THE DISCRETE ROLES OF GENERAL COUNSEL

Deborah A. DeMott*

INTRODUCTION

It has long been evident that a lawyer who serves as an organization’s chief legal officer or general counsel typically occupies multiple roles within the organization. This Article focuses on the position of general counsel within a publicly held business corporation when the general counsel is an employee-officer of the corporation charged with overall responsibility for how the corporation’s legal matters are handled.1 So situated, a general counsel’s roles include furnishing legal advice to the corporation’s board of directors, chief executive officer (“CEO”), and other senior executives. But a contemporary general counsel often occupies other roles as well, each complex and interlinked in several ways. These linkages may be beneficial to a corporation and to society more generally. Positioned as an officer within a corporation, a general counsel who is an influential member of the corporation’s senior management can help to shape its activities and policies in highly desirable directions, exercising influence that may extend well beyond the bare bones of ensuring legal compliance.2 A general counsel also may be uniquely well positioned to

* David F. Cavers Professor of Law, Duke University School of Law.

1. The position covered by this Article does not encompass “general counsel” who are responsible only for divisions within corporations or nonemployee officers who are members of law firms and designated by corporations as their “general counsel.” For an example of the latter, see Robert L. Nelson, Partners with Power: The Social Transformation of the Large Law Firm 57 (1988) (discussing AT&T). This Article also excludes the situation of law firms that serve as clients’ general counsel. On this arrangement, see Susan P. Shapiro, Tangled Loyalties: Conflict of Interest in Legal Practice 36 (2002). Throughout this Article, I use the term “role” somewhat loosely and without any precise correspondence to concepts of legal capacity. On the importance of this distinction, see James S. Coleman, Foundations of Social Theory 541 (1990).

2. On general counsel’s potential influence, see, e.g., Michele M. Hedges, General Counsel and the Shifting Sea of Change, in Enron: Corporate Fiascos and Their Implications 539, 540 (Nancy B. Rapoport & Bala G. Dharan eds., 2004) (noting that “[g]eneral counsel are uniquely positioned to affect the legal well-being of their corporate clients and the professional agenda of the state and local bars”). For specific examples of the exercise of influence by general counsel, see David B. Wilkins, A Systematic Response to Systemic Disadvantage: A Response to Sander, 57 Stan. L. Rev. 1915, 1939-40 (2005) (describing instances of initiatives championed by a black general counsel, including reducing employment discrimination within the corporation and enabling the provision of affordable AIDS drugs in South Africa). Black general counsel also have “pressed [law] firms to recruit at historically black law schools and to attend minority job fairs in order to increase the number of black applicants that they see.” *Id.* at 1938.
champion a transformation of the organizational culture that shapes how the corporation addresses its relationships with law and regulation.³

Nonetheless, a general counsel's position often has been characterized as ambiguous—a characterization that suggests that not all occupants of the position succeed in balancing its multiple roles in either a professionally or socially satisfactory manner.⁴ More generally, a general counsel's dependence on a single client may call into question counsel's capacity to bring an appropriate degree of professional detachment to bear. Indeed, some general counsel appear to have erred fundamentally by misidentifying their clients as the individual members of the corporation's senior management rather than the corporate organization as a whole,⁵ an error shared by members of senior management themselves.⁶

Several incidents over the past few years illustrate circumstances—including tensions among general counsel's roles—that may undermine the effectiveness with which a general counsel fulfills the reasonable expectations engendered by undertaking such roles. Although the prospect of tensions among a general counsel's roles is not a newly observed phenomenon, recent events heighten both the significance of these tensions and the importance of resolving them carefully. The most visible events are criminal indictments, guilty pleas, and trials,⁷ as well as civil proceedings in which a general counsel is a defendant.⁸ For example, the Securities and Exchange Commission ("SEC") initiated thirty enforcement proceedings against lawyers, predominantly in-house counsel, in the past three years.⁹

³. For a recent example, see Lynnley Browning, How an Accounting Firm Went From Resistance to Resignation, N.Y. Times, Aug. 28, 2005, at A1. Senate hearings focused on tax-shelter products created and marketed by KPMG. The ensuing staff report, initiation of a grand jury inquiry, and an opinion from a federal judge suggesting that KPMG had obstructed justice all proceeded the recognition that "KPMG needed more help." Id. The firm hired a former federal judge as its vice chairman of legal affairs and positioned him over the incumbent general counsel. Id. The vice chairman then "set about cleaning house, firing about a dozen partners and effectively taking over the firm's legal department." Id. KPMG then settled with the Justice Department on terms that required a payment of $456 million and acceptance of an outside monitor of its operations. Id. KPMG as a firm was not indicted. Id.

⁴. See, e.g., Geoffrey C. Hazard, Jr., Ethical Dilemmas of Corporate Counsel, 46 Emory L.J. 1011, 1011 (1997) (stating that "the role of corporate counsel entails intrinsic ambiguities that must be worked through in the ordinary course of a day's work with far greater frequency than in most other practice settings"); Robert L. Nelson & David M. Trubek, Arenas of Professionalism: The Professional Ideologies of Lawyers in Context, in Lawyers' Ideals/Lawyers' Practices 177, 207 (Robert L. Nelson et al. eds., 1992) ("[C]orporate counsel occupy an ambiguous position both within the legal profession and within their employing organization.").


⁷. See infra text accompanying notes 97-99.

⁸. See infra text accompanying note 96.

⁹. Michael Bobelian, GCs No Longer Above Scrutiny: Company Lawyers, Not Just CEOs, Increasingly in SEC's Crosshairs, Conn. L. Trib., Feb. 14, 2005, at 3. Private plaintiffs also may pursue claims against general counsel stemming from securities and
To be sure, individual foibles may explain some incidents, but that possibility does not foreclose the value of broader inquiry into a general counsel's position.

This Article begins with a brief history of the evolution of general counsel's position within large corporations. This history illustrates sharp fluctuations over time in the organizational power and professional status of general counsel and in the functions that general counsel have performed. Scholars using sophisticated social science methodologies have yet to investigate the environment and performance of general counsel to the extent that social scientists have explored law firms and relationships between clients and external counsel. Nonetheless, this Article argues that implications for general counsel may stem from the more fully developed body of social science inquiry into law firms and their partners. In particular, this body of work suggests that general counsel's position has a paradoxical quality: While a lawyer who serves as general counsel of a large corporation holds the clearly defined power associated with a hierarchical position in a large bureaucratic organization, the position itself is ambiguous in many ways that may prove troubling.

The Article then specifies four roles typically occupied by general counsel before examining tensions among them. These roles include: (1) legal adviser within the corporation to its constituents in an individual professional capacity; (2) officer of the corporation and member of the senior executive team; (3) administrator of the corporation's internal (or "in-house") legal department; and (4) agent of the corporation in dealings with third parties, including external (or "outside") counsel retained by the

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common-law fraud. See, e.g., JP Morgan Chase Bank v. Winnick, No. 03 Civ. 8535, 2005 WL 2000107 (S.D.N.Y. Aug. 16, 2005) (denying a general counsel's motion for summary judgment against lenders' claims that counsel aided and abetted management's fraud to permit the corporation to draw funds from a credit facility on the basis of false statements of compliance with the credit agreement).

10. Two exceptions are noteworthy. See Hugh P. Gunz & Sally P. Gunz, The Lawyer's Response to Organizational Professional Conflict: An Empirical Study of the Ethical Decision Making of In-House Counsel, 39 Am. Bus. L.J. 241 (2002); Robert L. Nelson & Laura Beth Nielson, Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations, 34 Law & Soc'y Rev. 457 (2000). Nelson and Nielson conducted in-depth interviews with corporate counsel plus an in-depth case study of relationships between in-house lawyers and nonlegal executives in a large industrial company in the mid-1990s to determine how in-house lawyers construct or understand their own roles. Based on their titles, about one-quarter of the study's respondents were members of senior management. As Nelson and Nielson's title suggests, in-house lawyers police their clients' behavior in addition to providing advice. Increasingly, in-house lawyers also place themselves in an "entrepreneurial" role in which law is conceived and marketed internally as a source of profit for the client. Id. at 466. The study conducted by Gunz and Gunz obtained the responses of senior in-house lawyers to a set of cases describing ethical dilemmas, assessing in part the extent to which responses were more or less "lawyerly" or "organizational." Gunz & Gunz, supra, at 272. The study found, among other things, that in-house lawyers' responses to situations of ethical conflict may be differentiated into advising and observing. Id. at 275.
corporation. Although earlier accounts of the position of general counsel did not tend to single out these latter two roles as distinct ones, this Article uses a selection of recent events to demonstrate their significance and their interrelationships with general counsel's other roles.

The Article concludes by examining recent developments and prospects for further change that may reshape the general counsel position. The relationships that underlie the general counsel's power are under stress from a variety of directions, suggesting that further evolution is inevitable.

