

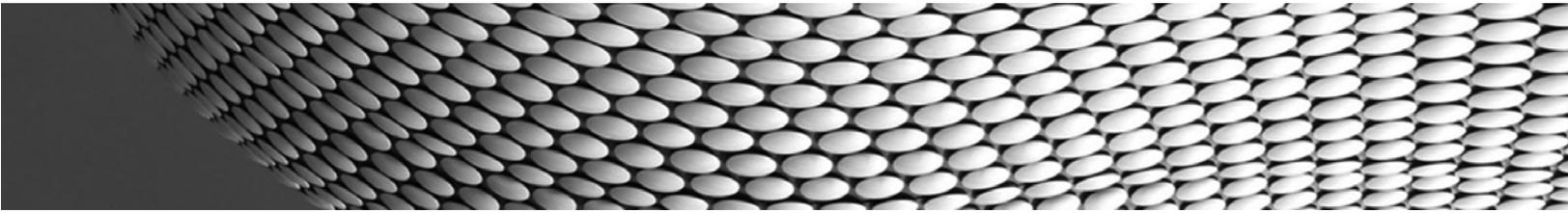
HARVARD LAW SCHOOL
PROGRAM ON THE LEGAL PROFESSION



**THE GENERAL COUNSEL
AS LAWYER-STATESMAN**

A Blue Paper

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FOREWORD

The Harvard Law School Program on the Legal Profession was founded in 2004 to:

- ❖ Conduct and publish world-class empirical **research** on the structure, norms and evolutionary dynamics of the legal profession;
- ❖ Innovate and implement new methods and content for **teaching** law students, practicing lawyers and related professionals about the profession; and
- ❖ Foster broader and deeper connections **bridging** between the global universe of legal practitioners and the academy.

This manuscript by the Program's Senior Distinguished Fellow, Ben Heineman, launches a new "blue paper" series of substantial essay, speech and opinion pieces on the legal profession selected by the Program for distribution beyond the format or reach of traditional legal and scholarly media channels. Thank you for your interest and we look forward to your feedback.

THE FUNDAMENTAL MISSION OF THE CORPORATION

The foundational goals of the modern corporation should be the fusion of high performance with high integrity. The ideal of the modern general counsel is a lawyer-statesman who is an acute lawyer, a wise counselor and company leader and who has a major role assisting the corporation achieve that fundamental fusion which should, indeed, be the foundation of global capitalism.

I believe that this concept of General Counsel as lawyer-statesman has strong roots in major American companies, is growing in the UK and has adherents in some companies elsewhere in the world. Trends over the past 25 years have made possible a powerful, affirmative leadership role for General Counsels, at least in large transnational enterprises. But to understand the role, it is necessary, first, to understand in some detail what (in my view) should be the mission of the contemporary global corporation.

High performance means strong sustained economic growth through provision of superior goods and services which in turn provide durable benefits for shareholders and other stakeholders upon whom the company's health depends. Such performance entails an essential balance between risk-taking (the creativity and innovation so essential to economic growth) and economic risk-management (the financial, commercial and operational disciplines so essential to the soundness and durability of business institutions).

High integrity means robust adherence to the letter and spirit of formal rules, both legal and financial; voluntary adoption of global ethical standards that bind the company and its employees; and an employee commitment to core values of honesty, candor, fairness, trustworthiness and reliability. It involves understanding, and mitigating, other types of risk—beyond directly economic risk—which can cause a company catastrophic harm: legal, ethical, reputational, communications, public policy and country-geopolitical.

But the fusion of high performance with high integrity is not just about risk mitigation. It is about creating affirmative benefits in the company, in the marketplace and in the broader global society. Ultimately high performance with high integrity creates the fundamental trust among shareholders, creditors, employees, recruits, customers, suppliers, regulators, communities, the media and the general public. This trust is essential to sustaining corporate power and freedom which drives the economy with widespread economic and social benefits—trust which in the past 10

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years has dramatically eroded due to stark corporate scandals and unthinkable business failures.

