

RESOLVING THE PARTNER-GUARDIAN TENSION: THE KEY TO GENERAL
COUNSEL INDEPENDENCE

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TABLE OF CONTENTS

I. INTRODUCTION.....	150
II. LAWYER-STATESMAN.....	151
III. THE PARTNER-GUARDIAN DILEMMA.....	153
IV. THE FUSION.....	156
V. THE OBSTACLES.....	161
VI. THE GENERAL COUNSEL’S CHARACTER, REPUTATION AND IDENTITY.....	165
VII. PROTECTING OTHER INSIDE COUNSEL.....	168
VIII. ALLIANCE WITH OTHER STAFF FUNCTIONS.....	171
IX. THE BOARD OF DIRECTORS.....	172
X. THE CEO.....	177
XI. DEALING DIRECTLY WITH CEO RISK.....	179
<i>A. The Front End: Due Diligence.....</i>	179
<i>B. The Back-End Resignation.....</i>	181
XII. PROSPECTS.....	184

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I. INTRODUCTION

The practical ideal of the modern General Counsel is a lawyer-statesperson who is an outstanding technical expert, a wise counselor and effective leader and who has a major role assisting the corporation achieve the fundamental goal of global capitalism: the fusion of high performance with high integrity and sound risk management. For the lawyer-statesperson, the first question is: “Is it legal?” But the ultimate question is: “Is it right?”

This vision of the General Counsel has been a critical element of the inside counsel revolution which began in the late 1970s and which has increased in scope and power ever since. Working with the CEO and other senior executives, the GC must forge an unbreakable bond between performance, integrity and risk on a set of foundational corporate issues: business strategy, culture, compliance, ethics, risk, governance, citizenship and organization. In so doing, the GC must help create the trust in the enterprise which is so vital to its sustainability and durability: trust among employees, shareholders, creditors, customers, partners, suppliers, regulators, media, NGOs and the public. To carry out this challenging role with independence and vision, *the GC must resolve the most basic problem confronting inside lawyers: being partner to the board of directors, the CEO and business leaders but ultimately being guardian of the corporation.*

Over the past 30 plus years, the inside counsel revolution has increased in scope and power, transforming both business and law in two important ways. *Inside the corporation*, the General Counsel has often replaced the law firm senior partner as the primary counselor for the CEO and board of directors. The GC is now an essential member of the core management team. And the GC’s stature is now comparable to the Chief Financial Officer because the health of the corporation requires that it navigate complex and fast-changing law, regulation, litigation, public policy, politics, media and interest group pressures across the globe. *Outside the corporation*, the role of the General Counsel has also grown in importance with a significant shift in power from outside law firms to inside law departments over both matters and money. The General Counsel is also, increasingly, a public representative of the corporation in negotiating deals, leading on public policy and as representative to key stakeholders. As a result of both trends, the expertise, quality, breadth, power and compensation of the General Counsel and inside counsel have increased markedly.

II. LAWYER-STATESMAN¹

As noted, the inside counsel revolution is built on two aspirational but practical roles of the General Counsel and inside lawyers: lawyer-statesman and partner-guardian.

First, in assisting the corporation achieve its fundamental mission--the fusion of high performance with high integrity and sound risk management---the General Counsel as lawyer-statesman must engage in robust debate on all major corporate initiatives: about what are the “ends” of that action, not just about “the means” for carrying it out; about “purpose” not just “process;” about consequences, not just acts. The General Counsel is well positioned to introduce a dose of “constructive challenge” to such discussions about “what is right” on following the law; on key ethical duties; and on how, most broadly, the enterprise acts as a responsible corporate citizen.

To discharge this foundational responsibility, the General Counsel as lawyer statesperson must function, often simultaneously, in the three fundamental roles of a great lawyer: as technical expert, wise counselor and accountable leader.

As technical experts, inside lawyers must address the daunting challenge of determining “what is the law” the global corporation must follow in multiple jurisdictions, with varying enforcement practices, conflicting formal mandates and legal ambiguity. The inside lawyers must not only exercise sound judgment in determining within a reasonable range of discretion what “law” the corporation will follow. But they must also address strong pressures for corruption at the core of capitalism (e.g. bending the rules to make the numbers) and play a major role in deploying the systems, processes and resources necessary to ensure adherence to formal legal (and financial) rules.

In their role as experts on law, General Counsel and inside lawyers should call out and reject certain courses of action underlying numerous corporate scandals.

- It is wholly inappropriate to ignore the law and hope the corporation can get away with it, sometimes through bribes.
- It is wholly inappropriate to be Holmes’ “bad man” and decide whether to follow the law based on a cost-benefit calculation: do

¹ BEN W. HEINEMAN, JR., *THE INSIDE COUNSEL REVOLUTION: RESOLVING THE PARTNER-GUARDIAN TENSION* (2016), pp.23-53, 91-128.

the benefits of disobedience outweigh the costs of being caught?

- It is wholly inappropriate to look solely at the “face of the documents” and render a hyper-technical judgment on legality which not only is outside the range of reasonable discretion but also fails to ask hard questions about what is the real purpose of the legal arrangements and what are likely, or even possible, consequences.

General Counsels must accept the binding force of existing law---and not supinely follow improper business pressure---even though that law may be unwise or politically motivated. Leaving a country or seeking to change the law are acceptable courses of action in the face of a “bad” law. Ignoring it, weighing costs and benefits of non-compliance or interpreting away its impact through non-credible hyper-technicalities are not.

As wise counselor and leader, the General Counsel as lawyer-statesman must discharge four ethical responsibilities: to the corporation and its employees; to other stakeholders (from shareholders, partners and creditors to customers and suppliers); to the rule of law and the administration of justice; and to establishment of social goods necessary to a just and productive society which cannot be achieved through the market alone. Importantly, as counselor and leader, the GC as lawyer-statesman must possess not just “core” legal competencies but also “complementary” competencies beyond law that include (but are hardly limited to): asking “what ought to be” questions; having broad knowledge of competitors, competition and global markets; executing not just deciding; leading and building organizations; having financial and technical literacy; and, ultimately, being a great generalist to define---and solve---multi-dimensional problems properly.

Ultimately, the GC, working with the CEO and top business leaders, must be fiercely dedicated to creating and leading a uniform performance with integrity culture across the globe. Culture is the shared principles (the values, the policies and the attitudes) and the shared practices (the norms, systems and processes) that influence how people feel, think and behave, from the top of the corporation to the bottom. The General Counsel has a special, critical role in the multiple, interrelated steps---the articulation of the aspirations and the implementation of the actions---so necessary to an

authentic performance with integrity culture that binds together employees numbering in the tens of thousands or even hundreds of thousands. This involves such actions as clear articulation of policy; robust education and training; embedding integrity systems, processes and resources in business operations; giving employees voice; proper discipline for bad behavior; and proper incentives for good behavior.

III. THE PARTNER GUARDIAN DILEMMA

But to function effectively as a lawyer-statesperson, the General Counsel must assume a second aspirational position by meeting the greatest challenge for inside lawyers: reconciling the dual---and at times conflicting---roles of being both a partner to the business leaders and a guardian of the corporation's integrity and reputation. Successfully addressing this problem is essential if a company is to attain the fundamental goal of fusing high performance with high integrity and if the General Counsel is to act as technical expert, wise counselor and effective leader in realizing the broad lawyer-statesman ideal. *The inside counsel revolution is premised on resolution of the partner-guardian tension.*

General counsel have failed as guardians. In the 21st Century's first great wave of scandals, beginning with the collapse of Enron and WorldCom, the recurring question was, "where were the lawyers?", echoing a query from scandals past. In-house counsel were excluded from key decisions. They failed to ask probing questions about whether problematic actions were legal or appropriate. They passively rubber-stamped improper business decisions. But, compared to CFOs, they generally escaped formal sanctions. In a subsequent wave of investigations relating to options backdating, general counsel were, once again, squarely in the middle of corporate improprieties---and in the line of fire. Formal investigations, indictments, settlements, pleas, and convictions of inside lawyers resulted. In notable cases, both the GC of Apple and the GC of Google were sanctioned by the SEC. Moreover, in another high-profile U.S. corporate scandal, the General Counsel on numerous occasions "touched" the use of "pretexting" to investigate leaks from the board of directors at Hewlett-Packard (obtaining phone records of directors through subterfuge and misrepresentations). But she was incurious about probing the legality of the pretexting practice and indifferent to its ethical propriety, even though the practice was fraudulent on its face. Insecure about her position, she was over-eager to please the board chair who

was intent upon finding leakers. The GC was ultimately forced to invoke the Fifth Amendment at a Congressional hearing and to resign, although, unlike another HP law department colleague, she avoided indictment.²

The Enron debacle, the back-dating scandal and the Hewlett-Packard “pretexting” case are just part of a parade of horrors where inside lawyers, in their eagerness to “partner” with business leaders, failed utterly in their responsibilities as guardians. The Siemens and Wal-Mart bribery scandals and the failure of GM to remedy a dangerous ignition switch defect for years are other examples where General Counsel and inside lawyers in their eagerness to appease business leaders failed miserably as guardians with great damage to their corporations. In fact, there are a rising number of instances where General Counsel and inside lawyers have been found culpable in criminal investigations, in SEC inquiries, in other enforcement actions and in private civil actions because, in essence, they were supine in the face of business pressure or complicit in improper acts, failing, for example, to report problems up, to make adequate disclosure or to act honestly in litigation.³

In the view of some commentators, exemplified by Professor John Coffee in his recent book, *Gatekeepers: The Professions and Corporate Governance*, General Counsel and other inside lawyers will inevitably fail. While well placed to play a broad guardian role, they simply lack “independence,” because they are subject to “pressure and reprisals” from business leaders. Too often, Coffee contends, they also lack a strong reputation outside of the company to

² Sue Reisinger, *Did Ann Baskins See No Evil at HP?*, CORPORATE COUNSEL (2006); See, e.g., *In the Matter of Google, Inc. and David C. Drummond*, Admin. Proc. Rel. No. 33-8523 <http://www.sec.gov/litigation/admin/33-8523.htm> (January 13, 2005); *Securities and Exchange Commission v. Nancy R. Heinen*, Case No. C-07-2214 (JF) (N.D. Cal.) <http://www.sec.gov/litigation/litreleases/2008/lr20683.htm> (August 14, 2008); Sung Hui Kim, “Gatekeepers Inside Out,” 21 GEO. J. LEGAL ETHICS 411, 413 (2008) (resignations of general counsel due to back-dating issues).