I. GENERAL COUNSEL'S POSITION

Unsurprisingly, the position of general counsel within large U.S. corporations has evolved over time. Three facets of its evolution are noteworthy: (1) general counsel's relationships with members of senior management, (2) general counsel's relationships with outside counsel, and (3) typical pathways for a general counsel's career. Each facet bears on general counsel's professional status as well as counsel's position within a corporation's hierarchy. The present position of general counsel is reminiscent in some but not all respects of circumstances from the late nineteenth century through the 1930s. As "both business and legal advisers," counsel then "were held in high repute and their sage counsel was regularly sought" by members of senior management. Consistent with their status, general counsel were paid approximately sixty-five percent of the CEO's remuneration and usually were among a corporation's three most highly compensated individuals. General counsel often assumed critical roles in arranging solutions to the financing challenges that confronted businesses in need of investment capital in an era when capital markets were less developed in depth and size. In the post-Civil War

11. For a statement of functions performed by general counsel, see 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, 1061-62 (1997). By the early 1980s, general counsel performed distinct functions: "They managed and reviewed the legal services provided to corporate clients by outside counsel; they regularly supplied routine legal services and, on some occasions, directly handled complex transactions and even litigation; they counseled clients and their constituents on regulatory requirements; and they created compliance programs." Id.


13. Id.

14. "For a generation after the Civil War to be general counsel of a railroad was to hold the most widely esteemed sign of professional success." James Willard Hurst, The Growth of American Law: The Law Makers 297 (1950). Corporate finance and mergers and acquisitions work for railroads were key to "a whole new field of corporate counseling." Id. at 298. Lawyers more generally became "familiar figure[s] on boards of directors; first the railroad general counsel, and then the lawyer for the investment banker led the way." Id. at 342. The prominence of lawyers in railroad financing work and in their relationships with railroad clients may be attributed to the novel legal solutions required to enable railroads to raise the large amounts required for construction from numerous investors through debt financing. Diffused owners of bonds or other debt securities would find it costly and difficult to monitor and enforce compliance with the bonds' terms. The solution was a
period, judges were lured from federal and state courts by the attractions of serving as general counsel to railroads.15

By the 1940s general counsel’s status and position had diminished noticeably as large law firms became dominant in corporate representation. The general counsel’s position became that of a “relatively minor management figure, stereotypically, a lawyer from the corporation’s principal outside law firm who had not quite made the grade as partner.”16 General counsel’s responsibilities were limited to handling routine matters of corporate housekeeping and (unsurprisingly) to serving as liaison between members of management and counsel’s former law firm.17 Service as senior management’s trusted adviser or as a monitor of how well outside counsel performed fell outside of the general counsel’s portfolio.

How this shift might best be explained is open to question. Developments stemming from the law firm sector of the profession are one possible explanation, in particular, the success with which law firms’ leadership articulated an ideal of professional independence that was inconsistent with an employment relationship with a single client.18 As the ethic that embodied the capacity for professional independence exclusively within law firms became dominant, law firms competed successfully to attract and retain the most talented young lawyers.19 Alternatively, a distinct, but not inconsistent explanation emphasizes the value that perceived independence from the client brings to a lawyer’s work, whether as an advocate in litigation or as an intermediary in transactional work.20 It is also possible that changes in the demographics of senior corporate management explain the diminished status of general counsel. In the earlier era, a higher percentage of CEOs were lawyers who had been promoted internally from the law department.21 By the 1940s, “[t]he new wunderkinds of the business community were marketing and finance...
types—the MBAs. With their ascendancy, the role that the corporate counsel played began to diminish. Thus diminished, the position lacked allure for the enterprising.

By the 1970s, the general counsel’s position in many large corporations grew in stature and scope of responsibility. Staffing for internal law departments increased, as did the range of matters handled internally. General counsel joined senior management near or at the top of the corporate hierarchy. General counsel also exercised much more discretion in delegating work to outside law firms and became active in monitoring its execution, thereby becoming a powerful and centralized intermediary among the corporation, its management, and its outside counsel. Moreover, the career path leading to the general counsel position shifted, as partners from major law firms and other prominent lawyers acceded to the position. The ratio between the salary of the CEO and the general counsel improved.

The increased cost of legal services, itself a consequence of increases in regulation and in the size, scope, and complexity of business operations, helps to explain the extent to which large corporations internalized legal work. Yet, cost pressures, standing alone, do not explain the enhanced prominence of general counsel as a member of senior management. That is, large corporations might reduce the cost of legal services by internalizing the legal function without enhancing the management power of general counsel outside the confines of the law department itself, just as corporations internalize other important functions in a department headed by an administrator who is not a member of senior management. One explanation for general counsel’s enhanced managerial stature is the nature of the advisory services that general counsel may provide: Other members of senior management may come to expect general counsel’s involvement in high-level strategic decisions as an adviser with intimate knowledge of the corporation and its business, able to bring to bear business insight in addition to legal skill. Consistent with general counsel’s expanded position within a corporation, the character of the legal work done by

22. Liggio, supra note 12, at 621.
23. See Chayes & Chayes, supra note 16, at 277 (reporting that as of 1985, “antitrust, tax, securities, patent, acquisitions, and even litigation are coming inside,” joining the more traditional internal categories of “[c]ommercial, corporate, personnel/labor, and property law”).
24. Id.
26. See, e.g., id. at 57; Larry Smith, Inside/Outside: How Businesses Buy Legal Services 216-17 (2001) (observing that by the late 1980s, “in-house practice began . . . to attract a higher caliber of practitioner,” including “prominent partners at law firms [from] all over the country”).
27. Liggio, supra note 21, at 1206.
29. Daly, supra note 11, at 1060-61; Weaver, supra note 6, at 1027 (stating that general counsel “can enhance their value to their client and their power within the organization when they are perceived as ‘adding value’ beyond traditional legal advice”).
general counsel and other in-house lawyers may be, to some degree, proactive as opposed to purely reactive because the lawyers’ involvement could occur at an earlier phase of any given transaction.\textsuperscript{30}

Why the present position of general counsel might hold appeal for talented and enterprising lawyers with other attractive opportunities\textsuperscript{31} also warrants examination, especially when considered against the long-established perception that “[t]he large law firm sits atop the pyramid of prestige and power within the American legal profession.”\textsuperscript{32} That is, the phenomenon of the general counsel’s position might be explained, not solely by factors related to corporate desire for a particular method of obtaining legal services, but also by factors relevant to the supply side—those lawyers who may serve as general counsel. This inquiry would benefit greatly from social science study, an enterprise beyond the scope of both this Article and the competence of its author.

Notwithstanding this limitation, some possible explanations for the competitive appeal of general counsel’s position merit articulation and brief discussion. These are: (1) the fit between the general counsel’s position and an individual lawyer’s talents (the “fit” hypothesis), (2) the prospect that service as general counsel may furnish a good launching pad into other positions within senior management (the “launching pad” hypothesis), (3) the position’s anticipated economic rewards (the “economic rewards” hypothesis), and (4) the contrast with partnership in a large law firm (the “law firm contrast” hypothesis). Each hypothesis carries somewhat different implications for the appeal of service as a general counsel.

The “fit” hypothesis reflects the likelihood that legal training does not exhaust an individual’s capacity to develop additional skills and to function well in a high-level business environment in which high-stakes decisions are made, as well as the likelihood that legal skill may complement, if not enhance, these aspects of business decision making. The fit between any general counsel’s strengths and any corporation’s need is not necessarily constant over time; as the corporation’s circumstances evolve in response to growth and other factors, so may its need for different counsel. In some circumstances, which most obviously include the wake of scandal and extensive legal and regulatory difficulties, the corporation may require a

31. In contrast, for entry-level positions, one corporate counsel observes that
when interviewing law students, it has become apparent that any corporation is at a disadvantage. . . . We are unable to offer the lure of partnership and associated financial rewards. Moreover, we must overcome a strong bias against corporate law departments. Most law students of the caliber we seek are conditioned to believe that the best graduates go to major business law firms. We thus must stress that in all respects, other than partnership compensation, we are similar to the competition and offer other compensating rewards.
32. Nelson, supra note 1, at 1.
general counsel with a very specific combination of abilities and credibility.\textsuperscript{33}

The "launching pad" hypothesis, more susceptible to testing through quantitative measures than the "fit" hypothesis appears to be, would be supported by evidence that general counsel move into other management positions, including that of CEO,\textsuperscript{34} and perhaps also by evidence that general counsel simultaneously hold other offices.\textsuperscript{35} The "launching pad" hypothesis also buttresses one explanation for why general counsel may serve on a corporation's board of directors. Fellow board members' familiarity with counsel's abilities as a board colleague may enhance counsel's position as a candidate for the CEO's position should it become vacant.\textsuperscript{36} To be sure, in some circumstances, external observers may interpret the appointment of general counsel as CEO as a recognition by the corporation's directors that its legal problems are especially grave.\textsuperscript{37} Situated within the corporation, general counsel may be especially well positioned to take the requisite actions as the CEO when large changes in corporate culture are required. An intriguing question is the length of tenure of CEOs appointed in such circumstances.\textsuperscript{38} This metric might

\textsuperscript{33} See supra note 3 (discussing the circumstances under which accounting firm KPMG appointed a former federal judge as vice chairman for legal affairs); see also text accompanying infra notes 88-95 (discussing the circumstances leading to the appointment of a new general counsel by Wal-Mart Stores, Inc., and by Morgan Stanley Inc.).

