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## Law Firm General Counsel Extravagance or Necessity?

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*"I firmly believe that whether it was a good idea or a bad idea depends on whether it works out." John F. Kerry.*

The full-time Law Firm General Counsel is no longer unheard of, but it is far from an institution. Many, but not most, firms have a General Counsel position, or are approaching it, but the title describes different positions in different firms. The 2002 Association of Professional Liability Lawyers' annual meeting materials contained a survey of 32 firms, ranging in size from 75 to 1000 lawyers, and reported that, by one name or another, about a third of the firms have full time lawyers doing one or more functions within the range of General Counsel functions described here, and that there is no correlation between the employment of a full time compliance lawyer and the size of the firm.<sup>1</sup> A 2004 Altman Weil survey of AmLaw 200 firms found that 63% had a designated "General Counsel", with another 10% intending to do so, but for only 25% of the counsel did the position occupy 100% of their time.<sup>2</sup> Other studies are beginning to emerge, but the position is a developing one, and the lack of consistent job description makes such studies more anecdotal than statistical. Thus, for example, a statement that "Our GC spends only half the time of your GC" doesn't necessarily mean ours is faster. From these and similar studies, it can be concluded that law firms are recognizing that it is necessary and desirable to dedicate lawyer time to conflicts, ethics, claims and loss prevention, but they are in the process of inventing ways to do that. In my view, the institution of a full-time official General Counsel position with responsibility for the firm's loss prevention, claims, ethics, professionalism, conflicts, and other programs can be

of great benefit to a law firm, both professionally and economically.

### I. THE FIRM IS DOING THE WORK OF A GENERAL COUNSEL ANYWAY.

**INTERNAL LEGAL WORK COMMON TO MOST FIRMS.** Every firm needs and uses the services of its lawyers for a number of things. Almost every firm uses its lawyers to resolve conflicts, to negotiate its own contracts (office leases and the like), to handle certain employee issues, to handle insurance matters, particularly professional liability insurance, to assure ethics requirements are followed, and to keep up with or resolve ethics issues. If a claim against the firm arises, a firm lawyer may investigate, and in the event outside counsel is hired, a firm lawyer will serve both the client function and a portion of the lawyer function in the relationship. To assure that the staff and other employees are following proper procedures, particularly those required by law, firm lawyers must see that rules are adopted and that both lawyers and staff are educated about them and their importance. And the firm lawyers will be required to handle crises. There is a lot of legal work that the firm has to do for itself – which it cannot or should not bill to a client.

**GRADUAL FORMALIZATION OF INTERNAL LEGAL WORK.** Some malpractice insurers, during the underwriting stage or as a condition to the policy, require some of the above functions to be formalized. They may ask about an ethics committee or Ethics Partner. They might ask about opinion review panels or committees. They will want to know about the conflicts procedure and how it is supervised and how conflicts are resolved. They will want to look at written policies relating to business relationships with clients and client confidentiality, and ask how new lawyers and staff are

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made aware of the policies. They will want to look at the organization of the firm, and ask who supervises inexperienced lawyers. They want to understand the business intake process. Many require that one person be designated Loss Prevention Partner, and that someone be designated Claims Counsel, either on a claim-by-claim basis, or as an overall position. They may require a Sarbanes-Oxley committee or panel. These requirements are becoming more and more a fact of life, because the subjects are more and more important. The underwriting of simpler days, "Do you write things you have to do on a calendar?", is gone.

**FULL-TIME OR PART-TIME LAWYERS FOR THE FIRM HAVE BEEN EMERGING.** It is pretty well recognized that a lawyer with the loss prevention job at a firm cannot be expected to have as much billable time as he or she did before accepting the job. The same is true of Claims Counsel, and the supervision of conflicts is more demanding. Ethics questions arise more frequently and take more time than in the past, and more firms are devoting more time to them. Evidence of this is found in the experience of Attorneys' Liability Assurance Society's (ALAS) Loss Prevention Counsel. ALAS emphasizes loss prevention, and provides its member firms with access to a panel of one part-time and seven full-time loss prevention lawyers, to help with issues of ethics, risks and professionalism. ALAS Loss Prevention Counsel report that it is their impression that in recent years the more basic questions that used to be asked frequently have declined and are handled by member firms in-house, and that they are now more likely to consult on more difficult and sophisticated problems. This supports the anecdotal observations that more time is being taken by law firms to develop in-house expertise. The assignments within the firm of Ethics Counsel or Loss Prevention Counsel or other similar positions require enough time to reduce billable work, either as a matter of formal recognition or as a matter of fact. A person who must handle an ethics crisis is not doing work for a file.

So the firm is doing the work of a General Counsel and, if the work is not being done by a specialist, is doing it less than efficiently. And often less than adequately.

**IF THE FIRM IS DOING IT ANYWAY, DOING IT EFFICIENTLY MAKES SENSE.** In general, the right lawyer devoting full time to the internal legal needs of the firm can do the jobs much more efficiently than when the responsibility is scattered.