³ See generally JOHN K. VILLA, CORPORATE COUNSEL GUIDELINES Section 6:18 (Thomson Reuters 2014); E. NORMAN VEASEY & CHRISTINE T. DI GUGLIELMO, INDISPENSABLE COUNSEL: THE CHIEF LEGAL OFFICER IN THE NEW REALITY (Oxford Univ. Press 2012); Jonathan C. Dickey and Jeffrey E. Minnery, *Trends in Claims Against Lawyers*, in 4 SECURITIES LITIGATION 2 REPORT (Feb. 2007); ASSOCIATION OF CORPORATE COUNSEL, IN-HOUSE COUNSEL IN THE LIABILITY CROSS-HAIRS (Sept. 2007) www.acc.com/vl/public/Article/upload/ACCReportsInHouseCounselintheLiabilityCrosshairs.pdf; See also Sue Reisinger, *In-house Lawyers, Compliance Officers Cited in BNP Deal*, CORPORATE COUNSEL (2014) (“Yet another corporate investigation...cites lax in-house lawyers and compliance officers for allowing the company to commit criminal acts.”); Marjorie J. Pearce, Charles Stillman, & Elizabeth J. Lee, *Criminal Prosecution of In-House Counsel and Compliance*, CORPORATE COUNSEL (2015).

give them power to stand up to the CEO. To critics, the unceasing stream of major corporate scandals demonstrates that inside lawyers will inevitably be weak and compromised.⁴

By contrast, the New York City Bar Association “Report of the Task Force on the Lawyer’s Role in Corporate Governance,” issued in November, 2006, states that “the role of the general counsel of a public company is central to an effective system of corporate governance.” (Disclosure: I was one of many people interviewed and cited by the Task Force.). The Task Force used corporate scandals, not to argue that General Counsel were always compromised, but rather to argue that these events demonstrated the need for strong internal disciplines and for a strong General Counsel to help integrate them into business operations. Similarly, the former Chief Justice of the Delaware Supreme Court, in a recent book, has argued powerfully for the General Counsel’s essential role as a guardian of a corporation’s integrity, endorsing the partner-guardian formulation I have long advanced. These are among the many voices maintaining that a strong guardian role for the General Counsel is both desirable and feasible.⁵

I do not believe that the choice for general counsel and inside lawyers is to go native as a yea-sayer for the business side and be legally or ethically compromised, or to be an inveterate naysayer excluded from key discussions and decisions and from other core corporate activity. Indeed, I think being both an effective partner of business leaders and respected guardian of the corporation is critical to the performance of each role. I deeply believe that this fusion is possible. But, for this to occur, very real obstacles must be overcome and certain key conditions inside the company must exist.

On my discussion of the practical lawyer-statesman ideal, I will discuss in more detail below the affirmative fusion of the partner and guardian roles; enumerate the key

⁴ See, e.g., JOHN C. COFFEE, JR., *GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE* 195 (Oxford Univ. Press 2006); Deborah A. DeMott, *The Discreet Roles of General Counsel*, 74 *FORDHAM L. REV.* 955, 967 (2006); Sarah Kellogg, *Financial Crisis 2008: Where Were the Lawyers*, *WASHINGTON LAWYER* (Jan. 2010).

⁵ Ben W. Heineman, Jr., *How GCs Can Avoid Being Caught in The Middle*, *CORPORATE COUNSEL* (2007); The Association of the Bar of the City of New York, *Report of the Task Force on the Lawyer’s Role in Corporate Governance*, *NEW YORK CITY BAR* (2006); Sarah Helene Duggin, *The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility*, 51 *ST. LOUIS U. L.J.* 989 (2007); Omari Scott Simmons and James D. Dinnage, *Inkeepers: A Unifying Theory of the Inside Counsel Role*, 41 *SETON HALL L. REV.* 77 (2011); Kim, *supra* note 2; Lawrence A. Hamermesh, *Who Let You into the House?*, 2012 *WIS. L. REV.*, 359 (2011); Christine Bader, *Corporate Lawyers Can Be More Than Naysayers-in-Chief*, *THE ATLANTIC* (May 8, 2015).

obstacles blocking integration of those roles; outline a number of different ways in which those obstacles can be overcome; and reserve for the end a discussion of the most important obstacle/solution—the General Counsel’s relationship with the CEO. This relationship is best understood when all other aspects of the analysis are on the table.

For purposes of this discussion, I posit that the General Counsel should be a direct report to the CEO, as is the normal case in the United States. But, in Europe and other parts of the world, that direction relationship may not exist, with the chief legal officer reporting to the Chief Financial Officer or to some business leader under the CEO due to a cramped view of inside lawyers. I also believe that General Counsels should have a direct, unfettered relationship with the board of directors, as, again, is often the case in the U.S.

IV. THE FUSION

In the optimal situation, the CEO and board of directors *explicitly authorize* the GC to act as both partner and guardian energetically and seamlessly to help create value, protect integrity and manage risk. The CEO and board will seek a GC who can act on a broad array of issues of priority concern to the corporation. To effect the vital partner-guardian fusion, *the CEO and the board should ensure that the following conditions exist.*

As partner-guardian, the General Counsel must have a *broad scope of responsibilities* to address the myriad business and society issues facing modern corporations. The means involvement, at the highest levels of the corporation as expert, counselor and leader in business, law, ethics, reputation, communications, risk, public policy, governance and corporate citizenship.

As partner-guardian, the General Counsel must have a *deep and broad understanding of the corporation’s business activities in the context of the broader geopolitical environment* so that their role as expert, counselor and leader occurs in the most sophisticated, multi-faceted context. The lawyers need to understand all aspects of a corporation’s competitive and technological posture. As described by one thoughtful commentator, this business knowledge encompasses the five factors Michael Porter, noted

Harvard Business School Professor, has said are essential to commercial success: “buyer power, supplier power, the current threat posed by current rivals and the availability of substitutes, and the threat of new entrants.” The inside lawyers need to be financially literate on general issues of accounting. They need to be fluent in the company’s own language of financial terms and acronyms used in every aspect of business from investor pitches to the “Management Discussion and Analysis” (MD&A) in the Annual Report to the company’s method for analyzing deals to ways of evaluating resource allocation and capital expenditures. Increasingly, CEOs and boards of directors are seeking business knowledge and acumen in the corporation’s General Counsel and its leading lawyers (indeed among all lawyers). Simply stated, in addition to law, ethics and public policy, they want the lawyers to be savvy about finance, technology, products, markets, geographies, competitors and other major non-legal factors which affect business opportunities and risk.⁶

As partner-guardian and as a senior officer of the corporation, the General Counsel should be *fully informed about high level and high priority issues facing the company both in the near term and in the longer term*. The General Counsel should be a regular attendee at the key business meetings that occur on a regular rhythm at the CEO level : annual strategic reviews of core business units; annual budget reviews; regular (often quarterly) updates with senior business leaders; and the frequent meetings of the top officials at corporate headquarters, often with the title executive committee, to review top company priorities, She should also be involved in preparing the CEO’s major presentations to analysts and investors. She should participate in top of the company decision meetings on all major issues, including vital “early warning” sessions which systematically seek to anticipate a wide variety of risks and opportunities. And, she should (as is the normal practice in U.S. companies) attend all board and board committee meetings (with the possible exception of the management development and compensation committee). Attendance at all these core corporate meetings may not be possible given the General Counsel’s own leadership responsibilities. But the CEO’s standing invitation to those meetings should be immutable.