The core task of CEOs, and top senior executives like the General Counsel, is to build a performance with integrity culture that permeates the corporation. Such a culture entails shared principles (values, policies and attitudes) and shared practices (norms, systems and processes). Although this culture must include elements of deterrence against legal, financial and ethical wrong-doing, it must, at the end of the day, be affirmative. An underlying tenet of this culture should be that people want to do the right thing because leaders make it a company imperative and live it themselves. Clear expectations must be driven down into the company, and this must be a uniform global culture that applies in every nation and cannot be bent by corrupt local practices, regardless of short-term business costs.

THE ROLE OF A GENERAL COUNSEL—AND INSIDE LAWYERS—IN A HIGH PERFORMANCE WITH HIGH INTEGRITY CORPORATION

Given this view of the global corporation's fundamental mission, the role of the General Counsel, and other inside lawyers, is extremely broad, involving three distinct functions: acute technical lawyer, wise counselor and lawyer as leader. The essence of being a lawyer-statesman is to move beyond the first question—"is it legal?"—to the ultimate question—"is it right?" Such a role involves leadership, or shared responsibility, not just for the corporation's legal matters but for its positions on ethics, reputation, public policy, communications, corporate citizenship, country and geopolitical trends.

The lawyer-statesman role involves not just dealing with past problems, but charting future courses; not just playing defense, but playing offense; not just providing legal advice, broadly defined, but being part of the business team and offering business advice. It means being both a partner to business leadership but ultimately the guardian of the company. Even more broadly, it involves the wise counseling and leadership roles which stem from practical wisdom, not just technical mastery; which requires broad judgment based on knowledge of history, culture, human nature and institutions, not just a sharp tactical sense; which flows from the ability to understand long-term implications, not just achieve short-term advantage; and which is founded on a deep concern for the public interest, not just the private good.

In aspiring to be a lawyer-statesman, the General Counsel, and inside lawyers, must be skilled in asking "what ought to be" questions; in articulating systematic and constructive options that expose and explore the value tensions inherent in most decisions; in assessing risk, but not being paralyzed by its existence; in understanding how to make rules realities and develop strategies for meaningful implementation of policies; in understanding the hurly burly world of politics, media and power outside the corporation and how to navigate with principle and purpose in that domain; in leading and building organizations, creating the vision, the values, the priorities, the strategies, the people, the systems, the resources and the motivation; in having understanding, intuition, perspective and respect relating to different cultures around the globe; in, ultimately, having the quintessential quality of the great generalist to envision and understand the multiple dimensions of issues—to define the problem properly—and the ability to comprehensively integrate those dimensions in decision-making.

Given this definition of fundamental corporate purpose, this delineation of the general counsel's broad responsibilities and this description of essential qualities of mind a lawyer leader must possess, let me very briefly highlight ten essential tasks of the General Counsel as lawyer-statesman. Each task could, in and of itself, be the subject of an article (and most apply to all senior inside lawyers as well).

The General Counsel must build a world class legal organization...

...hiring the best possible global talent which includes both top-flight generalists (to head legal teams at profit and loss centers) and world class specialists. These lawyers must be capable of handling the most difficult matters facing the company on their own, and, as necessary, in forging strategic partnerships with outside counsel. The General Counsel must lead in creating an inside-outside relationship which minimizes conflicts over money and is instead characterized by a powerful value proposition of providing high quality services with alignment of economic incentives (through, for example, fixed fee arrangements). The inside legal team must be integrated with other staff (Finance/HR) and business teams. And the General Counsel must effect world-wide integration (one legal culture) through specialist global practice groups, cross-company lawyer councils at national and regional levels (e.g. China or Europe) and close partnering at the senior lawyer level.

The General Counsel and the legal team must be creative, affirmative partners to business leaders in using their broad skills to accomplish the corporation's high performance objectives.

The General Counsel should be at the table with the CEO on the broad array of performance issues: key operational initiatives, economic risk assessment and mitigation, major transactions, new strategic directions (new products, new markets, new geographies), important template contracts, resolution of major disputes (through mediation or arbitration if possible), and major accounting decisions that have a forensic dimension (as many do today). The fundamental task is to establish critical facts, define applicable legal principles, identify areas of risk and generate options for accomplishing performance goals while minimizing legal, ethical or reputation risk.

The General Counsel must also provide perspective and advice as a business person, not a lawyer.