- Committees are inefficient. If everybody agrees that there needs to be a new business intake procedure, it will take years for a committee of busy lawyers to agree on one, and more time to supervise it once done. Law firms are full of good ideas whose time is delayed in committee due to calendar conflicts. The lawyers are not unconcerned – the client just comes first, as the

ethics of the profession require. The projects take a lot of time even when they are not getting anything done.

Most of you have had the experience,

"Hey! I can't find the \_\_\_\_\_ policy in the office manual. I know we have one, because I helped write it ten years ago."

"Oh, I was told to leave out it of the new manual because it was out of date and a new one will replace it."

"Oh, okay. When?"

"Well, the new manual came out 2 years ago . . ."

There are certain benefits to doing things by committee, of course. Committee work spreads the administrative duties of the firm around. It allows future managers to emerge. Compliance with any policy is enhanced for persons who have input into the making of the policy. But loss prevention, ethics, conflicts and claims are specialized subjects that need to be handled promptly if not immediately. Where the policy or system is in fact going to require considerable education and a significant change, a committee may help, but it will work better if chaired by the General Counsel.

*Law firms are full of good ideas whose time is delayed in committee . . .*

- Immediate Decisions are needed. As discussed below, certain problems such as conflict resolution require immediate attention because the affected work cannot ethically proceed without it. When the person with the ethics counsel assignment has competing client duties, there will be more down time for the firm and more exposure for the affected client.
- The times are more dangerous. There are more things for lawyers to watch for. Missed or ignored conflicts lead to lawyer liability. Claims against lawyers are more and more common. The practice of law is more and more complex. Inefficiency in addressing the loss prevention and ethical concerns, or allowing them a priority behind client work is less and less wise. The work needs to be done. The times suggest that it needs to be done well.
- The firm as a whole will not lose billable time. The work is necessary, and is being done. Some of it involves committees, using the time of more than one lawyer. Spreading the responsibilities around the firm as administrative duties does not reduce the cost to the firm, it merely hides it. Assigning responsibility to one person, even at the sacrifice of the billable hours he devoted to the practice last year, frees up hours for many others. There is unlikely to be a net loss. If a full time GC can reduce the nonproductive work of every lawyer by an average of two minutes a day, you are money ahead, even ignoring (a) the value added by any improvement in loss prevention with its attendant reduction in crises or claims, (b) the likely quicker res-

olution of conflicts questions that tend to paralyze work until resolved, and (c) the avoidance of embarrassing situations that diminish the firm in the eyes of a client, even though they do not result in a claim.

## II. THE GENERAL COUNSEL JOB – WHAT CAN IT INCLUDE?

Obviously, the duties of General Counsel, even full-time General Counsel, will differ among firms. If the GC's background is litigation, he should not negotiate the new lease. A GC without an employment background will need help from the employment law department. Some firms may have such a good Ethics Committee already that that function should be left out of a new GC's job description, and other adjustments to the model described below will undoubtedly work best in an individual firm, influenced by talent, experience and personality. But in general, a Law Firm General Counsel should expect to handle the following:

1. **Loss Prevention systems, policies and compliance.** Among other things, somebody in the firm must study, recommend, implement and evaluate systems for loss prevention. A General Counsel can do that, and can also recommend and lobby for the adoption of policies addressing known risks in the profession, and ensure compliance.

- **Systems** include the new business intake system, the conflicts system, and the exit system for departing attorneys. In some firms, the trust accounting system might be included, either directly or in consultation with the accounting department. Checklists and gatekeeping functions can be imposed to address known areas of law firm risk. The business intake process is a gatekeeping opportunity. Systems can assure proper staffing to avoid dabbling, proper due diligence to avoid unworthy clients, and proper pricing, in addition to compliance with conflicts rules. At the exit level, a system for lawyers leaving the firm can assure that clients are contacted professionally and that responsibility for files is clearly documented with the clients.
- **Policies** having to do with loss prevention include such things as the policy against investing with clients, the policy requiring immediate reporting of mistakes or claims or threats to a specific person (General Counsel), the client confidentiality policy that some lawyers and staff confuse with privilege, the policy against serving on client boards without firm approval, and an Ombuds or open door policy that encourages all employees to share concerns, anonymously if necessary, without worrying about consequences. To have a particular person responsible for worrying about such risks, proposing policies, assuring that those adopted are written, published and remembered is of great advantage from a risk management standpoint.
- **Compliance:** Most will agree that a policy that is not followed can be a virtual admission of a failure to follow the standard of care. A lawyer who has invested

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with a client may have an argument that he followed all the ethical safeguards and requirements for doing so. But if some challenge to the investment arises, or if other investors accuse the firm or the lawyer of having behaved improperly because of the lawyer's personal interest, the lawyer's failure to follow a firm policy that any such investment must be vetted by the management committee beforehand is sure to be part of the arguments that the circumstances show that the behavior was improper. No matter how it is enforced (see the discussion below on the effect of firm culture on style) it is better not to have a policy than to have one that is routinely ignored by any appreciable percentage of affected lawyers.