In *planning and decision meetings* with the CEO and top business leaders, *the General Counsel may function **both** as a lawyer and as a business person in being a partner*. As a lawyer, the GC is being a “partner”

⁶ CONSTANCE E. BAGLEY, WINNING LEGALLY: HOW TO USE THE LAW TO CREATE VALUE, MARSHALL RESOURCES AND MANAGE RISK 8-10, 223-45 (Harvard Business School Press 2005); Charles H. Veigel, *The Chief Opportunity Counsel—How to Increase Your Value Through Participation in Strategic Business Conversations*, ACC DOCKET 30 (July-Aug. 2014) (“Confirmed by a recent survey of general counsel and boards of directors, strategic input is an area of increasing value for the 21st century general counsel....”).

in finding effective, lawful ways to achieve legitimate corporate goals. In this legal capacity, the General Counsel has an important perspective on almost any major corporate strategy decision or any important operating decision: from acquisitions/dispositions to new products to new geographies to hard personnel decisions to major changes in company contracting to the host of legislative, regulatory and litigation questions facing the company. In carrying out this fundamental task of giving legal advice, as I have emphasized, the General Counsel must argue, at a minimum, for following the letter of the law under a reasonable (not strained, narrow or hyper-technical) reading of the relevant formal rules. *This legal role at decision meetings of insisting on following the law is the absolute core---which must never be compromised---of being General Counsel.*

But, as a smart, informed generalist, the General Counsel can also be a “partner” by bringing to the table other “wise counselor” perspectives---from “spirit of the law” and ethical and reputational issues to broader corporate strategy and business issues (e.g. identification of risk, assessment of counter-party motives, helping define the key trade-offs in the deal terms of major transactions). The GC must know when she is crossing over from being a lawyer proffering legal advice to a broader business counseling role, giving up the attorney-client privilege and making her comments subject to private discovery or government inquiry. And she must provide clear guidance and demarcate clear safeguards so that all inside lawyers can distinguish when they are serving as legal experts giving legal advice and when acting as business counsellors providing broader strategic advice. At “decision” meetings, all participants, except for the CEO, come with their unique perspectives (finance, HR, manufacturing, head of a business unit), but all, including the General Counsel, should try to advance discussion and debate by offering productive ideas as wise senior company leaders, beyond their expertise as heads of staff functions or business units. These broader perspectives help the CEO make a decision that integrates all relevant factors. In my experience, the CEO and other executives were very receptive to counsel participating in core business discussions, not just as “experts” but as “counselors,” if the lawyers were knowledgeable about the broad business context and constructive about broad business issues.

As partner-guardian, the General Counsel and inside lawyers obviously *play a vital role in implementing major strategic and operational objectives that create value and competitive advantage*. These include such issues as doing outstanding due diligence, negotiating the legal terms of key deals, simplifying contracts of general application, working on product development teams, reducing legal outside legal costs, achieving public

policy objectives. Indeed, virtually every legal area in the corporation creates values and is vital to commercial performance. The tax function reduces the corporate tax rate to the legally appropriate minimum. The IP function protects and defends core technology assets. The labor and employment function participates as a full member of the team negotiating labor agreements or addressing HR initiatives. Antitrust counsel obtains clearance across multiple jurisdictions in large transnational deals. International counsel helps global operating units navigate the shoals of conflicting commercial laws in numerous countries. Litigation counsel defends the company (or settles cases) in high profile matters---and may bring suits on the company's behalf. Environmental, health and safety leaders can improve business processes by helping to introduce safety and quality that reduce costs and avoid expensive problems. This litany is virtually if each one of the company's value creating activities. Moreover, there may be instances where the General Counsel and inside counsel play a business role in implementation, such as acting as a business, not just legal, negotiator on major cross-border transactions or representing the company in meetings with customers or licensees or suppliers or governments on a broad range of company issues. There is little question that General Counsel and inside lawyers who "can get things done" ---either in a legal or business capacity-- to implement company performance goals in a legal and ethical way are able to develop great credibility with the board, the CEO and other senior executives.

The General Counsel as expert, counselor and leader has *a vital job as guardian in devising and then implementing measures to protect the corporation's integrity and manage its risk. The guardian role is front and center in all the corporate settings described above: strategy and budget meetings, decision meetings and implementation efforts. But it also involves a host of specific tasks which must be integrated into business processes.* This GC guardian role encompasses such issues as compliance, ethics, risk, public policy, governance and corporate citizenship, each of which require detailed discussion not possible in this article. It involves raising hard, uncomfortable issues. It involves, further, being a systems and process leader. The point here is that the General Counsel must have a lead role in addressing these issues on an *ad hoc* basis *but also* in ensuring that they are systematically addressed and solidly integrated into business processes which are owned by business leaders. Again, the trust built up by the General Counsel and inside lawyers as partners on performance decisions and on company execution give them great credibility in working with executives to address integrity issues and integrate them into business processes.

In all these activities, the General Counsel as partner-guardian, along

with the CEO and other senior officers, *needs to define the framework of appropriate internal governance and the proper approach to checks and balances in all aspects of corporate decision-making and corporate action.* The values of speed and efficiency are important for corporations operating in a highly competitive world. But these values must co-exist beside the need to ask and answer important questions---to integrate checks and balances into corporate activities---and to find the right balance between creativity/innovation and risk assessment/risk mitigation. Addressing this issue head on is an important aspect of the partner-guardian role---working with the CEO and senior leaders to develop a system of checks and balances across multiple areas of corporate activity that are neither too confining nor too lax but are, in the context of the business and environment in which it operates, just right.

A leading commentator has summarized the partner-guardian fusion: “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.’”⁷

V. THE OBSTACLES

But there are many potential obstacles inside corporations which might undercut a seamless partner-guardian fusion for the General Counsel and other inside lawyers. These obstacles can also apply to other senior staff leaders in finance, HR, compliance and risk who have important guardian as well as partnering responsibilities.

- Lack of understanding about law and policy among business people. Given possible limitations in their education and experience, business executives may understand neither how law works nor all the ways lawyers can create value and protect the corporation. A lack of vision about the potential contribution of lawyers can bar adoption of a partner-guardian role.
- Negative attitudes about lawyers at the top of the Corporation. The CEO and senior executives may hold many outdated, even antediluvian, negative clichés about lawyers. Lawyers are risk-averse. Lawyers are just a cost center. Lawyers are “Doctor No’s”

⁷ 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).

who are incapable of being constructive. Lawyers will never understand business. Lawyers, in short, are a barely necessary evil.

Not surprisingly, if the senior business team has these negative attitudes or if bad lawyer behavior has created such attitudes, then many or all of the key elements of partner-guardian fusion may be hard to achieve for the General Counsel and other senior lawyers. Narrow scope, limited information, no presence and role at key decision meetings, no involvement in key operational issues, no clout in seeking to advance the integrity of the company.

- Negative attitudes about lawyers in middle-management. Even if top management has a positive view of the General Counsel and senior lawyers as partner-guardians, middle management may still have negative attitudes towards the inside lawyers working for them in their smaller profit and loss centers in difficult environments across the globe. These P&L leaders are often under harsh pressure to make their numbers. The combination of negative attitudes and unrelenting performance pressure can subject field lawyers to a very pinched, technical role divorced from the business and can lead to limited influence and impact. They may face overbearing and critical reactions in the field when they attempt to raise integrity issues or issues involving other types of risk. This problem is accentuated when lawyers are serving in remote places in foreign nations (e.g. rural Indonesia or India or China), with attenuated links to (or attention from) higher level corporate or business unit leaders.
- Negative group pressures in decision meetings. Even if attitudes towards lawyers may be positive, the group dynamic in tense business meetings may shut lawyers down or frighten them into silence. CEOs are often impatient and want to make decisions, even big ones, swiftly. Other direct reports may routinely support the CEO for a combination of business or political reasons. In these situations, it can be very hard for the General Counsel (or other inside counsel) to raise fact questions, try to get more time for decision, raise broader considerations or actually debate a group of senior executives aligned against the GC. (Only half-jokingly, I often urged GE lawyers periodically to watch the 1957 film, “Twelve Angry Men,” where a lone juror, Henry Fonda, resists group pressure to convict and ultimately sways the jury to acquit in a murder case.)

- General group pressures of working inside a corporation. There is a risk that lawyers' independence will be compromised by their conscious or unconscious socialization into the business organization which may have a set of values more oriented towards performance than integrity. In particular, if companies are focused on short-term maximization of shareholder value, then lawyers may internalize this viewpoint at the expense of other non-financial or long-term performance, integrity or risk perspectives. Obviously, it is highly desirable for inside counsel to be integrated into the business organization but not at the price of compromising their independent point of view. This problem of a powerful group ethos can be a special problem in societies which value deference to authority.
- Problems of working for a single client. Unlike lawyers in private law firms who often work for many clients, the General Counsel works for a single client. Some argue that this fact, combined with pressures to conform, can lead to a pinched view of the world when seen through the lense of a single product or single industry. The single client focus can thus impact the independence and broad view of "what is right" so necessary in a General Counsel.
- Conflict between advising the CEO as business leader and advising the board as representatives of the company as a whole. It is, of course, fundamental that the General Counsel represents the corporation, not the CEO or any particular individual the company employs. The board as a whole is viewed as representing the company, and when the General Counsel advises them in their collective capacity (not particular directors in their individual capacity), she is advising the company. Potential conflicts between the board and the CEO pose an obvious problem because the General Counsel works day-to-day with the CEO but owes ultimate responsibility to the company as embodied in the board of directors. For example, the CEO may zealously advocate an acquisition in an emerging market, but not completely describe the legal and reputational risks which the GC thinks the board should understand.
- Lack of lawyer training/over-specialization. Lawyers employed in corporations may not have had broad education and training in the different roles of expert, counselor and leader or in the "complementary competencies" so essential to being an effective

inside lawyer-statesman and partner-guardian. This lack of appropriate education and training can result from the continuing narrowness of most legal education and the continuing failure of law firms and corporations to understand the roles of contemporary lawyers and prepare them properly, e.g., for cross-functional, global or management roles. It can also result from the pressures in the legal profession to specialize and thus to have only a narrow, very technical perspective on the world. Specialists, in particular, may not be skilled at asking a generalist's broader, more probing questions about business issues because their energy and experience has been spent mastering a narrow-- extremely narrow??--domain.

