Three core competencies for the modern general counsel

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Abstract

This paper offers a perspective on how current general counsels (GCs) need to extend their reach and spheres of influence in order to add the greatest value to their companies. It provides practical suggestions on how to integrate and align the legal functions squarely with the company's decision-makers, by focusing on achieving mastery over three competencies: (1) active engagement by the department in the governance structure of the entity; (2) a central role in the company's reputational risk framework; and (3) an embracing of operational risk in the actual work being performed by the legal function. The author argues that it is insufficient if a GC is simply an outstanding lawyer who views their job largely to analyse legal issues and problems presented to them; rather, the paper postulates that a modern legal department needs to extend its reach and be more proactive and that the three competencies enumerated above, if mastered, help to accomplish that and create the opportunity for the GC and the department to be considered truly successful and influential. The paper also offers thoughts on how to nurture and develop talent within the department, how to incorporate the GC's experience in crisis management for the greater good of the company, and how to be a thought leader on efforts to streamline processes and increase efficiencies.

Keywords: role of the general counsel, governance, reputational risk, legal operations, crisis management, developing talent in the legal department

INTRODUCTION

Over the course of my 30-year career as an in-house lawyer and adviser (15 of which were spent as a general counsel [GC]), the role and the requirements of a GC have

evolved dramatically. When I began this journey, the primary, if not the sole, prerequisite for a GC was legal excellence. And that is, of course, still the case today. A GC has to possess a comprehensive breadth of legal knowledge across the various areas of the law that could affect the company and should be someone who has demonstrated superior judgment, be battle-tested, if you will, by managing crises. A strong understanding of the entity — its structure, its businesses, the corporate culture etc — has always been important as well and has therefore advantaged the in-house candidate. In this paradigm, if you fulfilled these qualifications, you stood a good chance of getting hired and, assuming consistent, demonstrated mastery over the company's legal affairs, being viewed as a successful GC.

All of these qualities remain necessary ingredients to a high-performing GC. But in today's environment, a GC must do more. Part of the shift is a shift in mindset from reactive to proactive. In-house lawyers, and particularly GCs, no longer have the luxury of having the questions come to them, playing the answer person or oracle when business people deign to seek their advice. Rather, an effective GC needs to see 'the entire field' in terms of understanding what is going on within the company, either on their own or through the eyes and ears of the attorneys in the department, and needs to observe and understand all of the downside risks facing the company. 'Nimbleness' is the new watchword, but nimbleness only works if you and your department are embedded in the fabric of the company as a whole in certain fundamental ways. Legal excellence, therefore, has become merely the baseline for success. A GC today needs to have outsized influence on the company they serve, in ways in which a traditional GC would never have contemplated.

So how does one exert this outsized influence for the benefit of the client — the corporate entities the GCs serve? To me, there are three essential competencies: (1) a comprehensive understanding and focus on internal governance; (2) appreciation and ownership of a reputational risk framework; and (3) an embracing of operational excellence within the workings of the legal department. The first two of these three competencies are outward looking in the sense that they go beyond the traditional operation of the legal function — and indeed extend the reach of the function. The third one is more inward looking, but there are clearly enormous benefits to the company as a whole if a GC gets operational excellence right. All three have the potential for benefiting the enterprise in a substantial way. I will take each of these three competencies in turn.

GOVERNANCE

Lawyers have historically played a central role in the governance structure of the companies they serve. This is especially true with respect to the operating legal entities that form the backbone of the enterprise. Adherence to corporate formalities — having appropriate bylaws, functioning boards, clear and concise minutes of meetings reflecting actions taken — have always had a legal hand lurking in the near background. But even these basic elements of governance have sometimes been ceded to nonlawyers residing, most typically, in the office of the corporate secretary. I am not suggesting that the GC function must control the nuts and bolts of how the company's legal entities are managed, but I do believe that the GC must understand and approve of the way in which this function operates.