Maybe a better example would involve conflicts of interest. Firm policy requires the checking of all parties to a potential new matter against the conflicts database. Sooner or later, there will be an occasion when a conflicts challenge arises, which might involve a disqualification or a fee dispute. If a conflict arises because a lawyer has failed to follow policy, not only is there an ethical violation but the inference of a bad motive can be argued by the opponent: "The firm (or the lawyer) was so anxious to take this profitable work that the firm's own procedures were sidestepped, in hopes that the problem would not be discovered." On

the other hand, the occasional glitch in the system that allows a proper conflicts search to miss a party makes the later discovery of a conflict embarrassing, not sinister.<sup>3</sup> Compliance is very important in the case of policies that can affect risk.

the other hand, the occasional glitch in the system that allows a proper conflicts search to miss a party makes the later discovery of a conflict embarrassing, not sinister.<sup>3</sup> Compliance is very important in the case of policies that can affect risk.

2. **Education.** Efforts to increase the awareness of loss prevention issues, policies and risks should be almost constant within the firm. According to most of the loss prevention professionals I talk to, education is both one of the most important and one of the most neglected functions in a law firm. A full-time General Counsel will handle this function far more efficiently than a committee or a practicing lawyer with an administrative assignment. In many firms, it is a familiar scenario that (i) the need for a policy is recognized, (ii) the policy is adopted after a few years in committee, and then (iii), that task accomplished, the policy is put out of mind. The committee remembers it, but considers the problem solved and out of the way. The people who were not directly concerned will forget, and the subsequently hired lawyers will have no memory of it even if it is mentioned during orientation.

There are a variety of ways to raise the awareness level of the firm members about policies, their reasons for existing, and the risks they address. This is important because the more sophisticated the lawyers and staff become at recognizing issues of ethics or loss prevention, the better protected the firm is. Having the GC or Ethics partner alone know what the rules are is nice, but not very much protection if the

rest of the firm does not know enough to ask the question. If the GC is still predominately getting questions that are as ignorant as, "Hey, there is no conflict if I sue Joe's client as long as the matters are not related, right?", then his education efforts are wanting. If the questions are difficult to extremely difficult, and there are many of them, the firm has developed a high average awareness of the issues and has built an early warning system that is significant protection against loss. The sophistication and volume of questions is an indication of success that is observable and (almost) measurable. Also, and for similar reasons, the GC should play an important part in the orientation of new lawyers.

In seeking compliance with policies, reminders that they exist are essential. In addition, people generally will follow policy if they understand *why* they should. Education on the value of loss prevention in general is equally important. It is eye-opening to many, for example, that quite aside from ethical requirements, potential for disqualifications, and liability claims, the failure to adhere to the conflicts rules has resulted in fee forfeitures in the millions of dollars, and that these losses are not insured.

Among more formal efforts such as in-house CLE courses of the type that may provide credit for purposes of the Bar's mandatory CLE requirements, the General Counsel should attend meetings of departments or practice groups, either as a part of the program or as available on practice or ethics matters.

I have found that frequent short emails intended to raise awareness of areas of concern are helpful. It is my practice to send an email firm-wide at the rate of one every week or two. It might be explaining a policy, or extracting a lesson from some other firm's misfortune in a reported case, or informing the firm of a benefit derived from a policy, or explaining how a problem involved in a recent case cannot happen in our firm if our policy is followed, or a trap that a lawyer fell into because he was practicing out of his ordinary area of practice.

Frankly, some lawyers in my firm think I do this too much. But they tend to be the ones who do not need the education. Some think the messages could be shorter (maybe a bumper sticker- "Don't Screw Up") but they are not the problem either. On average, I get 3 responses per message (from different people, thanks) indicating I have accomplished something. Some will say something like, "Good idea, somebody should have told us this before" despite the fact I have done so repeatedly. Others might say that a story about a problem that grew because it wasn't addressed early is scary, or the like. One of my favorites was the one who responded to my statement that legal ethics is more than being honest and doing the right thing, by admitting that that had been his approach and that he thinks he now gets it. But the fact is, I get 100 such responses in a year, and after a while, the level of awareness of the firm as a whole has risen to a pretty high level. This results in more sophisticated

issues being recognized earlier by more lawyers, which is a huge loss prevention bonus. Obviously, a potential problem avoided is much better than an actual problem dealt with.

3. **Claims.** The loss prevention and education functions seem to go hand in hand with handling claims and/or the supervision of claims handling, both within the firm and in coordinating with outside counsel. Claims against law firms will include the ridiculous and demented, which the firm may want to handle in-house with the approval of the firm's insurer. The GC should have authority to appoint an assistant claims counsel for a specific case, to get the advantage of specialists within the firm, but should do so formally and pursuant to a written policy to increase the chances of preserving privileges. Other matters will require the assistance of outside counsel, whose contact with the firm should generally be through General Counsel.

