

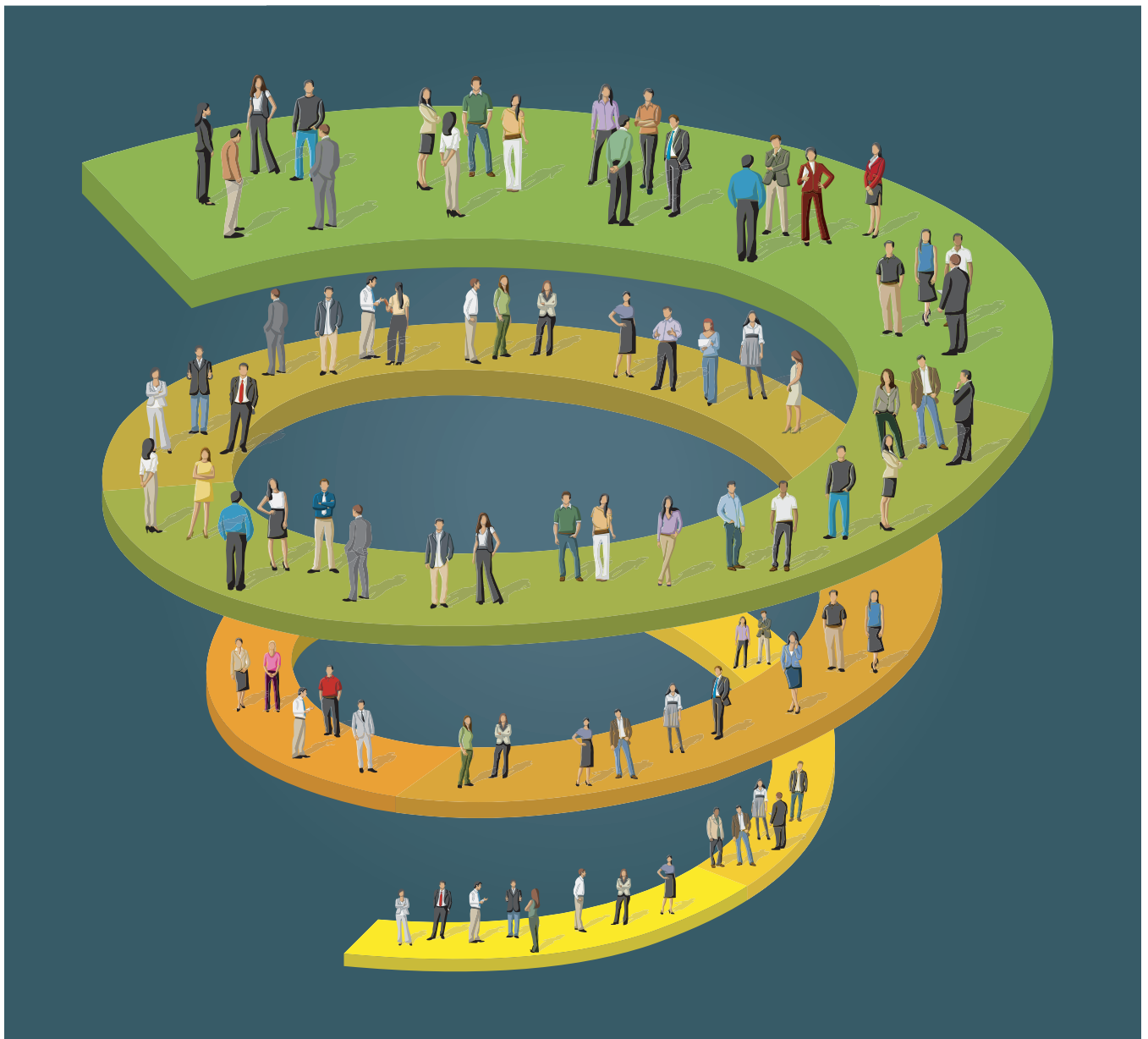
# The Enhanced Profile of the Health Industry General Counsel

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The ability of corporate leadership to effectively pursue strategy and assure compliance depends in part on the active involvement of the general counsel, appropriately positioned within the organizational hierarchy. This is especially the case for health care companies, operating in a transformative environment with significant regulatory and competitive challenges.