- Fear of being fired by CEO as at will employee. In the United States, many General Counsel do not have employment contracts. They are hired by the CEO and report directly to her. They serve at will, like all other inside counsel. The fear of the “death sentence” reprisal—being irrationally or unfairly fired-- is another potential obstacle to providing the necessary broad, wise and independent advice in the fusion of the partner and guardian roles. This fear may also be a serious constraint on an important related trait: a willingness to question, challenge or disagree with the CEO on critical issues of performance or integrity or risk. General Counsel cannot do their job if they operate under the constant fear of the CEO firing her *without* cause.
- Fear of financial benefits loss, possible demotion or lack of promotion. General Counsel earn a wide variety of financial benefits: salary, bonus, stock options, restricted stock units, deferred compensation, long term incentives. They also have the expectation that these benefits will be constantly refreshed—and often increase—over time. Obviously, the A-Bomb of being fired creates one type of fear, but there is the related fear of tactical nukes: losing earned benefits that have not vested and losing the chance to earn additional benefits in the future. The amount of earned benefits can be in the millions or tens of millions of dollars, as can additional future benefits. Fear of losing these benefits is another potential restraint on the GC or inside counsel's willingness or ability to act as uninhibited partner-guardian. Getting cross-ways with the CEO can also lead to a GC demotion, either explicitly or implicitly--- by having responsibilities diminished or access to key meetings limited. These harms of

being fired, demoted or denied financial benefits are also a risk for all other senior lawyers if their relationship sours with the CEO or with relevant executives.

- Fear of injury to reputation. A General Counsel who has a fight with the CEO also risks reputational damage with both internal and external constituencies to whom the CEO may speak. A reputational war with the CEO is a nightmare. The General Counsel may be constrained by the attorney-client privilege and, even if able to discuss failings of the CEO, the GC is likely to be diminished in a public wrestling match. Such fears of conflict with the CEO may cause inside counsel to speak softly and carry a small stick.
- Potential conflict of interest about personal compensation. In contrast to the inside lawyers' fear of being fired or having his benefits otherwise reduced is the risk that the lawyers will not provide their best judgment on issues because they want to increase their compensation. Whether it is salary increases, more stock options, increasing the value of the company stock or quest for other financial benefits, General Counsel and other inside lawyers may support business steps which skirt the law or are not "right" in order to stimulate questionable "performance" that increases their compensation at the expense of "integrity." Worse, such financial incentives may prompt them to engage directly in corrupt acts.

I have purposely painted a bleak picture of factors that can seriously undermine the General Counsel's ability to resolve the partner-guardian tension. All these obstacles to a constructive and seamless fusion of the partner-guardian roles can exist in complex organizations. In all human endeavors and relationships, the worst case is always possible---and a CEO-General engagement that starts out with sweetness and light can always turn sour and dark. There is, of course, no guarantee that a General Counsel and inside lawyers will successfully fuse the partner-guardian roles. No matter what we write or say in books, articles, company codes, employment commitments, corporate guidelines, CEO speeches or job interviews, there is an inevitable contingency—or even tragedy-- in human affairs.

But, given all the *external factors* that have led to the General Counsel's rise in stature, power and prestige, I believe that the "horribles" I have described here, while possible, are not likely to occur in most modern, major global corporations. Among other things, the striking increase in the importance of "business in society" issues demands a GC

partner who can help navigate, as a corporate guardian the shoals across the world of changing legislation, regulation, government investigations, enforcement, civil litigation, stakeholder demands, NGO critiques and media attention. *Thus, the board of director, CEO and business leader impetus for hiring a General Counsel who is a big player and for fusing the partner-guardian roles is driven by the realities of the marketplace and society, not just the power of a conceptual ideal.* In the rest of this chapter, I describe specific, additional *internal conditions* necessary to increase the chances that the partner-guardian tension can be resolved. But, if it cannot, the General Counsel must be prepared to resign and give up unvested financial benefits.

VI. THE GENERAL COUNSEL'S CHARACTER, REPUTATION AND IDENTITY

General Counsel success as a partner and guardian begins with certain key *character traits* beyond the core legal and complementary competencies which are fundamental to roles of technical expert, wise counselor and effective leader. One could offer a laundry list of General Counsel "virtues" but, in my experience, four are vital.⁸

First, the General Counsel must have a strong sense of *independence*. This entails exercising and expressing judgments in the corporation's best interest independent of relations with the CEO, or connections to other senior executives or the General Counsel's own personal interests, especially financial interests. More affirmatively, it means an unbending insistence that the actions of the corporation comply with a fair interpretation of the law. It means an unyielding insistence on putting the "is it right" question front and center in all decisions and actions. It means an unflagging devotion to inculcating the corporate values of honesty, fairness, candor, trustworthiness and reliability in all corporate employees.

Second, the General Counsel must have the *courage* to speak out, even in pressured situations and even when she may be a lone voice in a group of powerful people. Courage is often required when the general counsel has to resist giving the quick, simplistic answer which executives often demanded in fast-moving, complex situations. CEOs are often in a hurry. They may bridle at allowing time for needed legal analysis. They may not have the patience to listen to a nuanced presentation on the various risks involved and the

⁸ For discussion of desirable traits in legal leaders, see ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (Harvard Univ. Press 1995); DEBORAH L. RHODE & AMANDA K. PACKEL, *LEADERSHIP: LAW, POLICY AND MANAGEMENT* (Wolters Kluwer, 2011); Ben W. Heineman, *Law and Leadership*, 56 J. LEGAL EDUC. 596 (2006).

various options available. Moreover, some of the toughest problems come in the form of crisis management, not stately strategic decision making. The courage to stand in front of the tank is essential.

Third, however much they need to be independent and courageous, General Counsels must have *tact* in contributing their views, must act in a constructive manner that is firm but not offensive. General Counsel and other inside lawyers must live by the cliché of being able to disagree without being disagreeable. This is not easy when confronted by powerful executives who may be angry and aggressive, especially at those, like GCs, who do not readily kowtow. Effectively saying “no” or “wait” depends on place (in the meeting or afterwards), form (offering other options is key) and style (when to duke it out or just make the point, without arguing it, and hope the CEO hears). Without question, knowing when, as well as how, to express independent perspectives and judgments is an invaluable trait.

The General Counsel must also have *credibility and trust* so that her business superiors and peers believe that, although they may disagree, they appreciate that the General Counsel is trying to do the right thing for the corporation (and for them). This credibility, of course, comes from their experience with the GC, with the GC’s effectiveness on both performance and integrity issues. A new GC, without a record, faces special difficulties if immediately faced with hard issues and a skeptical (hostile?) CEO and group of senior executives. Credibility and trust also stem from the skill to listen carefully and to communicate, both verbally and in writing, with clarity and conciseness: the ability to get to the essence of the matter, to pose issues in a crystalline way, to explain trade-offs succinctly, to speak with confidence and authority (but not with arrogance). Most importantly, when more facts and analysis are truly needed before a decision, GCs need to engender CEO trust so that they can explain in a compelling, not overly complicated or academic, way why this is so, without being seen as just “bottle-necking” or “ass-covering.”

In addition to these character traits, the *professional reputation* of the General Counsel *outside* the company enhances her capacity to function as partner-guardian *inside* the corporation. A person who has occupied a position of prominence prior to corporate service brings such a reputation---a former Attorney General or Deputy Attorney General, a former federal appellate or district court judge, the counsel to the President or Vice President, a leading partner in a leading law

firm. But an inside lawyer may also develop such a reputation by her prominence in bar activities, by being a national spokesperson on their particular issue (litigation, tax, trade, labor and employment), by representing the company in major business association matters, by teaching or writing, or by *distinguished service as inside counsel in another company*. A strong professional reputation also helps the GC serve as a true “institutional intermediary” to external parties like investors or creditors or regulators and to vouch for the integrity of corporate representations and actions – a function which in turn can enhance the role of the General Counsel inside a properly led company. Such an institutional intermediary is acting as lawyer for the corporation, in the broadest sense, seeking to do what is right in the company’s enlightened self-interest. This depends on a person being trusted by outsiders to give a balanced, honest view of facts or law or policy position, not a skewed one that, in the language of the street, was simply “bought.” A sterling external reputation can thus be an important complement to the key traits of independence, courage, tact and trust for a true partner-guardian role inside the corporation.

Finally, in addition to character and professional reputation, the General Counsel *needs to be explicit with her peers and her superiors about the core identity as partner-guardian* that she and other lawyers aspire to assume inside the corporation. The GC should not shy away from articulating her vision of her role in the company. This starts with underscoring the corporation’s goals of high performance with high integrity. It entails expressly discussing and implementing with senior executives the conditions of the authentic partner-guardian fusion set forth above, including scope of responsibilities, the integration in the business culture, having access to information, participating in business decisions and helping a corporation in executing on its key objectives. The General Counsel must believe in this partner-guardian identity to her core and seek explicit consensus about it at the highest levels of the company.

