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THE EMPLOYEE-LAWYER: A CANDID REFLECTION ON THE
TRUE ROLES AND RESPONSIBILITIES OF IN-HOUSE COUNSEL

Steven L. Lovett



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TRUE ROLES AND RESPONSIBILITIES OF IN-HOUSE COUNSEL

*Steven L. Lovett**

ABSTRACT

This article¹ is an examination of the variety of real-world roles and characteristics which are the hallmarks of valuable, and well-balanced, in-house counsel. As the number of employee-lawyers has steadily increased over time, the expectations, needs, demands, and complexities of representing client-companies “in-house” have also increased. The traditional approach to, and the practice of, law leaves significant gaps in the preparedness of lawyers to join in the employee, and executive, ranks of businesses. While a substantial body of literature focuses on specific issues, such as a privilege preservation, or on specific roles or nuances of roles, such as serving as general counsel, few resources discuss the practicalities of an in-house lawyer’s responsibility to make sure his or her contribution to a client-company—combined as legal counsel and as an employee or executive—is valuable, productive, and appropriate.

Much of what this article discusses is based on anecdotal experiences and observations. Opinions and experiences may certainly vary, but the fact remains, in-house counsel are increasingly responsible for adding value to, and becoming more involved in the *business* strategy of, their organizations. This heightened need for employee-lawyers to understand and fulfill roles outside of the mere practice of law means that successful in-house counsel must be willing and able to wear many more hats than an advocate’s wig.

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¹ With permission, certain portions of this article are adapted from a book, authored by Steven Lovett, and published by ABA Publishing. STEVEN L. LOVETT, CORPORATE COUNSEL GUIDES: PRACTICE BASICS (2013).

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I. THE INCREASING PRESENCE OF, AND THE NEED FOR, IN-HOUSE COUNSEL

In 2006 there were approximately 18,000 companies in the United States that employed between 49,000 and 61,000 in-house lawyers.² If those figures remained unchanged in 2014, it would have been reasonable to estimate that thirteen to sixteen percent of all persons whose occupation is practicing as a “lawyer” does so as in-house counsel: lawyers who are in management and/or who are employed by companies.³ This estimation does not take into account the more recent upward trend of in-house counsel positions.⁴

As a consequence of this massive professional demographic, most state bar associations, as well as the American Bar Association, maintain committees and sections dedicated to the nuances of practicing corporate law, or as it is interchangeably called, “business law.”⁵ Independent professional organizations have also sprung up to augment traditional bar-associated affiliations. The Association of Corporate Counsel, dedicated to “serving the professional and business interests of lawyers who practice in the legal departments of corporations,” currently boasts the active membership of “a diverse mix of more than 35,000 in-house lawyers who represent more than 10,000 companies in the United States and 85 countries around the world.”⁶ *Inside Counsel*, a monthly magazine “published

² Association of Corporate Counsel, *Profile of In-House Counsel* 4 (Dec. 2006), <http://www.acc.com/v1/public/Surveys/loader.cfm?csModule=security/getfile&pageid=16297&page=/legalresources/resource.cfm&qstring=show=16297&title=ACC%202006%20Census%20of%20Inhouse%20Counsel%20>. This is a one-time study performed by Cogent Research (www.cogentresearch.com) for the Association of Corporate Counsel.

³ This estimation is based on a comparison of the figures provided by the Association of Corporate Counsel’s survey (*supra*, note 2) and an occupational chart provided by the U.S. Bureau of Labor Statistics. See *U.S. Bureau of Labor Statistics*, LARGEST OCCUPATIONS IN LEGAL SERVICES (May 2014), http://www.bls.gov/oes/current/ind_emp_chart/ind_emp_chart.htm (last visited Apr. 23, 2015).

⁴ Interview conducted by John Okray & Diana Li, *Hiring and Compensation Trends for In-House Counsel*, THE FEDERAL LAWYER (Mar. 24, 2014), available at <http://www.mlaglobal.com/community/thought-leadership/hiring-and-compensation-trends-for-in-house>.

⁵ See, e.g., the Corporate Counsel Committee of the ABA’s Business Law Section, <http://apps.americanbar.org/dch/committee.cfm?com=CL240000> or the Corporate Counsel Committee of the ABA’s Section of Litigation, <http://apps.americanbar.org/litigation/committees/corporate/about.html>.

⁶ Association of Corporate Counsel, Membership, <http://www.acc.com/membership/faqs.cfm> (last visited Mar. 5, 2015).

specifically for in-house counsel,” has a circulation of 40,000, including chief legal officers, vice presidents, and general counsel.⁷

The world of business is increasingly complex. In an effort to remain competitive and to grow, companies face a dizzying array of challenges: employment issues, regulatory compliance, litigation risks, transactional concerns and relationships, multijurisdictional interests, intellectual property rights, media relations, and an ever-evolving, rarely satisfied, demand-side consumer. Lawyers have increasingly become a key participant in this environment, and businesses more than ever before recognize the tactical importance of obtaining and retaining competent, effective, and efficient legal counsel.⁸ Many businesses have taken the step of internalizing their lawyers by hiring in-house counsel to join their management and operations teams and including them within the decision-making matrix of their companies.⁹ In 2007, when Steve Jobs, the iconic founder of Apple, was struggling to find someone to build the right kind of legal department within Apple Inc., he found Daniel Cooperman, who was then the General Counsel of Oracle Corporation.¹⁰ Once Mr. Cooperman set up shop at Apple (with the blessing of Larry Ellison, the CEO of Oracle), he led the way to building a legal department that is now “integral to the company’s \$300 billion business—from protecting its signature logo and

⁷ *About Us*, INSIDECOUNSEL, <http://www.insidecounsel.com/pages/aboutus.php> (last visited Mar. 5, 2015).

⁸ A remark contained in the Association of Corporate Counsel’s “Chief Legal Officers 2016 Survey” provides an approximate idea of how many lawyers work as in-house counsel. The ACC describes itself as “the lead organization serving the needs of more than 40,000 corporate lawyers at more than 10,000 organizations in 85 countries[.]” ACC Chief Legal Officers 2016 Survey 1 (Association of Corporate Counsel ed., ACC 2016), <http://www.acc.com/vl/public/Surveys/loader.cfm?csModule=security/getfile&pageid=1422254&page=/legalresources/resource.cfm&qstring=show=1422254&title=ACC%20Chief%20Legal%20Officer%20CLO%202016%20Survey%20%20Executive%20Summary&recorded=1> (last visited Feb. 5, 2016). The report also reflects “significant increases (greater than 10 percent) among in-house lawyer positions” in 2015. *Id.* at 31.

While CLOs [Chief Legal Officers] maintain their trusted position as business advisers—a majority report spending their time advising executives—some are turning to chief operating officers (COOs) to run legal operations, and many seek to develop needed non-legal skills in their departments. To support this business advisory role, CLOs have a range of non-legal skills, including emotional intelligence and executive presence, which they also seek to develop in their staff.

Id. at 2.

¹⁰ Catherine Dunn, *Working Under an iCon*, CORPORATE COUNSEL 15 (Dec. 1, 2011).

coordinating worldwide product launches to waging war over smartphones patents.¹¹ Apple's top lawyers 'are part of the senior management team[.]''¹²

The tasks and roles of in-house counsel continue to move well beyond customary (even if still-important) assignments, such as contract review, litigation risk assessment, legal compliance, and employment law functionary. Lawyers typically have little education or formal training for the demands and nuances of working as a team member (usually at a management or an executive level) within a business organization. While some law schools are beginning to recognize the significance of offering coursework focused specifically on the practice of in-house lawyering, the vast majority continue to overlook the growing need for this particular subject-matter curriculum.¹³ Although lawyers, who find themselves heading into an in-house career, are typically well-educated and intellectually motivated, they can still struggle to fulfill responsibilities external to (or inextricably bound-up with) their responsibilities as lawyers.

Defining and understanding our roles as lawyers is an ongoing part of our professional life. Designating a person as a partner, associate, judge, lead counsel, division chief, co-counsel, client, or clerk comes from an ability and a need (on some level) to define and understand what that person does—what that person's job *means* and what it may mean in the pursuit of our own careers. Most of our professional rules discuss some of the definitional differences, and consequences, between acting as a counselor, advocate, or officer of the court.¹⁴ Defining roles—the functional meaning of those roles—provides compass points to navigate through an endless ocean of legal and professional issues. With defined roles: (1) we know what to expect; (2) employees know what to expect; (3) clients (or

¹¹ *Id.*

¹² *Id.*

¹³ The author's 2015 review of the 204 ABA accredited law schools in the United States (or territories) showed that only 8% (approximately 16 schools) offer courses dealing the various roles and duties performed by in-house counsel, and another 3% (approximately 5 schools) offer some kind of externship or clinical program focused on in-house counsel practice.

¹⁴ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 2.1 ("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."); MODEL RULES OF PROF'L CONDUCT R. 3.1 et al. (describing the duties of a lawyer as an "Advocate"); MODEL RULES OF PROF'L CONDUCT R. 3.3 (discussing a lawyer's superior duty to act with "candor" toward "the tribunal").

the client) know what to expect; (4) other lawyers know what to expect; and (5) the public, the government, and other parties know what to expect. Our sense of what our role means in any given situation is what acts as a rudder, steering the course of our conduct and our decisions. The more firm and comprehensive our sense of meaning, the more precisely and predictably that critical rudder will pilot us. Understanding a lawyer's underlying purpose will formulate behavior, rights, obligations, decision matrices, personal ethos, and ultimately an in-house lawyer's principal usefulness to his or her employer.

From a business perspective, defining roles also establishes the pragmatics of function and procedure, including (1) vertical and horizontal structure, (2) processes for workflow, and (3) efficiency of work management. A lawyer's ability to define his or her role as a general counsel, an in-house lawyer, or a company's corporate lawyer is essential to dictating a level of overall success when working with and for a corporation. Though it is important to have a job description—if, in fact, one is available—it is even more imperative to grasp what that job *means*, as illustrated by Ivan Fong, a Senior Vice President of Legal Affairs and also general counsel for 3M:

One of the most exciting and interesting parts of my job is being a business partner; that is, being an advisor to the business and helping the business grow, while ensuring the business does so in a legal and ethical way. Having a strong legal background is helpful, of course, but sometimes the issue is not solely a legal issue. In those instances, there are both legal and business dimensions that are important to capture in the analysis.¹⁵

It is essential for in-house counsel, outside corporate counsel, and for the legal community as a whole, to recognize the uniqueness of an in-house lawyer's role—as an “employee-lawyer”—in order to better prepare to serve, and to provide better services to, organizational client-employers. Accordingly, this article's purpose is to discuss the critical axioms of serving as in-house counsel, which are extraneous to, but intertwined with, the “traditional” practice of law. The specific aspects of a general counsel's position will be discussed first, followed by a discussion of those aspects attributable to all in-house counsel and to outside counsel.

¹⁵ ACC Chief Legal Officers 2014 Survey 2, http://www.acc.com/aboutacc/newsroom/upload/ACC-CLO-2014-Survey-exec_summ-012814.pdf (last visited Apr. 17, 2015).

II. THE “SIMPLICITY” OF A SINGLE CLIENT

Professor Deborah DeMott’s article on the roles of a general counsel discusses four likely reasons why a lawyer may seek to hold the position of general counsel.¹⁶ All four of Professor DeMott’s ideas are convincing and relevant; I would like to posit a fifth, which is an equally likely attractant for all in-house counsel. This fifth reason is a more elemental hypothesis: the *simplicity* hypothesis.

What is readily apparent and so strikingly simple about the condition of an in-house counsel is that he or she has a *single* client. Though this can often be the very thing which makes an in-house counsel’s role complicated, it should also bring a refreshing straightforwardness to the job. That straightforwardness is in itself an attractive challenge. For many other lawyers, the single-client phenomenon can occur in a modified way in private practice, usually in larger law firms when one is burrowed within a particular practice division or when one is working on a particularly complex, single transaction or piece of litigation.