Moreover, proper governance has to mean more than what a competent corporate secretary might design. In order

to truly serve the company well, a governance structure has to have the following attributes:

1. A coherent and recognisable structure necessary for the consideration of issues and decisions within the operating legal entities is, of course, required. This is the bare minimum.
2. A governance structure for decisions taken that affect multiple legal entities must also be created and relied upon as an adjunct to the legal entity structure. For example, in the case of a multinational corporation, some level of regional governance, to the extent that the region is not coterminous with the regional legal entity, is essential, as there are decisions that are best taken on a region-wide basis, not just within the specific operating legal entities.
3. The governance structure needs to work, to be fit for purpose. By this, I mean that it cannot be so cumbersome or byzantine such that business persons will seek ways to work around it or simply will not choose to use it all. Simplicity of design is essential; it must be easy to understand and should, wherever possible, avoid duplication. The last thing a GC needs in an organisation is a structure that cannot easily be comprehended by the business side and becomes, therefore, unusable.
4. Finally, the governance of the company needs to be objectively verifiable by an outsider, whether that outsider is an auditor, a regulator, a prosecutor or a litigant.

There are a number of reasons why a current-day GC needs to have a keen appreciation for company governance, but perhaps the best reason is that whenever the company experiences a problem, you, as the GC, will own the legal clean up. Effective and highly functioning governance is a more than credible defence to most every action a corporation might take, and it is one of the best and easiest ways to take proactive steps to avoid future calamities. There simply is no reason not to embrace this challenge as a GC.

A mature governance function can also serve as a vehicle for hastening the development of the next tier of leaders within the department. By having an active voice in governance, it may make sense for the GC to cherry-pick what committees and boards they wish to sit on and to allow other lawyers in the department to take the primary roles on other committees and boards. This opportunity provides an excellent training ground for subordinates. They get to observe firsthand the machinery of governance: how issues are presented, how thorough and robust the discussion surrounding the issues need to be and, ultimately, how decisions are made, along with a plan for the execution of those decisions. These can be heady moments for a young in-house lawyer placed in a room with senior business people. But the benefits from a developmental perspective are substantial.

Equally important, having an active profile in the governance structure of your company helps to integrate and align the legal team with the business. Alignment with the business, which by that I mean having a comprehensive understanding of the strategy of the business and the activities undertaken to pursue that strategy, are critical components towards a model where the legal department is in a position to spot issues early on, and potentially to prevent problems from occurring.

Finally, having good governance also requires diligence around updating. Corporate norms evolve, case law develops and best practices emerge. While this is a topic for another paper, I believe that a GC must spearhead these changes in governance, in part, by having an external reach outside of the company, through

trade association activities, conversations with other GCs, and frequent, non-adversarial contact with regulators. By having this external perspective, a GC will be better equipped to understand new developments and can lend a strong voice over how the governance structure needs to adapt.

Governance can be a sleepy topic. It is never particularly exciting and requires a doggedness and attention to detail that some lawyers find tedious. But it behooves the modern-day GC to embrace it, if not own it. The dividends paid in terms of how the company functions and how external constituents perceive it are enormous.

REPUTATIONAL RISK

Perhaps the best way to exercise outsized influence within your company is to play a strong role in the reputational risk framework. But first, I suppose I should define what I mean by reputational risk and why I believe there should be a framework around it.

In its simplest terms, a reputational risk is any corporate action that has the potential for creating negative or adverse publicity for the company sufficiently significant such that the company would be prepared to forgo the proposed transaction or business relationship. It is divorced from legal risk, because there is the potential for negative publicity even in the face of actions that are unquestionably proper from a legal perspective. It is also largely divorced from other forms of risk, such as credit risk, market risk, operational risk etc, although there may be circumstances where several of these risks overlap with reputational risk. But in its purest form, reputational risk is a risk where the various constituent parts of risk have weighed in — credit, operational, legal, compliance etc — and have determined that there are no obstacles to pursuing the business conduct from their traditional lenses; yet there remains the potential for adverse publicity that the company might or might not be willing to accept if it were to pursue the proposed relationship or course of conduct.

Reputational risk can take several forms. It could involve a client relationship: Does the company want to do business with a particular individual or entity? It could involve an industry sector or otherwise touch upon environmental, social and governance (ESG) concerns. It could mean whether to do business in a risky part of the world, or a risky jurisdiction. It could relate to the particulars of a transaction, for example, whether something is so prolix or opaque such that it would be difficult to explain it in the sound bites necessary to satisfy inquiries from a reporter or a regulator. And obviously, there can be overlap across some or all of these forms. To me, all of this requires strong consideration for a reputational risk framework to provide a final check before embarking upon a relationship or transaction that contains the potential for reputational harm.