\textsuperscript{34} See Daly, supra note 11, at 1073; Susanna M. Kim, Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation, 68 Tenn. L. Rev. 179, 206 & n.109 (2001) (reporting that "[m]any lawyers actively seek to join the ranks of senior management and leave the legal department altogether" and that "[s]tudies have revealed that in recent years, there has been a 100% increase in the number of CEOs who began their careers as lawyers"). However, not all in-house lawyers aspire to leave the legal department. See Nelson & Nielson, supra note 10, at 485 (reporting that "only a few" in-house lawyers interviewed "seemed seriously to entertain the possibility of shifting to a business job").

\textsuperscript{35} It is not unusual for general counsel to also serve as a corporation's secretary and to carry a vice-presidential title. See Kim, supra note 34, at 200 & n.82.

\textsuperscript{36} See id. at 224 (noting that a "general counsel who makes a strong impression on the board increases the likelihood that the board will elevate the general counsel to the chief position").

\textsuperscript{37} See Michael E. Porter et al., Seven Surprises for New CEOs, Harv. Bus. Rev., Oct. 2004, at 62, 68 (reporting that a chief executive officer ("CEO") "with a legal background recounted how the markets reacted negatively to his appointment, on the assumption that the only reason to make a lawyer CEO was that the company was facing deeper asbestos-litigation problems than previously acknowledged").

\textsuperscript{38} For example, Citigroup's CEO, formerly its long-term general counsel, took over in 2003 following a series of serious legal and regulatory problems, including the loss of Citigroup's private banking license in Japan. See Monica Langley, Behind Citigroup Departures: A Culture Shift by CEO Prince, Wall St. J., Aug. 24, 2005, at A1. Acting to implement a new internal focus on controls and ethics, the new CEO has "hired lawyers for [many] top positions," stating that his objectives included "clearing the decks of problems and rolling out a new ethics model. These aren't center-of-the-plate issues for [the prior CEO, now Chairman], but I think they are exactly what the company needed. The times we're in required the kinds of things I'm working on." Id. Citigroup's CEO "is giving himself plenty of time. He says he hopes to run Citigroup for 10 years." Id. When a corporation's situation requires a new CEO with a particular kind of legal credibility, other candidates may be more attractive than the incumbent general counsel. See, e.g., Ian
illuminate whether, in the circumstances in which a CEO's position requires a general counsel's background and skills, the CEO's role is better defined as a shorter-term turn-around assignment with a specifically legal orientation, as opposed to a longer-term engagement with a broader business focus.

The "economic rewards" hypothesis likewise lends itself to quantitative measures, in particular by comparing the anticipated value of the compensation packages of general counsel with the anticipated value of partnership in a large law firm.\textsuperscript{39} It may be significant that a general counsel's compensation package often includes components not otherwise available, such as stock options and other forms of compensation based on an employer's equity securities.\textsuperscript{40}

The "law firm contrast" hypothesis has dimensions beyond a comparison of anticipated economic rewards. The most important are contrasts between the relevant organizational structures and the circumstances that determine an individual actor's position and power within them. The internal structure of corporate law departments has been characterized as an attempt to mimic or "to resemble the law firm in the day-to-day structure of its work."\textsuperscript{41} Junior lawyers learn from their seniors, while all focus on performing tasks that require the exercise of judgment to resolve often

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\textsuperscript{39} One study found the median total cash compensation of a chief legal officer to be $370,000 in 2003, an increase of nine percent over the prior year. See Alexi Oreskovic, \textit{General Counsel Compensation in the Crosshairs?}, Legal Intelligencer, June 30, 2004, available at 6/30/2004 TLI S7 (Westlaw) (reporting a study by Altman Weil Inc.). Reportedly, at some companies the CEO has sole responsibility for determining the general counsel's compensation, while at others the board's compensation committee acts on the basis of a recommendation made by the CEO. \textit{Id.}

\textsuperscript{40} To be sure, some individual lawyers and law firms make equity investments in their clients. For comprehensive treatment of this practice and its implications, see John S. Dzienkowski & Robert J. Peroni, \textit{The Decline in Lawyer Independence: Lawyer Equity Investments in Clients}, 81 Tex. L. Rev. 405 (2002). On the use of equity-based compensation for in-house counsel, the authors report that corporations offer stock or stock options as compensation or bonuses, and they often make the corporate stock a central feature of the employee retirement plan. This trend has been justified as both a recruitment device for getting highly qualified lawyers to move in house from private law firms and an effective incentive method of compensation based on the corporate client's financial performance. \textit{Id.} at 517. One study, now somewhat dated, reports that over seventy percent of senior in-house lawyers receive stock options in some form. See Nancy J. Moore, \textit{Conflicts of Interest for In-House Counsel: Issues Emerging from the Expanding Role of the Attorney-Employee}, 39 S. Tex. L. Rev. 497, 538 (1998) (discussing a 1985 study).

\textsuperscript{41} Eve Spangler, Lawyers for Hire: Salaried Professionals at Work 88 (1986); see Nelson & Trubek, \textit{supra} note 4, at 208 (stating that corporate counsel "maintain the appearances and internal rhythms of a law firm: They look and act like lawyers, they have their own law offices within their corporations, and these offices are managed by lawyers").
complex problems. These patterns of work typify a collegial organization, one conventionally associated with work that requires professional expertise and cooperation among peers. The power within a collegial organization to control other actors stems from resource dependencies among them and from often-fragile arrangements for power sharing. In contrast, in bureaucratic organizations, power is associated with defined positions and its exercise is often less complex than in a collegial organization. A corporate law department might be characterized as a “collegial pocket” within a larger and more bureaucratic corporate organization.

Within the collegial pocket that a corporate law department may represent, general counsel’s position is defined with a degree of hierarchical clarity carrying authority that is not associated with the position of a partner in a law firm, however powerful that partner might be. An individual partner’s power in the law firm context stems from the partner’s ability to “find” or attract and retain clients, plus the ability to enlist the allegiance of other lawyers in the firm to work on client matters. Thus, the power derived from a finder’s status is contingent on the finder’s intra-firm relationships. Moreover, law firms at least attempt to define and impose firm-wide values on all partners and to limit partners’ discretion in many ways, in particular by developing practices to reduce the risk of defection by partner-“finders” and the teams of lawyers who work on their client matters. Power within the polycentric context of a law firm is diffused, and authority may be fuzzy, in contrast to the unclouded hierarchical position of the general counsel in relation to the remainder of the law department. Although holding authority defined with such a degree of clarity can be

42. Spangler, supra note 41, at 89 (“Like law firm lawyers . . . in-house attorneys may devote a substantial portion of their work to delicate and complex legal tasks in a context of loosely structured supervision.”).


44. Id. at 3.

45. See id. at 4, 51 (using the terminology “collegial pocket”). Nelson and Trubek characterize most law departments as “collegial enclaves within the corporation.” Nelson & Trubek, supra note 4, at 208.

46. Lazega, supra note 43, at 13; Nelson, supra note 1, at 70-73.

47. Lazega, supra note 43, at 192-98.

48. "'What we have here,' declares the general counsel of a mixed industrial corporation, 'I call a benevolent dictatorship. Clearly a law department reflects the personality of the vice president or the general counsel more so than a law firm.'" Spangler, supra note 41, at 75. The author comments, "To the extent that general counsel have near-dictatorial powers, committees and other vehicles for staff participation have little importance in law department governance." Id. Even when a general counsel’s powers are not “near-dictatorial” or are not exercised as if they were, general counsel’s power has a clarity and stability that an individual partner in a contemporary law firm would only rarely possess. See Smith, supra note 26, at 216-17. Compared with partnership in a law firm, a general counsel’s position provides "the opportunity to run a more hierarchical organization and pursue global business goals without having to vet every decision with committees of argumentative lawyers, each one having his or her own separate clientele, practice area focus, and personal agenda." Id.
attractive, in the case of general counsel, the clarity of positionally defined authority inextricably accompanies a position—that of general counsel—that is itself ambiguous.