When an in-house counsel walks into the office, his or her mental resources are charged with addressing and/or being responsible for the full spectrum of an employer-company’s liabilities, business operations, and current projects—past, present, and future. How, then, does this equal simplicity? Instead of thinking in terms of having a single client, think in terms of how *working* for a single client, as an in-house counsel does, affects a lawyer’s professional worldview.

In-house counsel can largely concentrate on one industry,¹⁷ a single group of employees and employment issues (even when the employment

¹⁶ Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 *FORDHAM L. REV.* 955, 961–65 (2005). Professor DeMott thoughtfully proposes four hypotheses, namely:

(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” hypothesis), and (4) the contrast with partnership in a large law firm (the “law firm contrast” hypothesis).

¹⁷ There are always exceptions, such as companies with multiple divisions and subsidiaries, just as there are some exceptions for each of the upside advantages I have listed, but if the observation ceiling is raised a bit higher, then even the exceptions can characterize themselves within the simplicity hypothesis.

pools are large), a single corporate philosophy, a single board of directors, and a single management group. An in-house counsel can look to a single corporate history (unless dealing with a new venture) and the history of a single industry for guidance and some level of future predictability about the scope of his or her job. An in-house counsel can look to an identifiable group of regulatory agencies and become a pseudo-expert on a fairly particular body of laws and regulations while still practicing as a generalist. The attractiveness of an in-house counsel's position is that a lawyer can go into work and face a *known* universe.¹⁸ True, an in-house counsel may face an immense amount of work, involving a host of difficult and various issues, but he or she can do so while keeping in mind that everything that needs to be done is predicated upon working for *one* client within *one* universe. If an in-house counsel changes or forgets this *primoris elementum*, the effectiveness of an in-house lawyer's role—indeed, the role itself—would disintegrate.

By way of simple proof, let us revisit and borrow Professor DeMott's definition but remove the *organizational* term used by Professor DeMott: “[An in-house] counsel is an employee-officer of the _____ charged with overall responsibility for how the _____'s legal matters are handled.”¹⁹ Immediately, we can see the client component of the definition is not an elective component. It directly affects *who* and *what* every in-house counsel is and does. This, then, must be the building block on which we frame all of our construction about how all in-house lawyers are examined: *you cannot conceive the many without the one*.²⁰

III. GENERAL COUNSEL

Succinctly put, “the general counsel is an employee-officer of the corporation charged with overall responsibility for how the corporation's

¹⁸ Conversely, the intrigue of private practice for many lawyers is that, on any given day, their universe of practice may radically expand or contract—the number of open files and limitlessly diverse issues might be many or few. In fact, when a private practice lawyer has only *one* client, it can create quite a bit of heartburn. The uncertainty of not knowing when the billable hours' gravy train will end can be disconcerting.

¹⁹ DeMott, *supra* note 16, at 955.

²⁰ Plato, *Parmenides* 165e–166a.

legal matters are handled.”²¹ Even more succinctly put, a general counsel is a company’s most senior lawyer.²² The day-to-day role of a general counsel can be one of the most ambiguous and difficult roles in the legal profession, but it is also, in many respects, influential and impactful on the success and strategy of an organizational client.

A. Advisor, Counselor, and Pundit

A general counsel is the ultimate *legal advisor* to a corporation, bearing the ultimate responsibility for all of a corporation’s legal matters.²³ In spite of acts of delegation, or the participation of outside-counsel specialists, a general counsel bears the true onus of insuring a company is receiving appropriate and quality legal counseling on all necessary issues at all times. In this primary capacity, a general counsel is *the* legal advisor to senior management (or sometimes not-so-senior management), *the* legal advisor to the board of directors and its committees, and *the* legal advisor to the whole of the corporation, staying dutifully abreast of the body of laws—and pieces of litigation—which have an impact on all of a company’s business enterprises.

Significantly, as the singularly responsible legal advisor to a corporation, a general counsel’s role must also be to champion the ethical conscience of the corporation. “In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, which may be relevant to the client’s situation.”²⁴ Unless there is simply a changing of the guard as a general counsel retires or moves on, there are times when a new general counsel is hired because of an immediate issue the corporation believes needs some proven expertise or a prominent reputation to successfully handle. A lawyer might be hired as general counsel to help steer a company out of a strategic setback and to

²¹ DeMott, *supra* note 16, at 955.

²² For the purposes of this discussion, I am putting aside the less frequent situation in which a company’s general counsel is a partner of a private law firm. That particular situation can have its place in certain circumstances, but much of the examination of that role is better addressed when discussing the role of outside corporate counsel.

²³ Susanna M. Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, 68 TENN. L. REV. 179, 200 (2001).

²⁴ MODEL RULES OF PROF’L CONDUCT R. 2.1 (1983).

position itself to regain its market momentum.²⁵ A general counsel might be hired to restore market or governmental confidence in a corporation that has struggled with regulatory issues or enforcement actions.²⁶ A general counsel might be selected to restore public confidence in its brand name or public image.²⁷ A general counsel might be employed on an interim basis—

²⁵ The president and CEO of H&R Block pinpointed two key reasons for H&R Block's announcement that it was hiring Tom Gerke as its general counsel and senior vice president: "Tom has guided Fortune 500 companies through a variety of legal and regulatory challenges. He's also great at helping companies build on opportunities." Julie Beck, *H&R Block Appoints New GC*, INSIDECOUNSEL (Jan. 5, 2012), available at <http://www.insidecounsel.com/2012/01/05/hr-block-appoints-new-gc> (last visited Apr. 30, 2015). In 2011, H&R Block had been prohibited by the Justice Department from buying TaxAct, an online service. The antitrust lawsuit went to trial in late 2011.

²⁶ JPMorgan Chase & Co. investment bank hired Jonathan Schwartz as its new senior lawyer in the spring of 2010. Mr. Schwartz's experience included stints as general counsel of Napster and deputy general counsel at AOL TimeWarner, two companies that had participated in trench warfare with government regulators. See, e.g., Edmund Sanders & Michael Cieply, *AOL Time Warner Probe Tests Nerves*, THE BALT. SUN, July 3, 2003 (reprinted with permission at <http://www.lawcfl.com/news/aol-time-warner-probe-tests-nerves>); see also *Kranwinkle Leaves, Schwartz Joins Univision*, MEDIA MOVES (Nov. 26, 2012), <http://www.mediamoves.com/2012/11/kranwinkle-leaves-schwartz-joins-univision.html> (last visited Feb. 5, 2016). Before taking up arms for private corporations, Mr. Schwartz had studied at Cambridge University as a Fulbright scholar, clerked for United States Supreme Court Justice Thurgood Marshall, worked as a federal prosecutor in Manhattan, and risen to the level of a principal associate deputy attorney general in the Department of Justice. The timing of Mr. Schwartz's hiring went hand in hand with in-depth SEC investigations and legal actions concerning JPMorgan's role in, and investment advice about, collateralized debt obligations. See David Henry & Peter Rudegear, *JPMorgan Faces Criminal and Civil Probes Over Mortgages*, REUTERS UK (Aug. 7, 2013), <http://uk.reuters.com/article/uk-jpmorgan-probes-idUKBRE9761A420130807> (last visited Feb. 5, 2016).

²⁷ In January 2012, Gerson Zweifach, a partner at Williams & Connolly, was named as the general counsel and a senior executive vice president of News Corp., Rupert Murdoch's broadcast and journalism behemoth, after the company had endured the ignominy of a massive phone-hacking scandal. The announcement release specifically noted Mr. Zweifach's experience as "one of the nations' [sic] leading litigators and a staunch protector of the First Amendment." The strategy of cherry-picking a high-profile First Amendment lawyer for News Corp.'s senior legal officer was directly tied to the company's interest in its bottom line. Mr. Zweifach fittingly said, "I look forward to working in concert with Rupert and News Corporation's businesses to help ensure the best possible return to all of the company's stakeholders." Alex Vorro, *News Corp. Officially Names Zweifach GC*, INSIDECOUNSEL (Jan. 10, 2012), <http://www.insidecounsel.com/2012/01/10/news-corp-officially-names-zweifach-gc>. Eight days after it was announced that Mr. Zweifach had been hired as GC, News International, Inc., the British newspaper unit of News Corp., agreed to a range of settlement payments during a hearing in London. The first of the civil trials was about a month away at the time. Alex Vorro, *News Corp. Settles Hacking Claims with 36 Victims*, INSIDECOUNSEL (Jan. 19, 2012), <http://www.insidecounsel.com/2012/01/19/news-corp-settles-hacking-claims-with-36-victims>. One of Mr. Zweifach's more engaging tasks is sure to be dealing with—both internally and externally—the revelation that senior employees and directors of News Group Newspapers (which published some of News International's newspapers)

one that could stretch for many months or longer—as a permanent replacement search is underway.²⁸ A general counsel might be hired for his or her neutrality and grit as a corporation deals with putting an end to corrupt or harmful internal practices and the painful exodus and replacement of various senior-level and management-level personnel.²⁹ These situations are worth mentioning because they typically present some of the greatest hurdles to a general counsel's role as a corporation's legal advisor.

A real temptation is for a general counsel to have a “pet” area of practice while giving other vital areas of practice negligible attention. When this happens, a corporation has only hired itself another in-house counsel, or another outside, corporate lawyer. What a company truly *needs* from its general counsel is an epicenter, sitting directly above and to the center of all of its legal demands and resources. Although a corporation may go

knew about the phone hacking and attempted to conceal it by destroying evidence and deliberately deceiving investigators.

²⁸ Such is the case of David W. Healy, the former co-chair of Fenwick & West LLP's Mergers and Acquisitions Group. Mr. Healy was tapped by Hewlett-Packard to fill the general counsel spot on an interim basis after Michael Holston's departure was announced in December 2011. *See HP Names New General Counsel and Thanks Fenwick's David Healy* (Apr. 24, 2012), <https://www.fenwick.com/news/pages/hp-names-new-general-counsel-and-thanks-fenwicks-david-healy.aspx> (last visited Feb. 5, 2016). Mr. Healy had a deep background of corporate representation of technology companies in the practice areas of mergers and acquisitions, joint ventures, strategic partnering transactions, spin-offs, venture capital financing, public offering, and licensing matters.

²⁹ This, as an example-situation, comes from the archives of my own experiences. A \$1.8 billion financial institution's audit committee had hired counsel to conduct internal investigations of several of its senior management and board members. I was on the legal team acting for the interim transitional counsel as we investigated, interviewed, and “showed the door” to several high-level officers—the first of which was the institution's general counsel. My main roles were to advise on governance and regulatory issues, as well as to generally oversee the revitalization of the nearly paralytic legal department. As brutal as the process was in some ways, it was also very successful, notably because it provided the real opportunity for radical improvements in management and on the board without causing a single adverse hiccup in the institution's marketing, public image, or profits. Pathetically though, when the smoke had almost cleared, the newly installed senior executive vice president delivered a coup d'état to protect herself from her own eventual demise by strong-arming the still-weakened board into firing all of us. She knew she would probably be let go for her own past indiscretions, so she seized a brief window of power (and board exhaustion) to protect her own skin. The institution had no definitive replacement, and thereafter it seemed foolishly averse to selecting any corporate law attorney as its company lawyer. Mark Twain once said, “A man who carries a cat by the tail learns something he can learn in no other way.” I still carry a few claw marks. (Note: Because of the ongoing confidential, and non-public, nature of this professional experience, the author is unable to provide any reference citations and/or other access to materials.)

shopping for a lawyer because it is looking for a particular set of experiences or for a particular reputation, any person who is hired as a general counsel will ultimately be *the* lawyer of the corporation—its *general* lawyer. That lawyer may have been a topnotch litigator, but he or she will now also need to give competent legal advice on compliance issues. The new hire might have been awesome at mergers and acquisitions, but he or she will now also need to give competent legal advice on employment and human-resource issues. The new general counsel, brought on board for his or her regulatory background, will now also need to give competent legal advice on intellectual property issues. The point is not a trivial one. A general counsel is ultimately responsible for *all* of a corporation's legal advice and legal activities.

