

THE ROLE OF THE INSIDE COUNSEL HAS SLOWLY SHIFTED FROM LEGAL ADVISER TO, INCREASINGLY, A STRATEGIC PARTNER TO SENIOR MANAGEMENT AND THE BOARD. IN OUR INTERVIEW WITH FORMER GE GC BEN HEINEMAN JR., WE GET A GLIMPSE AT HOW AND WHY THAT EVOLUTION HAS OCCURRED FROM THE PERSPECTIVE OF A FORMER GC WHO HAS WITNESSED THIS TRANSFORMATION FIRSTHAND.

Ben W. Heineman Jr., former general counsel for General Electric and a senior fellow at Harvard University's schools of law and government, has witnessed a sea change over his career regarding the role of the general counsel. He's written a new book on the topic, so we sat down with him to hear more about it and why he passionately believes it's important for boards and executives to embrace this new dynamic.

One of the tenets you've preached for years involves the need for the general counsel to reconcile being both a legal adviser and a guardian for the corporation. Is this what you mean when you refer to the role of the GC as a "lawyer-statesperson"?

In my new book, *The Inside Counsel Revolution: Resolving the Partner-Guardian Tension*, I set out a framework of four practical ideals for the role of the general counsel in a corporation. These include two related ideas: GC as lawyer-statesperson, as you noted, and GC as "partner-guardian." Let me briefly explain.

First, corporations, especially global companies, should adopt as their core mission the fusion of high

performance with high integrity and sound risk management. 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. High integrity means robust adherence to the spirit and letter of formal rules, both legal and financial; voluntary adoption of binding global ethical standards that go beyond the mandatory rules; and employee commitment to core values of honesty, candor, fairness, trustworthiness, and reliability. The core values of the company, as expressed importantly through the core values of its employees, are essential to strong, trusting relationships inside and outside the company—to corporate sustainability. These values, in turn, can only exist when the company is committed to making law and ethics operational throughout the company. Law, ethics, and values!

Second, the general counsel must be a lawyer-statesperson who is an outstanding technical expert, a wise counselor, and an accountable leader who has

a major role in assisting the corporation achieve that fundamental goal of high performance with high integrity. For the lawyer-statesperson, the first question is, "Is it legal?" But the ultimate question is, "Is it right?" As lawyer-statesperson, the general counsel must engage in robust debate on major corporate initiatives of all shapes and sizes 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; about what is the right role of business in society as seen through the lenses of performance, integrity, and risk, not just about what is legal. The general counsel is well positioned as counselor to focus on four basic duties—to the corporation, to stakeholders, to the rule of law, and to society—and to introduce a dose of "constructive challenge" as a counselor or to make such decisions as a leader.

Third, to function effectively as a lawyer-statesperson, the general counsel must assume a second aspirational role: partner to the board and business leaders and guardian

THE CHANGING FACE OF THE GENERAL COUNSEL

of the corporation. Under appropriate conditions, being an effective partner on business and law establishes the trust and credibility that allows the general counsel to be an effective guardian. The fusion of the partner and guardian roles turns on deep GC integration in the corporation: being at major corporate decision-making meetings (strategy, budget, deals, new products, new geographies, etc.) and being deeply involved in the implementation of those decisions. Such involvement means the GC can help the business leaders achieve

legitimate commercial goals but also give independent views on whether corporate action comports with appropriate standards relating to integrity, risk, and citizenship. It requires character, stature, independence, and courage so that the GC does not just passively salute and obey when business leaders suggest questionable actions.

Fourth, the CEO and top business leaders, including the GC, must be fiercely dedicated to creating and leading a uniform performance with cultural integrity across the globe. Culture comprises

the shared principles (the values, policies, and 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 cultural integrity that binds together employees numbering in the tens of thousands or even hundreds of thousands. This involves

BY DEBORAH SCALLY



general actions, such as clear articulation of policy; robust education and training; embedding systems, processes, and resources in business operations; giving employees voice; offering proper discipline for failures; and providing proper incentives for good behavior.

The GC must live these four practical ideals in addressing the fundamental issues he or she will face in the corporation: performance, compliance, ethics, risk, governance, citizenship, and organizational leadership.

