205.2(a); *see also* Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release 68 Fed. Reg. 6296, 6296 (Feb. 6, 2003) (to be codified at 17 C.F.R. § 205), *available at* <http://www.sec.gov/rules/final/33-8185.htm>.

violation,<sup>192</sup> must report evidence of material violations of law up the corporate ladder to the chief legal officer, or to both the chief legal officer and CEO, and the chief legal officer may in turn refer the report to a QLCC of the company's board of directors,<sup>193</sup> although relatively few entities have established QLCCs.<sup>194</sup> Thus, the reporting attorney must go through the general counsel—unless the attorney reasonably believes that a report to the chief legal officer or to the chief legal officer and CEO would be futile.<sup>195</sup> In that event, the attorney may report directly to the corporation's audit committee, another board committee comprised of independent directors, or to the full board if there is no committee of independent directors.<sup>196</sup>

As a chief legal officer, the general counsel of an issuer is deemed to be a supervisory attorney "appearing and practicing" before the SEC<sup>197</sup> with concomitant responsibility to make reasonable efforts to ensure that subordinate attorneys conform to applicable reporting requirements.<sup>198</sup> If and when the chief legal officer receives a report of a material violation, the chief legal officer must either refer the matter to a QLCC or conduct a reasonable inquiry to determine whether the purported material violation "has occurred, is ongoing, or is about to occur."<sup>199</sup> Unless the chief legal officer reasonably believes that there is no such material violation, the chief legal officer must "take all reasonable steps to cause the company to adopt an appropriate response"—i.e., endeavor to cause the company to stop the violation, try to prevent it from happening, or initiate steps to rectify the consequences of the violation.<sup>200</sup>

Whether or not he or she determines that a material violation has occurred, the chief legal officer must notify the reporting lawyer of his or her findings.<sup>201</sup> If the chief legal officer has found that a material violation has occurred, is

192. Lawyers acting in this capacity, however, are subject to the rules set forth in 17 C.F.R. §§ 205.3(b)(6) & (7) (2003).

193. 17 C.F.R. § 205.3(b)(2) (2003).

194. See Bost, *supra* note 94, at 1107 (citing Susan Hackett, *QLCCs: The In-House Perspective*, WALL ST. LAW., May 2004, available at <http://www.acca.com/resource/v6355>); Eli Rosen, *Resistances to Reforming Corporate Governance: The Diffusion of QLCCs*, 74 FORDHAM L. REV. 1251 (2005) (noting limited use of QLCCs and stating that as of September 30, 2005, 97.5% of issuers did not have QLCCs).

195. 17 C.F.R. § 205.3(b)(4) (2003).

196. *Id.* at §§ 205.3(b)(4) & (3).

197. *Id.* at § 205.4(a). See generally VILLA, *supra* note 89, at § 8:6.

198. 17 C.F.R. §§ 205.4(a), (b) (2003). However, attorneys under the direct supervision of chief legal officers—e.g., deputy general counsel—are not subordinate attorneys pursuant to the Part 205 rules. *Id.* at § 205.5(a). See generally VILLA, *supra* note 89, at § 8:6.

199. 17 C.F.R. § 205.3(b)(2) (2003). The chief legal officer also has the option of referring the report to a QLCC and informing the reporting attorney of this referral. *Id.* at § 205.3(c)(2).

200. *Id.* at § 205.3(b)(2).

201. *Id.*



ongoing, or is about to occur, the chief legal officer must advise the reporting attorney of the responsive actions undertaken.<sup>202</sup> If the reporting lawyer does not reasonably believe that the responsive actions are appropriate he or she must go to the audit committee, another committee of the board comprised of independent directors, or to the full board if there is no such committee.<sup>203</sup> If, after a reasonable time, the reporting attorney still does not reasonably believe the corporation has responded appropriately, the attorney must explain why to the chief legal officer, CEO, and/or directors to whom the attorney made the reports.<sup>204</sup> Ultimately, the reporting attorney may reveal “confidential information related to the representation” to the SEC without the corporation’s consent if the attorney reasonably believes that this disclosure is necessary to prevent “a material violation that is likely to cause substantial injury to the financial interests or property of the issuer or investors,” to prevent the corporation from committing or suborning perjury or to avert a fraud upon the Commission, or “to rectify consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest of the issuer or investors in the furtherance of which the attorney’s services were used.”<sup>205</sup> An attorney who believes that he or she has been discharged as a result of reporting evidence of a material violation as provided in the rules “may notify the [corporation’s] board of directors or any committee thereof that he or she believes that he or she has been discharged for reporting evidence of a material violation.”<sup>206</sup>

Of course, the optimal solution for lawyers and corporations alike would be to create an environment that obviates the necessity for reporting damaging information outside the client entity. It would be naïve, however, to assume that optimal results are likely in all situations. However, the general counsel, through his or her formal and informal interactions with business managers and other in-house and outside lawyers, is in an ideal position to foster an environment of integrity and legal compliance within the corporation.