Unfortunately, most lawyers, and most clients, routinely think in terms of being *event*-driven; that is, legal services are provided due to a single event or series of events. Not so with the role of a general counsel. A general counsel needs to be thinking well beyond the scope of whatever particular event(s) ushered him or her into the halls of the company. A general counsel needs to be thinking in terms of 360 degrees and for the long-term. True, many duties can be, or will be, performed by other persons. Other lawyers within the legal department, outside counsel, special counsel (such as counsel who might be hired by and for a board's audit committee), reporting services (such as compliance review services), and quasi-legal persons (such as consultants or compliance officers) may all be part of the alphabet soup of legal resources who handle many of the practical, day-to-day advisory functions for the corporation, but a general counsel is the proverbial bowl in which the alphabet soup sloshes and splashes. His or her ultimate responsibility as *the* legal counsel for the company is never a charge to be taken lightly, even if reviewing arcane financial statements lies well beyond a lawyer's pre-general counsel litigation background.³⁰ Relying on others is critical, and it is a healthy

³⁰ The Enron debacle should always remain a cautionary tale whose events and players merely recast themselves over time into new displays of corporate malfeasance, greed, willful ignorance, apathy, and criminal collusion. Enron's general counsel, James V. Derrick, provides us with a fateful example of a prominent litigator who was ill prepared (and did little to cure that lack of preparedness) to advise his corporate client on *all* aspects of its business. Instead, he blandly deferred to outside counsel or to "associate" general counsel from various Enron divisions. "[Derrick] reviewed the final drafts to look for obvious errors, but otherwise has little involvement with the related party proxy statement

function of delegation, but a general counsel must at all times remember that he or she bears the final responsibility for what information, documents, or advice other persons or entities are providing.

In the final analysis, a corporation (and other, more menacing entities, such as a court) will look to a general counsel as the source and sieve of all of a company's legal advice and activities.³¹ A corporate client-employer depends on that gatekeeping function as an essential part of a general counsel's advisory role.

*B. The Managerial Role: "O Captain, My Captain!"*³²

A general counsel's managerial and administrative role requires as much of a rodeo roundup as it does square-dance calling. If you are doing neither at some meaningful level, then something is fundamentally wrong.

Most corporate law departments utilize some kind of hierarchical, vertical structure for their organizational purposes. Even when the structure comprises no more than a general counsel, a small staff pool, and one associate or deputy lawyer, part of the general counsel's role is going to be to act as the senior (and only) administrative "partner" of this unique "law firm." Larger administrative issues—such as hiring and firing, budget requests and projections, and departmental reports—typically fall within the purview of a general counsel's personal attention (or the personal attention of a deputy general counsel, but keep in mind there is still only *one* "end of the line"—one lawyer of the company).

Day-to-day administrative duties are often assigned away from a general counsel's desk, but again, this is an area where a general counsel has final accountability, and he or she should have oversight mechanisms in place to superintend these duties. A well-built, well-thought out

disclosures. He said that he relied on his staff, Vinson & Elkins and [Arthur] Andersen to make sure the disclosures were correct and complied with the rules." *In re Enron Corp. v. Enron Corp.*, No. MDL-1446, Civ. A. H-01-3624, 2003 WL 21418157, at *14 (S. Dist. Tex. 2003).

³¹ Reliance on an attempt to firewall blame or responsibility by hiring outside counsel is a dangerous game. *See, e.g.,* *Itel Containers Int'l Corp. v. Puerto Rico Marine Mgmt.*, 108 F.R.D. 96 (D.N.J. 1985) (imposing liability on general counsel even though only local counsel signed pleadings).

³² This is the title of a poem written by Walt Whitman in 1865 as a tribute to a remarkable lawyer and a master administrator, Abraham Lincoln. WALT WHITMAN, *LEAVES OF GRASS* (CreateSpace Indep. Publ'g Platform 2014).

departmental structure is the backbone to effective administration and management. It defines areas of responsibility, both horizontally and vertically, and it provides a quick roadmap for identifying exactly where and when something is inefficient or missing. Administrative matters, in fact, can take up a significant amount of a general counsel's time, but to a certain extent, they should. If a general counsel is too far removed from *why* his or her department uses the amount of paper it does, or *why* a contract review project has not been assigned to anyone yet, or *why* \$10,000 was recently spent on an associate's continuing legal education, or *why* \$50,000 was recently spent in litigation-support expenses (*expenses*, mind you, not fees), then a general counsel's function as an administrator is not where it should be.

Any single inefficiency does not usually spell doom, but it can be the canary in the coal mine, signifying there is a much more systemic problem with the overall supervision and/or delivery of legal services to an employer. Keep in mind that a general counsel and a company's legal department are a *business investment*. A general counsel should administer his or her department—both its personnel and resources—in cost-effective and project-effective ways. Delivering effective and positive cost-benefit legal services to a corporate client, the employer, should be the basic objective of a legal department.

Input and an appropriate level of self-autonomy from your division leaders, associates, and staff is important and should be encouraged, but each person has to understand his or her chain of command, and all chains of command have to eventually lead to the general counsel's door. There need to be systems in place (the simpler, the better) that keep track of resources, departmental needs (current and projected), department's actual usages, and the volume/activity of a department's "docket"—that is, the work it performs in a repetitive manner, the special- or event-driven projects it has, and the projects it is supervising in other departments or through outside counsel. Without this kind of data, and without the data being easily producible in a regular and uncomplicated manner, proper administration of a legal department cannot occur. Budgets cannot be written. Expenses cannot be controlled. Productivity cannot be measured. Services cannot be efficiently and effectively provided to other business departments or divisions. Outside counsel cannot be properly monitored. And eventually, when push comes to shove, a general counsel would be unable to make sure there are enough of the right kind of "beans and

bullets” to get the job done right. Worst of all, an employer’s business investment in its legal department and the legal department’s staff will have been needlessly squandered.

A corporation depends upon its general counsel—its chief legal officer—to be its chief legal administrator. Department staff needs to understand, and therefore be capable of supporting and completing, the legal department’s business goals. This begins with good administration. A general counsel, leading from the front, has to make sure the entire department is being run, and has been organized, in an accountable, productive way. When properly trained and appropriately supervised, subordinate lawyers and staff will be able to execute the kind of mission accomplishment desired by a general counsel and needed (required) by a client-employer. The bottom line is a general counsel has to “manage upward, to justify the department’s budget to the CEO and CFO.”³³

Administration might seem to be a mundane part of a general counsel’s role, but developing and administering a successful legal department is a key function of the department’s head, who is a *business* executive as surely as he or she is a lawyer.

C. Working as an Executive Crewmember

Not too many lawyers can boast that they have held the title Senior Vice President, Football Operations, but Sashi Brown can. Mr. Brown was promoted to the position within the National Football League’s Jacksonville Jaguars from his previous job as the Jaguars’ senior vice president, digital media, and assistant general counsel.³⁴ Though many lawyers might have the tendency to see a general counsel’s *executive* title and station as superfluous—quickly skipping past its import and its rightful obligations—Mr. Brown’s uniquely memorable title might help to redirect our attention. Whatever this rare job might have entailed, Mr. Brown was just as much responsible for its successful prosecution as he was for acting as the

³³ Anthony Paonita, *2011 Law Department Metrics Benchmarking Survey*, CORPORATE COUNSEL (Nov. 30, 2011), <http://www.corpcounsel.com/id=1322409834601>.

³⁴ Alex Vorro, *Jacksonville Jaguars Name New GC*, INSIDECOUNSEL (Jan. 11, 2012), <http://www.insidecounsel.com/2012/01/11/jacksonville-jaguars-name-new-gc?t=careers>.

Jaguars' most senior lawyer. He was one of the Jaguars' executive crewmembers.

Many general counsel have some kind of nonlegal executive title as a companion role to their position as their company's senior legal officer. Because these professionals stand at the top of the legal food chain within their corporations, most outsiders—and many lawyers—unthinkingly gloss over the “executive” part of the title. It can seem gratuitous, intended to act more as a gauge of the management level of a general counsel within a corporation rather than as a true operational title. In one respect, such a presumption might be correct—it does denote a senior-level position—but to see the executive side of a general counsel's job predominantly as mere window dressing is an incomplete point of view.

Historically, general counsel have borne the duties of acting as the corporate secretary, and many times, that is still the case today. Because a corporate secretary's natural responsibility is to ensure the corporate records reflect the proper exercise of the board's fiduciary duties, the corporate secretary is also in a position to provide advice and resources to the board's directors for discharging their duties under state and federal law.³⁵ A corporate secretary is more than “a combination of scrivener and custodian.”³⁶ The need for core competency in governance issues—corporate and securities law—has made this corporate-officer position a cozy fit for many general counsel. But despite the cozy fit, this executive position, as with all others, is distinguishable from the duties of acting as general counsel especially when a corporate secretary is delivering managerial advice, as opposed to legal advice.³⁷ And like all other executive positions, it deserves and requires studious attention to its own realm of responsibilities.

Most general counsel (and many assistants and deputies) find themselves wearing two different shoes at the same time: one shoe as a

³⁵ Society's Corporate Practices Committee, *The Corporate Secretary—Duties and Responsibilities: What Does a Corporate Secretary Do?*, THE SOCIETY OF CORPORATE SECRETARIES AND GOVERNANCE PROFESSIONALS (July 2013).

³⁶ *Id.*

³⁷ *Id.* This article also makes the very good point that this potential dual identity between a corporate secretary and a general counsel (or other lawyer) may broach an interesting question as to whether advice that is given to the board (or management) is privileged: managerial/governance advice is not; legal/governance advice is if given by a lawyer.

lawyer and one shoe as a company executive. One foot might be heeled with a dress shoe and the other with a running shoe, but at no time can a general counsel impetuously hop along on only the legal shoe while ignoring the equal weight and attention the other shoe—the executive shoe—also needs. Indeed, Texas and Delaware—two states that prolifically deal with the concerns of leadership roles within corporations—have recognized that “a corporate officer owes fiduciary duties of care, good faith and loyalty to the corporation, and may be sued in a corporate derivative action just as a director may be.”³⁸

Even though a general counsel may keep a tidy house within the legal department and avoid legal malpractice pitfalls, he or she can become woefully exposed to nonlawyer liabilities if other executive responsibilities are not competently met. Paradoxically, a general counsel, who sports a nonlawyer executive shoe, needs to look into his or her own mirror when providing advice to directors and other officers about their actions, duties, and fiduciary obligations. As with other senior-level colleagues, an executive general counsel’s own actions may be the focus of particular scrutiny by shareholders, regulators, creditors, or other businesses, especially when he or she is involved in executive compensation, affiliated-party transactions, business-to-business interactions, corporate insolvency, or illegal activities.³⁹ Finding oneself as a potential target for the crosshairs of leadership liability—*aside* from the liability of malpractice—can be an unsettling proposition, but it can also be a useful incentive to make sure your contribution as a nonlawyer executive is meaningful and principled.

The legal function [of a general counsel] must strive to align itself with the strategic objectives of the company. If the overriding aim is to be more customer focused, then [general counsel] must play their part by understanding the needs of the customer and translating them into controls, processes and contracts that further this objective. To ensure this kind of strategic alignment, [general counsel] must develop their business skills still further.⁴⁰

³⁸ Byron F. Egan, *Recent Fiduciary Duty Cases Affecting Advice to Directors and Officers of Delaware and Texas Corporations*, 32ND ANN. CONF. ON SEC. REG. AND BUS. L. 37 (2010).

³⁹ *Id.* at 1.

⁴⁰ *Over the Horizon: How Corporate Counsel Are Crossing Frontiers to Address New Challenges*, KPMG INT’L 23 (2014), <https://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/broadening-role-general-counsel/Documents/general-counsel-survey-report-v3.pdf>.