4. **Insurance.** An important aspect of loss prevention is appropriate professional liability insurance. The firm must understand not only the protection provided by the policy, but also its requirements. Someone must be assigned to contract management - knowing and complying with policy obligations such as the notice requirements for claims or circumstances that could result in a claim. Someone must know and handle the often-exacting requirements of renewal applications. This is appropriately the function of General Counsel, maybe with

the assistance of an insurance law specialist if available. Professional liability insurance has some complexity, including not only understanding the policies but also the value added by different providers. The General Counsel should have a grasp of both the business and legal aspects of insurance, and should be able to communicate with his partners concerning such things as the importance of claims handling, loss prevention support, protection against punitive damages, exclusions, the importance of loss prevention to underwriting as well as for its own sake, the influences on the insurance market, as well as next year's premiums.

5. **Facilitate communication.** An essential part of a complete loss prevention infrastructure are policies, systems, or skills that make it easy for everyone from staff to the newest associate to the most senior partner to consult the firm - including General Counsel - about matters within his concern - ethics, practice issues, professionalism, mistakes, potential claims, difficult clients, difficult partners, teamwork issues. The General Counsel should see to the establishment of, and then enforce and encourage use of an Ombuds policy or safe harbor or open door or whatever other policy works within a particular firm to ease any fear that reported concerns may have adverse consequences. Available lines of communication should be advertised within the firm continuously. Certain risks - such as dabbling, bad clients, conflicts and improper staffing - may be guarded against with a good gatekeeping business intake system at the outset of every matter. But what system can

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guard the firm against the problems caused by a lawyer who develops a substance problem or erratic behavior? The only legal best defense is a savvy legal secretary who knows that her loyalty is primarily to the firm, and also knows she has nothing to fear from talking to the General Counsel (or other designated persons) about her concerns.

**6. Observe, document and help shape firm culture.** Every organization has a culture. It may need seeking out and stating. The cultural impediments to compliance with new policies or needed changes should be identified and, in consultation with management, steps should be taken to remove any impediments and make the changes. A culture of billable hours, or a formula compensation system, or emphasis on control of clients, or on developing business, or on individual responsibility, or sink-or-swim training, or tolerating abusive behavior, or forgiveness of violations of policy, has unintended risk and professionalism consequences. There are balances to most of those, and a General Counsel has a clear role in identifying destructive cultural forces.

**7. Assure quick resolution of conflicts and other ethics matters.** The administration of systems and education about policy usually go hand in hand with consultations on ethics problems and risk problems. The General Counsel can rule on problems if they are matters of ethics and recommend action to management if they are matters of personnel, policy or business. In some firms, the GC can in effect be the ethics committee or panel. Others may prefer that he be an ex officio member or chair. In any event, a full time GC can assure that whatever system works in the particular firm is operational and efficient. Part of the inefficiency of the committee as a means of resolving problems is the calendar of the chair. If the GC can call the necessary meeting, there is a greater chance that things will get done timely.

The speedy resolution of conflicts issues is particularly important to a firm. Often, until conflicts are resolved, no work can be done on the file, and the lawyers wanting to advance the case are virtually paralyzed. If the issues can be resolved without waiting until the ethics partner finishes a deposition or concludes a 3-day closing, the firm benefits.

**8. Employment issues.** If the firm has a labor or employment department, it is wise to designate a member as employment counsel for issues in that area. He should work with the GC so that both are informed, and this relationship should be formal to better the prospect of keeping privileges.

**9. Committees or panels.** The GC should be an ex officio member, at least, of the committees or panels that serve important loss prevention safeguards, such as opinion review panels or committees, audit response panels, and the like, and can educate the firm sufficiently to assure that the panels are properly being consulted and that they are functioning smoothly.

**10. But DON'T be part of management!** Regardless of his

or her history or stature within the firm, the General Counsel should not in my view be on the executive committee or management committee or the board of directors of the firm. The GC is a lawyer for the firm, not a manager. The same confusion of roles that the GC should preach against when advising firm members not to be both directors of a client and lawyers for the client<sup>4</sup> applies in spades in the law firm. The GC's role is to give legal advice as independently as possible to management, and he should not be in a position to vote whether management should take that advice. The Altman Weil survey mentioned above suggests that some firms do not follow this strict separation. But the survey does not contain enough information to tell whether those firms who do not separate the GC from management have simply designated a General Counsel as a part-time assignment, with duties such as claims counsel, or whether they have been serious and created a full-time position.