The simplest way to manage reputational risk is to have a committee that acts as a final check before a decision is made around a particular business idea. Ideally, the GC should sit on such a committee, alongside other senior corporate actors. Typically, actors like the chief operating officer (COO), the chief risk officer (CRO) and the chief compliance officer (CCO) could be members of the committee, but others roles, including the head of government relations and the head of communications, could also be considered. In addition, senior business management needs to be represented in some fashion. Such a committee would need to be able to convene promptly so that it is not perceived as an impediment to doing business.

The need for swift action may be a reason for keeping the committee membership at a manageable number, say five or so. Once it is structured and operates smoothly and efficiently, it will become a strong part of the company's overall risk mitigation framework.

Of course, in order for the committee to have relevance, there must first be an institutional commitment to bringing appropriate matters to its attention. An entity-wide communications strategy, combined with strong support from senior management, must therefore be key components to any roll-out. As a practical matter, however, the best way to gain buy-in is to rely on key control actors within the company to remind business people of the need to go through the committee process in appropriate situations. Lawyers within the legal department, compliance professionals, credit officers etc, must all feel empowered and deputised, if you will, by the heads of their respective departments, to inform businesses that particular transactions should undergo review by the committee. Once the committee begins its work, these control actors should continue to play a necessary gatekeeping role; it will, however, soon become apparent that the businesses themselves will begin to calibrate their risk tolerance accordingly and seek out the committee's guidance once they gain an understanding of the types of matters that should go before the committee. In my experience, the initial roll-out phase for a new reputational risk committee should take under six months if the communication strategy is robust, if senior management is committed to the process and if the control actors understand that part of their jobs is to advise the businesses of the need to seek committee review where necessary. In its mature state, there are exceedingly few matters that would otherwise qualify for this sort of review that will escape scrutiny in a company that takes reputational risk seriously.

There are many benefits to having a formal reputational risk framework. First of all, going back to the first core competency, having a reputational risk process is simply good governance. It shows the company went the extra yard before accepting the risks posed by the contemplated business conduct. Secondly, a reputational risk process creates entity-wide organisational buy in and serves to promote a culture where reputational risk is on everyone's mind and is everyone's responsibility. In a highly functioning organisation, one that has a mature reputational risk function, a prudent business person will seek out guidance prior to investing any substantial time in a new, potentially controversial, client relationship or in a risky deal. The business person who goes to the reputational risk committee or its chair for a preliminary reading on the reputational risk tolerance of the company may receive a tentative green light to do more work on the contemplated deal or relationship, or they may receive a likely red signal, thus saving wasted hours and resources. Some of my fondest memories as a GC involve my tenure as chair of the reputational risk committee and having senior business people running a nascent idea by me prior to doing much, if any, work on it, just to see if the idea would be a nonstarter were it to be ultimately presented to the committee. Thirdly, a strong reputational risk process brings disparate senior disciplines together on a regular basis, and establishes a uniform standard for risk tolerance within a company. This uniformity can have enormous benefits in terms of growing the culture of the company. Fourthly, and finally, having an integral role in the reputational risk function allows the GC to have truly outsized influence within the company. The GC is no longer simply just playing traffic cop and providing red, yellow or green lights on legal questions. Rather, the GCs in this context are using their judgment and experience to provide a perspective on what might go wrong — the

downside risks — and what the public fallout might be. The home run, which I have personally experienced, is passing up a risky deal or relationship which a competitor then chooses to pursue and subsequently experiences a negative publicity event. There is no more gratifying moment than getting a call from the CEO, saying 'Thank God we missed that one!'