II. DISTINCTIVE ROLES OF GENERAL COUNSEL

Each of the roles presently occupied by general counsel is complex. Each role, moreover, is at least potentially in tension with counsel’s other roles. This part specifies each of the roles and identifies some of the tensions that may arise among them. Part III then uses this typology of roles and tensions as a framework for discussing a few actual conflicts of general counsel in the recent past.

A. Legal Adviser to Corporation and Its Constituents

The specifics of a general counsel’s role as an individual legal adviser vary considerably depending on, among other factors, the size of the corporation and its in-house legal department, as well as on the complexity and nature of the legal and regulatory questions that the corporation must address.⁴⁹ Although some delegation of work to subordinates within the legal department is inevitable,⁵⁰ a general counsel bears ultimate responsibility for “all legal matters affecting the corporation.”⁵¹ Acting individually, a general counsel furnishes advice to senior management on major transactions or other situations.⁵² The general counsel’s individual advisory role also encompasses discerning trends in the law and projecting their impact on the corporation.⁵³ Under normal circumstances, the general counsel also furnishes legal advice to the corporation’s board of directors.⁵⁴

Lurking behind these generalities are a number of difficulties concerning a general counsel’s individual advisory role. For starters, counsel’s responsibility for the corporation’s legal compliance may be at odds with counsel’s role as an adviser. Although this also may be true for all lawyers to some degree, for general counsel the dissonance may become especially pressing.⁵⁵ For example, if general counsel has direct charge over implementing corporate compliance programs, as opposed to involvement in designing compliance programs and serving an educative role within the

⁵⁰. Id. § 2-3.
⁵¹. Kim, supra note 34, at 200.
⁵². Liggio, supra note 21, at 1208.
⁵³. Id. at 1208-09. This role may merge into participation in the corporation’s strategic planning process and thus into functioning as a business adviser, if not necessarily a business decision maker. Id. at 1209-10.
⁵⁵. Nelson and Nielson report that in-house lawyers generally differentiate between their roles as “cops” and “counsel”: In the “cop” role, lawyers focus on “policing the conduct of their business clients,” while the “counsel” role entails providing advice on legal questions but also “implies a broader relationship with business actors that affords counsel an opportunity to make suggestions based on business, ethical, and situational concerns.” Nelson & Nielson, supra note 10, at 463-65.
corporation with respect to these requirements, counsel’s position as the corporation’s top compliance officer may conflict with counsel’s responsibility to defend corporate actions when they are challenged.  

More generally, like any lawyer, general counsel’s professional duties require appropriate responses when counsel learns of legally problematic conduct by the corporate client’s constituents. But situated within the corporation, general counsel—whether directly or through subordinate members of the legal department—is exposed to “the informal, back-channel information that flows around the company water cooler” and other settings in which information is transmitted informally within any organization. Outside counsel, in contrast, is sheltered from such information, at least initially when outside counsel learns facts that have been distilled by the client. Somewhat paradoxically, general counsel’s embedded position within a corporation, which underlies counsel’s ability to function proactively, also places counsel in an environment rich with information that may require uncomfortable choices. This also may be an environment that rewards alacrity over accuracy, thereby creating a greater risk for error.

A further complication stems from the fact that not all general counsel are as fully functional as advisers as descriptions of the general counsel’s present position might suggest because counsel may be unaware of major ongoing developments. Although many reasons may keep general counsel out of informational loops that operate at the senior management level, one structural explanation is the ability of other members of senior management to exclude general counsel from any particular loop. Consider in this light the well-known facts of Smith v. Van Gorkom, a case known for its controversial imposition of individual liability on negligent directors. The corporation’s long-serving CEO/Chairman, having determined that the

56. James F. Kelley, The Role of the General Counsel, 46 Emory L.J. 1197, 1199 (1997) (observing that “[i]f the general counsel is thought of as primarily a compliance officer rather than an advocate for the corporation, he may have abdicated the role that his client most needs, although the client may not always realize it”). For more extensive treatment, see Nelson & Nielson, supra note 10.

57. Hazard, supra note 4, at 1019.

58. Id. Access to informal informational channels also presents the challenge of determining whether what is learned is reliable. To be sure, difficulties for counsel arise when a client’s distillation of “facts” proves unreliable, whether counsel is situated within or outside the client’s organization.


60. It has been said of in-house lawyers generally: “After a while on the job, inside lawyers “get it.” They recognize that their duty is to give the best possible answer they can, but also that the answer is more valuable at a 50% level of certainty today than a week from today at 90%.... “Getting it” from a business rather than a legal standpoint is what the in-house marketing chore is all about. In-house lawyers have the time and opportunity to convince the client that they know their job is to move business forward rather than impose the delaying concerns that outside counsel are obligated to impose.

Smith, supra note 26, at 247.

61. 488 A.2d 858 (Del. 1985).
company should be sold to a particular third party through a cash merger transaction, pressed ahead toward board approval of the transaction over the opposition of some members of the company’s senior management. Prior to the board meeting, the CEO/Chairman retained outside counsel to advise on legal aspects of the transaction. However, the CEO/Chairman did not consult with either the corporation’s incumbent general counsel or his predecessor, who by that time had become a vice president and also served as a director. Why the CEO/Chairman was so reticent with the corporation’s present and prior general counsels is not evident from the court’s opinion, but his ability to exclude them from the informational loop concerning the merger is striking.

B. Corporate Officer and Member of Senior Management Team

The bare bones of general counsel’s position as a corporate officer normally would be defined in the corporation’s bylaws. Although general counsel would, as a corporate officer, be appointed to office by the board of directors, in a large corporation the general counsel generally reports to the CEO and the CEO has a substantial if not exclusive role in choosing the general counsel. General counsel’s portfolio of responsibilities may include nonlegal functions, including the corporate secretarial, human resources, and governmental affairs functions. Beyond formally defined authority and responsibilities, as discussed above general counsel may also participate in formulations of corporate strategy at the highest levels of the management hierarchy.

Conventional skepticism about the capacity of in-house corporate lawyers to exercise independent professional judgment focuses on the exclusivity of their relationship with a single client (their employer), which calls into question the feasibility of withdrawing from representation if

62. Id. at 867.
63. For sample by-law language, see Basri & Kagan, supra note 49, § 2-4 ("The corporation may have a general counsel who shall be appointed by resolution of the board of directors and who shall have general supervision of all matters of a legal nature concerning the corporation.").
64. Id. § 2-2.
67. See supra text accompanying notes 24, 29-30.
professional norms so require. General counsel’s position may be more complex in this respect. If counsel’s past remuneration has been generous, accumulated wealth may enable counsel to be bolder, risking the economic consequences of withdrawal (i.e., resignation) or termination by the corporation. General counsel’s withdrawal also may send a louder signal to audiences both internal and external to the corporation. On the other hand, to the extent general counsel is socialized as a member of the senior management team, general counsel may be reluctant to jeopardize ongoing membership in the team and inclusion in its informational loops, which underlie effective power within the corporation. The impact of such socialization on a general counsel may run stronger and deeper than the impact that socialization into a corporate employer may carry for subordinate members of the legal department. This is so both because the stakes associated with general counsel’s position are higher and because the bonds of personal loyalty between general counsel and other members of the senior management team may bind more tightly than the more impersonal ties between a subordinate lawyer and a corporate employer.

More generally, to the extent general counsel participates at an early stage in shaping major transactions and corporate policy, counsel’s ability to bring detached, professional judgment to bear in assessing their legality may be compromised, especially when the question of legality is tinged in shades of gray as opposed to black and white. An executive who participates in formulating strategic corporate decisions is likely to view the

68. See, e.g., Dzienkowski & Peroni, supra note 40, at 518.
69. For discussion of the policy considerations that shape the debate over in-house lawyers’ rights to assert wrongful discharge claims, see Susan R. Martyn & Lawrence J. Fox, Traversing the Ethical Minefield: Problems, Law, and Professional Responsibility 413-17 (2004).
70. Nelson & Trubek, supra note 4, at 208 (noting that legal departments “attract and socialize lawyers into a business ideology”).
71. “Typically, the loyalties of the general counsel are to the company. ‘I always feel I have one hat, and this is: I am a corporate officer who is a lawyer’ is the way one general counsel described the balance he maintains between business and professional commitments.” Spangler, supra note 41, at 74. Conflicts for general counsel may arise “more subtly and with greater frequency” than is the case for outside counsel. Robert C. Kahrl & Anthony T. Jacono, “Rush to Riches”: The Rules of Ethics and Greed Control in the Dot.Com World, 2 Minn. Intell. Prop. Rev. 51, 58 (2001) (discussing specifics in the case of start-up companies). The authors comment,

When the CEO of NewCo instructs Counsel to execute a business plan, Counsel feels a natural compulsion to assist the CEO in executing the plan, even if the legality of certain steps in the plan might otherwise trouble him. Counsel may feel a more powerful compulsion than an outside counsel, who is not so dependent on the personal goodwill of the CEO for his family’s immediate sustenance. The CEO’s influence over Counsel’s status at NewCo, and the inherent compulsion that Counsel feels to align himself to the goals of the CEO, may be analogous to the conflict of interest that Counsel feels when he is two weeks away from turning his five percent equity into five million dollars. If Counsel feels any propensity whatsoever to act against his independent professional advice, regardless of whether an actual conflict ever materializes, the Counsel is in the same situation as an equity-holding attorney who is advising his client on going public.