It has been my experience that a strict distinction between an advisor's role and a management role is extremely valuable. A question will arise with some frequency whether the firm can or should take on the representation of a client in view of issues such as a hoped for representation of a different client, or a positional conflict, or sensitive political or industry matters, or other business considerations. If something ethically prohibits one or the other representation, or if waivers will resolve the issue, a General Counsel can decide those issues. But if in the final analysis the decision is a business

decision choosing one representation over another, it works better for all concerned if the GC can identify the ethical issues, analyze the business issues, and present the business issues to management for the business decision. Confusion of the roles of ethics, liability, or risk counselor and business decision maker can present situations that suggest that the General Counsel has not been neutral among the firm lawyers, and can damage the overall value of the position as a reliable source of help in professional matters. In more general matters of the business of the firm, it sometimes occurs that one course of action under consideration may present ethical issues, as for example, unauthorized practice implications of a multijurisdictional undertaking. It promotes good management decisions to have a person with no responsibility for making the ultimate decision responsible instead for the analysis of the ethical issues and available options for resolving the problem. Of course in an individual case, a different firm could appoint a committee for that. But having the firm's lawyer serve solely as the firm's lawyer, with the firm management making business decisions just as in the case of a private client, is better. There is then less chance of confusion of roles or responsibility. And of course the chances of preserving privileges are improved. Discussion among the members of the management committee of a business organization is not privileged. Consultation between the management committee and the organization's lawyer is privileged.<sup>5</sup> Why confuse the matter

*Consultation between the management  
committee and the organization  
lawyer is privileged.*

by making the lawyer part of the management committee?

**EXCEPTION:** One anecdote from the prior experience of a loss prevention professional suggests a caveat, and illustrates that the culture of the firm will determine what is best for that firm at a given time. She said that there was a great change that occurred when her former firm appointed as general counsel a well-respected and highly professional senior partner, *and made him an ex officio member of the management committee*. This resulted in the automatic consideration of ethics, professionalism, and loss prevention as part of every decision, which in and of itself worked a change in the culture of the firm, and greatly reduced dissonance with loss prevention and ethics policies.

### III. ADVANTAGES OF A FULL-TIME GENERAL COUNSEL

**The importance of "full-time".** Some firm managers will read this far and react, "Hey, that was a pretty good list. But why don't we appoint a loss prevention guy, a claims committee, a CLE committee, designate one of the employment lawyers, and cover all this and not have to lose a productive lawyer to a full-time General Counsel job?" Better than nothing, but there is something missing. There is efficiency in appointing somebody whose job includes worrying about how all these things fit together for the benefit of the firm, and there is inefficiency in squeezing the duties in with client obligations, where a tenet of the profession is that the client comes first. In our experience with assigning various functions to people with a concurrent obligation to serve clients, the job description is basically "putting out fires" -- dealing with emergencies -- rather than planning, educating or systematizing a coherent defense system for the firm. This is *not* intended as criticism. Fifteen years ago, that was a reasonable approach. Suits against lawyers were rare, and the problems were basic -- a missed statute of limitations or a botched legal description. Aiding and abetting a crooked client would have to be blatant, not inferred or insinuated, to draw a claim. That approach is not sufficient today.

**The efficiency of specialization.** As a full-time job, the same advantages of specialization that benefit the substantive practice areas come into play along with the ability to focus on problems without competing client demands. Plus, the better job the General Counsel does in education and responding to requests for help, the more in demand his help will be. If the GC does his or her job right, so that the members of the firm both (a) know to call, (b) know who to call, and (c) feel free to call, there will be almost constant interruptions on conflicts issues, on ethics matters, on waiver issues, etc. It is pretty efficient after a year or so. Looking from another view, with 200 business days a year and 200 lawyers, a problem that comes up once a year in an individual lawyer's practice comes up once a day in the firm, a problem that occurs once every 5 years, once a week, and a problem that might arise for an individual practitioner every 25 years will arise in the firm once a month. A firm made up

of lawyers who are sensitive to such issues will double the demand. Having a person who specializes in the law of lawyering makes resolving those problems more efficient than reinventing the answers daily, weekly or monthly.

I had mistakenly thought when I accepted the Loss Prevention Partner job the first year that once we put systems and policies in place and did a little internal CLE, things would settle down. Instead, they got more hectic, because the sensitivity to ethics and loss prevention issues went up. More people were recognizing more subtle questions earlier, and were more aware of the risks.

**Privilege.** The chances of maintaining privilege in communications within the firm are greatly increased with full-time General Counsel, who is only the lawyer for the firm and its members, not a member of management, and only incidentally serving clients. The role of General Counsel in the business community is well-established, and most of the established law there should carry over to the law firm. While a few cases have refused to recognize privilege in internal law firm communications, usually other factors were influential. A lawyer consulting with another lawyer in the firm about how he can avoid telling his client about a mistake while he continues to represent the client doesn't deserve a privilege. A lawyer consulting with the General Counsel about what to do should be privileged. If the firm makes an unethical decision, such as to

cover the matter up and not advise the client, the privilege might be lost. But suppose that the consultation results in the proper action: (a) the client is informed of the mistake, (b) the conflict of interest involved in continuing the representation is explained, (c) consultation with independent counsel is recommended, and (d) the conflict of interest is waived after such consultation. I believe that the consultation with General Counsel would be held privileged even by those courts that have held that there is no internal privilege while the firm continues to represent the client. But even if there is a risk that there is no privilege, the value to the firm of assuring that General Counsel is immediately informed of mistakes is of vital importance to the firm. If independent judgment is enlisted early, the chances of containing damage are immeasurably improved.

