

Leveraging Legal Leadership:

**The
GENERAL
COUNSEL**
as a
*Corporate
Culture
Influencer*



Leveraging Legal Leadership: The General Counsel as a Corporate Culture Influencer

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"The only thing we have is one another. The only competitive advantage we have is the culture and values of the company. Anyone can open up a coffee store. We have no technology, we have no patent. All we have is the relationship around the values of the company and what we bring to the customer every day. And we all have to own it.

- Howard Schultz, founding CEO, Starbucks

Introduction

Corporate culture is widely acknowledged as adding value to companies, both in terms of improving financial performance and in creating an atmosphere that encourages ethical behavior. Evaluating and setting corporate culture is an important responsibility for boards and executive management, and because the board chooses the chief executive, ultimately culture emanates from the boardroom.¹ Corporate culture is not a topic typically linked to a company's general counsel and legal department, but the failure to draw that link may prove shortsighted on the part of the board. Given the importance of the general counsel in matters of ethics, compliance, corporate governance, and risk and reputation management, the general counsel should be a key ally and partner in establishing a corporate culture that supports corporate performance without compromising ethical behavior, and legal and regulatory compliance.

This thought leadership paper explores how the general counsel (a/k/a chief legal officer) can be leveraged as a corporate culture influencer, and how her standing and stature vis-à-vis the CEO and other C-suite executives should be a topic of board inquiry.

¹ "Tone From the Top: How Behavior Trumps Strategy," by Ian Muir, Keeldeep Associates Ltd, UK. First published in 2015 by Gower Publishing LOC Control, No. 2014957909.

When the general counsel has a seat at the chief executive's leadership table, it sends a signal to the company's stakeholders (internal and external) that ethics, compliance, and other legal risk considerations are a top priority of the company. A direct reporting line between the chief legal officer and chief executive officer is important to corporate culture as a reflection of the "tone at the top," and through which the CEO sends a powerful message that business decisions are made with appropriate consideration of the ethical, legal, and reputational impacts.

There are many ways in which the board can send signals. The most powerful signals come from behaviour, language, and actions of executive directors, particularly the CEO. If the CEO is sending signals that business is a game where fouling is OK if the referee does not see you (think football), or that cutting corners is acceptable to deliver results, no amount of 'good tone' from the rest of the board will have much impact.²

As the board meets its fiduciary duty to keep a critical eye on the company's culture, part of that examination must include how the general counsel functions within the company. Through talking with well-respected general counsel and our own research regarding the expectations of corporate directors and chief executives regarding the chief legal officer, the Association of Corporate Counsel (ACC) has developed five indicators that all directors, particularly non-executive directors, should look to in order to assess whether a company's general counsel is well positioned to have a positive influence on corporate culture.

Regulatory and business demands expand the need for general counsel influence

In 1991, the US government issued the United States Sentencing Guidelines for Organizations, which incentivized the creation of corporate compliance programs meant to prevent and detect violations of the law. This began a more systematic approach by companies to address regulatory compliance as well as ethics within their organizations. Ultimate responsibility for a company's regulatory compliance usually rests with its general counsel, and as regulatory scrutiny has increased, so has companies' need for regulatory compliance advice.

² Id. at page 34.

Although some companies have compliance functions that are separate from the legal department, many of the activities mandated by a compliance program require legal analysis, and any effective compliance program requires coordination with the general counsel.

The emphasis on the general counsel's role in ethics and compliance has made the position grow in professional stature and influence. Regulators recognize that in-house counsel have an essential role in promoting compliance and ethics in their companies. They have even included in-house counsel in regulatory regimes meant to deter corporate wrongdoing like the Sarbanes-Oxley Act of 2002. Both directors and general counsel are acutely aware of the importance of the general counsel role in promoting ethics and compliance within the company. In ACC's *Skills for the 21st Century General Counsel* survey, 54 percent of directors ranked "ensuring a company's compliance with relevant regulations" as one of the top three ways general counsel provide value to the company. ACC's *2017 Chief Legal Officers Survey* found that 74 percent of general counsel rated ethics and compliance as "extremely" or "very" important over the next 12 months — the highest ranked concern in the survey. This emphasis on the general counsel's role in ethics and compliance created the need for general counsel to exert greater influence within their companies in order to fulfill the compliance mandate from regulators and the board.