Moreover, the playing of an active role in the reputational risk process allows a GC to employ what should already be one of their existing core competencies — crisis management. Virtually, all GCs play a substantial role when the company is in crisis, whether the crisis is due to regulatory pressure, unusual business challenges or highly public controversies that have the potential to adversely affect the company's brand. This crisis management skill is tested over time and, with each crisis, the GC expands upon an existing residue of knowledge and understanding of how to best navigate through the particular challenge presented. When those experiences are brought to the reputational risk committee, the other players in the room — the co-committee members and the presenters — get to hear how the proposed business idea may play out in the court of public opinion, based on the past experiences of the GC in crisis management mode. They may also benefit from the mistakes made in past crises, insofar as the committee may be able to avoid some of the earlier missteps seen previously by crafting ways to allow the proposed conduct to occur (the solution can take various forms, including enhanced compliance measures that were not present in the prior event, improved financial controls over the business conduct etc). It is usually difficult for a GC, and a company, to capture learning from past crises, at least in a formal sense. But one way to do so is through a reputational risk process, which allows for those painful lessons to be incorporated into future, critical decisions made on behalf of the company.

Finally, while much of what has been written in this section may imply that the GC is performing a Cassandra-like naysayer role on the reputational risk committee, the reality is that for this process to be credible and effective, it should not be used as a club to stifle legitimate business pursuits and prevent sound business ideas from proceeding. In a well-run company, most matters coming under this sort of review can and will likely be approved, either entirely outright or with conditions that are easily achievable by the business. Conditional approval can include things like further due diligence on specific areas of concern, or enhanced compliance measures or financial controls around the proposed conduct or transaction. In a highly functioning company, however, the businesses themselves likely will self-police and will not waste their time pursuing business ideas that they know will die when presented to a reputational risk committee. As the committee should be structured to include participation from, at a minimum, the business, the head of risk and the GC, a business person presenting an idea to it should not feel aggrieved if a senior body of officers simply calibrates the risk tolerance of the company in a different way. And returning to our modern GC, while identifying and mitigating a potential legal risk is a great thing, there is immense satisfaction in being a participant in a process that avoids a problem that goes beyond pure legal risk and would otherwise have subjected the company to an ugly article on the first page of the *Wall Street Journal*. Or something even far worse, like an existential crisis in confidence for the organisation.

OPERATIONAL EXCELLENCE

The third core competency is more inward looking within the legal function itself and relates to operational excellence. There

was a time, not so very long ago, when legal departments viewed themselves as islands apart from the rest of the organisation. Quite often, this metaphorical island was also set apart from the other corporate functions, with the GC arguing, frequently with success, that their departments, by virtue of their unique expertise and need to be independent, should not be subjected as vigorously to usual corporate norms, such as efficiency and cost control. One of the reasons this legal exceptionalism held sway within corporations was because of the limited number of options at the disposal of GCs and companies to deliver services. Indeed, in this regard, there was some legitimacy in the GC's assertion of legal exceptionalism because, in contrast to the chief financial officer (CFO) or CCO, whose departments relied in major part on processes, technology and procedures to do their work, the quiver carried by the GC often contained fewer arrows. In fact, the choice was frequently a binary one: either hire more lawyers in-house to deal with a rapidly expanding set of new legal challenges, or send more work out to outside counsel. Neither choice was particularly palatable, except insofar as it shifted costs from fixed to variable, or vice versa.

None of this is still true. Today, more than ever, there are many terrific options and methods for the delivery of legal services to the corporation. The old days when the only lever for 'controlling' expenses was to move work from inside to outside counsel, or to take work from the law firms and hire more in-house attorneys, are gone. A modern-day GC needs to become familiar with, and explore, all of the various new alternatives that are available in the marketplace. Indeed, the pandemic, and the almost total reliance on a remote working environment, has shown most corporations that they can do more with less, even in the delivery of legal services.

What are the components to this new arsenal? For some departments, 'nearshoring' lawyers to lower cost cities in the United States and away from the big money centres, has been an attractive option. The one thing America has is an abundance of lawyers, and it is usually not difficult to replicate many of the legal skills necessary to service the company in midsize cities across the country. This option is almost exclusively about saving compensation dollars and real estate costs, laudable corporate goals to be sure, but it is not necessarily a transformational choice — ie the work gets done in the same way, albeit with cheaper lawyers in cheaper office spaces.