Others at the table with business leaders come, like counsel, from specialist backgrounds: finance, marketing, engineering, IT, HR. Beyond providing advice as members of different disciplines, they all need to generate energy as intelligent persons with a broad understanding of the products, technology, competition and other dimensions of business decisions. The General Counsel, as curious, broad-gauged business partner, must help define, debate and develop business positions on broad company issues.

The General Counsel must be a leader in building an integrity infrastructure that embeds formal requirement (law and finance) and the company's ethical rules into business operations.

This task requires an understanding of the enormously complex web of law and regulation of both general (competition law) and specific (health care law) application at national, state and local level in nations all across the globe. Each business process (finance, sales, marketing, engi-

neering) in each business unit in each country must be mapped to understand where requirements intersect—then those points of intersection must be risk-assessed with appropriate risk mitigation systems integrated into the business processes. The broad purposes of the integrity infrastructure are to prevent legal and ethical misses, to detect misses as soon as possible and then to respond quickly and effectively. This merger of integrity and business process requires business leader commitment with the General Counsel (and other inside lawyers) providing expertise and advice on such key leadership issues as resource allocation and in-depth management reviews which demonstrate commitment from the top down.

The General Counsel must play a lead role in defining and adopting ethical standards—beyond what the formal rules require—which bind the corporation across the globe.

Great corporations often impose rules upon themselves: no bribery (even when not prohibited), building new facilities to world, not local law, standards; engaging in ethical sourcing so that third parties avoid child or prison labor and provide safe and healthy working conditions. The General Counsel has a key role in these decisions which, as noted above, go beyond asking “is it legal” to asking “is it right.” The chief lawyer helps generate issues (by, for example, systematically reviewing claims on the corporation by various stakeholders); determining which ones require in depth analysis; conducting that analysis under an “enlightened self-interest” standard which understands that “costs” are also “investments,” that “benefits” may be expressed in strictly financial terms but may also require judgment, and that the proper “accounting period” may be years, not just the next quarter. The General Counsel will be at the center of resolving conflicts between national laws (which transnational companies must follow) and global ethical standards, a vexing problem illustrated by Google’s recent decision to stop complying with Chinese censorship laws because of global ethical standards against suppression of information.

The General Counsel must help develop early warning systems which allow the corporation to stay ahead of emerging global trends and expectations relating to formal rules, ethical standards, public policy and important country and geopolitical risk.

The integrity infrastructure and adoption of global ethical standards focus on immediate issues, but looking into the future and anticipating changes is one of the characteristics of a lawyer-statesman. These early warning systems are systematic: careful compilation of information from a variety of sources (cases, legislative proposals, commentary, NGO agendas); regular meetings to determine which issues require analysis; and then decisions about whether pro-actively to change policies and practices far in advance of when the company might be forced to do so.

The General Counsel must play a lead role in fostering employee awareness, knowledge and commitment to a high performance with high integrity culture.

Employees must understand their basic obligations; must do the right thing under those duties; must live the core company values; and must understand enough about the technical rules to seek advice when in “gray areas.” It is the task of the General Counsel, working with other key corporate staff, to create education and training materials on business and society issues which are as engaging as the education in business disciplines. This involves tracking, training and test-

ing employees in high risk jobs; creating meaningful case-based learning; being candid about company failures; and integrating integrity training with business training. It also means confronting cultural differences head on (explaining why conflicts of interest involving family members may be the norm in Chinese society but why they are not tolerated in a global corporation).

The General Counsel must develop systems which give employees at all levels "voice" to express concerns about the corporation's adherence to law, ethics and values.

Based on nearly 20 years in one of the world's most complex business enterprises, I believe that integrity is greatly advanced when employees are encouraged (indeed required) to report concerns without fear of retaliation. The General Counsel has a vital role in developing different forums for "voice" to be heard: through bottoms-up compliance reviews that start on the shop-floor; through a powerful independent, internal audit staff doing compliance reviews; through candid communications from lawyers in the businesses to the General Counsel; and, most importantly, through a company "ombuds" system. Such a system allows employees to report in many languages in many forms (email, phone, letter) to many recipients (in the division or at headquarters) either anonymously or not. The General Counsel (and the CFO) must treat all concerns promptly with dignity and respect and follow the facts wherever they lead—up, down or sideways. Employee trust in the integrity of the processes is key to a successful ombuds system that detects and deters (and avoids back-biting because cheap shots won't work).