**DISADVANTAGES** - The disadvantages of a General Counsel position are practical rather than theoretical. They include:

- Finding somebody to do it. Nobody goes to school to be a GC of a law firm, at least not yet, and although it might be done someday with a firm with just the right culture, it is almost inconceivable to me that a lawyer who is not an established member of a firm could do even a passably effective job. There are three aspects:
  - Finding somebody who is willing to do it.
  - Finding somebody who is able to do it.
  - Finding somebody else to do it.

*Nobody goes to school to be a GC of a law firm, at least not yet . . .*

To some extent, the job of GC is to tell people no. To carry that off, the GC requires respect. This is generally earned after years working together doing something other than being General Counsel. There will generally be only a few people in a firm who can do it.

Many such people will not want to risk doing it. Like making a productive lawyer the full-time executive of the firm, a full-time General Counsel must have a great deal of trust in his firm and his ability to demonstrate worth in ways that are not the ordinary law firm model. Such a full-time General Counsel in effect gives up his practice - his responsibility for clients and most of his billable work - to others in the firm. While our firm's culture emphasizes that all clients are firm clients anyway, still there obviously is a recognition that a lawyer who has a solid relationship with solid repeat clients for significant matters has value to the firm. From the firm's standpoint, of course, appointing a General Counsel does not cost the firm his clients, but the new General Counsel personally must keep his stature by earning it on another basis.

For instance, one way people gain respect is by having enough money to give credence to a claim that they are generous. "I bring in more than anybody and I'm willing to give up enough to pay to keep this bright young partner" is both fun to say and, while generally hogwash, can sometimes help produce the desired result. Once that partner's billable time is cut by 90% because of the demands of the GC job, he has lost that leverage and must rely on something else, like good ideas, demonstrable contribution to the welfare of the firm, and persuasiveness.

A full-time GC will lose measurable indicators of performance. The creation of systems, education, and implementation of systems and policies may have saved the firm a million dollars in time, increased realization rates by 3%, and avoided ten million dollars in claims, but because it did, it isn't anywhere:

"What problems do we have?"

"None."

"Great. By the way, why are we paying you if we have no problems?"

You can't show the answer on a spreadsheet multiplying hours or anything else by rates or anything else.

And many people will not like it. It is pretty stressful, having such a high percentage of immediate problems in which one of your partners is paralyzed without the answer to a sometimes tough question, or dealing with the emotions a lawyer didn't know he had until somebody accused him of doing something unethical or making a mistake. The fact that your clients are not strangers increases the stress. It is as hard as I have ever worked. I had not really focused on it, but a year ago, one of our paralegals saw me in the hall and said, "Mr. Winders - you look different!" I asked her what it was, and she said, "I don't know why, but you look

relaxed". I had just been taking a rather difficult deposition, covering for one of my partners in the area I used to practice in. Going back to dealing with somebody else's problems is relaxing indeed.

Trust between the firm and any lawyer who takes on a full-time responsibility for the business of the firm - manager or General Counsel - is a necessity. It is a big step. It may provide a tremendous advantage to the firm.

There is also the problem of succession. All the successful law firm General Counsel I am aware of have "emerged". With exceptions, the position is new enough that there are few anecdotes about choosing replacements that are useful. Finding someone else to do it can be a problem. When I have a tentative conclusion, I will probably write another article.

#### IV. WHAT'S IN A NAME? IS THE "GENERAL COUNSEL" TITLE IMPORTANT?

A feature of my son's summer camp was "Campers' Day" - various boys were appointed to cover staff positions while all but a skeleton staff had the day off. At a weekend visit, ten-year-old Pete was telling us that he had been cabin counselor for his cabin on Campers' Day. "And Dad! That was the day the tornado came through camp! We were really scared! Nobody knew what to do! Somebody said, 'Hey, Pete! You're the counselor', and everybody crawled in bed with me. Why did they do that?"

There is power in a title - for better or worse.

Before Carlton Fields established the General Counsel title, I was performing all the above functions - ethics, loss prevention, claims, etc. I was "Risk Management Shareholder", "Loss Prevention Partner", "Ethics Counsel", "Claims Counsel" and a couple of other functions. The responsibilities had become virtually full time. A couple of my partners suggested the change in title, and I was thinking about it. The terms we were using were awkward, but in the culture of the firm, we avoid pretension. I learned that Bill Raper had been named the first General Counsel of Womble Carlyle, and called him for his opinion. My experience exactly follows his, and echoes his advice. Within the firm, one has stature with the senior lawyers because he has earned it over several decades, but with the newly associated lawyers, the stature comes as a presumption with the title, making it easier to perform the education functions, and lending authority to the insistence on following policies designed to help with loss prevention issues, and demonstrating that the firm "puts its money where its mouth is" in its emphasis on ethics and loss prevention. And the title encourages lawyers to come to you when the tornado comes through - and if you do the job right, even when the warnings or watches appear.

