

Consigliere, Juggler and Business Partner – Today’s In House Lawyer

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“...I don't want a Lawyer to tell me what I cannot do; I hire him to tell me how to do what I want to do.”¹

J.P. Morgan’s thoughts perhaps echo the 21st century business leaders’ expectations of their in-house legal functions². Of course this is not to say that ethical, legal and regulatory concerns need to be overlooked or otherwise side stepped to enable the J.P. Morgan’s of today to crystallize their vision for the businesses they run, but, rather, for in house lawyers led by competent General Counsel’s to be seen as partners to business ‘enablers’ rather than the traditional role of ‘naysayers’ or obstacles to business plans and visions.

This article examines the changing role of the General Counsel (and the in-house legal team) and compares the traditional role of the in-house lawyer with how this role has evolved and changed to adapt to today’s business needs. It also considers that whilst the role is now perceived differently than it was some years ago, what is it that needs to be done to ‘convert’ (or rather bring about a change in perception) the myriad C-suite executives and decision makers that still hold fast to the old world view of in-house legal teams and the position of the General Counsel/lead lawyer(s).

Prior to delving into the role of today’s in-house lawyers, it is essential to first consider the very need for internal lawyers led by a General Counsel – Why have an in-house legal function manned with competent lawyers? What is the value to business in hiring, retaining and developing the in-house legal team? Why does a business need a General Counsel and a legal function?

Whilst the need for in-house lawyers and the size of such a team will depend (among other things) on the nature of the business and its short, medium and long term aspirations, it can safely be said that the way business is done today is very different from how it was done, say 20 years ago. There is increasing regulation, especially in the wake of the global financial crises of 2007-2008 (Enron, Northern Rock, Lehman Brothers that warrant a trusted advisor to the CEO, the business and the Board. The crisis highlighted the complete and total failure of (amongst other things) corporate governance and risk management frameworks. Now, decisions on whether or not to hire an in-house team and/or General Counsel are more than just a simply task of performing a cost analysis of outside legal spend versus cost of in house hiring. Decisions are being driven by a recognition that in-house lawyers add value not only by providing wise counsel and sound legal advice but by virtue of being close to business, through several ‘water cooler’ moments, walking around the business departments, getting to know the people, the mindset, the aspirations and of course the strategic insights that drive the legal advice which is geared towards advancing business interests in as much as this is possible to do

¹ J.P. Morgan.

² For the purposes of this article, the terms ‘in house lawyer(s)’, ‘in house function’ and ‘General Counsel’ are used interchangeably.

so and contributing to the very fabric of a sound risk management and governance structure.

Companies are increasingly looking at liability and risk and need sound legal advice in order to balance business goals whilst managing and mitigating risk. An advisor who is a partner to the business is a key ally and can enable decisions to be made swiftly when the need arises or at the very least be able to quickly identify and tap into their network for specialized outside counsel. Technology has changed the way in which business is done and has enabled business to be conducted on a global platform requiring legal and regulatory advice in multiple jurisdictions. More so, given the pace of global business, timely advice can give a significant edge to one party over another and the in-house lawyer (if seen as a key ally) can add significant value in rendering the relevant advice expeditiously especially given his/her familiarity and knowledge of the business.

Peter Rees, QC (former Shell Legal Director), commented on the need for an in-house legal function stating that “it’s an increasingly complex world and a lot of the regulation and legislation is so industry specific that you often need a lot of extra expertise to deal with that. Often the best response is to have lawyers in-house.”³ Similarly, Peter Rees’ sentiments are echoed in numerous articles on the subject which essentially illustrate that building a first-class in-house legal team has many advantages. One of the benefits is of course a control over legal spend but other than this, “having broad-gauged, high-integrity, business-savvy lawyers around the coffee pot and around the conference table increases speed and productivity. These lawyers operate seamlessly in business teams, gaining credibility by helping more swiftly to achieve performance goals and by assisting business leaders promote high integrity down the line inside the corporation.”⁴

Statistically speaking, the Law Society of England Wales’ Competitiveness Audit Report showed that between 2001 and 2011, the number of solicitors working in commerce and industry (i.e. in-house) grew by a phenomenal 137% or 9% a year. This compared with 2.5% annually in private practice. Leon Shelly, General Counsel UK and Europe, Westfield Group aptly points out “If you want to drive a Ferrari fast then you need good brakes – we are the brakes.”⁵ It is probably safe to assume that General Counsels and in-house teams no longer need to constantly justify their existence – they are an integral part of the management fabric of a sophisticated corporate entity with a sound governance model operating in today’s highly regulated world.