The General Counsel should have either the lead role, or a strong supporting role, in the development and implementation of the company's positions on public policy...

...in capitals all across the globe, from Brussels to Beijing, from Washington to Moscow. Policy development requires marrying substantive expertise with the corporation's business strategy and should be done with business teams at headquarters. Many of the substantive experts on public policy which cuts across the company will work for the General Counsel: antitrust, environment, IP, securities law, labor and employment law, tax, trade etc. These corporate legal specialists should have broad knowledge and experience in public policy and its processes. The General Counsel should also help the individual business units find industry specific policy experts (e.g. communications, energy, healthcare). Once policies are developed and prioritized then the government relations staff (whose customers are executive and legislative branch officials) should work with the business people and the policy experts on political implementation. One of the most challenging tasks for the General Counsel is defining policy positions based on credible facts that advance public interests not just the corporation's narrow private interest and thus can command assent, rather than just being viewed as a business land-grab.

The General Counsel will also be a core member of crisis management teams responding to investigations, law suits, product problems, personnel emergencies and threats to company people, facilities, information or supply chain from terrorism, natural disaster or war.

Working with the CEO, the General Counsel must seize the issue the moment top management learns about it; develop a crisis management team with clear responsibilities; meet continuously

to adapt to changing developments; and, ultimately determine an appropriate response. A key related role, one for which the General Counsel is well suited, is to develop the facts both expeditiously and carefully. And the General Counsel must be closely integrated in all communications stemming from the crisis to assure accuracy and credibility. Crisis management is often a stress test for the corporation's integrity—and for the General Counsel.



Integrating all these foundational roles, the General Counsel should develop the corporation's essential position on corporate citizenship for review by top business leaders, the CEO and the board of directors. Consistent with my emphasis on high performance with high integrity, I believe that corporate citizenship (a much better concept than corporate responsibility for assessing business' role on society) consists of three elements:

- ❖ Sustained economic performance which provides benefits to stakeholders across the society;
- ❖ Robust adherence to the spirit and the letter of the laws and regulations designed to advance social goods; and
- ❖ Adherence to global ethical standards and public policy positions that are in the enlightened self-interest of the company but fairly balance private concerns with the public interest.

GENERAL COUNSEL TRENDS

The greatly enhanced role of the General Counsel in large transnational companies—whether headquartered in the US, the UK, Europe or elsewhere in the world—is due a number of trends which have occurred over the past 25 years. The future growth of the General Counsel role in major global corporations—and its spread to smaller and medium sized companies—will depend on the continuation of those trends.

- ❖ General Counsel have increasingly been hired from the upper reaches of government and private practice. A former U.S. Attorney General, a former Deputy Attorney General, distinguished former federal appeals court and district court judges, and a former White House counsel now all serve as chief legal officers of major American companies. Similarly, law firm partners in their forties and fifties are being recruited away from their firms to General Counsel positions.
- ❖ This remarkable upgrade in the quality of General Counsel has increased the status and prestige of inside lawyers and has made it possible to hire superb lawyers from outside the company to serve as heads of large business divisions or as heads of specialty functions (tax, environment, trade, antitrust, mergers and acquisitions, labor and employment, intellectual property). Indeed, larger companies are developing specialty practice groups, headed by a nationally renowned practitioners, which rival law firm practice groups.
- ❖ As a result of this increase in inside talent, the General Counsel has become, in many cases, the chief legal advisor to the CEO and to the board of directors, replacing the venerable senior partner from the great law firm. The General Counsel is a member of the core management team—and, as business and society issues have become of ever greater importance to corporations, has come to have comparable status to the Chief Financial Officer in some major companies.
- ❖ To attract this talent, corporations have been willing, at least for the General Counsel and division and lead specialist lawyers, to meet market pay, although some of that compensation may be in the form of deferred equity which may lose (or increase) its value. *Corporate Counsel*, an American magazine for inside lawyers, each year publishes a table of highly paid General Counsels in US companies—and it can only get this information because many GCs are among the companies' five most highly compensated executives whose pay packages must be disclosed, per government regulation, in the annual Proxy Statements.