A general counsel's role as a company executive should, in fact, be another opportunity in which he or she decides to lead by example, not just by proselytizing to other senior officers about what they should or should not be doing. This is easier said than done, of course, and the duality of the role as a general counsel and an executive can sometimes lead to discordant interests and goals: all the more reason for a general counsel to work with a tenacity to imbue *ethics* into his or her *business* role.⁴¹ To use a well-worn proverb: the best defense is a good offense. Just as a general counsel must understand his or her functions and duties as the company's lawyer, it is equally necessary to understand the functions and duties of acting as a company executive. Alongside the legal department, there might be an entirely different division or department to manage. Indeed, it might be these duties, hand in hand with predictable lawyerly responsibilities, that groom a general counsel for a full-flight executive post.

Harkening back to one of Professor DeMott's reasons by which a lawyer may be attracted to the role of general counsel, the "C-suite" may be calling.⁴² In January 2012, Laura Quatela found herself rising from the role of Eastman Kodak Company's general counsel, chief intellectual property officer, and senior vice president to the role of president. As a general counsel, Ms. Quatela created a profit center for Kodak through patent licensing, earning the company hundreds of millions of dollars in licensing income.⁴³ Ms. Quatela's business acumen, integrated with her responsibilities as general counsel, led her from working as a lawyer/executive to a full-time executive.⁴⁴

⁴¹ As strictly a management issue, this is a goal, which any executive—including general counsels' serving as executives—should strive to achieve. The organizational impact—both horizontally and vertically—will be wide-felt. See Gary R. Weaver, Linda Klebe Trevino & Philip L. Cochran, *Corporate Ethics Programs as Control Systems: Influences of Executive Commitment and Environmental Factors*, 42 ACAD. MGMT. J. 41, 45 (1999) ("Executives who are committed to ethics are likely to encourage a values-oriented approach to ethics management. . . . [M]anagers who are committed to ethics may project that outlook onto other organizational members.").

⁴² DeMott, *supra* note 16, at 962–63.

⁴³ See Alex Vorro, *Kodak Promotes Its GC To President*, INSIDECOUNSEL (Dec. 23, 2011), <http://www.insidecounsel.com/2011/12/23/kodak-promotes-its-gc-to-president?t=department>.

⁴⁴ Ms. Quatela's business acumen was needed more than ever when, a few days after announcing her promotion to president, Kodak filed for Chapter 11 business reorganization in the U.S. Bankruptcy Court for the Southern District of New York. See Alex Vorro, *Kodak Files for Bankruptcy Protection*, INSIDECOUNSEL (Jan. 19, 2012), <http://www.insidecounsel.com/2012/01/19/kodak-files-for-bankruptcy-protection> (last visited Feb. 5, 2016).

Fulfilling the role as an executive of an employer-client—whether directly tied to the office of general counsel or as a distinct, stand-alone position—can be an exciting new career, and it warrants careful and diligent attention.

D. Emissary, Agent, and Proxy

Lawyers are guided by rules of professional conduct that adopt a principle, cautioning that, at all times, a lawyer is an “officer of the court,” and as such, a representative of the judicial system at large, above and beyond the way in which he or she represents any individual client. Like most humans, naturally egocentric in our worldview, many lawyers find it a difficult concept to keep in mind at all times: that he or she is almost *constantly representing something greater than “self.”* Once a lawyer becomes caretakers of any kind of professional identity, he or she must always be “on,” always aware that a lawyer acts as an emissary, speaking and acting for whomever or whatever is the client. A general counsel, as a visible and operative *agent* (in both the legal and public-image sense of the word) of a corporation, possesses the interface role by which many third parties acquire their view of, and information about, a corporation’s litigation policy, its regulatory/compliance posture, its employment culture, its bargaining and collaborative prowess, and its public image.

Certainly other employees of the client-company look to a general counsel as an agent of the corporation. These employees include members of the legal department, who literally view a general counsel as their boss, and they include employees from other departments (including management), who work with, or rely on, the legal department to get their own work done. Indeed, when a legal department is fully functional and is truly running as a support system for the rest of the company’s departments, there are very few, if any, employees who do not interact with, or who are not familiar with, the legal department and the general counsel.

Unfortunately, all of those same employees can also see a general counsel as part of the machinery for terminating their employment, affecting their rights to benefits, and affecting their promotions, demotions, or transfers into other departments. And they are right: many times a general counsel (or the legal department) *is* included, and *should* be included, in those kinds of activities and decisions, and for many of those kinds of activities and decisions, a general counsel can be seen as (or

suspected of being) the company's "hatchet man." It is reasonable to presume most people's collective sense of the law is that it is a dispassionate and pitiless endeavor. In a mocking twist of fate, the legal profession is popularly seen as a source of *injustice*,⁴⁵ and fairly or not, a general counsel, viewed by other employees of the client-company, can easily be tarred and feathered with the same attitude.

It is a general counsel's responsibility to see the primary audience as being his or her fellow employees. A general counsel who is accessible, solicitous, patient, thorough, and well organized is going to make a substantial impact on how a company's employees view the legal department's usefulness, aptitude, and decisions. There will also be a substantial impact on broader cultural principles. An employee's jaded view of the law, or an employee's otherwise-irritated view of the legal department's interference with his or her area of responsibility, can be significantly and positively changed by a general counsel's attitude, channeled as leader of the legal department at large. Remember, too, this does not have to be achieved only through direct contact. Opinions are just as easily formed through anecdotal word of mouth or disinterested observation. If a general counsel is regularly seen stalking through the hallways with only the barest of personable greetings to any "underlings," then even the kindest and gentlest soul will be mistaken for an uptight ogre. The role of a diplomat lies as much in passive perception as it does in active negotiation.

Do not think for a moment this role as an ambassador is limited to a company's larger workforce or to a legal department's immediate pool of employees. Fulfilling the role as a representative of a client-company extends perhaps most importantly to a general counsel's fellow executives, those in his or her command chain, the board, and the owners. Regardless of the level of expertise a lawyer may bring to any particular issue, a general counsel's *representative attitude* can still exhaust these stakeholders, alienate them, or entirely estrange them.

⁴⁵ Acknowledging the reality of this increasingly cynical public image, Walter Bennett, a former trial lawyer, a judge, and a law professor who teaches legal ethics, explores how lawyers can recover the legal system's—and their own—loss of trustworthiness. See WALTER BENNETT, *THE LAWYER'S MYTH: REVIVING IDEALS IN THE LEGAL PROFESSION* (2002).

How is this different from a general counsel's role as a crewmember? There is a distinction in a general counsel's job between acting as a team member and acting as a representative of the company *to* the company and *to* the public. For instance, this distinction can become terribly apparent if a general counsel is involved in, or at the head of, an internal investigation. In this situation, while a general counsel may have a role as a nonlegal executive, he or she now also must fill the role as the legal arm of the company, acting as its voice of query, concern, or sanction. At this point, a general counsel's sentences might usually begin with, "The company's position on this matter is . . .," which cements a general counsel's position as the company's spokesperson.

Never is the art of diplomacy more critical than when a general counsel is wearing the emissary's hat and speaking to a board member, another executive, or a shareholder. For any employee—and certainly for senior management, a board member, or a significant stakeholder—the cold water shock of having *your* company speak *to you* through the voice of the *company's lawyer* is an experience that can sometimes begin a butterfly effect of emotions and consequences. A general counsel, just by the nature of the profession, swings a heavy, psychological bat. A misstep of tact with those who are inside the company may inadvertently create the kinds of internal schisms that are the hardest and messiest to heal.

A general counsel's secondary audience (but perhaps the first one to leap to mind) is outside counsel. Over the past thirty years, the meaning of a general counsel's role, as compared to the role of outside counsel, has changed as most general counsel have now become the taskmasters and gatekeepers of outside counsel. Instead of being members of a "second-class citizenship," as they were when outside counsel was viewed as the landed gentry of the corporate, legal world, general counsel are now seen to be at the top of the profession's social order.⁴⁶ Nowadays, outside counsel may feel the need to pay a certain amount of homage to a general counsel in order to retain consistent and well-paid work. That shift in power (which is not, of course, always a very clear shift) does not mean a general counsel should act the part of an elitist. On the contrary, it is in this role—as a benevolent sovereign over many outside counsel resources—that a general

⁴⁶ *Profile of In-House Counsel*, *supra* note 2.

counsel can deliver one of the greatest assets to his or her employer: to deliver access to competent, specialized, and attentive legal representation by selectively pairing specific outside counsel to specific projects or problems.

No one wants to work for a draconian dictator; likewise, few good professionals want to work for a sloppy, weak, and unpredictable manager. A general counsel, as a proxy for the corporation, must be able to set the overall tone for the company's approach to each of its legal issues, competently manage those activities, and knowledgeably evaluate the outcomes and effectiveness of the end results. At each stage, a general counsel must guide outside counsel with a firm hand, but one that does not micromanage. A general counsel must be as attentive to the needs of outside counsel (that is, for discovery, statements, depositions, document retention, and so forth), as a general counsel expects outside counsel to be attentive to the unique needs of the corporation. And like a medical internist, a general counsel needs to successfully orchestrate all outside counsel in concert with each other, especially in those matters that have multiple fronts, such as employment litigation tied to an ongoing internal investigation involving governance issues. This is never truer than when selecting and dealing with outside counsel.

The third audience, as the *emissary* of a client-company, is global. This audience rightfully stands outside of a company's doors and receives information, well groomed or not, without any basic loyalty to a general counsel's employer. This audience consists of regulators, clients and customers, creditors, policy makers, business partners, business rivals, journalists, pundits, bloggers, tweeters, talking heads, court jesters, and the unpredictable public. Every lawyer has had his or her "moment." When something was said or done in such a way, there forever exists the wish to take it back. The faux pas, which really causes the night sweats, are probably those that occur in the public arena. These gaffes are irretrievably embarrassing and, worst of all, possibly damaging and destructive. In this sense, in which actions and words are at the mercy of outsiders, strangers, and foes, a general counsel must truly understand his or her role as a representative of the company.

Deals can fall apart, stock prices can dip, investigations can begin, contracts can be breached, lawsuits can be filed, images can be tainted, and congressional subpoenas can be issued when a corporation's senior legal officer says or does the wrong thing. Of course, the opposite can occur, too.

A general counsel's words and actions can rally a sinking stock price, save a merger, avoid or quietly settle a lawsuit, improve a corporate image, and bring balance and composure to an otherwise worrisome situation. As noted above, the very act of simply hiring a general counsel might be part of a corporation's public effort to handle a sticky situation. The moment a corporation's general counsel speaks, there is meaning, and there is an impact.

Thomas Saenz, the president and general counsel of the Mexican American Legal Defense and Educational Fund (MALDEF), who graduated from Yale University summa cum laude and from Yale Law School, who clerked for a federal district court and the Ninth Circuit Court of Appeals, and who has had a distinguished legal career as a civil rights advocate, reportedly made this comment on Arizona immigration laws: "If every state had its own laws, we wouldn't be one country; we'd be fifty different countries."⁴⁷ Although Mr. Saenz was likely intending to explain the MALDEF's opinion on the importance of a single, federal immigration law over the haphazardness of individual state laws, this sound bite created some choppy water for his employer's political position and public image. In response to this innocent slipup, a politically conservative blog, Moonbattery, made Mr. Saenz's remark its "stupid quote of the day," coupled with an acerbic comment about the MALDEF.⁴⁸ A reader of the *Orange County Register* rhetorically opined, "How is it possible for an attorney such as Saenz, born here in Southern California and educated at Yale, to make such an ignorant statement?"⁴⁹ Regardless of political affiliations or opinions, any lawyer who reads Mr. Saenz's quote should feel a wince of empathy. Everyone, on some scale, has been there.