If a chief legal officer is unsuccessful in efforts to get an entity to avert, cease, or remedy a material violation, however, like the reporting attorney, he or she has the option of resigning and/or reporting out relevant information.<sup>207</sup>

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202. *Id.* Appropriate responses include corporate action to prevent the violation or cause it to cease, remedial steps, and/or retention of a lawyer to investigate the matter with the consent of the board or a QLCC or other appropriate board committee. *Id.* at § 205.2(b).

203. *Id.* at § 205.3(b)(3).

204. 17 C.F.R. § 205(b)(9) (2003).

205. *Id.* at § 205.3(d)(2).

206. *Id.* at § 205.3(b)(10). *But see* VILLA, *supra* note 89, at § 8.11 (noting that the § 205.1 preemption of conflicting state ethics rules protects attorneys who disclose client confidences in such circumstances “only where the attorney has in fact acted as required by the rules *and* does so in good faith”).

207. 17 C.F.R. § 205.3(d)(2) (2003).

It seems possible that a general counsel might choose to resign if the directors of the client corporation refused to address evidence of a material violation,<sup>208</sup> although that decision might well encompass economic considerations and other extra-professional standards.<sup>209</sup> It is harder to envision that a general counsel would elect to report out damaging information. To do so would not only go against client loyalty and constituent ties, but it could constitute professional suicide. What corporation or other organization would hire as its senior counsel an attorney who reported another entity and its senior managers to law enforcement authorities? Consequently, it is particularly important to empower general counsel to act internally to promote corporate integrity.

## 2. Mandatory Reporting and Permissive Disclosure Pursuant to Model Rule 1.13

Model Rule of Professional Responsibility 1.13 specifically pertains to representation of entities.<sup>210</sup> Since its inception, Rule 1.13 has provided that lawyers who represent corporations and other organizations must place allegiance to the entity over loyalty to constituents.<sup>211</sup> The August 2003 amendments to the rule add a presumptive reporting-up requirement and, in tandem with amendments to the client confidentiality provisions of Model Rule 1.6, identify circumstances in which reporting out otherwise confidential client information is permissible.<sup>212</sup>

Unlike the Part 205 rules, the up-ladder reporting obligation set forth in Model Rule 1.13(b) applies not only to public corporations but to all entities. The reporting duty arises when an attorney “knows” of conduct by a constituent “in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that might reasonably be imputed to the organization, and that is likely to result in substantial injury to the organization . . . .”<sup>213</sup> In such situations, “[u]nless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do

208. See DeMott, *supra* note 8, at 967–68.

209. See *id.* at 967–69.

210. MODEL RULES OF PROF'L CONDUCT R. 1.13 (2003). The Model Rules of Professional Conduct came into existence on August 2, 1983. Since that time, Rule 1.13(a) has provided: “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” *Id.* at R. 1.13(a). For information pertaining to the Model Rules of Professional Conduct, see the website of the ABA Center for Professional Responsibility, [http://www.abanet.org/cpr/mrpc/model\\_rules.html](http://www.abanet.org/cpr/mrpc/model_rules.html).

211. See HAZARD & HODES, *supra* note 102, at § 17.2.

212. As Professors Hazard and Hodes observe, however, “[N]otwithstanding the Enron, WorldCom, and other scandals that gave rise to the important amendments to Rules 1.6 and 1.13 that were approved as a package by the ABA House of Delegates in 2003, . . . Rule 1.13 is still almost an entirely ‘inward-looking rule.’” HAZARD & HODES, *supra* note 102, at § 17.2.

213. MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2003); see generally HAZARD & HODES, *supra* note 102.

so,” he or she must “refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization . . . .”<sup>214</sup>