- ❖ The new inside lawyers—who now have skills equal to their peers in outside law firms—have begun to manage actively major issues staffed by joint inside/outside teams. Not only has power over control of matters shifted in a number of instances, but inside lawyers have also sought to break up old monopolies (when single firms represented companies on a broad range of matters) and introduce competition among firms. Thus, the new inside lawyers forged new cooperation on *matters* with outside firms and fostered new competition on *money*. As noted above, today both corporations and law firms are trying to develop new strategic alliances in which financial incentives are aligned and value and quality, rather than sheer hours billed, are emphasized.

In sum, in the course of a generation, General Counsels' prestige, status, compensation, power and position at the core of major transnational corporations have been transformed. But, this enhanced role will only continue, and be expanded at other companies, if boards of directors and CEOs see the value of a strong inside team working closely with business leaders. They must be willing both to pay for talent and to carry the legal headcount.

I believe that a strong inside legal team—that is part of the company culture, understands its rhythms and personality, is in the daily flow of business—is far more effective, and far more cost-effective, than outside counsel can possibly be in helping the company achieve both high performance and high integrity. In difficult economic times, there is always the call to cut costs by cutting headcount. While the legal function can never be immune from a relentless quest for productivity, it is very short-sighted of business leaders to use the traditional meat-axe (“10 percent down”) and either push costs (which will be higher) outside or degrade the core goals of performance with integrity which can lead to far greater, even catastrophic, costs down the road.

THE PARTNER-GUARDIAN TENSION AND THE LAWYER-STATESMAN ROLE

Although the role of General Counsel has been transformed in recent years, one dimension remains the same: the reliance on a good relationship with the CEO. And, at the core of that relationship, is what I term “the partner-guardian” tension. Indeed, in many recent scandals (from Enron-like accounting fraud to improper options back-dating to the credit crisis), General Counsel have failed as guardians. They were either excluded from decisions or failed to ask broad, probing questions about dubious actions.

Although the General Counsel must be a strong business partner for the CEO and other business leaders (to help the company but also to gain credibility), he or she must, at the same time, be guardian of the company (whom the General Counsel actually represents). This guardian role can involve slowing decisions down until facts are gathered and analysis completed—and, on occasion, it can involve saying “no” if no legitimate actions are possible. I do not believe that the choice for General Counsel (and inside lawyers generally) is to go native as a “yes person” for business leaders and be legally and ethically compromised or to be conservative, inveterate “naysayer” ultimately excluded from core corporate activity and decisions. Being at the table to assess facts, law, ethics, risk and options—to help find an appropriate way to accomplish business goals—is essential.

Resolution of this tension is key to a company’s high performance with high integrity and to the ability of the General Counsel to play to the kind of lawyer-statesman role I have outlined above. But, this requires a strong degree of independence. Yet critics have questioned whether such independence can exist when candid General Counsels run the risk of being fired and losing unvested economic benefits (like stock options, restricted stock or deferred compensation).

Certain conditions inside the company must be met before a General Counsel can resolve the tension and aspire to be a lawyer statesman. Most importantly, the board of directors and the CEO must understand and approve the broad role for General Counsel I have outlined here. They can demonstrate that by hiring a General Counsel with deep experience (hopefully in both public and private sectors), with superlative legal skills but also broad vision, with both credibility and courage. The CEO must also support the General Counsel in hiring the outstanding, independent lawyers for key inside positions. This is not to say lawyers make critical decisions for the company: their primary job is to give the business leaders a range of legitimate options with different

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degrees of risk and explain pros and cons. Only after acute analysis, integrating all relevant perspectives, should they make recommendations. And, unless the action is unlawful, General Counsels, having spoken their piece, should defer to the CEO's discretion.

Certain processes can help assure that the proper conditions exist. General Counsel candidates should do extensive due diligence on the CEO, the company culture, the attitudes of top staff and business leaders. They should clarify the conception of the chief legal officer held by those executives. They should meet with one or two board members before accepting the job. Once in place, the General Counsel should meet alone with the board (or the Audit Committee) on a regular basis.