NYSE Governance Services and executive recruiting firm BarkerGilmore have just completed a research study that found 97% of directors and officers say they expect the GC to be a member of the executive team by 2020. Is this a positive trend in your opinion? Could there be negative consequences of the pendulum swinging too far?

Let me first give my take on the trends. One thesis of my book is that over the past 30-plus years, there has been an inside counsel revolution of increasing scope and power. General counsel and corporate law departments in top global companies have become far more sophisticated, capable, and influential, transforming business and law in two important ways.

First, the role of the general counsel inside the corporation has significantly grown in importance. The GC has often replaced the senior partner in a law firm as the primary counselor for the CEO and board of directors. The GC role has broad scope—beyond law—that includes performance, ethics, risk, governance, and citizenship. The GC is a core member of top management, participating in decisions and actions not just about risks

but also about opportunities, not just about law but also about business, not just about public policy but also about geopolitics. The general counsel is now often seen as having importance and stature comparable to the chief financial officer by directors, CEOs, and business leaders because the health of the

importance with a related, dramatic shift in power from outside law firms to inside law departments over both matters and money. Because corporate law departments are increasingly staffed by outstanding specialists and generalists, inside lawyers have taken on day-to-day management and strategic direction over major issues and major vendor expenditures affecting the

corporation—ranging from cross-border transactions to multifront litigation to decisions about ethics to direction of public policy. General counsel and inside lawyers are also increasingly advocates, points of contact, or negotiators with important public and private parties in both developed and developing economies. For the critical risks and opportunities of business in society issues, boards and business leaders now delegate key outside relationships to the general counsel to help reach commercial and citizenship objectives across the minefield of policy, law, ethics, enforcement, and public scrutiny.

These trends are very positive for the corporation, improving not just economic performance but also the corporation's response to vital

business in society issues and helping the corporation productively use its resources on priority issues—and thus focusing on doing more with less in its legal/policy spend.

The danger, however, is that the GC and top management become too enamored of the GC's role as a businessperson. That evolving role is critical, but the core of the GC function is to determine what is law and to help the corporation comply with that law, which is an extremely complex task in a global company operating in numerous nations with ambiguous, evolving, and often conflicting legal mandates. Important as the partner role is for GCs, the guardian role is paramount. The goal is to fuse the partner and guardian roles, thereby resolving the partner-guardian tension, as I discuss in detail in my book.

To whom does the GC owe ultimate responsibility?

The GC's ultimate responsibility is to the best interests of the corporation as guardian, not as partner to the CEO or to individual directors. This means, as I have said, raising questions about what is right, not just from the perspective of what are the right performance choices, but what is right in terms of integrity (law, ethics, and values) and risk (both economic and noneconomic).

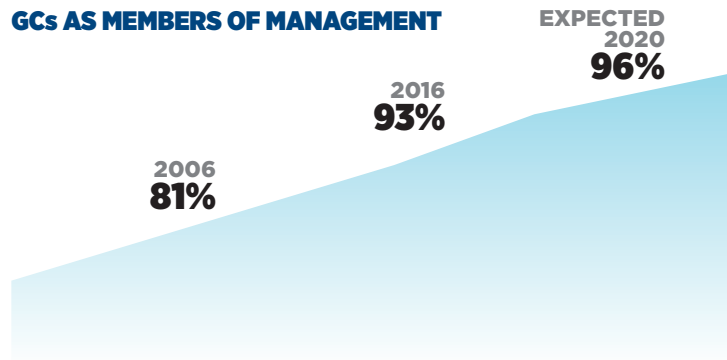
But, in this fundamental role, GCs face obstacles that critics often cite when expressing doubts about whether GCs can possess the independence to be true guardians. These include negative business attitudes about lawyers; business leaders' lack of understanding about law and policy; a leader's overbearing personality; group pressures to conform; inside lawyers' fear of CEO retribution; problems with

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corporation requires that it navigate complex and fast-changing law, regulation, litigation, public policy, politics, media, and interest group pressures across the globe—what I term “business in society” issues. As a result, the expertise, quality, breadth, and power of the general counsel and inside counsel have increased dramatically.