Id. at 58-59.
steps necessary to implement them differently than would a more subsidiary actor within the organization.\textsuperscript{72} Even if a general counsel’s role as a lawyer always distances counsel somewhat from other members of the senior management team, counsel’s ongoing associations with them may sway counsel’s loyalties away from the corporation and toward more personalized loyalties focused on the agents who comprise the corporate senior management team.\textsuperscript{73} Additionally, as a member of the senior management team, counsel may tend to address legal questions in a manner that pays allegiance to the wisdom of executive-level commitments and perspectives, even in the absence of explicit instructions from other members of the team.\textsuperscript{74}

C. Administrator of the Internal Legal Department

A general counsel functions as the top administrator of the corporation’s internal legal department. This position entails overall responsibility for managing the department’s budget, establishing and implementing

\textsuperscript{72} The point parallels the distinction between “executive” and “subsidiary” intentions. See Christopher Kutz, Complicity: Ethics and Law for a Collective Age 87 (2000). Kutz defines “executive intention” as “an intention whose content is an activity or outcome conceived as a whole, and which plays a characteristic role in generating, commanding, or determining other intentions and mental states in order to achieve that total outcome” and “subsidiary intention” as “an intention generated and rationalized by an executive intention, whose content is the achievement of a part of the total outcome or activity.” Id. at 96. A participant in a group acts from an “executive perspective” when that participant believes that “what we do is up to me.” Id.

\textsuperscript{73} On the likelihood that a lawyer’s ties of personal loyalty to individual agents may create dissonance with the lawyer’s duty of loyalty to the client organization, see Shapiro, supra note 1, at 104-05. Shapiro notes also that “abrogating that personal loyalty in favor of institutional loyalty sometimes threatens the ongoing business relationship between the corporation and the law firm that is controlled by the agent.” Id. at 105. The threat and its consequence of compromised loyalty appear greater when the relationship is that between general counsel and other members of senior management, as opposed to the “business relationship” between a corporation and its outside counsel. The risks are enhanced to the degree that general counsel identifies the CEO or the senior management team as counsel’s client. Even proponents of the movement toward strong general counsel occasionally appear to characterize counsel’s relationship with the CEO as that of attorney and client. For an example, see Liggio, supra note 12, at 634 (arguing that greater complexity in business intensifies the need for knowledge of the client, which is not so readily available to outside counsel, which will “put a greater stress on the need for inside counsel who sit at the right hand of the master”). The language that in-house lawyers and corporate constituents use to characterize their relationship may have some bearing on how loyalties are aligned. For example, corporate counsel repeatedly characterize business units and managers within the corporation as their “clients,” verbal slippage that may mirror situational reality. On this usage, see Nelson & Nielson, supra note 10, at 463.

\textsuperscript{74} For discussion of this point in connection with government lawyers, see W. Bradley Wendel, Professionalism as Interpretation, 99 U. L. Rev. 1167, 1229 (2005) (discussing how Justice Department lawyers who prepared a legal analysis of restraints on torture were advised that the administration sought “‘forward-leaning’” advice, which was interpreted to mean that “[l]awyers were expected to take risks, think outside the box, and in effect approach the law from an adversarial point of view, rather than as a set of legitimate reasons upon which to act”).
Structuring a law department requires decisions about two basic organizational questions: (1) how extensive a hierarchy will the department use internally, and (2) to what degree will the department operate in a centralized as opposed to a decentralized fashion.

Most law departments typically use hierarchical internal structures, with multiple reporting levels between the general counsel and the lowest level of staff lawyer. This structure also is associated with promotion and compensation practices that require attaining a supervisory position to vault over career and salary ceilings. More recently, some law departments reconfigured into organizational structures with fewer titles and hierarchical levels and with compensation based more on professional responsibility than on the number of subordinates.

Most law departments also are centralized to some degree, with legal matters coming to the department from the managers of sites at which the corporation operates. On the other hand, a pattern of geographically dispersed corporate operations tends to be associated with more decentralization in the law department, in which lawyers are assigned to the location of operating units. Centralized operations are simpler to control and have greater potential to develop richer professional cultures through interchanges among lawyers. In decentralized law departments, lawyers in closer physical proximity to the operational managers may have better rapport with those managers and with the specifics of the businesses they manage.

Regardless of how a law department is structured, a general counsel risks some degree of remoteness from the substance of the department's work. If the department is large, administrative matters may consume much of general counsel's time and energy. The risk of remoteness is enhanced to the degree the legal function is decentralized unless general counsel devises structures and practices that facilitate monitoring and other forms of control over work done by lawyers in the department.

D. Agent of the Corporation in Dealings with Third Parties

Acting to some degree as the corporation's agent is integral to the position of general counsel. Within a law department, the general counsel serves as the corporation's agent in dealings with junior members of the department. General counsel also serve as corporate agents in dealings with third parties external to the corporation. The most prominent instance is the role of general counsel in connection with relationships between the corporation and outside counsel. Prior to the reinvigoration of general

76. Id. § 2-6; Spangler, supra note 41, at 76.
77. Spangler, supra note 41, at 82.
79. Id. § 2-11.
80. Id.
counsel's position in the 1970s, a general counsel served as a liaison between the corporation's principal outside law firm and managers within the corporation.81 Since then, relationships between general counsel and outside law firms have been more fluid, as many counsel "shopped around" for representation on specific matters.82 Many general counsel developed the practice of running "beauty contests" at which multiple law firms might be interviewed prior to committing the corporation to a particular engagement.83 Others designated particular law firms as the corporation's preferred sources for outside legal work, paying close attention to costs.84

The prominence of general counsel's more discretionary role carries many consequences for relationships between corporate clients and law firms. For example, prominent counsel might join forces to mount a collective campaign for change in law firms' practices. Recently, general counsel of eight major corporations began meeting and exchanging information with the objective of improving delivery of legal services.85

81. See supra text accompanying note 17.
82. See Basri & Kagan, supra note 49, §§ 15-2 to 15-3. General counsels' success in consolidating authority to approve the retention of outside counsel led to their characterization as corporate "purchasing agents." See Robert Eli Rosen, "We're All Consultants Now": How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services, 44 Ariz. L. Rev. 637, 668 (2002). More broadly, general counsel have been characterized as "primary agents of change" in the market for legal services, because internalizing into the general counsel position the diagnostic and referral functions theretofore performed by outside counsel eliminated informational asymmetries between lawyers and their corporate clients. See Ronald J. Gilson & Robert H. Mnookin, Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits, 37 Stan. L. Rev. 313, 381-82 (1985). Professor Ronald Gilson links the elimination of informational asymmetries to a reduction in the ability of outside counsel to serve as reputational intermediaries on behalf of clients. See Ronald J. Gilson, The Devolution of the Legal Profession: A Demand Side Perspective, 49 Md. L. Rev. 869, 902-03 (1990). Contemporary general counsel, as knowledgeable purchasers of legal services, dramatically reduce the costs to a corporate client of switching counsel. Id. at 902-03. Thus, switching costs underlie lawyers' market power and ability to act as credible gatekeepers. Id. at 901. Inside counsel may not be good prospects to serve gatekeeping functions because their "reference group... may be other members of corporate management rather than other lawyers." Id. at 915. A subsequent empirical study finds an ongoing but somewhat declining market for service as a reputational intermediary. See Karl S. Okamoto, Reputation and the Value of Lawyers, 74 Or. L. Rev. 15 (1995).
83. See Shapiro, supra note 1, at 182-83. A law firm that is unsuccessful in the wake of a beauty contest may find itself conflicted out of representing an adverse party. This prospect leads to "convoluted pas de deux" between firms and their prospective clients so that the firm may "gather sufficient information about a new matter without obtaining confidences that will trigger conflicts of interest." Id. at 287. Shapiro cautions against overgeneralization on the basis of lawyers' accounts of their strategies to learn enough but not too much. Some protective mechanisms may have formal existence but be disregarded in practice. Id.
84. For an example, see Smith, supra note 26, at 206 (describing how general counsel of Caterpillar Inc., consistent with "'good tight management,'" pays slightly over one-half the national median in total legal costs and uses a small number of outside domestic law firms).
85. See Susan Beck, Clients Unite!, Am. Law., July 2005, at 22 (noting that these general counsels' concerns are not focused solely on fee reduction but also on efficient
General counsel also might press for information from law firms that may reflect idiosyncratic concerns.86 More broadly, the diffusion of corporate work among multiple law firms limits the breadth of any one firm’s knowledge of the client, empowering general counsel in dealings with firms but reducing the capacity of any one firm to bring judgment to bear when more comprehensive insight into the corporation may be desirable.87

However focused, general counsel’s role as an agent of the corporation may be in some tension with counsel’s other roles. As explored more fully in Part III, counsel’s affinity for other members of senior management, like counsel’s own involvement in managerial decisions, may bias the decisions that general counsel makes in retaining outside counsel and in interacting with outside counsel and other third parties, including representatives of governmental authorities. And, to the extent general counsel’s position within the corporation is tied, at least in some respect, to the size of the legal department, that fact may shape—not necessarily consciously—general counsel’s perspective on retaining outside counsel.