For many other departments, the use of alternative legal service providers (ALSPs) has been a better option. These companies emerged in the early 2000s as industry disruptors recognised that technological developments, and the ability to work virtually anywhere in the world, became viable ways to support legal functions. One of the major advantages to using a qualified ALSP is that the support is usually accompanied by cutting-edge process innovation. In other words, shifting certain legal tasks from a traditional in-house model to an ALSP is more than just an arbitrage play on labour costs; it also contains the potential for transformational change because it relies on new technologies, including artificial intelligence and associated new technology tools, as well as lawyers trained in legal processes, to drive down costs and improve efficiencies.

And these new technologies and process improvements have created countless new opportunities for development. Virtually, any function traditionally performed by in-house legal departments is now highly susceptible to improvement with some combination of an ALSP and utilisation of the right software tools. The list includes everything from contract formation and management, to M&A due diligence, to

litigation support, including document review and the management of the litigation process itself, to legal spend analysis, and even to basic compliance tasks. The trend towards technological innovation and process improvement will continue to drive efficiencies within corporate America's legal functions. Nevertheless, the primary driver has to be the willingness of the GC to embrace change and operational excellence.

What is the best way to achieve the optimal operating model? For me, an essential first step is to have in place a legal department COO, and to empower that person to drive change. My personal preference is for this person to be a nonlawyer but who is someone who understands process improvement and technology, and who can look at a particular workflow not from the perspective of how lawyers bring a unique and exceptional skill set to the entity, but rather from a pure process improvement lens. In my experience, lawyers are often the last actors in any company to embrace change and process improvement; having an experienced and credible nonlawyer in the legal COO seat gives the GC perspectives they often do not hear from their own lawyers and provides options that they or their lawyers might not come up with on their own. Enthusiastic engagement by the GC, however, is, of course, essential. At the end, they would be in the best position to choose from among the many options that could serve as substitutes for the business as usual approach. The GC should be in the best position to determine which alternative paths to pursue, given the specific tasks that need to be performed on a regular basis. A GC who is serious about running a state-of-the-art legal department should engage in a mapping exercise and scrutinise every task performed by that department. The solutions that are ultimately implemented may vary from task to task — for some tasks a nearshoring or ALSP solution makes sense; for other tasks, perhaps a bundling of the work to a lower cost law firm not located in the large money centers may be the best option. It is inconceivable to me that a serious effort to do a comprehensive analysis of how to do things would not result in substantial change and dramatic increases in cost savings and efficiencies.

A secondary, but equally valuable benefit of embracing true process improvement relates to the establishment of uniform norms and procedures throughout the department. Particularly in an international company, imposing as much uniformity as possible on a given workflow — either through reliance upon an ALSP to manage that workflow or a pure technology solution — should be a goal worthy of pursuit in and of itself. Errors will be minimised and the businesses will receive consistent advice on similarly situated action items. Outcomes such as these breed trust and respect for the legal function and will lead to greater reliance on the department down the road.

Finally, in today's environment, CFOs and heads of expense management, and even CEOs, are asserting tremendous pressure on GC to think about different and more efficient ways in which to deliver legal advice to the entity. How much better would it be for the GC to embrace operational excellence on their own and develop a deserved internal reputation for innovation and creativity? The effort would be noted and applauded in the C-Suite, and legal functions would finally rid themselves of the legal exceptionalism mindset and, frankly, join most of the rest of the corporate team in supporting effective cost containment and efficiency measures without sacrificing the quality of their services. It is still somewhat novel for lawyers to be perceived as technological and process innovators, although there are more than a handful of innovative GCs

within the Fortune 500 who are developing well-deserved reputations for doing precisely that. This final core competency in the triumvirate — a commitment to operational excellence — may be the one that garners the most internal acclaim of all, and may even be a contributing factor in the elevation of several GCs to the CEO seat in recent years. Basically, two decades after much of this was made possible through the combination of technology and industry disruptors like ALSPs, it is finally time for legal departments to enter the 21st century.

CONCLUSION

The modern GC can no longer just be a great lawyer. They need to think broadly and creatively about processes, about risk and about operational excellence. Only when all of these thoughts are uppermost in their minds, can they be viewed as truly outstanding performers.