Even outside of compliance concerns, legal and regulatory issues are increasingly central to the implementation of sophisticated business strategies. For example, protecting innovation requires understanding intellectual property law; overseas expansion requires knowing the employment laws of other countries; advances in data analytics require knowledge of data privacy laws. Where outside counsel used to be the primary legal advisers to the CEO, general counsel have come to fill that role in every corporation, particularly the large multinational and/or publicly held company. As legal departments have evolved and attracted top-level talent below the general counsel, the general counsel has carved out more time to consider strategic business issues and contribute to setting strategies. This development is a positive contribution to corporate culture.

Tone from the top is not a motivational crusade. Most changes happen where there are doubts about whether the tone is the right one. Ultimately chairmen should change the CEO if the values and ethics aren't present to the right extent.³

³ Id. at page 23.

When a general counsel is part of the executive leadership that makes strategic business and operational decisions, those decisions are informed by not only a legal perspective, but also by broad ethical and public policy considerations. The general counsel is a diverse and unique voice at the executive table. ACC's *Skills for the 21st Century General Counsel* report suggests that boards are just beginning to perceive the value of the general counsel as a strategic advisor. Twenty-seven percent of the directors surveyed ranked the general counsel's "input into strategic business decisions" as a top-three value driver currently, with 37 percent anticipating it would be a top-three value driver in the future.

A Strong General Counsel Supports a Strong Corporate Culture

"Courage is the most important attribute of a lawyer. It is more important than competence or vision. It can never be an elective in any law school. It can never be de-limited, dated or outworn

- Robert F. Kennedy, Speech at University of San Francisco Law School, San Francisco, 29 Sept. 1962

It is curious that there has not been greater discussion of the general counsel's role in influencing or supporting strong corporate cultures, especially with ethics and compliance being the primary drivers of corporate culture efforts. Of the 12 companies that have made Ethisphere's list of the "World's Most Ethical Companies" each year it has been published,⁴ ACC found that the majority of them have general counsel who are well-positioned to influence corporate culture. For example in 91 percent of those companies, general counsel report to the CEO. In 83 percent, general counsel serve as the corporate secretary, indicating direct access to the board, and in 83 percent of those companies, general counsel are also responsible for compliance.

The preventative role of the general counsel and corporate legal department is key to their contribution to regulatory compliance and corporate culture. When the general counsel is included in discussions of business strategies before they are implemented, she can help the company assess and avoid legal and business risks.

⁴ There are a total of 13 companies that have made the Ethisphere list every year, but information on governance and reporting structures was unavailable for one of the companies.

As preventing violations of laws and regulations is preferable to mere detection of violations when they occur, the general counsel has become instrumental in improving a company's overall compliance, as well as protecting its reputation.

Much of the general counsel's value when it comes to supporting a strong corporate culture stems from the fact that the legal department's metric for success is not the company's quarterly performance. The general counsel promotes ethical behavior and integrity in corporate decisions by taking the view that short-term gain is not worth compromising long-term sustainability. This perspective can be important to informing what a company considers ethical. Experts consider corporate culture to be the intangible framework meant to guide individual and organizational behavior when there are gray areas.

With her legal background, "gray area" is a space that the general counsel regularly occupies as most laws, cases, or regulations fail to offer a "bright line" rule.

[I]t is increasingly important that the general counsel have the skills to navigate beyond just the legal issues — to have many more of the softer skills necessary to negotiate matters where the rules are not always clear, where the outcomes are not always neat, and where the impact on the overall organization is widespread and profound.

– A general counsel who also serves as a board member, from the Skills for the 21st Century General Counsel report

A company that leverages its general counsel and legal department to fill in those gray areas (including outside the legal context) in a manner that promotes ethical practices and compliance with the law helps solidify an overall corporate culture that emphasizes those characteristics and values. On the other hand, when the general counsel is not empowered in such a manner, business units may fill in those gray areas in a way that maximizes short-term returns over the longer-term interests of the company, and compromises the ethical culture the company wishes to build.