Another indication of the breadth and significance of general counsel’s role as an external agent of the corporation is the close attention paid to changes in counsel when former counsel has been prominently associated with a particular approach to litigated matters or to dealings with regulators. The approach implicates actions taken by general counsel individually as well as actions taken by retained counsel. Indeed, so well known may general counsel’s commitment be to a given approach that more specific instructions to retained counsel may prove unnecessary. General counsel’s commitment may persist despite adverse outcomes that might call the wisdom of counsel’s approach into question. But allegiances between general counsel and other members of senior management, in particular the CEO, may inhibit change.

Wal-Mart Stores, Inc., for example, had “a long history of refusing to negotiate with plaintiffs,” whether private or governmental, and regardless

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86. See Tamara Loomis, Full Disclosure, Am. Law., July 2005, at 29 (noting the requirement that firms seeking fee increases from E.I. du Pont de Nemours & Co. disclose whether partners working on Du Pont matters are equity partners in the law firm and that such inquiry is not customary among corporate clients).

87. For discussion of this phenomenon and its consequences in the context of securities disclosure, see Restoring Trust in America’s Business Institutions 214-18 (Margaret M. Blair & William W. Bratton eds., 2005). One experienced lawyer characterizes the development as the “fractionalization of corporate representation.” Id. (quoting John Villa, Esq.). Another lawyer reports a relatively recent reversion to the days ... when outside counsel acted as the general counsel, in effect, for large corporations. Now we are seeing corporations turning to their outside counsel more for advice on ethics issues.... [T]hat’s the role that lawyers have traditionally played. Certainly when outside lawyers were acting as general counsel they were really the conscience of the CEO.

Id. (quoting Paul Saunders, Esq.).
Recognized as “part of the corporate culture,” the company’s litigation stance was associated with its long-term general counsel, as was the company’s policy of “scrimping on legal costs.” These policies both changed when the company hired more in-house lawyers with experience at other companies, followed, in 2001, by the insertion of a newly hired vice president for legal and corporate affairs between the CEO and the general counsel. An assistant general counsel with prior experience in government and as a plaintiff’s-side class-action litigator soon replaced the retiring general counsel.

More recently, and in the midst of turmoil at the senior management level, Morgan Stanley Inc. hired a senior partner of a prominent New York City law firm to oversee the firm’s legal department and governmental affairs unit, subordinating the company’s general counsel who had previously reported directly to the CEO. The company, distinct within its industry for its “combative approach to legal issues,” had suffered some noteworthy litigation losses and was reproved by the SEC Chairman when Morgan Stanley’s CEO stated publicly that retail investors should not be concerned about investment analysis tainted by conflict of interest. The company’s general counsel himself, while negotiating with the SEC to settle the stock-analysis charges, told regulators they had been “asleep at the wheel.” Soon after general counsel’s retirement and the board’s

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89. Id.
90. Id.
94. Susanne Craig, For Morgan Stanley, Difficult Task Lies Ahead, Wall St. J., June 6, 2005, at C1. The general counsel’s retirement was characterized as creating an opportunity for Morgan Stanley “to bring in a high-profile outsider,” focusing the company on “luring a high-level former regulator who could burnish Morgan Stanley’s legal reputation.” Id. The company’s outgoing general counsel, a “long-time” friend of the company’s soon-to-exit CEO, came to the company in 1999 from a Chicago law firm. Id. He “established a hard-nosed legal reputation, reflecting his background as a fierce litigator.” Id. This style “sometimes didn’t serve him on Wall Street, where companies often opt to quietly settle cases rather than fight with regulators.” Id. However, the general counsel’s downfall is attributed more to the Perelman case, see supra note 92, than to difficult relations with regulators. “Morgan Stanley’s legal team . . . so badly botched the discovery process . . . that the trial judge became infuriated. The judge entered a default judgment, saying the jury had to assume that Morgan Stanley had defrauded Mr. Perelman . . . .” Craig, supra, at C6. Morgan Stanley was represented by the general counsel’s former law firm as lead outside counsel. Following the judge’s grant of the partial default judgment, Morgan Stanley’s general counsel appeared in court to tell the judge that he had decided to fire the firm. See O’Brien, supra note 92, at 1. The judge refused to grant Morgan Stanley a six-month continuance to find new lawyers, “calling it a ‘ruse’ Morgan designed to buy itself time, a
appointment of a new CEO, a new general counsel followed. His background as a regulator and general counsel in another large financial services firm underscored a commitment by Morgan Stanley, at its most senior level, to making major changes in how the company would deal with legal and regulatory matters.\textsuperscript{95}

III. RECENT ILLUSTRATIONS OF TENSIONS AMONG ROLES

Recent incidents involving the predicaments of general counsel illustrate that the tensions among counsel’s various roles are not always surmounted successfully. These incidents include two civil trials alleging breaches of fiduciary duty in which general counsel—in both cases also directors of their client—were named as defendants;\textsuperscript{96} at least three trials of general counsel on criminal charges, leading to two convictions\textsuperscript{97} and one acquittal;\textsuperscript{98} and several guilty pleas by general counsel to securities fraud and other charges.\textsuperscript{99} The aftermath of Enron’s collapse led to a bankruptcy characterization Morgan disputes but one with which Mr. Perelman agrees.” Id. The judge subsequently made it clear that the law firm was not acting as “sort of the lone renegade who perpetrated what is almost a fraud on the court . . . . It was Morgan Stanley.” Id.

95. See Ann Davis, Mack Recruits Lynch for Top Legal Post at Morgan Stanley, Wall St. J., July 19, 2005, at C1. The subsequent resignation of Morgan Stanley’s advertising agency from its $80 million annual creative account is an additional indication of the depth of change at Morgan Stanley directed toward reorienting the company’s external persona. See Stuart Elliott, Burnett Decides to Resign From Morgan Stanley Account, N.Y. Times, Aug. 12, 2005, at C5. A spokeswoman for the agency attributed its resignation to unelaborated “recent changes at Morgan Stanley.” Id. Inside Morgan Stanley, the chief marketing officer left following the CEO’s exit. Id.

96. See Pereira v. Farace, 413 F.3d 330 (2d Cir. 2005) (vacating judgment in which general counsel, inter alia, was found to have devised a plan to disguise a share redemption by the corporation as a purchase by its controlling shareholder); In re the Walt Disney Co. Derivative Litig., No. Civ.A. 15452, 2005 WL 2056651, at *48 (Del. Ch. Aug. 9, 2005) (finding that directors were not subject to liability for breach of an employment contract in connection with the termination of the corporate President’s employment, where the corporation’s General Counsel, Chief of Corporate Operations, and Executive Vice President for Law and Human Resources served on the board of directors).

97. See United States v. Brown, 338 F. Supp. 2d 552, 561 (M.D. Pa. 2004) (finding that, where Rite Aid Corp.’s general counsel was found guilty on ten counts of fraud, conspiracy, and related offenses, in which counsel “orchestrated, organized and led the extensive obstructive conduct designed to cover up the accounting fraud,” an enhanced sentence was warranted and that counsel’s age (seventy-six) and health problems did not warrant a downward departure in sentencing); Richard M. Strassberg et al., Lawyers on Trial, N.Y. L.J., July 18, 2005, at 9 (reporting the conviction of former general counsel of Inso Corp. on a perjury charge stemming from the preparation of documents to facilitate a scheme to create the appearance of greater sales).

98. See Anthony Lin, Defense Strategy Pays Off for Belnick, Legal Times, July 19, 2004, at 3 (reporting the acquittal of general counsel of Tyco, Inc., on charges of grand larceny in excess of $30 million from Tyco, in which the successful defense depicted general counsel as an “honest lawyer and outsider at Tyco who failed to establish a rapport with Kozlowski [Tyco’s CEO] and encountered active hostility from other Tyco executives and members of the board of directors”). A civil suit remained pending against counsel. See Anthony Lin, A Cautionary Tale, Corp. Counsel, Sept. 2004, at 78.