The governing board (or a committee thereof) is expected to assure the effectiveness of the company's general counsel function.

In pursuing this responsibility, the board will be prompted in part by the seismic operational change impacting the health care industry, the financial sophistication of many health



companies, and the proliferation of new executive officer positions created by such change and sophistication. It will acknowledge the growth of corporate legal departments, and the resulting efficiencies in the delivery of legal services. It will be mindful of the fact that many younger board members and executives will be less familiar than their predecessors with Sarbanes-era concepts of corporate responsibility—and the scandals that prompted them.

Ultimately, the board's oversight will be grounded in the recognition that a marginalized general counsel function would present an enormous barrier to the achievement of corporate goals and objectives, and to long-term mission sustainability. It also would reflect negatively on the quality of board and chief executive officer (CEO) fiduciary conduct.

### Foundational Principles

The model of the organizationally prominent general counsel is rooted in the post-Sarbanes-Oxley era's emphasis on corporate responsibility. Fundamental to concepts of corporate responsibility is the participation of an active and empowered general counsel acting vigorously in the best interests of the organization.<sup>1</sup> Over the years, this theme has been elaborated upon through a variety of means, including amendments to professional ethics rules, emerging legal principles, new governance "best practices," and authoritative published commentary.

For example, important policy monographs from the American Bar Association (the so-called "Cheek Report") and The New York City Bar Association address the critical contributions to corporate governance made by a "strong" general counsel.<sup>2</sup> They emphasize that an empowered and vigilant general counsel plays an important role in assuring legal compliance and an honest corporate culture.<sup>3</sup> Subsequent commentaries by knowledgeable observers have chronicled the rapid growth in importance of the general counsel's role within the corporation.<sup>4</sup>

These resources provide a strong basis from which the board may exercise oversight of the office of the general counsel.

### Basic Elements of the Position

The relevant resources suggest the following as foundational elements of a properly structured general counsel position in the health care industry.

**Identification of the Client.** As the Rules of Professional Responsibility make clear, the general counsel represents the organization, acting through its duly authorized constituents.<sup>5</sup> Those constituents include officers, directors, employees, shareholders, and persons serving in equivalent positions. While

the general counsel may be a principal advisor to the board and to management, the corporate entity is her client. The best interests of the corporate entity must always be at the core of the general counsel's advice.

The issue of who is the general counsel's client can be an especially vexing concern given complex board and executive leadership structures in health care, and an intense enforcement climate in which both the organization and its officers may face liability exposure. In such an environment, the question becomes more than an academic exercise. Note that Rule 1.13(f) provides that "[I]n dealing with these constituents, the lawyer is to explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to the interests of those constituents with whom the lawyer is dealing."<sup>6</sup>

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**Clarity of Duties.** The success of the general counsel often depends on clarity of her roles and duties. Traditional expectations of the position include advising corporate decision makers of facts and circumstances that could present the potential for violations of law and potential injury to the company (including loss of reputation). The general counsel also is expected to serve as a facilitator and counselor to senior management.<sup>7</sup>

In that regard, the modern general counsel is increasingly recognized as a lawyer-statesperson who is not only an outstanding technical expert, but also a wise counselor and an effective leader.<sup>8</sup> In this expanded role, the general counsel is a "core member of top management" who participates in leadership conversations on a broad range of topics that extend beyond traditional legal and risk analysis.<sup>9</sup> In addition, the general counsel is often tasked with managing business units beyond the legal department.<sup>10</sup>

**Hierarchical Position.** There is little debate that the position of general counsel should be at an appropriately high position within the corporate hierarchy, as befits the significance of the duties ascribed to the position.<sup>11</sup> The specific title ascribed to the general counsel (e.g., Executive Vice President, Senior Vice President) may depend on the particular management structure of an organization. Yet, the organizational chart should not be interpreted as positioning the general counsel at a tier below that of other senior managers of the company. The physical proximity of the general counsel's office to that of the CEO also is a relevant factor.