A strong general counsel can establish the practices that reinforce a corporate culture that values ethics and integrity. But this value can only occur if the general counsel is properly situated within the company, and the legal department has effective interactions with the company's business units. A management team that marginalizes the general counsel and the legal department not only loses out on this risk-management perspective, but also sends a company-wide message that legal risk, ethics, and compliance are not taken seriously.

“Send lawyers, guns and money, the shit has hit the fan.

- Warren Zevon, “Lawyers, Guns and Money” (song) (1978)



The distinction is best explained as companies with a less solid corporate ethical culture, would generally view the general counsel and members of the legal department as the group to call to “clean up” after a legal, regulatory, or compliance mess, or when a transaction goes awry. Whereas, companies with a stronger “tone at the top” corporate ethical culture look to the chief legal officer and her team as allies whom, if proactive and involved at the onset, can help prevent a mess from happening.

Five Indicators of General Counsel Influence on Corporate Culture

Accepting the proposition that a strong general counsel will have a positive effect on corporate culture, we suggest five indicators a board might consider when evaluating whether the general counsel has sufficient influence on corporate culture, and whether corporate culture itself is indeed healthy.

#1 - The general counsel reports directly to the chief executive officer and is considered part of the executive management team

Before the rise of the general counsel and the corporate legal department, general counsel were not considered C-level executives. They often reported to the chief financial officer (CFO), chief administrative officer (CAO) or another senior executive. As regulatory and business demands spurred the changes in the legal department detailed above, the role and relative authority of the general counsel increased. Per the ACC *Chief Legal Officers 2017 Survey*, 72 percent of respondents report directly to the CEO.

General Counsel Reporting Structure

To whom do you directly report as the GC/CLO of your organization?

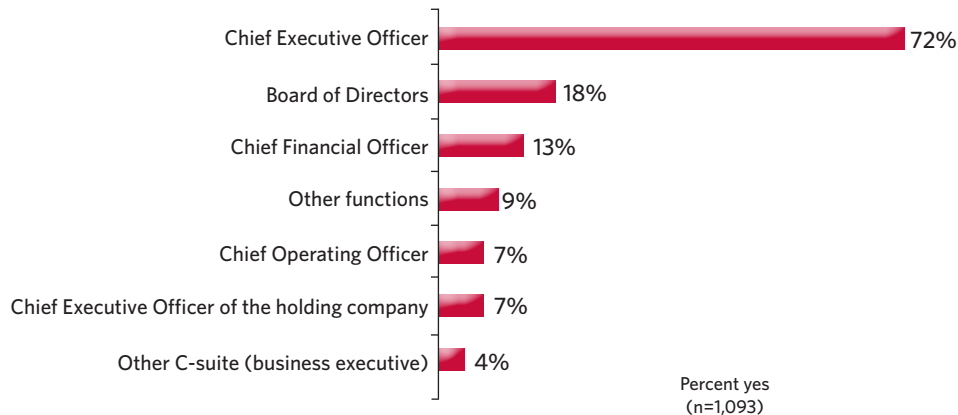


Figure 1 - Reporting Structure, ACC Chief Legal Officers 2017 Survey

While this number has increased – only 64 percent of general counsel reported to the CEO in ACC’s 2004 *Chief Legal Officers Survey* — the movement of less than 10 percentage points is a concern given how much more global and complex the challenges businesses face have become.

The reporting structure of the general counsel position is an important indicator of the influence that the legal department has in the company. The ACC *Chief Legal Officers 2017 Survey* showed that general counsel who report to the CEO were much more likely to say that the executive team “almost always” seeks their input on business decisions.

General counsel who report to the CEO were also significantly more likely to report they “almost always” contribute to strategic planning efforts compared with those who don’t. When the general counsel is consulted about business decisions and strategic planning efforts, there is a greater likelihood that those decisions and plans will take into account legal and regulatory risks. Pre-decision consultation helps the legal department fulfill its preventative role within the company.

In addition to providing the legal department with requisite influence, having the general counsel report to the CEO is an important part of setting the “tone at the top.” When legal has a seat at the table, it sends a message to the rest of the company that compliance with laws and regulations is a company priority. It also says something about the CEO: that input from legal is valued, and that the CEO’s vision for the company prioritizes ethics and integrity.