But query how many General Counsels/lead lawyers sit at the top table with other C-Suite executives? How many are part of the executive management team that meet ever so often to take stock of what is going on in their business? Various reports and studies put this figure relatively lower down the spectrum when compared to other specialized functions (finance, audit, HR etc). There is room to improve to elevate the General Counsel’s stature and the in-house team’s position but in order to win the hearts and minds of their business teams there must be an alignment with the business team and there must be a paradigm shift from ‘lawyers that work in-house’ to ‘business counsel.’⁶

So given that there are certainly tangible benefits to be had by establishing a sound in-house legal function, one must then ask what is the role of in-house lawyers, specifically the General Counsel that leads the team? How has this role developed and what are some of the key responsibilities that come with the General Counsel role?

³ <http://www.inhouselawyer.co.uk/> “More and Less”

⁴ “The Rise of the General Counsel” – Ben W. Heineman Jr. – Harvard Business Review, September 27th 2012

⁵ <http://www.inhouselawyer.co.uk/> “More and Less”

⁶ “From in – house lawyer to business counsel” A survey and discussion paper by Nabarro LLP

It is a commonly held view that 15-20 years ago (accepting that there are certain exceptions), the General Counsel's role, and that of an in-house team, if one existed, was not one that was at the forefront of corporate decision-making or strategy. It was not a powerful or influential role but rather classically depicted as a lone 'bookish' lawyer sitting in a room at the far end of the office building surrounded by impressive tomes and reams of paper only there to act as a post office to bridge the gap between business teams and outside counsel. Taking this image a step further, a recently published article in the Harvard Business Review pointed out that "the move from a law firm to in-house counsel was regarded as the "soft" option; in-house lawyers were often deemed second-class citizens in the legal profession. They worked shorter hours and made less money. They kept an eye on regulatory compliance, closed deals, reviewed documents, and dealt with employee issues. The most challenging and important issues were typically sent to outside counsel..."⁷ Business teams would (and to a certain extent continue to) think of the legal function as an obstacle to doing business, as business blockers not business enablers.

Now with increased regulation and the corporate world still finding skeletons from the global financial crisis in their closets, management's attention is (among other things) on risk management, good governance, protecting integrity and managing reputational and franchise risk. The management team at sophisticated organizations are thinking and focusing more on *how* profits are generated versus simply the quantum of revenue. Ethics, honesty, integrity and, importantly, transparency in doing business is now increasingly becoming a part and parcel of the corporate agenda. Given the importance on managing risk proactively (the 'nip it in the bud' philosophy) the corporate world wants legal teams and General Counsels who can react quickly to brewing issues and tackle them at the outset. As mentioned earlier, there is still room for improvement but in-house lawyers are beginning to be invited to management meetings where strategies and business plans are discussed, deal teams include in-house counsel at the outset, not at the point where the transaction has already been discussed at the commercial level and a lawyer is needed to draft the relevant agreements. In fact, the financial service industry which went through its own share of turmoil post the global financial crisis, started to insist that decisions on corporate lending be taken only after clearance from the legal function. This is evidenced by top international banks and financial institutions insisting that their lead lawyers be part of their respective 'credit committees' to provide immediate advice on material risks inherent in lending to corporate entities. This example highlights a key shift from a reactive to a proactive approach.

Given these major shifts in the corporate mindset, the General Counsel and the in-house function began to be seen as more than just a 'soft job', more than just the 'brakes on a Ferrari' and business teams and senior management started to realize that it was a tough job and not an easy one to get- "To land a General Counsel job today, a lawyer needs experience negotiating with legal and regulatory agencies and industry watchdogs... and whereas corporate lawyers were once expected to understand just the rules at home—the assumption was that legal expertise didn't travel across national borders well—CEOs today need lawyers who can operate across geographic boundaries...[this is] the new, versatile breed"⁸.