A company depends on its general counsel to convey the level of its legal intellect, as well as the breadth of its business judgment. When a general counsel's words or actions call those qualities into question, a

⁴⁷ *Furor Over Arizona's Controversial New Immigration Law Continues to Grow*, DAILY NEWS (Apr. 27, 2010), http://articles.nydailynews.com/2010-04-27/news/27062891_1_illegal-immigrants-immigration-status-federal-immigration-officers/2.

⁴⁸ Moonbattery.com, *Stupid Quote of the Day* (Apr. 27, 2010), <http://www.moonbattery.com/archives/2010/04/stupid-quote-of.html> (last visited Apr. 29, 2015).

⁴⁹ Patrick Buckley, *Letters: Arizona's Immigration Law in Perspective*, ORANGE COUNTY REGISTER (Apr. 28, 2010), available at <http://www.ocregister.com/opinion/state-246347-states-register.html> (last visited Apr. 29, 2015).

corporation can suffer. Conversely, when a general counsel's aplomb and diplomatic skill advance the perception of those qualities, a corporation can greatly benefit. By keeping in mind the three spheres of audiences when writing emails, drafting memorandums, providing advice, making decisions, speaking with the press, or simply walking down the hall, a general counsel is capable of delivering another invaluable resource to his or her corporate employer: that of a consummate ambassador.

A general counsel who possesses the deep rudder guidance of the *single-client* phenomenon—and who possesses an effective sense of his or her role as an advisor, administrator, team member, and corporate representative—will have the professional self-perception necessary to be a success and to remain an appreciated business investment of the company. The aspects of things that are most important for us are hidden because of their simplicity and familiarity.⁵⁰

IV. IN-HOUSE COUNSEL

A general counsel is (almost always) an apex species of in-house counsel.⁵¹ Every definitional trait of a general counsel carries the same DNA as is carried by every in-house lawyer; it is only a matter of degree and application that distinguishes the two. Just as a successful general counsel must understand the four-point compass of his or her role, a successful in-house lawyer must also appreciate his or her role as an advisor, administrator, teammate, and corporate representative (and all points in between). Consequently, the previous section's discussion of those four roles is a must-read for every in-house lawyer, regardless of day-to-day duties or position. Whatever other expectations or responsibilities are involved in a particular area of in-house legal work, an in-house lawyer also shares the same expectations and responsibilities as a corporation's most senior lawyer. A deputy or associate in-house lawyer's success, and a general counsel's success, are entwined and should be mutually supporting.

⁵⁰ Ludwig Wittgenstein—a twentieth-century philosopher of logic, mathematics, language, and the mind. See LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 129 (3d ed. Pearson 1973).

⁵¹ Unless there is a specific reason to not do so, the terms *general counsel* and *in-house counsel* will be used interchangeably throughout the rest of this article and will be equally covered by the term *corporate lawyer*. The use of one term does not necessarily preclude the application of any other.

As in private practice, the limelight might follow a senior partner, but his or her glory rests on the shoulders of others: the legal team, standing in the shadow. The relationships and roles are synergetic with each other. How then does the task of defining an in-house lawyer differ from the task of defining a general counsel? The task of defining the role of an in-house lawyer must focus on the value and creation of a *team concept*. If a general counsel sits at the tip of the corporate spear, then an in-house lawyer, regardless of the rung of the ladder on which his or her upward mobility now rests, comprises the body of the spearhead and some of its incisive edges. The role of a successful in-house lawyer—what it *means* to be an in-house lawyer, aside from those basic components discussed in the previous section—is best described by his or her contributions to a corporation’s legal team. This outlook actually provides an in-house lawyer with value far beyond the temporary peaks of a successful project or event.

Eric Esperne, counsel for Dell Healthcare & Life Sciences, shared some practical wisdom on working as an in-house lawyer in an article for *InsideCounsel* magazine.⁵² One of Mr. Esperne’s ten pieces of advice is to “turn hierarchy into collegiality” by looking for opportunities to make “your reporting into the law department as ‘flat’ as possible.”⁵³ This advice is referring to a type of organizational structure in which middle management (or superfluous hierarchical structure) is replaced with direct reporting to the person(s) who will actually perform the task—“flat reporting” (for example, a staff lawyer reviews a vendor purchasing agreement and submits the reviewed contract directly to the purchasing department, instead of routing it to a senior lawyer for dissemination). The point is that an in-house lawyer should look for ways to work as a team player, instead of merely grinding away as a back-office worker bee. “[O]ffering to help other lawyers in your department,” as suggested by Mr. Esperne, is a quintessential hallmark of the role of an in-house lawyer. The mission—the *role*—is defined by the value an in-house lawyer brings to the legal department, and thus to a client-company as a whole. Even when a general counsel decides to structure his or her legal department

⁵² Eric Esperne, *10 Pieces of Advice from a Seasoned In-House Lawyer*, INSIDECOUNSEL (Dec. 16, 2011), available at <http://www.insidecounsel.com/2011/12/16/10-pieces-of-advice-from-a-seasoned-in-house-lawyer?t=careers&page=2> (last visited Apr. 30, 2015).

⁵³ *Id.* at 5.

along regimented, hierarchical lines, an in-house lawyer's desire and ability to bring initiative and substantive value by looking for opportunities to laterally contribute will always be welcomed.

Preceding his piece of advice to look for direct-effect opportunities, Mr. Esperne also delivers another important morsel of advice: do not worry about specializing.⁵⁴ Many in-house lawyers, and many general counsels, have built their reputations by focusing on distinct areas of law.⁵⁵ There is nothing inherently wrong with developing a specialization, but as an in-house lawyer, for most companies, specialization may reduce the value of advice to a company-client. As Mr. Esperne urges, "specialize in knowing your company."⁵⁶ An in-house lawyer should be a "Swiss army knife,"⁵⁷ possessing enough knowledge to competently contribute, lead, and evaluate as part of a corporation's legal brain trust. "Improvements in [the] reputation and skill of in-house lawyers mark a watershed in legal demographics."⁵⁸ This observation is the result of the noticeable legal prowess of many in-house lawyers, but it is also the result of in-house lawyers delivering a better, overall business product to their employers.

What are the practical ways to meet that goal—the role of "value contributor?" There are few better ways to understand how to contribute value than to understand what a management team needs from *their* perspective. Interestingly though, there are few books or resources focused on the subject of being a team player, which should be an in-house

⁵⁴ *Id.* at 4.

⁵⁵ For instance, Allen Lo, formerly the vice president and deputy general counsel at Juniper Networks, Inc., was hired by Google, Inc., in 2012 as one of Google's newest patent licensing and litigation lawyers. See Julie Beck, *New Deputy GC Joins Google to Help with Patent Cases*, INSIDECOUNSEL (Jan. 20, 2012), <http://www.insidecounsel.com/2012/01/20/new-deputy-gc-joins-google-to-help-with-patent-cas> (last visited Feb. 5, 2016). Mr. Lo had built his entire career in the areas of patent and intellectual property law, and he certainly makes a distinguished addition to Google's legal department, but Mr. Lo's limits of practice are an example of how an in-house counsel's experience might limit the broader value he or she could otherwise deliver to his client at large. (Google is obviously an exception to many, many rules, due to its enormous size and global presence. Google, unlike most corporations, can afford to bring many highly specialized issues and lawsuits in-house, and Mr. Lo is very likely an excellent fit for his position.)

⁵⁶ Esperne, *supra* note 52, at 2.

⁵⁷ Omari S. Simmons, *The Under-Examination of In-House Counsel*, 11 TRANSACTIONS: TENN. J. BUS. L. 145, 147 (Fall 2009).

⁵⁸ Steven L. Schwarcz, *To Make or to Buy: In-House Lawyering and Value Creation*, 33 J. CORP. L. 497, 498 (2008).

counsel's immediate concern, almost regardless of how far or how near he or she might sit under a general counsel.⁵⁹ Certainly, it is even more difficult to find a book that specifically centers on the subject of being a team player within a corporate legal department.

After law school, once a lawyer has moved into an in-house setting, there are few who are able to look back on any kind of substantive training they received on how to bring real value to a large client-employer from a business perspective. Most lawyers have not attended training seminars, or sat through meetings, or pursued educational degrees, related to corporate teamwork. A typical, understandable, mindset is generally driven by the equation of task success equaling professional success. Although that equation has an obvious place, an in-house lawyer, just as a general counsel, must redefine what it means to practice law as a corporate employee. There is, therefore, a need to formulate the value-contributor role of an in-house lawyer by recognizing several key elements of collaboration. These elements, together with a general counsel's four-point compass, will give an in-house lawyer the basis of his or her role.

A. Adaptability⁶⁰

The embodiment of team ethos exists in a single trait, above all others, that defines an in-house lawyer's team-player role: to be *adaptable*. A corporation by its nature is a creature of surprising diversity and complexity. On any given day of the week (including weekends), a corporate lawyer will find him-or-herself staring straight into the eyes of a question, an issue, or a bet-the-company lawsuit that had not existed a few

⁵⁹ As a rudimentary example, the author performed a search for books on Amazon.com with the query, "being a team player." This resulted in approximately 7,631 hits. http://www.amazon.com/s/ref=nb_sb_noss_2?url=search-alias%3Dstripbooks&field-keywords=being+a+team+player. Performing a search for books on Amazon.com with the query, "successful management," resulted in approximately 44,613 hits. http://www.amazon.com/s/ref=nb_sb_noss_2?url=search-alias%3Dstripbooks&field-keywords=successful+management&rh=n%3A283155%2Ck%3Asuccessful+management. This suggests there are nearly seven times as many possible books for acting as a manager as there are for learning to be a team player.

⁶⁰ Because the principles are sound, and because they address the attributes of a successful in-house lawyer, I highly recommend expanding the tools of your value-contribution role by reading JOHN C. MAXWELL, *THE 17 ESSENTIAL QUALITIES OF A TEAM PLAYER* (Maxwell Motivation, Inc. 2002). You will probably notice some parallel principles to Mr. Maxwell's essential qualities.

moments before. Consequently, it is an in-house lawyer's ability to adapt and overcome as a team member, which delivers the single greatest measure of value to the legal department and to the company. There are days when an entire company looks to its in-house lawyers to hit a high-right, fast curveball out of the ballpark. If an in-house lawyer has an inflexible habit of contentedly shuffling papers in his or her own corner, without keeping his or her head up, then that wicked curveball will likely drill a hole through the legal department and the client-company.⁶¹

An in-house counsel has to make sure he or she is adaptable. Valuable in-house counsel look for opportunities to exercise their adaptability even for smaller, less consequential issues. An in-house lawyer's ability to calmly and decisively adapt to whatever storm hits the legal department will bring more value—practically and emotionally—to a corporate client than a year's worth of noble paper shuffling.

B. Dedication

In-house lawyers are very hardworking, but there is also the temptation to fall into an employment rut. The pressure of billable hours and contingency fee income is replaced with predictable income, set business hours, benefits, vacation, and being surrounded by other nonlegal employees. An in-house lawyer might unintentionally find him-or-herself tempted to act more like a run-of-the-mill employee, feeling ruffled when asked to go the extra mile. Dedication (slightly different than loyalty) means an in-house lawyer will complete the work that is expected but then

⁶¹ When working as counsel for a regional hospital group, which was literally in the final hours of signing the paperwork for a hard-fought \$97 million bond issue, I received an email alerting me to a series of medical malpractice lawsuits that had just been filed against the hospital and a long string of related defendants. Immediately, decisions had to be made about what to do. Of course, the preliminary official statement had already been circulated to institutional bond investors from the underwriter's trading desk, and the entire deal hung in the balance of a single sentence of disclosure, regarding "no pending litigation . . . of . . . any substantial risk of material liability." Within hours, all the energy of the deal went into strategic damage control, even to the point of finding myself on a conference call with institutional traders who were looking for a better sense of what the number of mounting lawsuits meant to the hospital's ability to repay the bonds (no script, notes, or prep time). The need to handle a variety of concerns and interpositions of the issuer's counsel, underwriter's counsel, bond counsel, and trustee's counsel, among others, kept things at a frenetic pace. Ultimately, the lawsuits rolled up the bond deal, but the adaptability and promptness of our legal team, working together for the client, gave our company valuable time and options.

look around to find what else might need to be done. This initiative results from an in-house counsel's devotion to the business objectives of a client-company. This means dedication to the company at large. All events and tasks touched by the legal department are seen as within an in-house counsel's responsibility.