Second, the role of the general counsel outside the corporation has also significantly grown in

GCs AS MEMBERS OF MANAGEMENT



Source: The Rise of the GC: From Legal Adviser to Strategic Adviser, BarkerGilmore and NYSE Governance Services, 2016

having only one client; and lawyers' concern about their compensation (either withdrawal of invested benefits or lack of future increases). In many recent scandals—from accounting fraud to improper options backdating to global bribery to the credit crisis—general counsel and inside lawyers, in their eagerness to be partners, have failed as guardians. They did not act with independence and courage; they failed to ask broad, probing questions about dubious actions; they failed to say “Slow down,” or “Stop.”

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 a conservative, inveterate naysayer, ultimately excluded from core corporate decisions and activity. The obstacles to the partner-guardian fusion can be overcome by many factors: for example, the character, reputation, and independence of the general counsel and an alliance with other top staff officers (finance, HR, compliance, and risk) who should share the same partner-guardian tensions and performance-with-integrity objectives. But nothing is more important than a close relationship with the board of directors, which should ask for private meetings with the GC; expect candid GC comments at board discussions; include the GC in the board culture (in events other than formal meetings); have a meaningful role in the hiring and firing of the chief legal officer; and should be intimately involved in setting the GC's compensation with incentives for integrity (and compensation recovery policies

if the GC fails on that score).

Ultimately, however, the GC's capacity to serve as partner to business leaders and guardian of the corporation turns on the CEO. The CEO, like the board of directors, must have the vision of high performance with high integrity and sound risk management and must affirmatively want a general counsel to be a lawyer-statesperson and partner-guardian who is never afraid to speak out on what is right for the corporation. But the board has a critical role in choosing a CEO who has this vision, thereby defining the mission of the corporation to emphasize performance with integrity; focusing leadership development on a 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.

I believe these board and CEO attitudes can—and do—exist. This is so not because of theory, but because of reality. The inside counsel revolution occurred in part as a reaction to the excesses and acquisitiveness of outside law firms. But the key driver was the dramatic increase in global commercial complexity and in related business in society issues, including core ethical issues, which sophisticated inside lawyers can handle with speed, skill, and judgment. Because these necessities, and the external pressures on corporations, are only going to increase, I believe that the rise of the general counsel as 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.

Have these changes affected the working relationship between inside counsel and external law firms? If so, how are external firms responding?

With respect to the substance of matters, the GC and inside counsel should exercise strategic direction and not simply cede matters to law firm control. This is a vital shift made possible because corporations now often hire as inside counsel high-quality, extremely skilled

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generalists and specialists who are as good as or better than outside counsel.

With respect to resource allocation, the GC must focus on productivity—on efficiency and effectiveness. This involves segmenting the corporation's work—from low complexity, low risk at one end of the spectrum to high risk, high complexity at the other. Then the inside law department must consider alternative service providers: bringing high-value work inside to be closer to the businesses; hiring non-law firm lawyers for routine or peaking work; hiring nonlawyer vendors, often with technology platforms, to do basic work at a fraction of the cost of a law firm; and hiring nonlegal experts for the array of issues inside lawyers face that go far beyond legal expertise.

Law firms are just one option today. And when corporate law departments do hire law firms, they need to negotiate arrangements that address the fundamental conflict in goals and economic models. Like the corporation, corporate law departments must be continuously in quest of doing more with less. But law firms often have an Orwellian view of productivity—less with more: more hours, lawyers, and revenues—in order to increase profits per partner. This primal tension has led GCs to seek alternatives to law firms, including bringing work inside. **Finally, let's discuss the GC's relationship with the board. You are quite clear in your book that the GC “should not be a timorous underling.” Can you explain what you mean by that?**

In the statesman and guardian role, the GC must first do outstanding analysis to expose options and choices on a huge range of issues that come before the board. But the GC should also feel unconstrained in giving his or her views on those options. This may put the GC at odds with the CEO or some members of the board—what is the degree of litigation or regulatory, geopolitical, or environmental risk? But the board, as a whole, should strongly support the GC in providing trenchant analysis and then giving a reasoned point of view. ■■■■

Editor's note: Heineman's book, *The Inside Counsel Revolution: Resolving the Partner-Guardian Tension*, published by Ankerwycke, will be released in June 2016 and is available at Amazon.com.