So what is it that is expected from this 'new, versatile breed'? What must be done in order to build upon the change in perceptions described above?

⁷ "The New Path To the C-Suite" by Boris Groysberg, L. Kevin Kelly, and Bryan MacDonald - March 2011 Issue Harvard Business Review

⁸ *Ibid.* (note 6)

Putting aside the organized crime originations of the word for a moment, it has been said that being General Counsel is much like being a ‘Consigliere’ – akin to Tom Hagen in the ‘*Godfather*.’⁹ The General Counsel is a trusted, ‘right hand man’ to the C-suite commanding a position at the top table. It’s not easy to gain this trust and it’s not easy to balance the conflict that arises from time to time between what business teams want to achieve and helping them do this within ethical, legal and regulatory boundaries. This is not to say that one needs to be a ‘yes man’ or compromise on certain standards but the perception that the legal team and General Counsel exist to say ‘no’ needs to be addressed and changed.

If the lead lawyer in the in-house function is to be ‘Consigliere’, an important aspect of this position (aside from the obvious – i.e. to provide sound legal advice) is to be viewed as a strategic partner with goals that are aligned to the clients, that is to say the business teams. An understanding of the business that is being advised is essential and there must be a concentrated effort made to do this – “only by gaining a clear handle on the work of their peers and showing genuine interest in that work can General Counsel be effective partners to others at the business as well as gain full support for the legal team’s efforts...”¹⁰ Law schools have even adapted their program offerings to include business and finance-focused courses so lawyers are better prepared to provide relevant commercial advice. To be an effective in-house lawyer and General Counsel pressure points in the business must be spotted and commercial advice rendered.

Relationships are key. Through the provision of advice to various business teams, the in-house lawyer builds bonds and relationships with senior and junior members across the entire organization. The quality of these relationships also dictates the influence of the lead lawyer in the business. However, here too, there needs to be a balance such that the relationship does not compromise the advice being given.¹¹ Going back to J.P. Morgan’s quote above, in-house lawyers need to now consider a more solution oriented and practical approach. It’s easy if what is being asked is illegal but it’s more difficult to provide solutions within the shades of grey that inevitably exist in many of today’s complex transactions. A completely risk averse view will not gain the trust that is so important and in-house lawyers need to start from the premise that risk is an inherent part of business and advice on mitigating that risk practically and within legal boundaries is what is expected. Companies are increasingly turning to senior individuals in the legal fraternity with in-house experience who have learnt to manage people, be in charge of a budget and run a legal department staffed with competent junior lawyers.

The General Counsel is looked upon to perform several functions and wear different hats. He is a crisis manager, a ‘fixer’, transactional expert, governance guru and the moral compass. Day to day roles may involve handling a cross border merger in the morning, followed by a negotiation with the government or regulatory bodies, only to meet with external counsel that same evening to file for an urgent interim order. This constant juggling is a part and parcel of the General Counsel’s role and those that succeed must be able to relish the challenge that such a role throws up.

An extension of the General Counsel role is that of Company Secretary to the Board. This brings with it its own challenges as even in board meetings the Company Secretary can be asked to put on the General Counsel hat and offer advice required by the Board.

⁹ ‘Why Start-ups hire their own lawyers’ posted January 4th 2014, Daniel Docktori

¹⁰ ‘Optimizing the GC’s relationship with the business’ Paul Mandell, July 9th 2014

¹¹ ‘The Pivotal Role of the General Counsel In Promoting Corporate Integrity and Professional Responsibility’ Sarah Helene Duggin, Saint Louis University Law Journal, Vol 51, 2007

Responsibilities of the General Counsel and the Company Secretary are growing and require the position holder to be a master juggler and, oftentimes, a tight rope walker.

In conclusion, it is only befitting that the General Counsel and the in-house team continue to be elevated and the General Counsel be seen as an integral part of the management and the C-suite. There are very few people who can act as Consigliere, Jugglers and partners to business and it is good business sense to invest in legal in-house talent and develop the skills needed for the role. The legal function continues to play a key part in shaping corporations and it is envisaged that the role will continue to become increasingly more critical to organizations that value good governance and measured, sustainable growth.

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