Indeed, the general counsel is described by one leading observer as having an internal importance and stature comparable to that of the chief financial officer (CFO) in the eyes of

directors, chief executive officers, and other managers of the business.<sup>12</sup> The alliance between the CFO and the general counsel is perceived more like a peer relationship, with multiple areas in which the officers share responsibility for the coordination and oversight for corporate issues of performance, compliance, ethics, risk and governance, and organization.<sup>13</sup>

#### ***Relationship to Executive Leadership Team***

**(ELT).** Given her additional duties as wise counselor and business partner to management, the presumption is that the general counsel should fully participate as a member of the executive leadership team. She is expected to participate in important business and strategic decisions and actions, not just as a lawyer but also as a valued business advisor.

In complex industries such as health care, only bad things happen when the general counsel is not a “member in good standing” of the ELT.

In an increasing number of companies, the general counsel has replaced the outside counsel engagement partner as a primary counselor to the CEO.<sup>14</sup> For these and other reasons, she should be involved in the inner workings of senior management; e.g., included in ELT meetings, receiving correspondence normally shared with this group, and being associated with other indicia of responsibilities of the ELT.

***Professional Responsibility.*** Senior executive management and the board should recognize that the duties of the general counsel must be performed within the framework of specific state rules of professional responsibility, the violation of which could subject the general counsel to discipline (including suspension or loss of license) by state bar authorities. In this regard, the general counsel is unique amongst senior corporate officers.

These responsibilities implicate a broad scope of activities within the job description of the general counsel, including the definition of who is the general counsel’s client, confidential requirements with respect to corporate information, and circumstances in which the general counsel must report “up the ladder,” ultimately to the highest authority level within the organization.

Contrary to the views expressed by some compliance industry observers, the rules of professional responsibility create meaningful incentives. They can be expected to guide the general counsel’s conduct, even when they potentially place her in conflict with the interests or perspectives of the CEO or other senior executives.

***Representation of Affiliates.*** Many health industry general counsel serve organizations with multiple affiliates controlled by a common parent company. The rules of professional responsibility recognize the possibility for uncertainty [for

in-house lawyers] as to the identity of the client because “it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed.”<sup>15</sup>

In most jurisdictions, the general rule is that in-house counsel who actually provides legal advice to multiple entities or who allows those entities to form the reasonable belief that they are clients will be held to have multiple clients.<sup>16</sup> This is generally known as the “one client” perspective. Yet the lack of clarity under the rules will prompt many general counsel to apply specific written engagement relationships reflecting the “one client” approach, with appropriate exceptions for conflicts of interest between the entities.

***Reporting Relationships.*** The question of which senior executive to whom the general counsel is to report increasingly depends on the circumstances, given the complexity of management hierarchy and the pressures and expectations of the CEO. The general counsel should have reporting relationships and leadership access rights that are consistent with senior status in the corporation. As a result, the general counsel is expected to report to a high-ranking corporate executive, most often the CEO.

Reporting to a chief operating officer (with traditional duties) may be appropriate when the CEO is materially separated from the performance of day-to-day operations. Yet such a relationship depends on ready and unrestricted access for the general counsel to the CEO.<sup>17</sup> Many commentators believe that the general counsel should not report to the CFO, given the perception of their peer relationship, as well as the overlap in their roles and relationships.<sup>18</sup>

***Access Rights.*** So much is made of the compliance officer’s access to the board. Yet it has long been the view that the general counsel will be allowed to maintain a strong relationship with, and ready access to, the board chair (and the lead independent director, should one exist). The general counsel should similarly have access to other key members of the ELT (e.g., the COO, CFO, CISO, and Internal Auditor) as well as to the chairs of key committees (e.g., Audit, Governance, Compensation, and Compliance).

Similarly the general counsel should be afforded the opportunity to meet regularly and in executive session with the lead independent director or a committee of independent directors (as opposed to only ad hoc meetings initiated by the general counsel in critical circumstances).<sup>19</sup> The purpose of these meetings is to communicate concerns of the general counsel as they relate to matters of legal compliance, and breaches of fiduciary duty to the corporation.