But the General Counsel must go into the position prepared to resign if asked to condone or do something clearly illegal or highly unethical or if excluded from major decisions. With a good CEO and a good Board, this will not happen, although there can be friction as hard decisions may yield tough conversations. With a bad CEO and a good Board, the General Counsel may be able to negotiate an honorable withdrawal. With a bad CEO and a bad board, the General Counsel obviously may simply have to quit—but with proper diligence before accepting the job this risk should be minimized.

At the end of the day, the rise of the General Counsel to a broad lawyer-statesman role, and an increase in status to be a true peer of the Chief Financial Officer, turns on intense commitment of board of directors and CEOs to high performance with high integrity.

ABOUT THE AUTHOR

Ben W. Heineman, Jr. was GE's Senior Vice President-General Counsel from 1987-2003, and then Senior Vice President for Law and Public Affairs from 2004 until his retirement at the end of 2005. He is currently Distinguished Senior Fellow at Harvard Law School's Program on the Legal Profession, Senior Fellow at Harvard Law School's Program on Corporate Governance, Senior Fellow at the Belfer Center for Science and International Affairs at Harvard's Kennedy School of Government, and Senior Counsel to the law firm of WilmerHale. A Rhodes Scholar, editor-in-chief of the Yale Law Journal and law clerk to Supreme Court Justice Potter Stewart, Mr. Heineman was assistant secretary for policy at the Department of Health, Education and Welfare and practiced constitutional law prior to his service at GE. His book, High Performance with High Integrity, was published in June, 2008 by the Harvard Business Press. He writes and lectures frequently on business, law and international affairs. He is also the author of books on British race relations and the American presidency. In 2007, he served on the Independent Review Panel on the World Bank Group's Department of Institutional Integrity (the Volcker Panel) and is currently on an international panel advising the President of the World Bank on governance and anti-corruption. He is a fellow of the American Academy of Arts and Sciences, a member of the National Academy of Science's Committee on Science, Technology and Law and recipient of the American Lawyer's Lifetime Achievement Award and the Lifetime Achievement Award of Board Member Magazine, was named one of America's 100 most influential lawyers by the National Law Journal and was named one of the 100 most influential individuals on business ethics in 2008 by Ethisphere Magazine. He serves on the boards of Memorial Sloan Kettering Cancer Center (chair of patient care committee), the Center for Strategic and International Studies (chair of program committee), Transparency International-USA (chair of program committee) and the Committee For Economic Development (chair of the corporate governance committee). He is a member of the board of trustees of Central European University.

ENDNOTE

This blue paper is drawn from a chapter written by the author for a German language book: The In-House Counsel in Multinational Corporations (Beck, 2010). This work in turn is based, in important part, on his writing on integrity, law, ethics and the role of inside lawyers since retiring from GE at the end of 2005. This writing includes a book---High Performance with High Integrity (Harvard Business Press, 2008)---and numerous articles: e.g. "In the Beginning: GE's Legendary Lawyer Explains How He Revolutionized the Role of In-House Counsel," Corporate Counsel, April, 2006; "Hands Across the Water," Corporate Counsel, October, 2006 (arguing that corporations need an affirmative "foreign policy"); "Law and Leadership," The Preiskel-Silverman Lecture in the Program on the Practicing Lawyer and the Public Interest, Yale Law School, November, 2006 (reprinted as essay in The Journal on Legal Education, December 2006); "Caught in the Middle," Corporate Counsel, April, 2007 (tension for general counsel and chief financial officer in being business partner to CEO and guardian of the corporation's integrity); "How to Say NO to Your CEO," Association of Corporate Counsel Docket, October, 2007; "Before You Sign Up: Prospective GCs Need Due Diligence on CEOs," Corporate Counsel, October, 2008; "Big Isn't Always Best: One Stop Shopping at Giant Global Firms Isn't Necessarily Wise, Says GE's Former Top Lawyer," Corporate Counsel, November, 2008; "Getting Your Fix: Two Veteran Lawyers Say That Now Is the Time for Fixed Fees," Corporate Counsel, September, 2009 (with William Lee, senior partner at WilmerHale). The Corporate Counsel articles also appeared in The American Lawyer.