A General Counsel may have the essential character, reputation and identity I have just described. To function as a true partner-guardian, she must, in addition, forge working alliances with other main actors in the enterprise: the members of the legal department, senior corporate leaders, the board of directors and, of course, the CEO.

VII. PROTECTING OTHER INSIDE COUNSEL

The partner-guardian imperative applies to all the lawyers in the corporation, not just to the General Counsel. Whether hired from firms, recruited from government or promoted from within, the company's lawyers---from lead specialists and division counsel to line lawyers across the globe---gain credibility for the legal function as a whole by being strong business partners. They also, of course, must serve as guardians in their direct dealings with peer business leaders at all levels of the enterprises, especially in the heat of battle.

To protect inside lawyers and to buttress their ability to function as partner-guardians for the company, not just for their particular business unit, the General Counsel must establish a living, breathing legal organization "protocol" under which division general counsel and other inside lawyers report their "concerns" about important commercial, legal, ethical, risk and reputational issues directly up the line. In a decentralized legal organization, business lawyers work directly for business leaders. But even in a centralized legal organization where all lawyers technically report to the General Counsel, lawyers may be "embedded" in the line businesses and have strong relationships with the operating people in that business. Having direct, working relationships with business leaders is vital. But, regardless of whether they work in a decentralized or centralized legal organization, senior lawyers, reporting directly to the General Counsel (on either a direct line or dotted line basis), must also raise promptly with the GC any concern with major implications for a major division or for the company as a whole. The GC must also make clear that line lawyers should report to the General Counsel immediately if they are not receiving adequate attention in their business units. Formal governmental or ethical requirements to "report up" are important but narrower mandates. For example, Sarbanes-Oxley requires certain inside lawyers (those representing the issuer before the Securities and Exchange Commission) to report threatened or actual material violations of relevant securities law or of fiduciary duties directly to the general counsel. The Model Rules of Professional Conduct (adopted, with variations, in many States) require, among other things, that inside lawyers refer a legal violation inside the corporation to "higher authority,"

including the General Counsel.⁹ This is well and good.

But the protocol for “up-the-line reporting” in the legal organization, which I consider a best practice (and which we sought to institute at GE), is far broader. It involves “concerns,” not just the likelihood of material violations under the securities law or actual violations under the Model Rules. The threshold for “reporting up” is thus much less strict; it should involve all lawyers across the globe, not just U.S. lawyers appearing and practicing before the SEC or operating under professional codes enacted by the States; and those concerns should not just be legal issues but a broad array of issues that deserve analysis and discussion because they can significantly impact the health of the corporation in such areas as ethics or country risk or serious personnel issues. The reporting should be both to senior lawyers or the GC directly *and* to the company ombuds system (where broad concerns are formally docketed, staffed, followed and closed out as discussed below). I periodically sent an email to *all lawyers* in GE saying that, if they had an issue of concern and were not getting an appropriate response from their business unit or from the ombuds system or from their senior lawyers, they should send an email directly to me describing the problem. They should mark it “urgent.” Or they should pick up the phone and call me directly. The purpose of this broad “reporting up” protocol was to make absolutely clear that inside counsel, while seeking to be partners to their business leaders, should also be a check on a variety of sensitive issues facing the company. In the four corners of the globe, often far away from the headquarters legal group, they also needed support to be guardians, sometimes lonely ones at that.

The General Counsel must earn the trust of the division General Counsel to make this reporting structure work (and the division counsel must earn the trust of the line lawyers). The GC must truly be available to senior inside counsel—to listen, to ask

⁹ 17 CFR 205; ABA Model Rules of Professional Conduct, Rule 1.13. Understanding and interpreting the technicalities of these rules is complex—what lawyers are covered, what kinds of offenses, what are the triggering standards for reporting up, what are the varying responsibilities of the reporting lawyer, the general counsel and the board. Inside lawyers---and GCs---must take great care in trying to follow these rules, the interpretation of which are not within the purpose or scope of this article. *See, e.g.,* The Association of the Bar of the City of New York, *Report of the Task Force on the Lawyer’s Role in Corporate Governance*, NEW YORK CITY BAR ASSOCIATION 70-94 (2006); LAWRENCE J. FOX & SUSAN R. MARTYN, *THE ETHICS OF REPRESENTING ORGANIZATIONS; LEGAL FICTIONS FOR CLIENTS* (Oxford Univ. Press 2009); Duggin, *supra*, note 5, at 1023-31.

questions, to test ideas, to suggest possible actions, but *not* to assert immediate control over the matter, *not* to substitute his judgment, *not* to run to the CEO and burn the division counsel with division leader. If, in the GC's judgment, the issue is significant and the company CEO should know immediately about a matter, then the GC should allow a very short period of time for the division business counsel and the business leader to bring it forward themselves to company headquarters and top company management. Failing that, the GC must go directly to the CEO. Such sensitive matters often must be managed jointly by "corporate" and "the business" because of the serious company-wide implications.

In return for that trust from the GC, division counsel and line lawyers must, in good faith, follow the protocol and report serious issues up to the GC. These attorneys cannot hoard sensitive information, or overzealously guard their relationship with their business leaders. They should err on the side of disclosure under a broad "significant concern" standard. They cannot become "homers" or "go native." In my view, repeated failure of division counsel to discharge this broad (if judgmental) reporting obligation to the General Counsel is a firing offense (we never had to fire anyone for this at GE). An occasional if not constant failure is cause for a compensation hit (this did happen at GE).

Of course, the protocol for reporting up and down the legal organization is made possible not just by a shared ethos but by the power of the General Counsel over the promotion and compensation of both senior lawyers and line lawyers, whether direct reports or dotted line reports, whether in a centralized or decentralized law department.

In sum, the General Counsel is ultimately responsible for reconciling the partner-guardian tension throughout the legal organization. In nearly 20 years of hiring senior lawyers at GE, a critical issue for me was whether they could work well with the business leaders as partners. But just as critical was the issue of whether I could also trust them to communicate honestly with me, and never forget that the good of the company—not the "good" of their business unit nor their business leader—was their ultimate concern as partner-guardians.

VIII. ALLIANCE WITH OTHER STAFF FUNCTIONS

The Finance, Human Resources, Compliance and Risk functions inside corporations have partner-guardian responsibilities which are analogous to those of the Legal Department. They need the same involvement in the core activities of the corporation, and they face the same obstacles in attempting to fuse the partner and guardian roles. The heads of Finance, HR, Compliance and Risk must be strong, independent actors in the web of shared corporate power and authority. They need similar character traits as I urge for the GC, a similar strength of reputation and a similar strong sense of identity as both a partner and a guardian.

Legal, Finance, HR, Compliance and Risk are essential elements of the company's nervous system. They connect, and signal to, all extremities of the corporate corpus. If they can act in alliance and support each other, the chances are greatly enhanced that these separate staff's functions can overcome the obstacles to the partner-guardian fusion each faces alone. This is especially so when there is close cooperation between the General Counsel and the Chief Financial Officer. Recall that I have defined the first element of corporate integrity as adherence to the spirit and letter of formal rules legal *and* financial. The integrity of a company has as its foundation *both* the accuracy of its financials and its compliance with law. The fundamental compliance activity is heavily dependent on the GC and the CFO. Both must be deeply committed to performance, but in the right way. *Close collaboration and cooperation—and ideally close friendship---among these staff leaders is a critical aspect of real, effective corporate governance that has not received enough attention.*¹⁰ But there always a risk that the occupants of these critical positions—Legal, Finance, Compliance, Risk and HR--- will be courtiers of the King, subservient to CEO whims.

It is hard to overstate the importance of these core staff leaders and the people all across their functions viewing their ultimate responsibilities within the same performance, integrity and risk frame. They may, of course, not agree on specifics, but the deep commitment to broad corporate citizenship will have an incalculable effect on the framing of the myriad discrete issues that hurtle at corporate leadership at speeds from fast to warp.

¹⁰ Ben W. Heineman, Jr., *How the CFO and the General Counsel Can Partner More Effectively*, HARV. BUS. REV. (2016).