Dedication does not always need to come in the form of late nights or painfully early mornings. Dedication also does not mean stretching oneself too thin or thrusting an unwanted nose into situations too far above your pay grade or too far beyond your level of competency. However, a genuine question of "How may I help?" always shows a readiness and willingness to pinch-hit for the team. An in-house lawyer who is dedicated to the functions and goals of the legal department is an invaluable asset to a general counsel and to a successful company.

C. Dependability

The question, "How may I help?" means little if an in-house counsel is not dependably available to offer the help which is needed. Dependability is only earned in one way: being *reliable*. It does no good to have initiative if it is not accompanied by a reliable follow-through. Unforeseeable things do happen (and everyone likes a long lunch when they can take it), but dependability means the legal department, the general counsel, and the company can depend on an in-house lawyer's commitment to be present and accountable. Most companies are investing a significant amount in resources when employing a full-time lawyer. This must mean, aside from other possible cost savings, such a company wants the advantage of having reliable legal counsel when legal counsel is needed.

Other employees, to say nothing of in-house lawyers, can and should be shown the door for being undependable.⁶² It is impossible to provide

⁶² Unfortunately, I knew of a general counsel of a fairly large financial institution who would disappear from her office for hours at a time on random days and at random times. The institution (as is sometimes the case) was late to the game when it finally decided to hire its first in-house lawyer, and it made some critical judgment errors when it decided to hire this particular general counsel. This newly installed general counsel seemed incapable of exhibiting one of the most basic traits of employment: dependability. Out of all the complaints her tortured staff eventually disclosed about her, the fact that she was unaccountable, employed in absentia, was one of the most damning. Her lack of dependability had all kinds of ramifications: meetings could not be scheduled, deadlines could not be met (or set),

competent, timely, and valuable legal services—to be adaptable and dedicated—when an in-house lawyer is unable or unwilling to be a dependable member of an in-house legal team. Valuable in-house counsel avoid this by sticking with predictable routines.⁶³ Everyone can work with a routine. They share their calendars; they let other staff lawyers and staff members know where they are and for how long they plan on being there. Dependable in-house counsel develop consistency with certain activities. For example, they might work to create predictable turnaround times with commercial contract reviews, which would allow their client-company’s commercial lending department to productively schedule its own tasks and its representations to customers. As much as anyone might like a sense of adventure, dependability—not erraticism—is a valued part of an in-house counsel’s role.

D. Mission Orientation

The U.S. Marines impart two primary objectives to leadership, implemented at every level of every unit throughout the Corps: “mission accomplishment and troop welfare.” Rarely are civilian situations as dire as those faced by hard-bitten Marines, but the pragmatism of the Corps’ first objective has a clear application to the world of an in-house lawyer.⁶⁴ To get the job done, the mission has to come first. If there is a clarion call for an in-house lawyer, it is: *support the mission*.

When an in-house lawyer understands and helps to effectuate the overarching goal of a legal department, then value contribution is a natural result. This applies to a legal department as a whole—to deliver necessary, competent, legal counsel to the corporation—just as it applies to internal divisions, projects, or daily tasks. If an in-house lawyer does not understand or has not bothered to learn the goal—the mission—then he or she cannot possibly be acting at 100% capacity, nor can he or she deliver the return on

interdepartmental questions were left unanswered, and confidence in the legal department dropped precipitously. For those and other reasons, she was eventually fired.

⁶³ Just do not let a routine trump the need to be adaptive for the client’s sake.

⁶⁴ Take a look at, if not a thorough read of STEPHEN R. COVEY, *THE 7 HABITS OF HIGHLY EFFECTIVE PEOPLE: POWERFUL LESSONS IN PERSONAL CHANGE* 102–53 (Simon & Schuster, Anniversary ed. 2013). Mr. Covey’s close kin to the Marine Corps’ leadership objective is his second habit: “begin with the end in mind.”

investment a corporate employer anticipated when it invested money in hiring, and employing, such a lawyer. Heeding the greater mission will probably require in-house counsel to think outside the legal box and to import an external point of view into law-based analysis.

Take for instance the simple matter of advising a company's IT department on a software provider's service contract's choice-of-law provision. Forgetting for a moment all the myriad other legal issues that might affect advice on this issue, any good transactional lawyer, and any good litigation lawyer, will practically demand that the choice-of-law provision name the client-company's home state, or the client-company's preferred venue, for purposes of contract interpretation (and litigation, if necessary). There are, admittedly, very good reasons for insisting on a home-court advantage when a company finds itself in a contract dispute with a software provider. However, an in-house lawyer must also include within his or her analysis the question: What is the big picture? Sometimes the big picture is that the client-company may need the service contract more than it needs to stubbornly argue over a choice-of-law provision. After all, the overall goal of the company is its *business*, not a possibly deal-breaking tug-of-war over a single contract. The choice-of-law provision can be important, and it is certainly an item on which to provide thorough and suitable advice, but the point is that an in-house lawyer's role is to weigh his or her legal counsel in balance with the greater mission.

Some skeptics of this proposed trait may argue that it is a lawyer's primary function to provide *objective* advice to a client, and legal advice that pays too much attention to nonlegal goals strips a lawyer of precious objectivity—the vaunted argument for the independence of outside counsel. A compromise of objectivity can certainly occur if an in-house lawyer fails to deliver advice in a balanced and thorough manner. It can also be true of outside counsel, who may pound his or her fist on the table with righteous conviction over a legal issue while forgetting the corporate client needs advice that assists in promoting, expanding, and strengthening its core business. Risks may have to be taken or endured. For those in doubt, Willie Miller, deputy general counsel of Kraft Foods, Inc., made this remark about Jeanne Gills, a partner at Foley & Lardner and outside counsel for Kraft: “She listens to the conversations, to the discussions we’re having, and then

she responds in a manner that helps us to get to where we want to go.”⁶⁵ All counsel, both in-house and outside, are best fulfilling their roles when they understand and look to help implement the overarching mission of the corporate client.

E. Preparedness

The drollness of Benjamin Franklin provides a pithy grasp of the importance of being prepared: “By failing to prepare, you are preparing to fail.” This simple truism, like each of the other elements of an in-house lawyer’s role, should come as no surprise. Most lawyers are born with words in their mouths, ready to make an argument or fashion an opinion at the drop of a hat. Most lawyers are improvisers by nature, a helpful characteristic indispensable to adaptability. But when taken to an extreme, a knack for improvisation can regrettably encourage a lack of preparedness.

When someone pokes his or her head into an in-house counsel’s office and begins, or ends, a request with “whenever you get the chance,” the offhand invitation to take as long as you want should be treated as an illusion. If the request did not matter, the person would not have asked. Many times, of course, in-house lawyers are faced with pressing questions or issues needing immediate attention or at least a quick turnaround. By staying as prepared as possible, an in-house counsel is better able to address either scenario promptly and knowledgeably. Over the long run, even a client-company which has to exercise some patience while waiting for its in-house lawyer to drill-down to the right answer—the legal *and* business solution—will respect its lawyer’s honesty and diligence, and an in-house counsel’s candor will lend credibility to his or her work.

There are a few keys to staying as prepared as possible, some of which many lawyers may already be doing without knowing it.

1. LISTEN: Many in-house lawyers’ intelligence inhibits their ability to listen. They hear only the first half of the question, or they so quickly jump to a stock legal rule, practice, or position

⁶⁵ Shannon Green, *Who Reps 2011: Like Minds*, CORPORATE COUNSEL (Oct. 1, 2011), available at <http://law.com/jsp/cc/PubArticleFriendlyCC.jsp?id=1202513984816>.

- that they forget to listen to the entire question, weighing the goal of their client against the backdrop of the law.
2. **KNOW THE LAW:** Staying current on the laws, regulations, and litigation that affect a company's industry is vital to providing good advice. Set up electronic devices and information streams so there is a steady diet of current and relevant legal information. Daily (or weekly) canvassing of a few key web sites and legal newswires is an excellent technique for keeping up with the curve.
 3. **KNOW THE INDUSTRY:** As important as the law is to a client-company, how the law fits (usually reactively) with a company's core business activities is the knife edge of where an in-house lawyer sits. Most industries have their own trade journals (many times online) and news outlets or resources. If an in-house lawyer fails to keep pace with market trends, supply-side issues, delivery systems, demand-side issues, customer demographics and trends, and the myriad of other topics that may affect a corporation's operations, he or she will fall woefully short of meeting a corporation's needs, as would even the best-prepared legal mind.
 4. **KNOW THE COMPETITION:** As part of staying current on industry matters, an in-house lawyer's capacity to keep a client-company's competition "on the radar" is essential. Not only will the actions, news releases, employment issues, public-image issues, acquisitions or divestments, success, and failure of the competition give an in-house counsel a wealth of contextual information, it might also prove valuable when there is the need to attack or join its efforts.
 5. **KNOW YOUR COMPANY:** An in-house lawyer must keep your finger on the pulse of his or her employer-corporation. Watch what is going on at every level (or on as many as can be managed). Drop by different departments, ask to sit in on meetings, attend company functions, participate in committees outside the legal department, and let everyone know the legal department is there to help (*not* interfere) and to support their jobs and operations.

Preparedness is in lockstep with prevention. It is also in lockstep with progression. A corporation will better be able to achieve success, stay competitively nimble, and generate good press when its in-house lawyers

know what strategies, procedures, and methods are in place, as well as what the overall goals are. Being prepared is a long-term project. It involves a healthy desire for self-improvement, coupled with a desire to benefit a client-company and a legal department. For most in-house lawyers, being prepared is (and should be) fairly generalized. Remember: the level of dedication is demonstrated by the dependability of a lawyer's preparedness, and being prepared means an in-house counsel is better equipped to adapt to unexpected situations within critical timeframes.

F. Remedy Orientation

The popular perception, certainly held within the business world for a long time, is that lawyers are doomsayers. We warn of disaster, predict devastation, and use the word "no" far too often. Admittedly, the naysayer task is an indispensable part of good lawyering. A mild obsession over possible pitfalls is proactive risk management, and a corporate employer will always need its legal counsel to shine a light in dark corners and say, "I wouldn't do that if I were you." Of course, words of caution need balance. Constant refrains of "no" and "be careful" will eventually erode the perception of an in-house counsel's objectivity or adaptability, and the impact of his or her advice might be lessened at times when it is needed the most. To deal with this situation, decide to take an active part in finding a good or positive remedy to whatever might be the problem or issue. Too often, an in-house lawyer's analytically risk- or loss-averse mind rushes only to defend against, or to warn away from, possible hazards. Like an unmoving sentinel, the oft-naysaying in-house lawyer can become so intent on protectionism that he or she forgets to help pursue a remedy. Neither function, though, is mutually exclusive from the other. A supportive in-house lawyer must be able to identify risks, threats, and liabilities, as well as generate or collaborate on curative resolutions. A corporate client needs its hawks to also be its doves (or at least its creative thinkers). An in-house lawyer can bring to bear the invaluable asset of his or her trained and battle-ready mind on a corporation's question of "how do we get this done?" instead of stopping at "don't do it."

The encouraging fact is, a majority of lawyers regularly execute this one-two punch combination on a micro scale. A quick Internet search, using the search term "solution-oriented lawyer," is very likely to pull up page after page of law-firm web sites featuring their law shops as solution

oriented. Many of their marketing claims may be true. Every day, lawyers encounter drafting problems, regulatory proscriptions, procedural obstacles, or litigation complications, and they deftly find their way around the issue (or through it). Part of an in-house lawyer's role is to take his or her well-worn micro-habit and layer it with a macro-habit. Because an in-house lawyer's relationship with his or her client is not event driven, an in-house lawyer's legal practice is concerned both theoretically and practically with the entire corpus and lifespan of the corporate employer. An in-house lawyer's thinking cap must be large enough to troubleshoot discrete tasks, and it also must be large enough to see those tasks as they exist within the greater universe of the corporation as a whole.

