



© 2014 American Health Lawyers Association

June 06, 2014 Vol. XII Issue 22

New Surveys Find Increased Prominence for General Counsel Role

By Michael W. Peregrine, McDermott Will & Emery LLP

Second in a two-part series highlighting issues to be discussed at the [In-House Counsel Program](#) in New York City on June 29.

Two new surveys lend empirical support to the view that the general counsel of a sophisticated enterprise (such as a health system) has highly consequential responsibilities, and thus should occupy a position of hierarchical importance within the organization. The surveys reflect an evolving role for the general counsel, by which he/she is increasingly viewed as a leading and valued member of the executive team. The general counsel's responsibilities are perceived as extending beyond traditional legal tasks to include governance and risk management, and providing material contributions towards the development of business strategy. These survey results are particularly significant given new concerns with what is perceived as the lack of clear distinction between the roles of the general counsel and other key corporate leaders such as the compliance officer, internal auditor, chief risk officer, and privacy officer. For these and similar reasons, the results should be shared with executive and board leadership.

The two surveys reflect a broad cross section of respondents, industries, and localities. One survey, prepared by the international consulting firm KPMG (KPMG Survey), [\[1\]](#) is the result of interviews of general counsel of both domestic and international companies. The other survey, prepared jointly by NYSE Governance Services and the executive search firm Barker Gilmore (NYSE/Barker Survey), [\[2\]](#) is based upon data derived from directors and chief executive officers in the data base of Corporate Board Member. Indeed, it is both the scope and breadth of the two surveys that serves to provide a comprehensive, complimentary overview for corporate leadership. The shared message of the two surveys is extremely positive; i.e., that the role and influence of the general counsel is

expanding within the organization as a result of the increasing complexity of legal challenges facing organizations, **and** because of the value that corporate leadership perceives as being provided by the general counsel.

The KPMG Survey expands upon its prior (2012) analysis that found general counsel were being asked to assert a more important role in how their company operates, and to transition from being strictly a legal counsellor to serving as a business advisor as well. Indeed, the 2014 KPMG Survey observes that general counsel are now expanding their role to include elements of risk, finance, regulation, human resources, and guiding corporate conduct. As such, this shift is involving general counsel in tasks that extend beyond those that are purely legal in nature, e.g., risk management and business strategy. The KPMG Survey projects that this movement towards an expanded role will continue, as the needs of the organization and the expectations of the board and senior management increase. Two reasons are cited by the KPMG Survey for this shift:

First, “technical expertise in legal matters” is becoming increasingly valued for its useful perspective on operations, whether with respect to conduct, corporate transactions, or contracting.

Second, as corporations become larger, and more intricate, the task of managing them becomes more substantial. The general counsel is perceived as having the unique ability to understand and help the organization address complex issues and pursue sensible solutions.

The KPMG Survey suggests that the prominence of the general counsel will increase consistent with the complexity of the organization, and that the ability of the general counsel to evaluate legal matters in the context of a sophisticated understanding of the company’s business strategy will add great value to the company. The KPMG Survey warns, however, of the challenge to the general counsel that arises when asked to address more demands, while provided with fewer resources.

The NYSE/Barker Survey reaches a similar conclusion as to both the rising influence of the general counsel within the boardroom, and the increasing role they are being called upon to play in terms of formation of business strategy. The specific findings of the NYSE/Barker Survey included the following: the general counsel role is regarded as a larger and more important part of the executive team than in the past; the board values the general counsel not just for his/her ability to provide competent advice on legal and governance matters, but also for service as a trusted advisor to executive leadership, and as a valued “sounding board” to “leadership”; the increasing business sophistication of the general counsel provides significant value to the chief executive through active participation in business/strategic dialogue; and general counsel provide significant value

in the areas of compliance and ethics, governance, risk oversight, and major corporate transactions.