IX. THE BOARD OF DIRECTORS

In their oversight of the corporation, the board of directors must make clear both internally and externally that the fundamental mission of the corporation is the fusion of high performance with high integrity. Although many boards believe in the centrality of integrity, not enough articulate it forcefully and clearly. Opportunities to do so exist in the director-authored compensation section of the Proxy Statement where integrity may often appear as an afterthought in the justifications for CEO pay. More importantly, in keeping with this mission, the directors need to make integrity an essential element of executive training and an explicit, fundamental specification when carrying out their most important job, choosing the CEO. As part of that specification, the board needs to clearly articulate, for the company and for external constituencies, that it seeks a CEO who believes in the partner-guardian vision for senior executives, especially the Chief Financial Officer, the General Counsel and the head of Human Resources. Again, very few boards of directors actually do this, even though they may believe it. But, beyond these broad actions, there are discrete aspects of the board relationship which bear directly on the General Counsel's ability to be both partner and guardian, although these actions must take place in the context of the GC reporting directly to the CEO and working directly on a day-to-day basis with operating company leadership broad range of issues.¹¹

First, the General Counsel should have constant and direct relationship with the board as a whole, with board committees (except perhaps compensation) and with individual directors. The General

¹¹ See e.g., American Bar Association, *Report of the American Bar Association Task Force on Corporate Responsibility*, 59 BUS LAW. 145, 161 (2003); Duggin, *supra*, note 5, at 1039; A direct, intense relationship between the CEO and the GC is essential for the GC to be an effective partner—and an effective guardian—with the CEO and other business leaders. Suggestions from academics that the GC report directly to the board of directors—and not to the CEO—is both unrealistic and wrong-headed in my view, given how infrequently the board meets, given how limited is its knowledge of the complex functioning of the corporation and given the importance for a General Counsel of a powerful, day-to-day operating relationship with CEO and the functional units of the corporation. Kim, *supra* note 2; Sureyya Burcu Avci & H. Nejat Seyhun, *Why Don't General Counsels Stop Corporate Crime?*, ROSS SCHOOL OF BUSINESS PAPER NO. 1326 (July 3, 2016), available at SSRN: <http://ssrn.com/abstract=2804352> or <http://dx.doi.org/10.2139/ssrn.2804352>. Although, as discussed in this section, the board oversees the relationship and although the GC “reports up” to the board to notify them of important matters, the CEO must hire, fire, supervise, and compensate the GC—and is critical to the integration of the GC into the company.

Counsel should be part of the board culture---attending board dinners, accompanying the board on business trips in the U.S. and abroad, and participating in board outings. The General Counsel should attend all board meetings and all board committee meetings, often as secretary to keep minutes. But, in addition to taking minutes and making formal presentations at the board or the committees, the General Counsel should speak out independently (if judiciously), either to clarify a matter or, at times, to express a view on a decision. The GC should not be a timorous underling. As part of the board culture, the General Counsel should develop relationships with individual directors and be available for one-on-one conversations to explain company activities when the director does not want to take CEO time. But the General Counsel should *never* be a member of the board in her corporation because of conflicts of interest (can't be both lawyer and client) and the incessant need to recuse herself from board deliberations.

Second, the board of directors should have oversight of both the hiring—and any firing—of the top staff officers, including the General Counsel. Although the CEO should, of course, formally hire the GC who should be a senior, direct report, the CEO should seek the advice and consent of the board on a small slate or on the favored candidate before an offer is extended. The board contact can be the lead/presiding director or a member of the Audit, Risk or Comp Committees. Ideally, the designated board member(s) would also interview the leading candidate for the General Counsel position. If the relevant board members have profound doubts about the CEO's GC choice, they should be able to prevent the hire. But otherwise, if the candidate is in the target area, they should defer to the CEO because of the intense CEO-GC relationship. This meaningful advisory role in the hiring process stems, of course, from the basic principle that the General Counsel's client is the corporation as embodied by the board of directors.

Similarly, the board of directors must clearly require that the CEO should consult with the board before a General Counsel is fired or otherwise separated. This not only imposes a slight procedural delay so such an action is not taken in a fit of pique, but it also gives the board the opportunity to understand the circumstances and to ensure that the General Counsel is not being fired for attempting to be guardian or for generally speaking up on legitimate issues. Just the existence of this process provides some protection for the General

Counsel from an intemperate firing decision. (although how much will depend on how independent the board is from the CEO). But if the CEO really wants to get rid of the GC and is not complicit in some wrong-doing, then that separation will occur. This board role *in advance* of either hiring or firing the top staff officers, including the GC, should be explicitly raised by the board and understood by the CEO. It could also be reflected in the corporation's published governance principles or governance commentary.

Third, the General Counsel should report regularly to the board of directors or to one of the committees (Audit, Risk, Public Affairs) on key issues relating to performance with integrity and sound risk management. Subjects could include: trends in the number of formal governmental enforcement actions (subpoenas/cases brought); detailed discussions of the most salient of those enforcement actions; trends, key issues and results relating to matters reported into the company ombuds-system; general litigation profile and trends; regular discussions of the cases with greatest risk (financial, reputational, precedential); the main take-aways or lessons learned from the annual business-by-business compliance reviews (in conjunction with the CFO and chief compliance officer); the results of compliance reviews by the external and internal auditors ; issues on the horizon which have emerged from the corporation's early warning systems (see pp. below). A striking example of what not do apparently occurred when issues arose inside Wal-Mart about an extensive use of bribes in Mexico to expand its store locations. Despite discussions both in Mexico and in U.S. corporate headquarters among senior lawyer and senior business executives, the board of directors was not informed, according to news reports. The issue was sent back to Mexico for a quick and unceremonious burial. It only rose from the grave some years later when a whistleblower laid bare the seamy affair in a front-page *New York Times* story.

Fourth, the General Counsel should meet alone with the board as a whole or the Audit or Risk Committee at least two times per year to discuss any issues of concern to the GC or to answer any questions from the directors. This procedure should be established by the board--just as the Audit Committee meets alone with the CFO, the head of the internal audit staff and the external auditors. Making this private meeting a board initiative avoids—or at least mitigates-- erosion of the critical trust that must exist between the CEO and the GC. *Ad hoc* meetings, especially if requested by the General Counsel, would be out of the ordinary and could be seen by the CEO as a potentially disabling act of disloyalty (although such meeting must be requested in extreme circumstances). The subjects of these regular, private meetings can include more detailed, “bark off” evaluations of the matters subject to periodic reporting to the board or entail communication of

sensitive information that has been reported up through the legal channel.

As with the protocol I suggest for “reporting up” by inside lawyers to the General Counsel, the formal periodic reports to the board on integrity and risk issues and these less structured but regular private meetings together constitute a more inclusive and appropriate method for General Counsel “reporting up” to the board than requirements imposed by law (i.e. Sarbanes-Oxley) or mandated by the Model Rules of Professional Conduct (i.e. Rule 1.13). Of course, the General Counsel should ensure that those narrower, more formal requirements are met---and evidence of certain potential or actual violations of law are reported to the board--- but a much broader, much more regular relationship will give the board a far better feel for integrity issues that are on the horizon before they evolve into possible or actual violations which must then be reported up under the law or the rules of professional conduct. The General Counsel would normally inform the CEO about the general topics of the private meetings with the board, but this is a matter of courtesy, not an opportunity for CEO censorship. Hopefully, the CEO will already have knowledge of any integrity matters which the GC discusses privately with the board, unless the CEO is involved in gamey activities or is failing to provide strong performance with integrity leadership. But there is no blinking the fact that these private Board-GC meeting are a sensitive area in the CEO-GC relationship. That is why the board must insist that they occur.

Fifth, the Board should be involved in establishing the various components of the General Counsel’s compensation. Several elements are vital to mitigate the risk that the General Counsel will be motivated to take improper actions in order to increase personal financial interests. All the elements of comp—salary, equity grants, bonus, long-term incentives—should involve a clear component that rewards actions in support of corporate integrity. Much of the GC compensation should be spread out over time. Benefits like stock options, restricted stock units, deferred compensation or long-term incentive grants which are awarded in Year 1 should not vest until future years so performance over time can be evaluated. And, like the compensation of all other senior leaders, the compensation of the General Counsel should be subject to the corporation’s “compensation recovery” policies. If the General Counsel herself fails the integrity test in a significant way the board can “hold-back” unvested benefits or “claw-back” vested benefits.

The CEO and HR will design the compensation of the GC, CFO and HR leader. But, especially with respect to these key staff leaders, the compensation committee or the whole board should review the structure of these packages carefully and explicitly approve appropriateness. Such an assessment may occur as a matter of course because many General Counsel

and CFOs in major companies are now often in the “High Five” ---the five most highly compensated employees—whose compensation must be disclosed in the Proxy Statement and who will thus be under careful board scrutiny. This approach to GC compensation should be a template for other senior lawyers in the company.

Sixth, the General Counsel must have the courage and judgment to recommend Board retention of independent outside counsel when there are credible allegations of impropriety about the CEO or other very high-level executives who are peers of the GC. Even when the General Counsel has a strong reputation for probity, the appearance of a conflict of interest in having the Legal Department investigate the CEO or senior executives demands that the General Counsel advise the board on finding its own counsel to handle the inquiry. Unless the GC is personally implicated, board selection of independent outside counsel does not totally disqualify the General Counsel or the legal department. The GC and senior lawyers clearly can help the outside firm locate documentary and testimonial evidence. In light of the GC’s knowledge of the corporation, he can review the findings of outside counsel to comment---but not edit---on issues that may have been missed or misinterpreted. She may give her advice on the ultimate disposition if asked by the Board. But, she absolutely may not impede or interfere in any way with the process or substance of the independent inquiry by the board’s outside counsel.