Janice Block, executive vice president, general counsel, and chief compliance officer for Kaplan Higher Education, said "we need to be able to prioritize both the problems and the solutions, and implement action plans for putting those solutions firmly into place."⁶⁶ After watching her elementary school daughter take part in a growing international problem-solving program,⁶⁷ Ms. Block identified six steps to generate a remedy for any situation. They are to find and develop:

1. all possible problems with any given scenario,
2. the most important underlying problem,
3. remedies to solve the underlying problem,
4. measurements by which to evaluate the remedies,
5. the best remedy, and
6. a plan for implementing the remedy.⁶⁸

Even if an in-house lawyer does nothing more than grab the closest legal pad and take a few minutes to loosely jot down ideas for each of these steps, he or she will not only have identified inherent hazards but also will have unwittingly walked through a process designed to build-in a global

⁶⁶ Janice Block, *Problem-Solving Activities Strengthen Legal Departments: Lawyers Must Prioritize Organized, Creative Thinking Processes*, INSIDECOUNSEL (Aug. 2011), available at <http://www.insidecounsel.com/2011/08/01/problem-solving-activities-strengthen-legal-depart> (last visited Apr. 29, 2015).

⁶⁷ *Id.* This article refers to Future Problem Solving Program International (FPSPI), formerly known as the Future Problem Solving Program, which was founded by Dr. Ellis Paul Torrance, an American psychologist who specialized in creative thinking. "FPSPI engages students in creative problem solving within the curriculum and provides competitive opportunities." (*See also* FUTURE PROBLEM SOLVING INTERNATIONAL, INC., <http://www.fpspi.org> (last visited Apr. 29, 2015)).

⁶⁸ *Id.* at 67.

point of view. An in-house lawyer's perspective must encompass more than just a panorama of the law; it must lie within a greater landscape of the company's condition and goals. When an in-house lawyer begins to regularly take even a few moments to step back from an issue or problem—or actually create an intradepartmental procedure for problem solving—and to systematically explore possible remedies, then his or her advice to the corporate client is going to have a much more valuable scope.

Instead of adding another disjointed opinion to the mix, when other employees, department heads, executives, or board members are sitting around a table trying to come to grips with a problematic issue—an issue impeding the company's business—an in-house lawyer's role should be to present the legal aspects while collaboratively augmenting efforts to find the best remedy. As Henry Ford said, "Don't find fault. Find a remedy."

What is the role of an in-house lawyer? Beyond individual job descriptions, his or her role is to act as an advisor, administrator, colleague, and corporate representative; more essentially, his or her role is to be an adaptable, dedicated, dependable, mission-oriented, prepared, and remedy-oriented lawyer-employee. His or her role is defined by teamwork, as a lawyer and an employee, and the ability to deliver valued contributions to a client-company as a whole. An in-house lawyer's professional life is not guided by billable hours, rainmaking, or the next big case. Working inside of a corporation means to practice law as a tool—a critical tool—for the advancement of a business enterprise. By undergirding all assignments and responsibilities with the core definitional characteristics discussed above, an in-house lawyer will consistently deliver value to his or her client-company.

V. OUTSIDE CORPORATE COUNSEL

Much has been made of the traditional friction and competition between in-house counsel and outside counsel,⁶⁹ but to a large extent, the competitive acrimony has done little to make either group a better value, or a better sell, to corporations. Mudslinging detracts credibility from both

⁶⁹ Carl D. Liggio, Sr., *A Look at the Role of Corporate Counsel: Back to the Future—or is it the Past?*, 44 ARIZ. L. REV. 621, 622 (2002). Mr. Liggio's article gives a good description of the historical "second-class citizenship" perception of in-house counsel.

factions.⁷⁰ Cynicism and negativity do not yield positive opinions, and corporate clients do not favor their outside counsel or their in-house counsel as a result of one slinging enough mud at the other. An objective observer would acknowledge that outside counsel and in-house counsel now reside in a much more symbiotic, rather than antagonistic, state. They are, and should be, complementary to each other's function and purpose, although there may still be some quibbling over just how to get the job done.

The role of outside corporate counsel is iterative of the roles—the *meaning*—of a general counsel and of an in-house counsel. Most of the characteristics of in-house counsel are equally crucial for outside corporate counsel to digest and live by. Outside corporate counsel, even if in a more limited, unique way, act as advisors and representatives of a company. They need to be mindful of their adaptability, dedication, dependability, preparedness, and remedy orientation. Not only will a corporate client look to its outside counsel for legal advice and representation as defined by these traits, but in-house peers and colleagues will also need to know the outside corporate counsel is just as driven by the goal of value contribution as they are. Mere subject-matter experience, and even a solid understanding of the industry and the individual client's goals, are not enough. Being a successful outside counsel (for the long term) means more than that.

A. Loyalty

When asked what makes the partnership between UPS and one of its outside counsel, Alston & Bird, so strong, Richard Rufolo, a UPS vice president and in-house lawyer, said, “trust. . . . It goes beyond just the legal advice,” Mr. Rufolo said. “It drives the relationship.”⁷¹ For outside counsel, legal advice and the relationship with a corporate client must go beyond subject-matter expertise, and it must go beyond simply identifying with a corporate client's goal. Attitude, actions, and decisions must tell the client, “you come first, and your ability to rely on our loyalty comes first.” If

⁷⁰ See MICHAEL BASIL, CAROLINE SCHOOLER & BYRON REEVES, POSITIVE AND NEGATIVE POLITICAL ADVERTISING: EFFECTIVENESS OF ADS AND PERCEPTIONS OF CANDIDATES 245–62 (Frank Biocca ed., Hillsdale: Lawrence Erlbaum 1991).

⁷¹ Sue Reisinger, *Who Reps 2011: Blood Brothers*, CORPORATE COUNSEL (Oct. 1, 2011), available at <http://www.law.com/jsp/cc/Pub/ArticleFriendlyCC.jsp?id=1202513986542>.

outside counsel steps back and objectively looks at a corporate client's need for loyalty—allegiance to the client first—he or she will have discovered the key ingredient to creating and maintaining a successful, long-lasting business relationship. For lawyers in private practice, who are more often trained in an event-driven mentality, this sometimes takes a conscious effort.

Sarah Feingold, general counsel of Etsy, an e-commerce company that has grown to one million five hundred thousand sellers and twenty-two million buyer accounts,⁷² related an unfortunate experience she had with a hopeful outside counsel.⁷³ As Ms. Feingold was finishing an introductory call with a very promising outside counsel candidate, the lawyer asked where to send his bill for the telephone call.⁷⁴ In less than a minute, he had communicated to Ms. Feingold, the general counsel of a company with which he hoped to do business, that his fees were more important to him than the relationship he was about to build. Ms. Feingold summed up the unhappy result of missing that key ingredient:

My company and I were excited about the prospect of starting a new long-term relationship with a law firm that comprehended our goal. In one minute, however, all of that was thrown away. The attorney's shortsighted view of legal fees and, in turn, how to generate business, proved to me that I had to continue my legal search.⁷⁵

Loyalty means something more than simply being committed. For outside counsel, loyalty is much more akin to the fiduciary duty of good faith imposed upon corporate directors (and officers): “to not allow . . . personal interest to prevail over the interests of the corporation.”⁷⁶ Even more obvious than an in-house lawyer's loyalty, outside counsel's loyalty to a corporate client, and the client's ability to rely on it, is loyalty to an *ambition*—the ambition of a long-term connection, driven by the success of the company and outside counsel's desire to remain a part of that success.

⁷² *About Etsy*, ETSY.COM (last updated Sept. 30, 2015), <http://www.etsy.com/about>.

⁷³ Sarah Feingold, *Inside Experts: How to Lose a Client in One Minute*, INSIDECOUNSEL MAG. (July 29, 2011), <http://insidecounsel.com/2011/07/29/inside-experts-how-to-lose-a-client-in-one-minute>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Egan, *supra* note 38, at 7.

The fees will roll in, but first and foremost, a corporation has to know they come “first” on the list.

B. The Independent Voice

An in-house lawyer’s likelihood of receiving some kind of equity-based compensation is a growing trend and has been for years.⁷⁷ Because of this, and simply because an in-house lawyer is an employee of a corporate client, outside counsel can bring a sense of independence to the legal services being provided to the client. The “not independent enough” critique is, in fact, one of the globs of mud sometimes thrown at in-house counsel. In truth, the difference in independence between in-house lawyers and outside counsel should be illusory. All lawyers, by virtue of their role as advisors, are compelled to strive to “exercise independent professional judgment and render candid advice.”⁷⁸ However, outside counsel does not usually have the unique, single-client financial exposure faced by an in-house lawyer, although the detachment of an outside counsel could also be undermined by the potential of large fees.⁷⁹ As attractive as it may be to be ushered through the front doors and whisked upstairs to the executive suites, outside counsel does better to preserve the value of its objectivity by mindfully keeping issues beyond his or her engaged purpose at a good arm’s length.

When sitting in a meeting or on a conference call that appears to be beyond the scope of the reasons for which outside counsel was engaged, take a quiet moment to ask, “Why am I here?” Any simple answer may be frustratingly difficult to pin down because an outside counsel *should* make sure his or her advice and representation is in concert with broader-reaching goals. In many instances, an outside counsel’s purpose of engagement is also generalized, even if it initially springs from a particular event, and there may be a long-term interest in staying in the loop of a company’s day-

⁷⁷ See, e.g., John S. Dzienkowski & Robert J. Peroni, *The Decline in Lawyer Independence: Lawyer Equity Investment in Clients*, 81 TEX. L. REV. 405 (2002).

⁷⁸ See MODEL RULES OF PROF’L CONDUCT R. 2.1 (ABA Publ’g 1893), http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor.html.

⁷⁹ *In re Enron Corp.*, No. MDL-1446, CIV. A. H-01-3624, 2003 WL 21418157, at *14 (S.D. Tex. Apr. 24, 2003).

to-day operations. Just be cautious. It is far too easy to be drafted as a partisan in the internal squabbles precipitated by a certain executive or board member (or other faction). It is far too easy to be viewed as taking someone's side, instead of preserving the above-the-fray significance of a professional point of view. The best insulation is to always go through the door of the general counsel's office or the legal department. There are specific instances when this will not work—such as when outside counsel has been hired directly by a board's internal audit committee—but in those instances, it is all the more necessary for outside counsel to be seen as an operating device, not a decision-making authority.

Independence is not synonymous with impassivity. A client-company needs zealous representation and an outside counsel's passion for balanced advice. Abraham Maslow,⁸⁰ a professor of psychology at Brandeis University in Brooklyn and Columbia University, cautioned, "I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail."⁸¹ Make sure you have more than a hammer in your legal toolkit.

C. Specialization

Though most in-house lawyers should "specialize"⁸² in generalization, an outside counsel should be an area-specific doyen. An outside counsel's ability to devote his or her energy and concentration within a single area of law affords the company-client the shrewdness of a specialist. In several areas of law, such as intellectual property, employment, mergers and acquisitions, bankruptcy, securities, and tax (to name only a few), subject-matter expertise *is* the commodity.

There are certainly law firms large enough, with enough divisions and departments, to act as a one-stop shop for a corporation, but in most

⁸⁰ My colleagues have too often heard me say, "The practice of law *is* psychology." If you can pin down Maslow's Hierarchy of Needs, then you will be masterful at your job. Saul McLeod, *Maslow's Hierarchy of Needs*, 2007 SIMPLYPSYCHOLOGY (2007), <http://www.simplypsychology.org/maslow.html> (last visited Feb. 5, 2016).

⁸¹ ABRAHAM MASLOW, *THE PSYCHOLOGY OF SCIENCE: A RECONNAISSANCE* 15 (Maurice Bassett 2007).