There is an additional benefit in dealing with persons outside the firm. If someone receives a letter from General Counsel of the firm, the recipient has a pretty good idea of

*In some firms, the Loss Prevention Partner or General Counsel is a cop.*

the scope of the writer's authority to speak for the firm, and the confidence of the firm in the writer. The firm may wish to comment on amendments to the ethics rules, or communicate about conflicts issues. It is easier, conveys more accurately, and is more effective to introduce yourself as the firm's General Counsel than, "I am Risk Management Shareholder for Carlton Fields. You probably wonder what a Risk Management Shareholder is. Well, among the responsibilities of that job title is to comment on stuff like this." Besides, "Loss Prevention" or "Risk Management" sounds like the firm makes so many mistakes it requires a full-time lawyer to cover them up. Hopefully, the firm makes fewer mistakes because it has invested somebody's time to pay attention to systems and policies that make mistakes less likely. <sup>6</sup> In any event, it is easier to be a General Counsel than to be risk manager, claims counsel, loss prevention partner, ethics partner and in charge of the conflicts program, even if the duties are the same.

#### V. LAW FIRM CULTURAL ISSUES - AND RESPONSIBILITIES

In some firms, the Loss Prevention Partner or General Counsel is a cop. As he sees it, his job is to catch people doing things wrong and institute corrective or punitive action, to bring the rule-breaker into compliance.

I was surprised when I first heard this view from a lawyer with this responsibility in a major firm. I thought that was a really poor way to look at it. I now realize that in some firms, that is the way it must be, because the firm culture forces it.

Those firms that emphasize or permit client "ownership" or control, individual production in the short term, and individual production statistics rather than the overall contribution to the firm as a whole, have a culture that creates rivalry between members, practice areas, offices, or all the above. Such an aspect of the culture of the firm virtually guarantees that loss prevention may be seen as a source of rules that should be sidestepped, or that apply to the other guy, or that are a hindrance rather than a help.

In a firm with that culture, it is pretty easy to see that the "cop" image must be the result. To take a simple example, suppose such a firm has adopted a policy at the insistence of its insurance carrier or its Loss Prevention person that a lawyer should not "dabble" in areas of law in which the firm has specialists. But the firm culture in the form of a formulaic compensation system rewards Partner A, a construction lawyer, for bringing in the estate planning work for the owner of his biggest construction client, and also rewards him for the work done for that client, and for the percentage of work done in his department for that client, and for the "control" of that client: conversely, since it is "A's client", the firm rewards Estate Planning Partner B only to a lesser extent if B does the work, and in fact rewards B to a greater extent for ignoring A's work in favor of equally important

work for "his clients." Foolish though it is, there are plenty of firms that operate like this to one degree or another. Obviously, no one would run a football team with a system that pays the quarterback for catching his own passes, or fining him for getting sacked even when his line doesn't show up. But that cultural equivalent in law firms is not uncommon, and the job of the loss prevention partner in that firm is one that operates in opposition to the firm culture, not in harmony with it. There are rules, but crime does pay. Loss prevention necessarily equals law enforcement.

Other firms are blessed with or have consciously created a different culture, and as a result, the loss prevention emphasis can be on education, on creating procedures that are clear and easy to follow, on alerting the members to dangers or trends that may have escaped attention, on demonstrating how a policy contributes to accomplishing the team effort, on creating resources for the prompt resolution of difficult ethical and practical issues, and making it easier and safer to practice law. Loss Prevention does not run counter to firm culture in a firm where clients are clients of the firm, not the "property" of individual lawyers, and where claims are to be avoided, rather than considered a cost of doing business.

A General Counsel is in a position to help firm management change damaging or dangerous aspects of firm culture in a way that a less independent position cannot. The title itself, assuming it is backed up by doing a good job, is helpful, but since the General Counsel with a full-time job working on firm legal problems is not dependent on "production" in any sense but the overall welfare of the firm, his motives for suggesting change in such a firm cannot be seen as economic self interest. As an advisor to management rather than being part of it, he can identify counterproductive forces at work and suggest changes to assure that the firm culture is not at odds with ethics or loss prevention policies and goals.

I have thought and written quite a bit about the interplay between firm culture on the one hand and loss prevention and other goals on the other, and those interested may want to see *Unintended Consequences (The Essence of Law Firm Management)* <sup>7</sup> regarding counterproductive forces, and see *Law Firm Culture - Its Importance and How to Overcome It*,<sup>8</sup> regarding how culture can be changed. I see it as extremely important for the success of a firm to assure that its culture is adjusted so as not to work at odds with ethics, core values or loss prevention. Culture change requires work, but it can be done and it is worth it. It is not a haphazard business, however, and some firms will have more work to do than others.