Use of outside counsel occurs regularly, of course, when a derivative suit alleging senior officer waste of corporate assets or other breach of fiduciary duty is filed. A special board committee is formed which hires its own special counsel. But the need for special board counsel can occur whenever there is an allegation from any credible source—including ones that come up through the Company’s ombuds system—that is both so significant and so factually specific about possible wrong-doing at the top of the corporation as to require additional investigation. Michael Holston, then Hewlett Packard’s General Counsel, acted in an exemplary fashion when Mark Hurd, HP CEO and a good friend, approached him with a letter to Hurd from plaintiff’s counsel alleging Hurd sexually harassed a company contract employee. Holston immediately went to the board of directors who hired special independent outside counsel. Holston told Hurd to get his own counsel. The directors eventually asked Hurd to leave as a result of the investigation. By contrast, Enron’s use of its regular, highly compensated commercial law firm, Vinson, Elkins, to investigate allegations made by whistleblower Sherron Watkins to Enron CEO Ken Lay-- and Hewlett Packard’s use of regular, highly compensated outside commercial law firm, Wilson, Sonsini, to help investigate HP board leaks --are examples of blatant conflicts of interest or very poor judgment on the part of the companies, their

General Counsel and the outside law firms.¹²

In addition to allegations against the CEO and senior officers, there are, of course, many instances where an independent assessment by outside counsel is needed to bolster the company's credibility with government officials. Typical examples are investigations or enforcement actions directed to major, wide-spread allegations of wrong-doing in the company which do not have direct involvement of the CEO or senior officers. The General Counsel should take the lead in identifying these situations and helping the CEO and the board either structure or oversee relationships with independent outside counsel retained either by the company or by the board itself (if the board concludes it needs separate counsel, in addition to both inside and outside counsel representing the company).

X. THE CEO

The right CEO is, of course, essential to successful resolution of the partner-guardian tension. Beyond having unquestioned personal integrity, the CEO must want to create a high performance with high integrity culture where most people want to do the right thing. But, *the CEO's explicit recognition and support of the dual partner-guardian role for the General Counsel and other HR top staff leaders---the Chief Financial Officer and the heads of Compliance and Risk---is a fundamental step in creating that culture.*

Such recognition can occur in a wide variety of ways. The CEO must hire people perceived both inside and outside the company as strong and independent to lead the key staff functions and to populate the senior ranks of those staffs. The CEO must make a demonstrable personal commitment to ensure that all the conditions necessary for fusion of the partner and guardian roles exist for the GC and other staff leaders—from a role with broad scope to information flow to involvement in decisions and to role in implementation. The CEO must encourage, not fear, a strong, independent relationship between the General Counsel and the board, its committees and individual directors. The CEO must at all meetings, even those occurring under high pressure, show

¹² Sue Reisinger, *How HP General Counsel Michael Holston Handled CEO's Sex Harassment Nightmare*, CORPORATE COUNSEL (2010); Peter Lattman, *H-P Mess Casts Harsh Spotlight on Ann Baskins*, WALL ST. J. (Sept. 12, 2006); James B. Stewart, *The Kona Files: How an Obsession with Leaks Brought Scandal to Hewlett-Packard*, THE NEW YORKER (Feb. 19, 2007); NEAL BATSON, FINAL REPORT OF COURT APPOINTED EXAMINER IN ENRON BANKRUPTCY CASE 6-13, 48-55 (2003) http://www.concernedshareholders.com/CCS_ENRON_Report.pdf.

respect for the General Counsel's point of view (even if the CEO doesn't agree) and not denigrate the GC. The CEO must give the General Counsel an important role at annual company-wide meetings of senior officers or general managers to talk about priority issues (geopolitics, law, ethics, public policy). Ultimately, the CEO must make clear to the company that the GC has a close professional relationship with the CEO—and has the CEO's trust and support---so that the General Counsel is viewed throughout the corporation as acting in the name of the CEO to carry out CEO objectives, policies and vision.

Of course, a strong relationship of trust and respect must actually exist for the recognition and support of the partner-guardian to be authentic and credible. Without that relationship, the recognition is hollow—and will be seen as such inside the company. To achieve this, the CEO must believe deeply that the General Counsel and key inside lawyers are strongly motivated and highly effective in helping the CEO “win” inside the company and in the marketplace---helping the CEO to succeed by giving broad strategic advice and by assisting in implementing strategic goals. The CEO must believe deeply in the importance of the this “wise counselor” role in providing the best possible analysis on hard problems and the best possible recommendation to aid the CEO (or the board) in making the best possible decisions on performance, integrity and risk. Just as the General Counsel must understand business opportunities and risk, so the CEO must understand the opportunities and risks of law and ethics. The CEO must deeply believe in integrity, not just give lip service to that core idea but then undermine nominal commitment through winks and nods. So, the CEO must, in his bones, want a General Counsel who is unafraid to speak her mind, with facts, with care, but with self-confidence, with force and with respect. The CEO must, in short, make clear to all that the CEO welcomes and wants the GC to be, neither a “yea-sayer” nor “nay-sayer,” but a strong, independent and courageous voice to speak out about the GC's vision of the long-term, enlightened self-interest of the company. About what is “right.”

The complex elements of chemistry and trust that must exist between the CEO and the General Counsel in support of the partner-guardian roles in a hard-charging global company are hard to describe and impossible to mandate. *The tough discussions of limitations and constraints in the present are made easier by business accomplishments in the past.* But successful resolution

of the partner-guardian tension depends on that chemistry and trust, stemming from a shared vision about the fundamental mission of a performance with integrity corporation. My personal goal with the two CEOs I served---Jack Welch and Jeff Immelt---was to have a strong, respectful professional relationship built on their bed-rock desire to have me honestly speak my mind on what I thought was in the broad interest of GE. Being a personal friend, while important, was secondary. I was very fortunate. Even when the discussions were intense, or the stress was high, and despite their very different personal styles, they both wanted it straight. There is absolutely no question that any influence I had in GE was due to the general perception that I enjoyed the confidence and support of the CEO.

XI. DEALING DIRECTLY WITH CEO RISK

Given the contingent nature of human affairs, the risks of working directly for a CEO always present a clear and present danger for the General Counsel. To maximize their chances of being able to serve as a lawyer-statesman and a partner-guardian, General Counsel candidates must undertake serious due diligence not just about the CEO, but about the company. At the same time, to protect their personal integrity, General Counsel should never go to work for a CEO and a corporation unless they are prepared to resign and give up unvested financial benefits.

A. The Front-End: Due Diligence

Although many aspects of the General Counsel's position have changed dramatically for the better in the past generation, one has not: GC job satisfaction is still largely dependent on the CEO. Being a General Counsel of a major global company is at least as fun, challenging and intellectually rewarding as being a senior partner in a law firm (former partners turned GCS might say "more so"). But outside lawyers still have one advantage over GCs. They can fire the client much more easily than the GC can fire the CEO!

If the CEO-GC relationship is so obviously important, shouldn't GC candidates do careful due diligence on the CEO—and on the company, itself—before accepting the job, especially at a time when corporations are beset on all sides by critics and when an integrity lapse can have catastrophic effects? The answer, of course, is yes. If few legal

jobs are as good as being a GC in a good company with a good CEO, few jobs are worse than being trapped working for a CEO with questionable values in a company without a culture of integrity—of being ignored, being forced to do questionable acts, and being unable to escape without serious harm to reputation and pocketbook.

But how many GC candidates do systematic, in-depth diligence before signing up for a tour of corporate duty? I didn't. I flat-out flunked due diligence when Jack Welch offered me the job—and was lucky that it worked out. Such diligence, certainly involves a detailed inquiry into the personality and values and integrity record of the CEO. But, it should also involve an examination of whether the CEO and the board of directors are committed to a lawful, ethical company—and how that commitment is carried out. This involves, in theory, an inquiry into the company's commitment to high performance with high integrity; into all the elements of the optimal Partner-Guardian fusion; and into the potential relationships with lawyers, senior officers and the board. It can also involve an examination of how fundamental principles and practices relating to performance, integrity and risk have worked on some of the key issues facing the corporation: emerging markets, government investigations, major pending litigation, acquisition diligence and integration, crisis management, public policy, and corporate citizenship.¹³

One obvious objection to this detailed diligence is how can it be conducted in the company while the GC candidate is competing for the job? One obvious answer is that on both sides of the interview table there is both selling and assessing going on. Asking good, tough, sophisticated questions about the organization can help advance an applicant's candidacy because it reflects an understanding of how big corporations operate. Even more importantly, if offered the job, potential GCs can then ask for an opportunity to get a "better feel for the company" before accepting. They can get into more detail with key leaders in addition to the CEO (e.g., CFO, HR, Compliance and Risk leaders, selected business leaders, lead ombuds person, head of audit staff). It is also appropriate for the prospective GC to ask to speak to one or two members of the board (e.g., the head of audit or risk committee, although, as noted, the board itself should initiate such an interview as matter of course). The GC candidate can also run checks with people outside the corporation. There is also a significant amount of public material available that can inform the decision, including 10-Ks and 10-Qs,

¹³ Ben W. Heineman, Jr., *Before You Sign Up: Prospective GCs Need to Do Some Due Diligence on the CEO Before They Say Yes*, CORPORATE COUNSEL (2008).

the annual, and quarterly SEC filings which list some of the company's most important liabilities and cases, albeit in a summary pro forma fashion. There is also something else that didn't exist when I started: Google. But, to state the obvious, this diligence must be undertaken with some delicacy.

When I was recruiting senior lawyers into GE, I would often say to the top candidates at the last interview that, while it was hard to know exactly where they were going to land, they should put on their star-spangled Evel Knievel suit, gun the motorcycle, and leap the chasm from practice or government to the corporation. Today, with business in society issues of far greater salience, with major integrity misses having calamitous impact, with corporate counsel in the gun-sights of the regulators and with the CEO relationship a crucial as ever, I might add to those being recruited as General Counsel: "But look—and look hard—before you leap."