#2 - The general counsel has regular contact with the board of directors

A board of directors that does not have a consistent relationship with the company’s general counsel should be a cultural red flag and prompt further board inquiry. While the relationship between the general counsel and the board can take various forms, it is important that the relationship at least be consistent. After all, the board is the company’s fiduciary representative, and the company is the general counsel’s client (not members of the executive management team). A relationship between the general counsel and the board of directors enables the board to set the right tone for the company’s legal, ethical, and compliance culture, and also helps maintain the independence of the legal function.

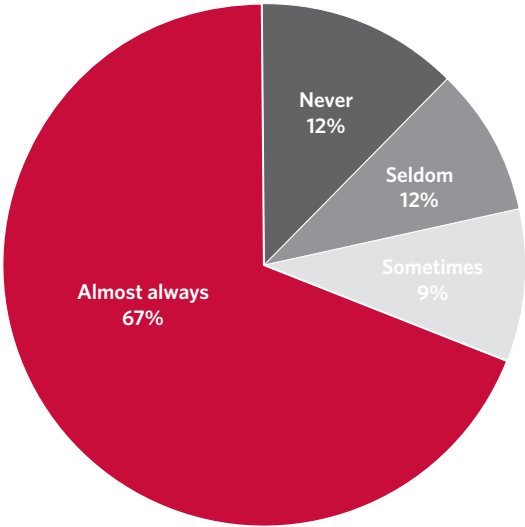


Figure 2 - General counsel attendance at board meetings

Our data indicate that there is room for improvement in the relationship between boards and general counsel. In the ACC Chief Legal Officers 2017 Survey, 18 percent of respondents reported having a “direct” reporting relationship with the board of directors, and 67 percent reported that they “almost always” attend board meetings. However, a full 21 percent report that they seldom or never attend board meetings. While not every company requires a direct reporting structure between the general counsel and the board, at a minimum, the general counsel must have a mechanism to bring controversial issues to the board — without prior CEO consent.

In addition to raising issues directly with the board, an influential general counsel can be an ally in the board's efforts to set the tone for the company's compliance culture. The ACC survey shows that similar to the effect of direct CEO reporting by the general counsel, a board relationship imbues the general counsel with more influence over business decisions. General counsel who had a reporting relationship to the board were significantly more likely to be asked for input on business decisions; they were also significantly more likely to contribute to the company's strategic planning.

A relationship with the board also helps preserve the independence of the legal department. Much has been made of the independence, or lack thereof, of in-house counsel, because they depend on management for employment and compensation decisions. The board can serve as an important check on the potential conflict the general counsel might feel between her service to executive management, and her duty to the company as a client. Moreover, if a general counsel needs to report concerns to the board, finding a way to do so without formal access or a prior relationship with the board creates an obstacle to fulfilling her ethical duties. Ultimately, this leaves the board of directors unaware, and potentially exposed, to legal or compliance risks that require their attention.

#3 - The general counsel is viewed as independent from the management team

The first two indicators state that general counsel should have a seat at the management table and a relationship with the board. If the general counsel fails to maintain her independence, neither of those relationships will benefit the company the way they should. The value the general counsel brings to the table is compromised if she is seen as lacking the courage to challenge management decisions when necessary. While general counsel are a part of the executive team, they must maintain a delicate balance between that position and their duties to the company as their client. Further, the board needs to satisfy itself that the general counsel is achieving that balance in order to have a healthy corporate culture.

As a board member, it's important to me that the GC understands that their obligation is to the company and not really to the CEO [who] hires them.

- From the Skills for the 21st Century General Counsel report

As mentioned above, the company is the general counsel's client, and if the general counsel is overly beholden to management, the result may be advice and counsel that does not prioritize what's best for the company.

Additionally, if such a perception is widely held throughout the company, it can erode the confidence that lower level employees place in the legal department. The general counsel should be seen as the senior executive most capable of pushing back on management decisions that put the company at legal or reputational risk. There must be a willingness by the general counsel to raise issues with the board, even if doing so may threaten her own standing with the CEO and other executives.

#4 - The general counsel is expected to advise on issues that extend beyond the traditional legal realm, including ethics, reputation management, and public policy

As a director, my experience is that boards look to the general counsel to give them perspective on not just the problems that present themselves ... but also for guidance on things the board should be thinking about, and how particular issues fit into the overall context of the business.