99. See Alison Frankel, GCs in Trouble: Collateral Damage, Corp. Counsel, Dec. 2004, at 28 (reporting a guilty plea by the former general counsel of Computer Associates International, Inc., to counts of conspiracy to commit securities fraud and obstruct justice);
examiner's close scrutiny of conduct by its lawyers, including its general
counsel.100 Moreover, the SEC has recently brought an unprecedented
number of enforcement actions against corporate counsel.101 As a
consequence, some general counsel reportedly feel that their positions have
been “sullied” within the legal profession more generally.102 Compared to
rank-and-file lawyers in their departments, general counsel report working
more hours in response to greater scrutiny on the part of regulators,
shareholders, and directors, while rank-and-file lawyers report feeling
“more useful than before, more vital to the smooth operation of their
companies.”103 Tellingly, legal periodicals publish articles that explicitly
offer advice to general counsel on lessons to be learned from their
colleagues’ plights and that identify patterns of conduct that may lead to
legal transgressions.104

Two incidents are especially revealing of how potential tensions among
general counsel’s roles may prove problematic: (1) the criminal misconduct
of Franklin C. Brown, former general counsel of the drugstore chain Rite
Aid, and (2) the performance of James V. Derrick, Jr. as general counsel of
Enron. Each story is unique, of course, but each has elements with
reflections elsewhere.

A. Misdirected and Excessive Loyalty

Franklin C. Brown’s story illustrates, among other things, tensions
among a general counsel’s roles as a senior officer, as the company’s chief
legal adviser, and as its agent in dealings with third parties. In 1965,
following three years as a solo practitioner, Mr. Brown was hired to join
Rite Aid by its founder.105 He felt “an overwhelming sense of loyalty to the
company” over the years, staying on after Rite Aid went public in 1968

Mark Harrington, Ex-Symbol Exec Pleads Guilty to Fraud, Newsday, Feb. 18, 2005, at A63
(reporting prior guilty plea by company’s former executive vice president/general counsel);
Strassberg et al., supra note 97 (reporting guilty pleas by former general counsel of U.S.
Wireless, Inc. to charges of mail fraud and money laundering stemming from a scheme to
use shell corporations to embezzle from the company and by former general counsel of
Katun Corp. to charges of wire and computer-related fraud stemming from a scheme to
defraud airlines); see also Ex-Hollinger Executive Pleads Not Guilty to Fraud Charges, N.Y.
Times, Aug. 25, 2005, at C1 (reporting not guilty plea of former general counsel of
Hollinger International to five counts of mail fraud and two counts of wire fraud stemming
from the alleged diversion of $32 million from the company).
100. See infra text accompanying notes 121-40.
101. See supra note 9 and accompanying text.
102. See Ashby Jones, Under the Scope, Corp. Counsel, Dec. 2004, at 80 (reporting the
results of a quality of life survey in which 405 respondents self identified as general
counsels; forty-nine percent of general counsel and forty-three percent of rank-and-file
respondents answered “yes” to the question whether recent corporate scandals “‘tarnished
the legal community’s image of Fortune 500 general counsel’”).
103. Id. at 78.
104. See Strassberg et al., supra note 97; see also Nicholas Adele & Talea Miller, Life
After Scandal, Corp. Legal Times, June 2005, at 42 (recounting the present professional
whereabouts of general counsel of companies involved in recent scandals).
when many other newly rich executives departed. Mr. Brown’s personal loyalties shifted to the founder’s son who became Rite Aid’s CEO in 1995. According to Mr. Brown’s defense counsel, “the history of their relationship since [the son] was a kid” was that the son “got his neck in incredible situations” from which Mr. Brown rescued him. Rite Aid reported disappointingly low earnings in March 1999, leading to the filing of class action suits and, a bit later, a restatement of three years’ pretax earnings in an amount that, at the time, set a record. The founder’s son, the then-CEO, resigned, as had Rite Aid’s chief financial officer (“CFO”) somewhat earlier. Rite Aid’s audit committee, having retained its own counsel and a forensic accountant, commenced an investigation, which led to the discovery of facts suggesting “conduct which appeared to constitute serious breaches of their fiduciary duties” by the CEO and CFO.

Mr. Brown and Rite Aid’s now-former CEO were indicted for conduct in connection with Rite Aid’s internal investigation and a related investigation by the SEC. The Federal Bureau of Investigation (“FBI”) also commenced an investigation and persuaded Rite Aid’s former president to tape conversations he would have with Mr. Brown and the former CEO. In their conversations, the three agreed to backdate letters and to take other measures in an attempt to conceal fraudulent accounting practices. Mr. Brown, additionally, paid his secretary $25,000 in exchange for altering documents. By this time, Mr. Brown had retired but still made repeated visits to Rite Aid’s office. He told the former president and the former CEO that he was “putting himself ‘totally on the line for you guys.’” As it happens, Mr. Brown was the only Rite Aid officer to go to trial, as all others made plea agreements, several agreeing to testify against Mr. Brown. Following his conviction, Mr. Brown was sentenced to ten years in prison despite his age (seventy-six) and medical problems.

It would be a mistake to dismiss Mr. Brown’s story as simply a vignette about a sadly misguided individual. Solidarity between a general counsel

106. Id.
107. Id.
109. Id. at 653. Rite Aid’s restatements amounted to a total of $1.6 billion. See Gardner, supra note 105, at 17.
110. Gardner, supra note 105, at 17.
111. In re Rite Aid, 139 F. Supp. 2d at 654.
114. Id.
115. Gardner, supra note 105, at 17.
116. Id.
117. Strassberg et al., supra note 97, at 9; see also United States v. Brown, 338 F. Supp. 2d 552, 561 (M.D. Pa. 2004) (augmenting Brown’s sentence due to his leadership role in orchestrating the cover-up, denying downward departure on the basis of the defendant’s age and physical condition, and noting that nothing prevents defendant from “receiving appropriate medical care through the Bureau of Prisons”).
and other members of senior management can compromise counsel’s service as a legal adviser and as the company’s agent in its dealings with third parties—in Mr. Brown’s case the squads of internal and external investigators who focused on Rite Aid. In a similar vein, if arguably less blatantly so, Computer Associates’ general counsel faced obstruction of justice charges stemming from his “coaching” of the company’s employees who were to be questioned by outside counsel and government investigators.\textsuperscript{118} A key concern appears to have been the counsel’s dissuading the employees from revealing the company’s practice—well-known within at least some circles of the company—of using a “35-day month” system of keeping the company’s books open at the end of fiscal periods to create the appearance that it had met revenue and earnings estimates.\textsuperscript{119} Indeed, the indictment alleged that the general counsel and CFO lied to outside counsel retained to conduct an internal investigation, knowing and intending that their false representations would be transmitted by outside counsel to the FBI, the SEC, and the U.S. Attorney’s office.\textsuperscript{120}

B. Decentralization, Distance, and Mismatched Expertise

James V. Derrick, Jr. was the Senior Vice President and General Counsel of Enron Corp. until he became its Executive Vice President and General Counsel in July 1999.\textsuperscript{121} Mr. Derrick’s position placed him at the top of a large and decentralized structure within the corporation. Enron had a large in-house legal department, staffed by approximately 250 lawyers.\textsuperscript{122} A mix of in-house and outside lawyers worked on transactions, with outside firms chosen “based upon the level of expertise within the law firm and [the firm’s] availability.”\textsuperscript{123} Although Enron had designated Vinson & Elkins as its “preferred outside law firm,” Mr. Derrick was “interested in giving work to a lot of different firms”\textsuperscript{124} and the company used “hundreds of outside law firms.”\textsuperscript{125} Each of Enron’s business units had its own legal department headed by a general counsel, who reported to the head of that

\textsuperscript{118} Strassberg et al., supra note 97, at 12.
\textsuperscript{119} Id.
\textsuperscript{120} Frankel, supra note 99, at 29.
\textsuperscript{122} See Batson Report, Appendix C, supra note 121, at *9.
\textsuperscript{123} Id.
\textsuperscript{125} Batson Report, Appendix C, supra note 121, at *9 (quoting sworn statement of Enron’s Vice President and Associate General Counsel).
unit as well as to Mr. Derrick. All SEC-related matters were the responsibility of an Associate General Counsel situated within the legal department who reported directly to Mr. Derrick.