Model Rule 1.13(c) permits reporting information outside the corporation even if Rule 1.6 would not otherwise permit disclosure, but only if reporting up efforts have been unavailing, and, even then, only in the event of a clear violation of the law that “the lawyer reasonably believes . . . is reasonably certain to result in substantial injury to the organization, . . . but only if and to the extent the lawyer reasonably believes necessary to prevent” the injury.<sup>215</sup> This permissive disclosure provision does not apply to attorneys engaged to investigate or defend against alleged legal violations.<sup>216</sup> Of course, corporate counsel, like all attorneys operating under ethics laws substantially identical to the Model Rules, may invoke the longstanding confidentiality exceptions of Rule 1.6 to disclose information “to prevent reasonably certain death or substantial bodily harm,”<sup>217</sup> as well as to prevent the client from using the lawyer’s services to further a crime or fraud,<sup>218</sup> or to “prevent, mitigate or rectify substantial injury to the financial interests or property of another” as a result of such misuse of the lawyer’s services.<sup>219</sup> Ultimately, the lawyer may also withdraw from the representation and “proceed as the lawyer reasonably believes necessary to assure that the organization’s highest authority is informed of the lawyer’s . . . withdrawal.”<sup>220</sup> Consistent with the SEC rule, the same procedure applies to a lawyer who reasonably believes that he or she has been discharged because of his or her report.<sup>221</sup>

The role of the general counsel is implicit in the amendments to Rule 1.13, because the general counsel is precisely the type of “higher authority” to whom most in-house and outside lawyers would naturally report upon discovery of a significant problem likely to injure the client. Although neither Model Rule 1.13 nor the accompanying commentary specifies that a report to an entity’s general counsel/chief legal officer is required, corporations and other entities can create such requirements through contractual provisions. The general counsel is also bound by the requirement to report up conduct likely to result in substantial injury to the organization. Since the scope of the general counsel’s representation is arguably coextensive with the operation of the entity itself, the amendment underscores the general counsel’s obligation to communicate about any such matters with the CEO and, ultimately, the board of directors.

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214. MODEL RULES OF PROF’L CONDUCT R. 1.13(b) (2003).

215. *Id.* at R. 1.13(c).

216. *Id.* at R. 1.13(d).

217. *Id.* at R. 1.6(b)(1).

218. *Id.* at R. 1.6 (b)(2).

219. MODEL RULES OF PROF’L CONDUCT R. 1.6 (b)(3) (2003).

220. *Id.* at R. 1.13(e).

221. *Id.*; *see supra* text accompanying note 206.

### 3. Sarbanes-Oxley's Independent Counsel Provisions

In viewing the emerging ethical landscape from the perspective of general counsel, another provision of Sarbanes-Oxley is particularly worth noting. Section 301 of the statute amends section 10A of the Securities Act of 1934 to provide: "Each audit committee shall have the authority to engage independent counsel and other advisers, as it determines necessary to carry out its duties."<sup>222</sup> The statute further provides that payment for these services is to come from corporate funds.<sup>223</sup> Sarbanes-Oxley's independent counsel provisions underscore a trend that is already well established in corporate law. The impact of the increasing frequency of retention of independent counsel by directors, as well as the persistent practice of separate retention of counsel by other constituents is discussed below.<sup>224</sup>

#### *B. The Critical Role of the General Counsel in Fostering a Climate Conducive to Reporting Up and Resolving Significant Legal Problems*

The legal and professional standards established by the SEC's Part 205 rules and state ethics standards adopting and adapting amended Model Rule 1.13 define the boundaries of a new ethical framework, particularly for public companies. While both approaches require up-ladder reporting and permit limited external disclosure, whether these rules will accomplish their intended objectives depends not only on their enforcement by external authorities but also on their internalization by members of the legal profession and the entities they serve. Internalization is less a function of paper policies and procedures than it is a product of institutional culture and the ability and willingness of those in charge to make the system work.<sup>225</sup> There is perhaps no more critical player in this process than the general counsel.

As head of the law department and the individual with the most direct and comprehensive responsibility for the legal aspects of an entity's operation,<sup>226</sup> the general counsel has a great deal to do with the much touted "tone at the top" of a corporation. There are some checks and balances built into the system—primarily in the Part 205 provisions mandating reports to the CEO or

222. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301, 116 Stat. 745, 776 (2002). The term "separate" counsel is sometimes used interchangeably with "independent" counsel, but as Chief Justice Veasey and Ms. Di Guglielmo point out, in any given situation "independence" depends on "a context-specific inquiry." Veasey & Di Guglielmo, *supra* note 8, at 9. Separately retained counsel are not necessarily "independent."

223. *Id.* at § 301(m)(6).

224. *See supra* Part III.A.

225. Enforcement is critical. Enron, for example, had a business ethics code that was a work of art on paper. *See* Enron Code of Ethics, available at <http://www.thesmokinggun.com/enron/enronethics1.html> (last visited June 25, 2007).

226. This is particularly true in light of most companies' relegation of outside counsel to episodic representation. *See supra* Part I.C.1.c.ii.

audit committee if chief legal officers fail to fulfill their responsibilities and the referral to the “highest authority” required in Model Rule 1.13 when lesser authorities have failed to mend their ways.<sup>227</sup> In reality, however, general counsel are likely to continue to exert great influence because of the practical difficulty of contacting CEOs and board members, and because of the extent to which most in-house and outside lawyers depend upon positive relationships with general counsel in doing and keeping their jobs or clients.