#### VI. CONCLUSION

A drawback of specialization, I guess, is that I am the one paying the most attention to what my contribution is. And the fact that the person with the job is convinced that his


*Culture change requires work, but it can be done and it is worth it.*



position is important is hardly scientific evidence that it is. But that does not mean it is not true.

The consolidation of numerous ethics, professionalism, loss prevention and claims responsibilities into a single General Counsel has in our firm proved efficient, has reduced the time and expense necessary to resolve conflicts and other ethical problems that require swift resolution, and has enabled a successful education and awareness emphasis that has noticeably raised the sensitivity of firm personnel — lawyers and nonlawyers — to risks and an understanding of the policies and systems designed to avoid or resolve them. There may be other ways to handle these necessary functions, but if they involve lawyers with time commitments to clients and other duties, and do not allow for at least one person with an overview of the way these efforts fit together and work, they are likely to be less than satisfactory.

### Endnotes

1. Elizabeth Chambliss, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms: Some Initial Findings*. APRL Annual Meeting, Washington, D.C., August 2002.
2. Altman Weil, Inc., *Results of Confidential "Flash" Survey On Law Firm General Counsel*. March 2004. Note that only 56 of the 195 firms solicited responded to the survey. This gives a pretty good idea, but not the figures from a complete response.
3. Our firm had an experience with a glitch that illustrates the difference from an intentional neglect of internal rules, and that also shows the value of the effort. During the process of integrating the matters of a new group of lawyers into our conflicts data base, one person (lawyer or staff or both) made the mistake of entering the insurance company (for whom we sometimes work directly and who sent us the defense) as the client, and the large corporate insured that we were to defend as "adverse" rather than "client". Thus a search of the insured's name showed that it was adverse in two matters (no conflict) when in fact we represented it in this one, a Rule 1.7(a) conflict impermissible without client consent. The matters were as completely unrelated as could be imagined, so the conflict was clearly a waivable one, but it was not discovered until the insured corporation asked another firm lawyer to represent it in a third unrelated matter, and the conflict search showed preexisting adverse representations, and we discovered the mistake. We sought waivers at that time, but the outside lawyer for the corporation in the real adverse representation sought to disqualify our firm. The firm promptly withdrew from the later filed insurance defense matter in which the mistake was made, and asked the court to treat this as a "former client" situation where, if the matters were unrelated, there is no conflict. Because the mistake was caused by a glitch, and not because our system was inadequate, or our policy weak, or because of a deliberate failure to observe the policy, the court treated this as a former client situation and denied the motion to disqualify. The moral of this story is admittedly a little weakened in that the court's decision was probably also influenced by the fact the opponent was being a jerk.
4. This is not an isolated view. CPAs have (or at least had for a while) a flat prohibition against serving as board members of clients. American Institute of CPAs Code of Professional Conduct, Rule 101, Interpretation 101-1(B)(1). The 1995 Report of the Blue Ribbon Commission on Director Compensation of the National Association of Corporate Directors recommends that "[boards should adopt a policy stating that a company should not hire a director or a director's firm to provide professional . . . services to the corporation. . . . Boards of directors should hire directors to be directors and service providers to provide services." (Report, pp. 15, 18.) The California Public Employees' Retirement System, (with shares in 1600 U.S. corporations and over \$135 billion in assets) has adopted corporate governance "core principles" for U.S. companies that state: "No director may also serve as a consultant or service provider to the company." The ABA Litigation Section's Task Force on the Independent Lawyer ("ABA Task Force") concluded that "[being a director of a client company] should be discouraged in most cases. If a lawyer nonetheless chooses to enter into this relationship, both the lawyer and the client should exercise considerable caution to evaluate, understand, and attempt to minimize the potentially serious risks that this practice raises." (Report of the Task Force on the Independent Lawyer, ABA Section of Litigation, March 1998) at 63-64.
5. See, e.g., *Nesse v. Shaw Pittman*, 206 F.R.D. 325 (D. DC, 2002).
6. As an aside, in the "what's in a name" context, I suppose you all know that the reason you have a Juris Doctor degree instead of the Bachelor of Laws degree that I got when I graduated. In the mid 60s, the federal civil service rules started people with a doctorate at a GS 12 pay grade, but could only pay people with bachelor's degrees at a GS 8 or something. And the government was incapable of understanding that the 3-year postgraduate work at law school was the equivalent. The law schools solved that by changing the name of the degree, and issuing them retroactively to prior graduates. I cannot testify that there IS a similar four-grade pay increase whenever a law firm names a General Counsel. But there is supposed to be.
7. Peter J. Winders, *Unintended Consequences (The Essence of Law Firm Management)*, Vol. 14, No. 3 THE PROFESSIONAL LAWYER 1 (2003).
8. Peter J. Winders, *Law Firm Culture – Its Importance and How to Overcome It*, 2004 SYMPOSIUM ISSUE OF THE PROFESSIONAL LAWYER — (2004). 

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