Decentralized structures present major challenges to assuring, among other matters, consistency and quality of work. For example, lawyers embedded within business units who report to the unit head may function with less professional independence than lawyers who report to general counsel. Ongoing exchanges among senior lawyers in supervisory positions may facilitate overall coherence. General counsel of Enron's major business units met weekly in Mr. Derrick's office, constituting a "forum for attorneys to raise issues and concerns, as well as a time to communicate the activities of each group." But this forum did not reveal any of the legal concerns regarding Enron's use of special purpose entities ("SPEs") according to Mr. Derrick's testimony before Enron's court-appointed bankruptcy examiner.

Mr. Derrick's understanding of his own role, when coupled with his individual professional expertise, may help explain why so much about Enron's SPE transactions remained unknown for so long by so many. Mr. Derrick "viewed his principal role as that of administrator of the law department, relying on the general counsel of each business unit to manage the attorneys and transactions within that business unit. . . . [H]e did not become substantively involved in any of Enron's business transactions unless a specific issue was brought to his attention." When SPE-related issues did come to Mr. Derrick's attention, he "did not fully analyze the issue but rather accepted the conclusions of others without probing or testing them." Similarly, Mr. Derrick did not focus closely on the conflict of interest issues posed by transactions in which Enron's CFO held a material financial interest, nor did he confirm that persons with delegated responsibility were adequately policing such transactions.

Mr. Derrick's professional background may help explain the limited and episodic character of his involvement in transactional questions. He lacked any background in accounting. He was a litigator who assumed a substantial individual professional role in major litigation involving

126. Id.
127. Id.
128. Such, at least, was the perception of one general counsel in Nelson and Nielson's study. See Nelson & Nielson, supra note 10, at 471 (stating that one general counsel reports that it is his job "to protect [the] independence" of lawyers assigned to business units; whether lawyers report to him could be a "resignation" kind of decision" for him).
130. Id.
131. Id. at *6.
132. Id.
133. Id. at *6-7.
134. At least, the complaint in the securities fraud class action in which Mr. Derrick was named as a defendant did not allege that he had such a background. See In re Enron Corp., No. MDL-1446, Civ.A. H-01-3624, 2003 WL 21418157, at *14 (S.D. Tex. Apr. 24, 2003).
He attended meetings of Enron’s board but his presentations to the board were generally limited to litigation matters. This focus and expertise did not match well with the nature and complexity of Enron’s legal situation as its business evolved. Waiting for others to discover problematic issues proved an inadequate mechanism for assuring sufficient awareness at the top of the law department’s hierarchy.

As it happens, Mr. Derrick was also a member of Enron’s Management Committee from 1997 through 2000. This body conducted the company’s day-to-day business, approved significant transactions, and (coincidentally) waived compliance with Enron’s conflict of interest policy to enable its CFO to hold equity interests in partnerships with which Enron dealt. As General Counsel, Mr. Derrick also reviewed the final drafts of disclosures Enron made in securities filings concerning related party transactions. In 2003, Mr. Derrick was dismissed as a defendant from the securities fraud class action brought on behalf of purchasers of debt and equity securities. The court held that, although Mr. Derrick served on the Management Committee, the complaint did not allege sufficient knowledge on his part to constitute scienter comparable to that of his codefendants based on their “day-to-day, personal participation in the business operations of Enron.” His review of Enron’s disclosures in securities filings was limited to discerning “obvious errors,” as he relied on the law firm of Vinson & Elkins to assure substantive correctness and legal compliance. However, Mr. Derrick’s assumption about the extent to which Vinson & Elkins reviewed Enron’s filings was not confirmed by the firm’s billings.

One can, of course, derive many morals from the Enron saga in all its facets. Mr. Derrick’s story illustrates the challenges that confront a general counsel—with a particular background and set of skills—in charge of a large and highly decentralized legal function in a corporation with rapidly evolving businesses and untrustworthy senior management. Additionally, the degree to which Enron’s relationships with outside counsel were fragmented and under the control of managers within its business units undermined the prospect that general counsel could respond appropriately to the company’s manifold legal challenges.

135. Id.
136. See id. at *13.
137. Id. at *15.
138. Id.
139. Id. at *14. The organization within Vinson & Elkins also may have fragmented knowledge about the legal implications of transactions. Lawyers who worked on securities disclosure questions were in a separate department from the lawyers in the corporate finance transaction who worked on special purpose entities transactions themselves. See Batson Report, Appendix C, supra note 121, at *32.
140. See Batson Report, Appendix C, supra note 121, at *33.
141. As Professor Robert Gordon assesses the implications of Enron’s structure, “[o]ne question for lawyers—as well as for senior managers and board members—is whether they can conscientiously and ethically do their jobs and exercise their functions as fiduciaries in organizations structured so as to diffuse responsibility and prevent their access to the big picture.” Robert W. Gordon, A New Role for Lawyers?: The Corporate Counselor After
IV. PROSPECTS FOR CHANGE

It is likely that the position of general counsel will continue to evolve. In particular, the functions and relationships associated with the position may themselves be repositioned in significant ways. Ties between a corporation’s directors and its general counsel may weaken, as may general counsel’s ties to the CEO. The scope of the general counsel’s portfolio may also contract in significant respects, as may the sway of a general counsel’s power within and over relationships with outside counsel.

One likely source of weakening in relationships among general counsel and the corporation’s directors is the use of independent outside counsel who are chosen and retained by audit committees comprised of independent directors to facilitate compliance with new requirements imposed by the Sarbanes-Oxley legislation, the SEC, and stock exchange listing rules. Once advised by independent counsel, independent directors on audit committees may prefer to establish an ongoing relationship with outside counsel. And then, unsurprisingly if not inevitably, outside directors as a group, separate from the audit committee, may perceive the value of ongoing independent representation. Were these developments to occur, general counsel’s advisory relationship to the board would be diluted, as would be general counsel’s control over relationships between corporate constituents and outside counsel.

A separate relationship that may weaken is that between general counsel and the CEO. The American Bar Association’s Corporate Governance Recommendations propose that the board of directors approve general counsel’s “selection, retention, and compensation.” Strengthening the board’s relationship with general counsel may weaken the bonds between the CEO and general counsel, as would instituting a practice of regular meetings between general counsel and a committee or other group of independent directors.

Enron, in Enron: Corporate Fiascos and Their Implications, supra note 2, at 763, 771. For a discussion of the moral bases for individual actors’ accountability regarding participation in collective activities—including those of organizations—that are harmful to third parties, see Kutz, supra note 72, at 146-65.


143. See id.

144. See supra note 65.

145. Such a practice has been proposed. See Bevis Longstreth, Speech Before the American Law Institute: The Corporate Bar As It Appears to a Retired Practitioner (May 17, 2005), http://www.ali.org/ali/AM05Longstreth.htm. Mr. Longstreth recommends that, as a matter of best practice, all outside lawyers with a significant representation of a corporation meet at least twice a year with a committee of independent directors without the presence of management for “frank dialogue” about their work, legal issues confronted by the corporation, and interactions with management. Id. He suggests that the same practice apply to general counsel but notes that “[t]he productive tension exerted by this system of governance might not be as effective in the case of the General Counsel, whose reputational risks are distinctly more bundled up with management and the corporation, which is his sole client.” Id. at 7.
Moreover, to the extent that a CEO seeks advice on difficult questions from counsel external to the corporation, the ties between the CEO and the general counsel loosen. One function usefully served by counsel is acting as the CEO’s “conscience,” as a sounding board and source of sound judgment on questions in which ethical issues often shade legal determinations. A CEO might believe that an adviser external to the corporation and its senior management echelons is best able to serve this function, bringing a greater measure of detachment to the exercise of judgment.146

General counsel’s portfolio of power and responsibility may also contract in other ways. In many large corporations, compliance responsibilities are allocated explicitly to a chief compliance officer and a compliance staff that is distinct from the legal department. Mutual funds, required by the SEC to appoint a chief compliance officer who reports directly to the board, have been cautioned against either housing the position within the legal department or having the officer report through general counsel.147 To intertwine legal and compliance functions may jeopardize the privilege otherwise available to the corporation for communications with counsel because the privilege is inapplicable to routine compliance monitoring, itself subject to examination by the SEC.148

CONCLUSION

All in all, the position of general counsel may prove less attractive than heretofore. The position’s appeal to many appears tied to its ambiguity, while tensions among general counsel’s diverse roles may become more difficult to resolve satisfactorily, prompting redefinition of the position. Moreover, the legal and reputational risks associated with service as a general counsel appear to have increased appreciably.

Separately, the relationships that enhance general counsel’s power are under stress on several fronts. Ties among a general counsel, the board of directors, and outside counsel would weaken to the extent that the board establishes direct ongoing relationships with outside counsel. Ties between the general counsel and the CEO would also be diffused by high-level advisory relationships between the CEO and outside counsel, motivated by the CEO’s desire for advice from a more detached source. The tensions among general counsel’s roles help explain pressures toward clarification.

146. See Restoring Trust in America’s Business Institutions, supra note 87, at 217-18.
148. Id.