In many respects, these new surveys are consistent with the conclusions of the thoughtful and authoritative 2013 report of the Association of Corporate Counsel (ACC), *Skills for the 21st Century General Counsel*.^[3] The ACC report similarly ascribes an evolving and increasingly important role to the general counsel: as (a) the manager of the legal department, operating within a complex environment with limited resources; (b) primary counselor to the chief executive officer and board of directors on a broad portfolio of issues that extend beyond traditional legal concerns; and (c) a major participant in the formulation and implementation of corporate strategy. The expanding role of the general counsel is attributed by ACC to a number of factors, including counsel's capability for addressing legal issues within a larger business perspective; a willingness to confront risk in decision making; the ability to dialogue with business executives in a "common language"; and the skill to work seamlessly and simultaneously with executive leadership and the board concerning operations and strategy.

Several other new developments are consistent with these survey results. One is the results of Corporate Counsel's 26th Annual General Counsel Conference,^[4] where an important theme emerging from the discussion was that general counsel are also important business leaders within the organization. Cyberrisks and technology challenges were two examples of where the experience and perspectives of the general counsel can make important contributions to the development business strategy. Another is the results of Grant Thornton's "2014 Corporate General Counsel Survey,"^[5] which presents leading risks as identified by the counsel/respondents, and underscores the limitations imposed on many legal affairs offices by the lack of resources (i.e., the inability to proactively reduce and react to major risks). So, it would seem clear that the themes expressed in the KPMG and NYSE/Barker surveys are part of a broader commercial acknowledgment of the increasing prominence of the role of the corporate general counsel. This is a concept that must be shared with, and embraced by, corporate leadership consistent with their fiduciary obligations.

All of this is particularly relevant in the context of the health care industry, where the forces of seismic industry change are creating corporate agendas of enormous complexity, with significant associated legal challenges. The noted relationship between the size and intricacy of corporate operations, and the importance attributed to the role of the general counsel, is particularly relevant to health care. In this regard, the surveys provide demonstrable evidence to corporate leadership on the value attributed by commerce to the role of the general counsel. It is this evidence that is especially significant to the board, for several reasons.

First, the board is ultimately responsible for assuring that the organization maintains a strong, capable and properly funded legal affairs office that is empowered to meet the legal and related needs of the organization. The KPMG and NYSE/Barker surveys provide an important and reliable reference as to industry standards in this regard. They help to answer the inevitable questions, “Is there any data about this? What are the best practices?”

Second, there are rising indications that in many boardrooms, the roles of the general counsel and the chief compliance officer are becoming blurred. The term “compliance” is increasingly being used loosely to encompass tasks and functions that are properly (or primarily) the role of general counsel. As a result, boards can become confused as to the proper allocation of roles and responsibilities between legal and compliance. The KPMG and NYSE/Barker surveys help provide clarity in this regard by their observations on the expanding role of the general counsel. In that regard, the surveys can serve as the catalyst for a much-needed internal dialogue about the respective duties of the general counsel and the compliance officer—a dialogue that is respectful to, and acknowledges, the important skills and expertise that **both** positions provide the health system.

Third, by firmly documenting the expanding role and prominence of the general counsel, the surveys may serve to reduce the inevitable internal tension between executive leaders and the general counsel arising from the competitive and strategic pressures confronting health systems.

These surveys and other, similar publications provide strong empirical support for the position that the health system general counsel should possess a broad and prominent organizational platform, for many credible and valued reasons. This is a message that should be shared with board and executive leadership as they work diligently to implement the most appropriate and effective leadership structure for the health system.

Michael W. Peregrine, a partner in the law firm McDermott Will & Emery LLP, advises corporations, officers and directors on issues related to corporate governance and fiduciary duties. His views do not necessarily reflect the views of McDermott Will & Emery LLP or its clients.

*Mr. Peregrine and his colleague, Anne M. Murphy, Esq., will be speaking to the AHLA [In-House Counsel Program](#) on Sunday, June 29, on the subject of *The Indispensable Counsel*.*

[1] Available [here](#).

[2] Available [here](#).

[3] Available [here](#).

[4] Available [here](#).

[5] Available [here](#).

© 2014 American Health Lawyers Association
1620 Eye Street NW
Washington, DC 20006-4010
Phone: 202-833-1100 Fax: 202-833-1105