In light of the influence they exert, or have the potential to exert, in the corporate arena, it is reasonable to impose a major part of the responsibility for navigating the new ethical landscape on general counsel. Congress, the SEC, and, albeit less explicitly, the profession itself have placed significant trust in the ability of chief legal officers to accomplish this task. It remains to be seen whether the regulatory framework is adequate to empower general counsel to perform their ethical obligations<sup>228</sup> and to hold them accountable when they fail to do so.

### III. BEGINNING A CONVERSATION: AREAS THAT MERIT CONSIDERATION WITH RESPECT TO THE GENERAL COUNSEL FUNCTION

The first part of this article touched upon the multifaceted formal and informal responsibilities of corporate general counsel, the significance of their role in promoting corporate integrity and the importance of a broad vision of the position in combating the kinds of choice-of-norm phenomena that may undermine the professional ethics of corporate lawyers as well as the integrity of other corporate constituents. The second section focused on the functions assigned to chief legal officers pursuant to the Part 205 rules and implicit in amended Model Rule 1.13. As lawyers, regulators, and legal scholars gain experience with the new rules, ongoing evaluation of their operation will be essential. This assessment should include analysis of their impact on general counsel, as well as other critical players. In an effort to initiate conversation on the role of general counsel, the following discussion briefly focuses on two of the many areas that merit ongoing consideration in the new ethical landscape: (1) the implications of the practice of hiring independent counsel to advise directors and other constituents and (2) general counsel-director relationships.

#### A. *Separate Counsel Provisions and the Need for Counsel Coordination Provisions*

On occasion, senior officers, business units, and other corporate constituents engage outside lawyers without the knowledge of the general

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227. MODEL RULES OF PROF'L CONDUCT 1.13(b) (2003).

228. As Professor Coffee has saliently observed, “Deterrence is easy, but empowerment is more complex.” Coffee, *supra* note 72, at 1315.

counsel or law department. At one time, the frequency with which this phenomenon occurred reflected the extent of a general counsel's influence, the ways in which legal expenses were allocated and paid by various corporate components, and the extent to which corporate constituents believed that they could obtain better—or perhaps less “conservative”—advice or other assistance from outside lawyers.<sup>229</sup> More recently, it has become relatively common for corporate boards and board committees, particularly those comprised of independent directors, to retain separate counsel.<sup>230</sup> This latter phenomenon is related to developments such as the proliferation of shareholders' derivative actions and the use of special litigation committees to evaluate the claims and determine board responses to the litigation,<sup>231</sup> the necessity for independent assessment of management actions in connection with certain types of corporate combinations,<sup>232</sup> and, in the post-Enron world, the call for corporate-wide internal investigations of allegations of misconduct implicating general counsel along with other senior managers.<sup>233</sup>

While it is sometimes necessary, retention of separate counsel by corporate constituents can be antithetical to the best interests of the entity. Constituents are unlikely to obtain the best possible legal advice for the entity without law department involvement. This is not because they will hire inadequate lawyers, but because lawyers retained in this fashion often lack sufficient knowledge of the way in which a particular matter fits into the overall objectives of the entity. In some situations, they may not even be aware that they lack information material to their task. Lawyers are also at risk of receiving “selected” facts from constituents seeking to circumvent unfavorable advice from in-house counsel or looking to pursue avenues outside permitted channels.<sup>234</sup> From an institutional point of view, uncoordinated efforts to attack problems often waste corporate resources and create the risk of inconsistent advice or litigation at odds with broader objectives. Perhaps most importantly, while it is easy to believe that “independent” counsel will bring objective analyses to bear on problems, there is no compelling reason to believe that the end result will be better from a business perspective or more

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229. See *infra* text accompanying note 236.

230. For discussion of the emergence of the practice and an evaluation of potential benefits and problems, see Geoffrey C. Hazard, Jr. & Edward B. Rock, *A New Player in the Boardroom: The Emergence of Independent Directors' Counsel*, 59 BUS. LAW. 1389 (2004); see also Veasey, *supra* note 74, at 1414–15 (suggesting that regular ongoing retention of separate counsel for directors or board committees is unnecessary).

231. See Hazard & Rock, *supra* note 230, at 1391–92.

232. See *id.*

233. See *id.* at 1392.

234. See Hazard, *Ethical Dilemmas*, *supra* note 8, at 1019; see also *supra* note 173 and accompanying text.

likely to promote corporate integrity, and such engagements may cost a company a great deal in terms of human and financial resources.