B. The Back-End: Resignation

Despite hopes of a happy marriage when the General Counsel starts work, the CEO can take umbrage at a wide variety of completely proper General Counsel acts (as opposed to poor GC performance) and the relationship can sour. For example,

- The General Counsel stands up to the CEO on important issues and disagrees in circumstances when the CEO is very committed to a position (and very emotional about it).
- The General Counsel "reports up" to the board of directors on a wide variety of risks or potential improprieties pursuant either to company policy and practice or to the requirements of SEC rules or to the strictures of the ABA's Model Rules of Professional Conduct as adopted (in various forms) by the states. Given my broad view of the GC's additional, non-mandated "reporting up" responsibilities, such issues can go beyond serious risk of legal violations and include, for example, serious concerns about ethics or reputation or country/political risk.
- The GC, as leader, can make decisions in good faith which the CEO nonetheless judges harshly and which can impair the CEO-GC relationship because of stresses between the personalities or within the organization or in relations with outside institutions.

If these or similar events impair the CEO-GE relationship, the CEO has innumerable ways to undercut the General Counsel and make her life

miserable due to the CEO's largely unfettered power at the top of the corporate hierarchy. When her role is reduced or when her character is impugned or when she sees serious company illegality or impropriety, the General Counsel must address the issues and not be passive. Broadly speaking, GC response to a difficult or intolerable situation can take place in three model scenarios (with real-world cases much more nuanced and complicated).

- Good CEO and Good Board. If the company has a good CEO and a good board, then the issues often involve disagreements and personal friction, but not impropriety by the board or the CEO. Decision-making at the top of companies "ain't beanbag," as Mr. Dooley said about politics. But with a CEO who is committed to high performance with high integrity and with board support, the basic structure is in place for the General Counsel to work through tension by putting the issues on the table and perhaps using informal mediation by another senior staff officer or a leading member of the board until tough moments pass.
- Bad CEO and Good Board. The company has a CEO who is providing poor leadership on integrity issues or is implicated in bad acts. In this scenario, the General Counsel can report to the Board on illegal, questionable, or negligent acts when direct recourse to the CEO himself is not possible or when it fails. The board can begin its own investigation with its own outside counsel. As this inquiry proceeds, the relationship between the bad CEO and GC is now probably beyond repair. The Board can try to keep the GC in place until it decides on an appropriate disposition for the CEO. If this is not feasible or if the board decides that the concern, while legitimate to raise, is not proven, the board can work out a separation agreement that seeks to protect the GC's reputation and financial interests. Or if the board determines that the CEO has committed the bad acts then the CEO would go and the GC would remain. This occurred when Hewlett Packard fired CEO Mark Hurd and retained General Counsel Michael Holstein who had helped investigate Hurd.

- Bad CEO and Bad Board. The toughest case-- and ultimate test of the General Counsel's character-- is when both the CEO *and* the board ignore a general counsel's concern about serious impropriety. If it involves certain types of threatened or actual violations of law (e.g. the company is about to commit perjury), then General Counsel is *permitted* to "report out" to regulators under a set of complex provisions in the Securities laws and the Model Rules of Professional Conduct as adopted by the states which define an exception to the general rule of lawyer-client confidentiality.¹⁴ But, there may also be situations where the GC feels strongly that the company's actions are wrong but has no recourse to "reporting out", for example, when there is a serious ethical violation---like unsafe conditions in factories of third party suppliers---or there is risk-taking which threatens serious harm to individuals or communities short of a legal violation. In either the "report out" or "no recourse" versions of this scenario, the General Counsel must resign if neither the CEO nor the board will address the serious illegality or impropriety or risk. By taking a principled stand, the GC has impaired key relationships with "bad" actors. As important, her trust in the corporation's leaders has also been destroyed---and the leaders' view of the GC diminished. Remaining in the company is untenable, not least because the GC does not want to be implicated in improper behavior. But the GC's resignation will, in all likelihood, have severe consequences, from loss of significant financial benefits to loss of reputation when the CEO and the Board criticize the GC. The obligation of confidentiality may prevent the General Counsel from fully explaining her actions. And her reputation may be sullied while the

¹⁴ 17 C.F.R. 205.3(d)(2); ABA Model Rules of Professional Responsibility, Rule 1.13, Rule 1.6. Again, these rules require care in interpretation because they are far from self-executing. *See* note 9, *supra*. For example, Model Rule 1.6 requires that the lawyer's services have been used when there is wrongdoing, but Rule 1.13 does not. But Rule 1.13 is triggered only if there is the threat of substantial injury to the company, while Rule 1.16 encompasses a broad range of actual or threatened illegalities. These reporting up and out requirements for lawyers must also be read in conjunction with various government whistleblower statutes which provide bounties for reporting wrongdoing without any "exhaustion" or "reporting-up" requirement. *See, e.g.,* LATHAM & WATKINS, ATTORNEYS AS SEC WHISTLEBLOWERS: CAN AN ATTORNEY BLOW THE WHISTLE ON A CLIENT AND GET A MONETARY AWARD (May 2013) <https://www.lw.com/thoughtLeadership/SEC-whistleblowers>.

facts are sorted out by the authorities. It is possible that a separation agreement can be negotiated even with a bad CEO and a bad board. Or a wrongful discharge suit—or other action against the company—may be possible.¹⁵ But, the General Counsel is clearly in a perilous situation. To retain her integrity, she has no choice but to leave. Resignation should never be threatened unless the GC is prepared to go through with it. But, when the circumstances warrant, the General Counsel, to protect her integrity, must resign.

When people consider becoming General Counsels, they should make detailed inquiries about the CEO and the company as I have suggested. But there are limits to what can be learned, and diligence at the point of hiring can hardly eliminate future risk. So, before accepting the job, General Counsel aspirants must also candidly and coldly consider the worst case. They must look hard in the mirror before saying “yes.” They must be prepared to resign if neither the CEO nor the board will address properly serious bad acts on the part of the CEO or others in the corporation. They must anticipate defending their personal integrity, sacrificing substantial financial gains and, perhaps, being bad-mouthed by the CEO and the board. They must consider the degree to which they may need to bring a wrongful discharge suit if separated for reporting up or out. The CEO-GC relationship should be one of trust, but it is inevitably one of power. The great advantage of coming to the General Counsel role from a position of prominence and with a high reputation in the profession and society is that that this background may, to an extent, deter the CEO (and the Board) from undercutting the GC. This type of background also gives the General Counsel the advantage of not being dependent on the corporation, her only client. She will have the stature to find other ports of call of comparable importance, challenge and remuneration, after (if?) she has sailed out of the corporation and out of the storm.

XII. PROSPECTS

The greatest problem for the future of the inside counsel revolution remains what it has been in the past: the attitudes of the CEO, top business leaders and the board of directors. The broad role I urge for General Counsel in advancing the mission of high performance with high integrity will be possible only if the CEO, supported by the board of directors, wills it---wills a lawyer-statesman role in a matrix organization of shared power and wills a partner-guardian role that values, rather than resists,

¹⁵ Sue Reisinger, *2 GCs Battled Their Companies, Got 2 Different Results*, CORPORATE COUNSEL (2015).

independent views. With CEOs, there is the potential obstacle that they simply do not have the breadth of vision about the appropriate mission of the corporation---and about the appropriate role of the General Counsel---when they assume the top spot. One answer is that business schools, like law schools, need to re-orient their basic education to deal with broad business in society issues which are so important in leading global enterprises in this era. More importantly, boards of directors must address this issue when selecting the CEO: redefining a performance-with-integrity mission of the corporation; focusing leadership development on the range of performance, integrity and risk issues; and ensuring that the CEO succession/selection process yields candidates who, in fact, have the necessary experience, vision and commitment. If the board fails in this task, and the CEO has to develop these traits on the job, then the General Counsel may have an even more important role in aiding that process or may find himself in “GC Hell” with a tone deaf and narrow-minded boss.

Due to the external pressures on corporations which have been a major cause of the inside counsel revolution and which are only going to increase. I believe the revolution will continue to gain board and CEO adherents in many, many companies. High performance with high integrity is not goo-goo theory but is the hard necessity now for many global corporations exposed increasingly to complex commercial challenges and to a broad variety of “business in society” risks and opportunities. Sophisticated CEOs and boards know that successful performance depends importantly on navigating effectively and fairly the myriad laws and regulations which limit business. They know that legal function itself can create significant value (e.g.: in tax, trade, IP, M&A). They also know that highly talented, broadly experienced, analytically rigorous and consistently innovative General Counsel---and an outstanding law department--- are essential to dealing in a systematic way with the core corporate issues of performance, compliance, ethics, risk, governance, citizenship and organization.

Because these necessities, and the external pressures on corporations, are only going to increase, I believe that the rise of the General Counsel as the exemplar of the inside counsel revolution---and support for the concomitant roles of lawyer-statesperson and partner-guardian---will continue to gain board and CEO adherents, both in the United States and in the rest of the world.

If we want performance with integrity companies, the place to begin --and to be most effective---is inside the company itself. Outside regulators can never be as potent---or as preventative---as internal governance on the front lines from the board of directors and CEO on down. General Counsels with experience, credibility, independence, guts and reputation are key because, as

even critics like John Coffee recognize, they are positioned to play a pivotal role as partners---and as guardians.