⁸² Any reference to "specialization" is not intended to refer to board specializations as awarded by state bar boards. The word, and its iterations, is intended to be read in its common meaning.

circumstances, outside counsel should concentrate the efforts of his or her representation on one, or a limited number, of practice areas and excel in them. Engaging in too many areas for a single corporate client may invite conflict, or the perception of conflict. Imagine a firm's governance division presenting a best-practices policy to a board regarding FASB⁸³ pronouncements for revenue recognition procedures, while the company's general counsel is, at the same time, using the same law firm's international division to defend a lawsuit based on the company's historical use of the International Accounting Standards involving revenue recognition procedures (which may conflict with domestic standards). Sound complicated? It can be, so beware.

Simply put, part of the role of outside counsel is to provide a corporate client with independent, objective legal representation and guidance. Resist the temptation to compromise that commodity, and wisely take pains to preserve it. Michael Porter, the Bishop William Lawrence University Professor at Harvard Business School, provides a nicely packaged perspective: "A 'strategy' delineates a territory in which a company [such as a law firm] seeks to be unique."⁸⁴

D. Standard-Bearer

Like a general counsel and other in-house lawyers, outside counsel is a unique, civic agent of a client-company. Zealous representation—even when dispassionately underwritten—is a cornerstone principle of every lawyer's legal practice. This principle extends well past the courtroom, perhaps most importantly *beyond* the courtroom, when outside counsel, many times more vividly than most, has the opportunity to exhibit a true attitude of *esprit de corps*. In-house lawyers by the nature of their direct association with a corporation wear a company's badge openly. However, outside counsel live their lives further afield, routinely attending functions, going to conferences, engaging other clients, and plying their trade in a

⁸³ The Financial Accounting Standards Board (FASB) is the organization which provides practice pronouncements under the Generally Accepted Accounting Principles (GAAP), used for domestic compilation of financial statements, available at <http://www.fasb.org/home>.

⁸⁴ Keith H. Hammonds, *Michael Porter's Big Ideas*, FAST CO. MAG. (Feb. 28, 2001), <http://www.fastcompany.com/42485/michael-porters-big-ideas>.

variety of forums, none of which may have anything to do with a corporate client. But it all *affects* a corporate client.

Judges, other members of the bar, and the public at large may view a corporate client through the lens of an outside counsel's activities. An outside counsel must not think of him or herself solely within the framework of his or her law firm. An outside counsel must realize reputation, action, success, or failure may impugn a client-company, too. This, of course, can be a wonderful sweetener for a corporation. If, for instance, a chagrined adversary of Facebook, Inc., decided to file suit against the social-networking giant, it might find itself facing Gibson, Dunn & Crutcher—*The American Lawyer's* choice for Litigation Department of the Year in 2010 and 2011—which Theodore Ulyot, general counsel of Facebook, has described as having “the complete game. They're aggressive and tenacious—they're incredible trial lawyers and superb on appeal. They really dig deep and nail down facts, and then they come up with the best legal and factual arguments.”⁸⁵ Reputation: a thousand years of consequence based upon the conduct of a single moment.⁸⁶

Outside corporate counsel is, in a very concrete way, the principal prosthesis of an in-house lawyer. Most in-house legal departments have more work than they can rightfully handle, and they look for a loyal, independent, and specialized “extra set of hands” to deliver the best, most efficient, and talented legal product for their corporate employer.

After her employer, MIPS Technologies, Inc., earned \$82 million in revenue during the 2010–2011 fiscal year, Gail Schulman, the company's vice president, general counsel, and corporate secretary, recognized the benefit of having top-flight outside corporate counsel at her company's disposal.⁸⁷ Ms. Schulman runs an energetic but small (three full-time lawyers) in-house shop that depends on the abilities of its outside counsel's extra sets of hands. Speaking of her outside counsel peers, her comments reveal the appreciation and the underlying core trait a general counsel, and

⁸⁵ Julie Beck, *5 Notable GCs in the News*, INSIDECOUNSEL MAG. (Jan. 6, 2012), <http://www.insidecounsel.com/2012/01/06/5-notable-gcs-in-the-news?t=careers&page=4>.

⁸⁶ This is a paraphrase of a saying made by the fictional character Kai Lung, a literary creation of the English author Ernest Bramah.

⁸⁷ Lisa Holton, *MIPS Technologies' GC Does Big Work with a Small In-House Team*, CORPORATE COUNSEL MAG. (Jan. 4, 2012), <https://advance.lexis.com> (search the title of the article in the search bar; then click “Legal News” in the left hand search box).

any in-house lawyer, has for exceptional legal support: they “really understand” the needs of her company and her company’s industry.⁸⁸ There is a close collaboration between in-house lawyers and their successful outside counsel. The role of outside counsel—their *raison d’être*—is to ensure their part in the collaboration is value contributive and ultimately a trustworthy business investment for the corporate client.

VI. FINAL REMARKS

The Honorable Lewis A. Kaplan, United States District Judge for the Southern District of New York once made a remark regarding the fate of KPMG’s unhappy defense counsel for its beleaguered former vice chairman of tax.⁸⁹ Their client was no longer paying the defense lawyers their legal fees, and they had sent notice to the court that they were withdrawing as defense counsel. Judge Kaplan had a different opinion by stating, “Having signed on for the voyage, they are on for the voyage unless relieved by the court.”⁹⁰

Practicing corporate law can be an exquisitely demanding and rewarding career. Both in-house and outside counsel will find themselves in situations where a multitude of jobs are on the line, millions (or billions) of dollars are at stake, the media is less than kind, and regulatory enforcement or criminal prosecution is only one bad decision away; and there are always twenty-five hours of work to accomplish in a twenty-four hour day. Even the most well-prepared, focused corporate lawyer is going to pitch high out of the water from time to time, with his or her rudder fully clear of navigable water, ready to quit and move on. However, corporate lawyers who remember who they are to client-companies—dedicated and necessary emissaries, advisors, crewmembers, and advocates—can act as their clients’ best rudders. Client-companies *need* well-rounded, business-oriented in-house counsel in order to be successful over the long haul. Reminded of that responsibility and privilege, those lawyers who have chosen to go “in-

⁸⁸ *Id.*

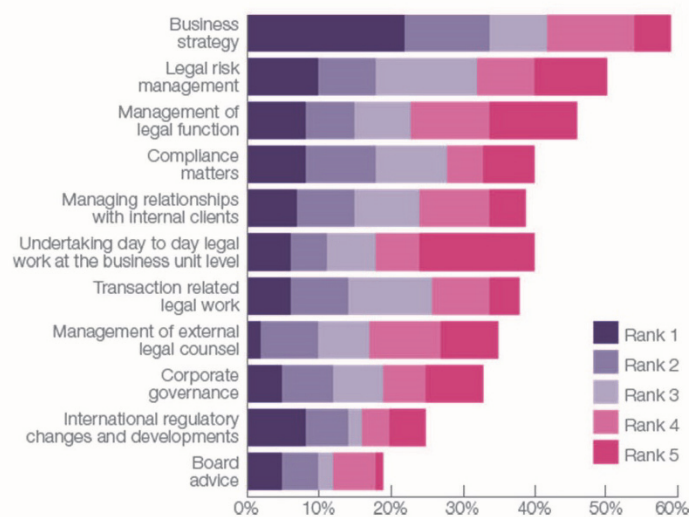
⁸⁹ United States v. Stein, No. S1 05 Crim. 0888 (LAK), June 20, 2007.

⁹⁰ Melissa Maleske, *Judge Says KPMG Defense Counsel Cannot Resign from Case*, INSIDECOUNSEL MAG. (July 25, 2007), <http://www.insidecounsel.com/2007/07/25/judge-says-kpmg-defense-counsel-cannot-resign-from-case>.

house” should be encouraged to weather the storms, go back to the basics—*their roles intended to enhance and support their client-companies*—and, unless ethically compelled to do otherwise, remain “on for the voyage unless relieved by the court.”

CHART 1.1⁹¹

Responsibilities Corporate Lawyers Found Most Challenging



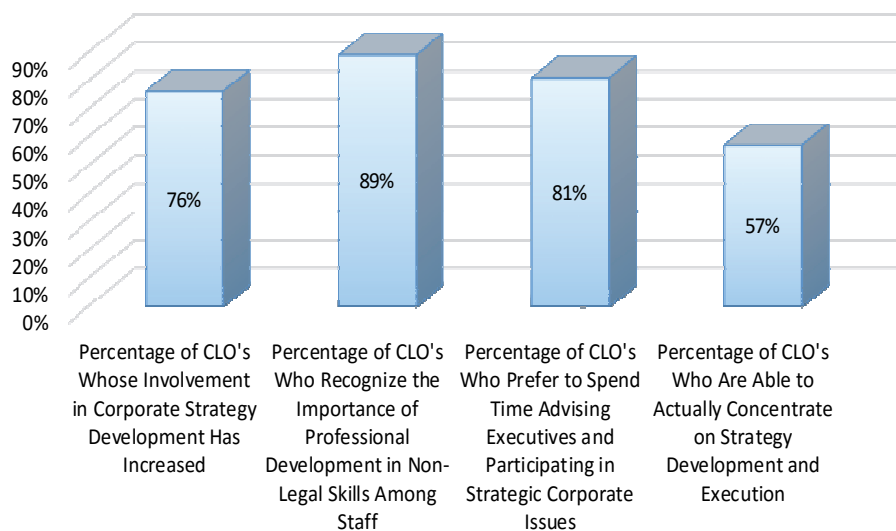
⁹¹ *Role of Internal Counsel*, KEY THEMES KWM COMPASS REPORT 2013, <http://reports.kwm.com/themes/in-house-role/> (last visited Apr. 29, 2015).

CHART 1.2⁹²

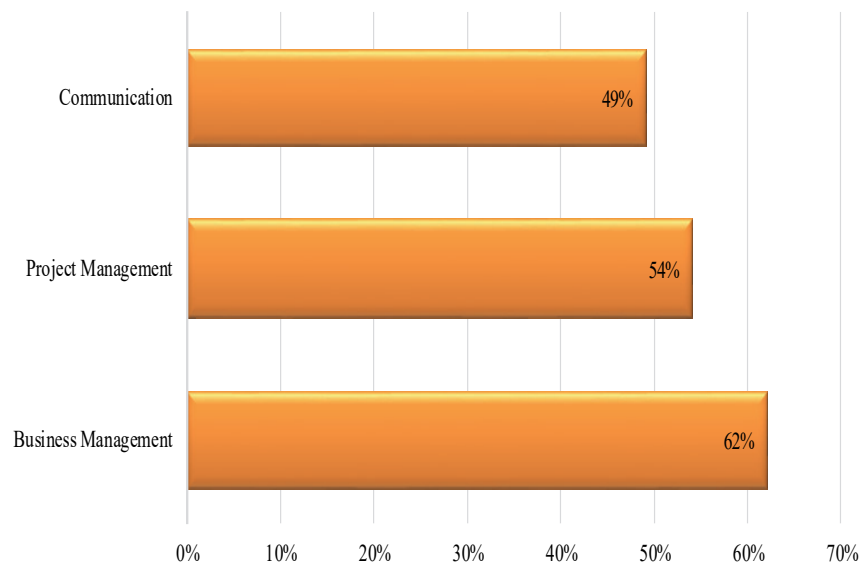
⁹² U.S. Bureau of Labor Statistics, *Occupational Employment Statistics*, LARGEST OCCUPATIONS IN LEGAL SERVICES (May 2014), http://www.bls.gov/oes/current/ind_emp_chart/ind_emp_chart.htm.

CHART 1.3⁹³

**2014 Chief Legal Officers' Report on
Their Work-Related Activities**



⁹³ ACC, *supra* note 15.

CHART 1.4⁹⁴**2014 Report on Most Sought After Non-Legal Skills Among Legal Department Staff**

⁹⁴ *Id.*