Many commentators have emphasized that in-house counsel may be less independent than outside lawyers because they have only one client—their employer.<sup>235</sup> It is equally true, however, that outside counsel “may be retained on the basis of selected facts precisely to accommodate a response that provides a desired outside opinion.”<sup>236</sup> With major economic interests at stake, more than one law firm has provided overly aggressive opinions to support a questionable transaction or an opinion supporting a manager’s effort to circumvent “overly conservative” in-house counsel. The report of the ABA Task Force on Corporate Responsibility specifically notes that “[t]he competition to acquire and keep client business, [like] the desire to advance within the corporate executive structure, may induce lawyers to seek to please the corporate officials with whom they deal rather than to focus on the long-term interest of their client, the corporation.”<sup>237</sup> Outside advice based on incomplete knowledge or a lack of understanding of the reasons in-house lawyers have insisted on particular courses of action, can draw corporations into dangerous waters. Finally, when constituents retain outside counsel without the help of in-house lawyers, they often pay more for services because they fail to negotiate favorable fee structures or they do not manage the engagement efficiently.

For public corporations, the new ethical framework may have the incidental effect of promoting coordination of counsel. The August 2003 Resolutions of the ABA House of Delegates advise that

[a]ll reporting relationships of internal and outside lawyers for a public corporation [should] establish at the outset a direct line of communication with general counsel through which these lawyers are to inform the general counsel of material potential or ongoing violations of law by, and breaches of fiduciary duty to, the corporation.<sup>238</sup>

This admonition is not, however, incorporated into the Model Rules, nor do the rules contain any other coordination-of-counsel provision applicable to lawyers representing entities.

The considerations relevant to retention of independent counsel by corporate boards and board committees comprised of independent directors are different. In this context, consultation of independent counsel offers distinct advantages because it affords access to legal advice free of the predilections or self-protective biases that may taint the advice of in-house lawyers and law

235. For informative discussions of the independence issue, see DeMott, *supra* note 8, at 967–68; Veasey & Di Guglielmo, *supra* note 8, at 11–12.

236. Hazard, *Ethical Dilemmas*, *supra* note 8, at 1019.

237. CORPORATE RESPONSIBILITY TASK FORCE REPORT, *supra* note 6, at 15.

238. AUGUST 2003 ABA RESOLUTIONS, *supra* note 5, at ¶ 7(c).

firms with close relationships to the company. In some instances—e.g., decisions by special litigation committees pertaining to shareholders' derivative actions—statutory mandates require or, as a practical matter, necessitate consultation with independent counsel.<sup>239</sup> Similarly, the use of separate counsel allows independent directors to bypass general counsel potentially implicated in questionable corporate activities or unable to break free of the influence of CEOs or other senior managers. Retention of separate counsel aids in avoiding dangerous situations in which lawyers are called upon to evaluate their own prior work, so long as the outside counsel retained are truly independent.<sup>240</sup> This is presumably why Sarbanes-Oxley specifically provides that the audit committees of corporations or public companies must have authority to retain independent counsel at the corporation's expense.<sup>241</sup> A similar rationale underlies the ABA House of Delegates' August 2003 resolution that "[e]ngagements of counsel by the board of directors, or by a committee of the board, for special investigations or independent advice should be structured to assure independence and direct reporting to the board of directors or the committee."<sup>242</sup>

Nevertheless, even for boards and board committees there are also downsides to retaining separate counsel. For example, retaining separate counsel to conduct an internal investigation makes sense when independent directors need to evaluate the validity of claims in shareholders' derivative actions, when there is evidence of pervasive senior management problems, or when the conduct of the general counsel herself is in question.<sup>243</sup> Even so, many of the same kinds of problems applicable to constituent retention of counsel—advice based on an insufficient knowledge base, unnecessary redundancies in the performance of legal tasks, and significantly increased financial and human resource costs—may arise.<sup>244</sup> There is also a danger that directors may employ independent counsel in an effort to exonerate themselves when charges of wrongdoing arise rather than to serve the best interests of the entity. In such cases the effect may be to salvage the directors at the expense of the company and its shareholders. Consequently, retention of separate counsel is far from a panacea.

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239. See Hazard & Rock, *supra* note 230, at 1390–91; Veasey, *supra* note 74, at 1414.

240. Vinson & Elkins found itself in a great deal of trouble as a result of an internal investigation conducted by firm lawyers into Enron matters in which the firm had provided legal advice. The firm was investigating not only the conduct of a major client, but its own. See Bost, *supra* note 94, at 1098; see also NEAL BATSON, FINAL REPORT OF NEAL BATSON, COURT-APPOINTED EXAMINER (2003), available at <http://www.enron.com/corp/por/examinerfinal.html>.

241. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301, 116 Stat. 745, 776 (2002).

242. AUGUST 2003 ABA RESOLUTIONS, *supra* note 5, at ¶ 9.

243. See Hazard & Rock, *supra* note 230, at 1390; Veasey & Di Guglielmo, *supra* note 8, at 8–10.

244. See Hazard & Rock, *supra* note 230, at 1411–12; *supra* note 93.



In addition, when other counsel enter the mix—whether at the behest of directors or other constituents—the ties between officers, directors, and other key players and corporate general counsel may be weakened,<sup>245</sup> thereby making it more difficult for general counsel to address other legal issues. It certainly becomes more difficult to hold general counsel accountable for legal matters relevant to matters addressed by outside lawyers acting beyond their control and sometimes even without their knowledge. The ABA Task Force on Corporate Responsibility emphasized that “[t]he general counsel of a public corporation should have primary responsibility for assuring the implementation of an effective legal compliance system under the oversight of the board of directors.”<sup>246</sup> It is unrealistic to expect any general counsel to oversee legal compliance effectively without assurance that lawyers retained to handle corporate business or investigate suspected wrongdoing coordinate with them in some fashion.

As a society we have become enamored of “independent” professionals. Independent counsel are only one species; others include “independent” doctors, consultants, prosecutors, examiners, testing laboratories, and many more. These independent professionals and entities can do a great deal of good, but they should not supplant those charged with the responsibility for ensuring the integrity of a corporation or any other institution.<sup>247</sup> Used judiciously, independent counsel provide invaluable services, but the trend toward employing lawyers who are not answerable to general counsel neither empowers general counsel to fulfill their obligations nor offers a basis to hold them fully accountable for corporate legal compliance or ethical behavior on the part of the lawyers who represent these entities.

In a recent article on the independent counsel phenomenon, Delaware’s former Chief Justice E. Norman Veasey, a preeminent expert in corporate law who chaired the ABA’s Ethics 2000 Commission, concurred with the ABA Task Force on Corporate Responsibility in cautioning against the idea that audit committees should retain separate counsel on an ongoing basis.<sup>248</sup> In Chief Justice Veasey’s view:

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245. See DeMott, *supra* note 8, at 980 (discussing the impact of retention of independent counsel on general counsel’s relationship to the Board and CEO).

246. CORPORATE RESPONSIBILITY TASK FORCE REPORT, *supra* note 6, at 32.

247. Moreover, even “independent” professionals are not always free of the problem of client confusion. See *id.* at 26 (“Too often, even when an outside adviser is formally engaged by the board of directors or by a committee of the board, the adviser’s view of the senior executive officers as the client has influenced the advice rendered.”).

248. See CORPORATE RESPONSIBILITY TASK FORCE REPORT, *supra* note 6, at 24 n.54 (cautioning that “retention of counsel other than general corporate counsel to advise the board of directors or one or more of its committees . . . may result in less open communication, less constructive collaboration between directors and senior executive officers, and, ultimately, less effective oversight by the board of directors”); Veasey, *supra* note 74, at 1414–15; Veasey & Di Guglielmo, *supra* note 8, at 8–10 (noting that independence issues apply to outside as well as in-

the real “heavy lifting” in this new world of corporate governance must generally be done by the general counsel and her in-house counsel staff, supplemented when necessary by the corporation’s regular outside counsel. It is the general counsel . . . who must shape the quest for best practices by the board . . . one would expect that a highly professional general counsel would have the intellectual honesty to counsel directors when they should consider separate representation.<sup>249</sup>

Chief Justice Veasey’s point is a compelling one. The judgment of outside counsel, while their services are often invaluable, should rarely substitute for the judgment of a general counsel whose sole professional responsibility is to represent one organization.<sup>250</sup>

Two conclusions flow from this analysis. First, incorporation of some type of coordination provision applicable to lawyers retained to represent entities with general counsel into Model Rule 1.13 merits serious consideration. The proviso could be applied unless the client entity’s CEO, board, or a board committee directs otherwise, or the counsel retained in such circumstances reasonably believes that communication with the chief legal officer would imperil the well-being of the entity itself. Such a requirement would also strengthen the creation of lines of communication between all lawyers and corporate general counsel.<sup>251</sup> In the same vein, even when independent counsel must keep an entity’s general counsel out of an investigative loop, as a matter of good governance practice, directors should still require investigating counsel to follow the company’s standard practices with respect to billing to the extent that this does not interfere in the substance of the investigation.<sup>252</sup> Otherwise, the company loses the benefit of policies developed by those most expert at ensuring good quality, high-value legal products. This is particularly true when payment for separate counsel comes out of the law department’s budget without any departmental oversight.