- *From the Skills for the 21st Century General Counsel report*

If the general counsel is to manage risk and support an ethical corporate culture, she must be empowered to advise on issues beyond traditional legal matters. In addition to rapid changes in the legal and regulatory landscape, companies are navigating issues involving public policy, politics, the media, and social pressure from consumers. The increasing importance of these “business in society” issues means they can pose formidable risks to companies. Someone needs to have official responsibility for these matters and the general counsel is well suited for this task. Effective lawyering has always left room for evaluation of nonlegal considerations. With the intense scrutiny that companies face in today’s world, it is important to consider how conduct that is technically legal can still be damaging to the company’s reputation, community goodwill, or its relationships with stakeholders. Corporate decisions in these areas need to be evaluated against a company’s risk appetite, integrity, and values.

Indeed there is a trend toward consolidating control of some of the corporate functions that address these legal-adjacent issues within the legal department. For example, the *ACC Law Department Management 2016 Report* showed that the legal department often oversees the government affairs function (44 percent); security (23 percent); public policy (21 percent); and communications (19 percent).

Even if the general counsel is not directly responsible for these matters, management should proactively seek the advice of the chief legal officer on these issues. The legal department cannot be left out of the decision-making on such matters if an ethical culture is to thrive.

#5 - Business units regularly include the legal department in decision-making

If the CEO's and board's relationships with the general counsel set the cultural tone at the top, then the interaction between business units and the rest of the legal department create the mood in the middle. Companies must develop a culture where in-house counsel are regularly consulted in decision-making at levels below the general counsel. This ensures that legal and risk considerations are taken into account as new products, services, or business practices are developed.

Inclusion of the legal department in the decision-making process is especially essential as businesses expand into areas where the law is uncertain. It is those gray areas where legal counsel can be most helpful in guiding the company in a manner that follows its corporate ethical compass. Having counsel involved on the frontend of decisions is the difference between having a legal department that is engaged, involved, and actively preventative from a compliance standpoint, and one that just plays clean up after something goes wrong. Greater interaction between the business and legal teams also reinforces the idea that risk management is everyone's responsibility. In today's hyper-regulatory business environment, ignorance of the law will not shield an executive from indictment. The interaction between a business and its attorneys will look different across companies, but from the board's perspective, if such interaction is not occurring, that might be a sign that corporate culture is underemphasizing legal and compliance risk.

The need for communication and collaboration with other functions is not limited to outward-facing business units — the internal-facing business units should also have established relationships with the legal department. Data security, for example, involves the law department and IT; the human resources department should provide information to support legal conclusions on employment matters; lawyers should be involved with the government affairs team to help define regulatory and legislative goals. In fact, because the legal department is so integral to the operations of a company, its reach can be a good proxy by which to measure communication and effective risk management across functions. If the board cannot find evidence of such collaboration, it could indicate a "siloed" corporate culture that exposes the company to unnecessary risks.

One important caveat to the above: However a company determines to facilitate the legal department's involvement in decisions, it should not be done in a way that negates individual lawyers' accountability to the general counsel. Several of the notable corporate scandals have been blamed, in part, on a lack of accountability between the general counsel and the line attorneys who had often seen signs of questionable corporate conduct. In other words, the attorneys who reported directly to business leaders were less effective in elevating issues of concern to the appropriate levels within the company. There should be general counsel oversight — perhaps a dotted-line reporting structure — over lawyers assigned to the business units to ensure proper reporting of issues of concern.

Conclusion

The five indicators below offer a checklist of current best practices of companies with strong general counsel and reputations for high integrity and ethics. These indicators can also be used as litmus tests of corporate culture. Given the incredible transformation of the corporate legal department over the last few decades, ACC believes we are just beginning to see the positive effects that a well-positioned general counsel and strong legal department can have on corporate culture.

- #1 - The general counsel reports directly to the chief executive officer and is considered part of the executive management team
- #2 - The general counsel has regular contact with the board of directors
- #3 - The general counsel is viewed as independent from the management team
- #4 - The general counsel is expected to advise on issues that extend beyond the traditional legal realm, including ethics, reputation management, and public policy
- #5 - Business units regularly include the legal department in decision-making