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It should be noted that the general counsel has a futility bypass-based professional responsibility to report “up the ladder” to the highest organizational authority matters relating to violations of law or breaches of fiduciary duty.<sup>20</sup>

**Participation in Meetings.** Consistent with her role as key advisor to corporate governance, the general counsel (or her designee) should have a standing invitation to attend all meetings of the board of directors, and of all board committees. In particular, her attendance is critical at meetings of the Audit Committee, the Executive Compensation Committee, the Governance/Nominating Committee, and committees with responsibility for Legal and Compliance matters.

Such regular participation helps ensure that important issues involving legal, reputational, or ethical concerns are appropriately presented and considered in these meetings. It also allows directors and committee members to have the opportunity to present questions to the general counsel “in real time.”

#### **Coordination with Chief Compliance Officer.**

The positions of general counsel and chief compliance officer are both of great significance to the health industry company. The value they respectively provide to the corporation’s legal compliance commitment will be enhanced when they work collegially, cooperatively, and in a coordinated manner. Yet the relationship between legal and compliance is inherently subject to a highly sensitive fissure; the inescapable fact that many, of the activities mandated by the compliance plan (e.g., monitoring, prevention, and education; provision of ethics advice) include some level of legal analysis.

For those and other reasons, the job descriptions of the general counsel and chief compliance officer should be structured to emphasize clear job responsibilities for those officers; horizontal and vertical reporting relationships; communication and coordination; and independence where necessary and advisable.

**Separate Board Counsel.** The general counsel generally serves as a senior advisor to the board of directors, as a primary constituent of the corporation/client. As noted above, the general counsel is expected to participate closely as an advisor in board and committee meetings.

Yet law and sound governance practice has long recognized that situations may arise from time to time to prompt the prudent governing board to consider the engagement of “independent counsel”—i.e., counsel other than the company’s general counsel or regular outside counsel. Use of independent counsel may in certain unique circumstances provide the board with a valuable perspective that is different from that of management or regular counsel.

Those circumstances might include, for example, where there is an identified need for particular expertise that neither the general counsel (nor regular outside counsel) has; there is a conflict of, or divergence in, interests between the board and management; or in matters involving an internal investigation regarding possible wrongdoing.

### **Expanding Responsibilities**

A series of new developments provides a platform for the expansion of the responsibilities of the general counsel. These relate to matters of workforce culture, codes of conduct, new officer positions, corporate ethics, and corporate social responsibility.

**Workforce Culture.** The general counsel is unusually well qualified to be a primary board counselor in the exercise of its new oversight responsibility for organizational workforce culture. This is principally due to the general counsel’s experience as the board’s key adviser on compliance program oversight. At their core, both the workforce, and compliance program, oversight obligations are based on a need to monitor and motivate employee behavior in a manner reflective of corporate mission and values—and law.

**Code of Conduct.** Codes of ethics and conduct are important means by which a company maintains a supportive workforce culture, retains valuable employees, protects the corporate reputation, and demonstrates a commitment to “tone at the top.” The general counsel has significant experience in addressing conduct-related issues due to her familiarity with compliance program education and disciplinary issues, her focus on the application of due process in internal investigations, and her experience in labor and employment matters.

**Ethics Advisor.** The general counsel is also well positioned to advise the board and executive leadership on matters of corporate ethics. Legal scholars, industry observers, and the Rules of Professional Conduct collectively recognize the general counsel’s portfolio with respect to advising on matters of ethics, morality, and institutional culture of integrity. Indeed, the general counsel has long been viewed as a “guardian of the corporate reputation.”<sup>21</sup>

**Corporate Social Responsibility (CSR).** In a similar way, the general counsel is poised to advise the company on corporate social responsibility-related initiatives. The Rules of Professional Conduct (e.g., 2.1) authorize the general counsel, in rendering legal advice, to refer not only to law but to other considerations *such as moral, economic, social, and political factors* that may be relevant to the client’s situation. This well positions the general counsel to fully participate in the broader range of executive discussions prompted by CSR factors

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**New Officer Positions.** The emergence and authority of new, non-traditional executive officer positions require the involvement and coordination of the general counsel. Titles such as “chief innovation officer,” “chief automation officer,” “chief experience officer,” and “chief diversity officer” reflect this trend. The common theme among most of these new, non-traditional titles is that they cover jobs that (directly or indirectly) implicate legal considerations under the primary jurisdiction of the general counsel

The general counsel should feel comfortable in asserting the jurisdiction of her office over these new duties.