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house counsel and that “determining the independence of counsel requires a context-specific inquiry”).

249. Veasey, *supra* note 74, at 1414–15; *see also* Hazard & Rock, *supra* note 230, at 1402–03.

250. As Chief Justice Veasey also notes:

The independent directors must make the decision whether and when they need special outside counsel on a continuing basis. For this decision-making process they should be able to turn to the general counsel or to the corporation’s regular outside counsel, who must have the professionalism and integrity to provide the directors with unvarnished, objective advice. If these counsels are not up to that task, they should be replaced.

Veasey, *supra* note 74, at 1418.

251. *See* CORPORATE RESPONSIBILITY TASK FORCE REPORT, *supra* note 6, 36–38.

252. These kinds of policies ordinarily address the level of detail required for billing, presentation of charges, limitations on expenses, and related matters.

Second, it is essential to continue the current exploration of the relative merits of the retention of independent counsel by corporate boards and board committees. Assuming that the trend continues, it makes sense to consider the development of guidance to assist corporate directors in determining when retention of independent counsel is appropriate and when such engagements are unnecessary or perhaps even counterproductive.

*B. Ongoing Attention to the Relationship Between General Counsel and Corporate Directors*

Good governance principles and professional responsibility on the part of corporate lawyers should operate in tandem to facilitate a healthy economic climate in which business managers, corporations, and corporate lawyers are mutually accountable. The work of Nelson and Nielson discussed earlier in this article reinforces the common sense proposition that the way people are treated influences the way they behave.<sup>253</sup> In particular, Professors Nelson and Nielson found that the business manager-lawyer relationship in in-house settings involves considerable reciprocity.<sup>254</sup> Similarly, Professor Kirkland, by adapting the approach Professor Jackall developed to study choices of norms in corporate settings, found that associates in large law firms often make decisions on the basis of perceptions of what it takes to survive and advance in a law firm environment rather than by evaluating the content of applicable norms on the basis of an internal moral compass.<sup>255</sup> These studies highlight the importance of aligning the objectives of both business managers and business lawyers with those of society. Shared objectives need to include a strong sense of the importance of complying with the law. In the end, perhaps the most useful aspect of Sarbanes-Oxley and the SEC implementing rules is not the resulting procedural mechanism but the clear message that norms are not fungible and that business managers and corporate attorneys need to work together to ensure corporate integrity.

Achieving the goal of prioritizing legal compliance in the corporate arena becomes possible when, as the Report of the ABA Task Force on Professional Responsibility emphasizes, lawyers, business people, courts, and legislatures recognize the integral interrelationship between corporate governance and the role of corporate lawyers.<sup>256</sup> Pursuant to Task Force recommendations, in August 2003, the ABA House of Delegates adopted several resolutions highlighting this relationship. Its proposals included injunctions that:

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253. See *supra* text accompanying notes 161–67.

254. See *id.*

255. See *supra* text accompanying notes 169–72.

256. See CORPORATE RESPONSIBILITY TASK FORCE REPORT, *supra* note 6, at 9 & nn.20–21.

Public corporations should adopt practices in which:

- a. The selection, retention, and compensation of the corporation's general counsel are approved by the board of directors.
- b. General counsel meets regularly and in executive session with a committee of independent directors to communicate concerns regarding legal compliance matters, including potential or ongoing material violations of law by, and breaches of fiduciary duty to, the corporation.<sup>257</sup>

These resolutions delineate important strategies for enhancing the relationship between general counsel and corporate managers, but they could go farther. While, as the Task Force Report recognizes, corporations and other entities differ with respect to the structure of the reporting relationships of general counsel,<sup>258</sup> general counsel should *always* have a reporting relationship to the board, as well as to the CEO, and open lines of communication with independent directors. It needs to be crystal clear to all concerned that this should be a two-way process facilitated by directors as well as the general counsel. Without such clarity, the ability of the general counsel to safeguard the entity's best interests is necessarily compromised in important respects. Boards need to be educated about the ethical responsibilities of general counsel and all corporate lawyers, including those hired directly by the board or board members in their official capacity.