## The Fiduciary Challenge

A strong internal general counsel function is critical to successful corporate performance. This is especially the case in industry sectors—like health care—that are subject to significant regulation, evolving business models, and significant business disruption. To be effective, the office of the general counsel must be perceived by both management and governance as technical experts, trusted counselors, and valued business partners.

The risks to the corporation inherent in the absence of a strong legal function are best demonstrated by publicly disclosed examples of fraud, malfeasance, and other illegal, improper, or ill-advised activity that have caused great harm to the corporation. Yet there remain in the executive and managerial ranks those who do not value, or disregard, the legal function and seek to marginalize its internal influence.

This is particularly the case in an industry as complex and evolving as health care. The unwillingness of leadership to support a fulsome internal legal function is an enterprise risk.

The board of directors has a clear obligation, within the bedrock duty of care, to assure the presence of an active, prominent, and empowered office of general counsel. Confident and attentive CEOs share this interest. There is no one, all-inclusive list of factors, the existence of which confirm the presence of such an office. Nevertheless, the factors set forth above can be a useful guideline from which the board and senior management can evaluate the strength and prominence of its own general counsel function. Abdication of this responsibility is likely to have serious individual and corporate consequences. **C**



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## Endnotes

- 1 See, e.g., Am. Bar Ass’n Task Force on Corporate Responsibility (James H. Cheek, III, Chair), Report of the American Bar Association Task Force on Corporate Responsibility, 59 Bus. L. 145 (2003) (hereinafter, Cheek Report).
- 2 See *id.*; Ass’n of the Bar of the City of New York, Report of the Task Force on the Lawyer’s Role in Corporate Governance (Nov. 2006), available at [www.abcny.org/pdf/report/CORPORATE\\_GOVERNANCE06.pdf](http://www.abcny.org/pdf/report/CORPORATE_GOVERNANCE06.pdf) (hereinafter, NYCBA Report).
- 3 *Id.*
- 4 See generally Ben W. Heineman, Jr., William F. Lee, and David B. Wilkins, *Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century*, Harvard Law School Center on the Legal Profession (2014); E. Norman Veasey and Christine T. Guglielmo, *The Indispensable Counsel: The Chief Legal Officer in the New Reality*, p. 97-105 (Oxford University Press, Inc., 2012).
- 5 See, e.g., Am. Bar Ass’n Model Rules of Professional Conduct (hereinafter, Model Rules) Section 1.13(a); Model Rules Section 1.13(a), Comment [1].
- 6 Model Rules Section 1.13(f).
- 7 See, e.g., Cheek Report *supra* note 1, at 155-156; NYCBA Report, *supra* note 2, at 96-102.
- 8 *Id.*
- 9 *Id.*
- 10 *Id.*
- 11 See *supra* note 7; see, e.g., NYCBA Report, *supra* note 2, at 96-102.
- 12 Ben W. Heineman Jr., *How the CFO and General Counsel Can Partner More Effectively*, HARV. BUS. REV., July 25, 2016.
- 13 *Id.*
- 14 NYCBA Report, *supra* note 2, at 97.
- 15 See, e.g., ISBA Professional Conduct Advisory Opinion No. 17-05 (May 2017) (“Current authority and jurisprudence also recognizes and supports the principle that in-house corporate lawyers may represent a corporate parent as well as multiple corporate subsidiaries or affiliates of the same parent.”).
- 16 *Id.*
- 17 NYCBA Report, *supra* note 2, at 102-106.
- 18 *Id.*
- 19 Cheek Report, *supra* note 1, at 161.
- 20 See, e.g., Model Rules Section 1.13(b); Standards of Professional Conduct for Attorneys, 17 C.F.R. pt. 205; 17 C.F.R. § 205.3(d)(2).
- 21 *Supra* note 4.

*Note: The Cheek Report, the NYCBA Report, the Indispensable Counsel book, and in particular the extensive published commentaries of Ben W. Heineman Jr. form the basis for many of the broader policy concepts reflected in this article, and are exceptional resources.*