Second, general counsel or another senior attorney should ordinarily attend all plenary board meetings, as well as significant committee meetings.<sup>259</sup> General counsel are in the best position to assist directors in identifying legal obligations and to caution them against potential violations of the law. Given the breadth of matters in which public companies may be involved, even the most capable lawyer may not catch every issue. Nevertheless, the presence of counsel at board meetings offers the best possibility of minimizing such errors. It also provides opportunities for general counsel to educate directors as to relevant legal obligations. Although the calculus is somewhat different with respect to meetings of independent directors, the general counsel has a professional obligation with respect to all legal aspects of the corporation's operation and governance. Consequently, as Chief Justice Veasey and Ms. Di Guglielmo have recently suggested, it is generally a good idea for general

257. AUGUST 2003 ABA RESOLUTIONS, *supra* note 5, at ¶ 7; *see also* REPORT OF THE NEW YORK CITY BAR ASS'N TASK FORCE ON THE LAWYER'S ROLE IN CORPORATE GOVERNANCE (Nov. 2006), 62 BUS. LAW. 427, 482–83 (2006) [hereinafter N.Y.C. BAR ASS'N TASK FORCE REPORT] (emphasizing the importance of general counsel's relationship with and access to the board).

258. CORPORATE RESPONSIBILITY TASK FORCE REPORT, *supra* note 6, at 29; *see also* ASS'N OF CORPORATE COUNSEL, *supra* note 66, at 24 (citing data showing that a high percentage, but not all, of general counsel report directly to corporate boards as well as to senior managers).

259. *See* Veasey & Di Guglielmo, *supra* note 8, at 17.

counsel “to attend or at least be available to attend [independent director meetings], absent some personal involvement of counsel in the subject matter under discussion.”<sup>260</sup> At a minimum, as the ABA Task Force recommends, general counsel should meet periodically with their company’s independent directors in executive session.<sup>261</sup>

Third, general counsel should, as a matter of course, inform the board of changes in counsel employment or retention arrangements in the event of: (1) termination or resignation of the general counsel or another senior in-house counsel, or (2) the termination or withdrawal of a law firm handling major work for the entity in the course of the representation rather than at its completion. As a matter of good governance, it is not enough to simply rely on individual lawyers who believe they have been inappropriately discharged.<sup>262</sup> The board, or a committee of the board, should require information as to the reasons for termination, resignation, or withdrawal of lawyers who have previously played significant roles in corporate matters and inquire into matters that raise particular concerns. While most of these changes are unlikely to be related to concerns over corporate integrity, as a matter of good governance, directors should take steps to satisfy themselves of the reason for the discharge or withdrawal.

Corporate managers do not operate under the kinds of rules of professional responsibility applicable to lawyers. Nevertheless, lawyers are instrumental in advising boards and legislatures on good governance practices, and courts are in a position to comment on the practices of organizations that come before them in the course of litigation. The ABA Task Force on Corporate Responsibility made great strides in identifying good governance practices already in place in many organizations but sorely needed in others. It is important to continue this work in both the legal and corporate arenas.

#### CONCLUSION

As Professor Hazard noted ten years ago, “[T]he role of corporate counsel is among the most complex and difficult of those functions performed by lawyers.”<sup>263</sup> This observation applies with particular force to general counsel, and, if anything, the role they play has become more complex during the past

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260. *Id.* Independent directors may have concerns about confidentiality vis-à-vis general counsel who report to CEOs, but it is incumbent upon general counsel to maintain the confidentiality of independent director meetings. Those who cannot do so should face termination. This is one of the necessary tensions inherent in the general counsel function. *See generally* Veasey & Di Guglielmo, *supra* note 8. *See also* DeMott, *supra* note 8, at 956–57; N.Y.C. BAR ASS’N TASK FORCE REPORT, *supra* note 257, at 480–81.

261. CORPORATE RESPONSIBILITY TASK FORCE REPORT, *supra* note 6, at 32, 70.

262. *See supra* text accompanying notes 206 & 221.

263. *See* Hazard, *Ethical Dilemmas*, *supra* note 8, at 1011.

decade.<sup>264</sup> It is critical for the profession to recognize that general counsel are pivotal players in the new ethical landscape. As a New York City Bar Task Force recently emphasized, “Strengthening the role of the General Counsel should be a high priority in efforts to promote compliance with laws, including the securities laws.”<sup>265</sup> Regulatory standards and ethical rules should empower general counsel to do their jobs and hold them accountable when they fail to meet their obligations.

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264. See DeMott, *supra* note 8, at 980 (noting the likelihood that the role of general counsel will continue to change over time); Veasey & Di Guglielmo, *supra* note 8, at 36 (observing that “[n]ot only lawyers but also directors and officers need to understand and appreciate the complexities and the ever-changing nature of the challenges faced by counsel for the corporation.”).

265. N.Y.C. BAR ASS’N TASK FORCE REPORT, *supra* note 257, at 480–81.