

It's Not Easy Being General Counsel: Privileges, Positions Under Siege

By Joanne Sammer

Attorney-client privilege is under siege. That's partially because regulators and the Department of Justice have stated that a company's willingness to waive the privilege would be a factor in determining whether that company is cooperating with an investigation.

Aside from the precedent such a move could set, general counsel are concerned that this requirement could send executives in need of legal guidance underground; rather than seeking advice from the general counsel, these individuals could simply turn to a personal attorney, thereby ensuring the confidentiality of any communication.

Conversations with general counsel at companies in a variety of industries reveal that these developments are the stuff of sleepless nights. "That situation would be a disservice to the company because, not only would the company have no idea of the issue's existence, but the advice a personal attorney would give in that situation would be quite different than the advice the general counsel would give," says Michele Coleman Mayes, senior vice president and general counsel of Stamford, Conn.-based Pitney Bowes, the \$4.9 billion office equipment company. "You are hoping for a knock on the door if something goes wrong, but people will become more reluctant to come clean or to ask what you think" if there is a chance the company would have to waive attorney-client privilege.

This development is particularly troubling given the current business environment. "Companies no longer have the benefit of the doubt in the public forum," says Mayes. "There is an immediate assumption that greed is at play in any situation and that executives are looking out for themselves at the expense of others."

To make matters worse, there may not be a lot that general counsel can do about this issue until some guidance and clarification is forthcoming. But the erosion of attorney-client privilege is just one of the challenges general counsel are also dealing with as part of the ongoing changes associated with The Sarbanes-Oxley Act of 2002 and other regulatory changes. These issues are consuming both the general counsel's attention and the resources of already over-committed corporate legal departments.

A 2004 Chief Legal Officer Survey conducted by the Association of Corporate Counsel and Altman Weil found that the biggest concern of CLOs is compliance. And compliance with SOX ranked highest, including implementation, execution, train-

ing, and records management. Not surprisingly, maintaining department performance and staffing were also considered key issues. However, only 37 percent of CLOs planned to hire new attorneys this year, and only 20 percent planned to increase in the use of outside counsel.



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Organizational Triage

Given these pressures, the ability to set priorities and delegate appropriately are becoming essential for general counsel today. "It is important not to overemphasize matters that don't deserve the attention," says Don Liu, senior vice president, general counsel, and secretary of \$473 million IKON Office Solutions in Malvern, Pa. "But you also can't delegate so much that you are not sure the risks are dealt with properly."

Charles DeLeon, general counsel and corporate secretary of \$1 billion GTSI Corp., a government contractor based in Chantilly, Va., finds that his greatest challenge is finding ways to comply with the increased statutory and regulatory oversight with minimal funding and staff. "If you spend more time on regulatory matters, then you have less time available to work in other areas," he says. DeLeon has found that he has had to conduct some triage to make sure that his department handles what is necessary, often at the expense of more proactive activities. For

example, as a government contractor, GTSI relies on DeLeon and his staff to review relevant regulations and educate the sales staff on the nuances in various governmental contracting regulations. "We do not always have time to do that and we have missed or passed on some business opportunities as a result," he says.

The problem with doing more with the same resources is particularly acute in growing companies. Eight years ago, Finish Line, a \$1.1 billion retail sporting goods chain based in Indianapolis, did not even have in-house legal counsel. Now that the company has a legal staff of six attorneys—including Gary Cohen, the company's executive vice president, general counsel, and secretary—the challenge is to structure the legal department according to the company's changing needs. "We are dividing up the department and creating specialties because the company is growing quickly," says Cohen. "We're trying to use our existing people more effectively rather than throwing people at problems."

Meeting New Challenges

Although their role is changing, some general counsel find that these changes are simply an extension of the changes that had already begun to take hold in the GC's office well before the passage of SOX. Those developments simply sped up the pace of change. "There has been more of an evolution than a revolution in the general counsel's role," says Liu at IKON.

Although general counsel are under more pressure and greater scrutiny than ever before, many GCs recognize that the changes to their role and responsibilities also represent an opportunity to contribute in new ways to their companies. For example, Alberto Gonzalez-Pita, executive vice president and general counsel of \$26 billion Tyson Foods in Springdale, Ark., finds that the board and its committees rely on him as general counsel to help them discharge their obligations to the company properly. In addition, he has opportunities to work more closely and build stronger relationships with other senior executives, especially the CEO and CFO.

Like many general counsel, Gonzalez-Pita also finds himself playing the role of company conscience and, in some cases, public spokesman. "Companies are not looking for lawyers to find loopholes in laws and regulations," he says. "They want to use the general counsel's knowledge to do the right thing because what is the legal

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thing to do is not always the smart thing to do.”

But more than that, GCs have become ethical beacons both inside and outside the company. “The general counsel becomes an internal symbol of ethical behavior and the rest of the organization identifies more closely with you,” says Liu. The same is also true outside of the company. Liu now plays a more prominent role as its external voice in governance matters, discussing the company’s ethics and compliance efforts with investors and the media. “Investors want to know what risks the company is dealing with and they want to be comfortable with the company’s levels of compliance,” says Liu.

Spreading The Word

For Mayes at Pitney Bowes, the greatest challenge is to train and educate individuals throughout the company about the need for appropriate business behavior, ethics, and overall compliance with laws and regulations. “You need to provide enough guidance so that people begin to ask the right questions,” she says.

But first, people need to know who is responsible for what, and blurred accountabilities can make that unclear. This is particularly true when a company is creating new C-level executive positions, such as chief compliance officer, chief risk officer, or chief governance officer. “There is a danger that these executives and other executives could be operating on parallel paths without realizing it,” says Mayes. “It is important that confusion not be an excuse” for problems occurring.

To avoid this, Mayes is helping to create forums for senior executives to come together to focus on and debate key issues facing the company in compliance. This includes a working group made up of critical compliance personnel, as well as representatives from the legal department and internal audit. The group also includes business unit executives in meetings if the issue is relevant to them. “This helps us keep a finger on the pulse of the business, while also looking at policies and disciplinary action,” says Mayes. “Anything that comes out of the committee will have more credibility when we get the right people involved.”

For example, when Pitney Bowes created the position of vice president of corporate compliance, the company brought together certain stakeholders, including Mayes, the CFO, and the senior vice president of human resources, to discuss the position’s responsibilities and how those

Keeping Up With Changes In Role, Responsibilities

Like many of their colleagues, generals counsel have seen major changes to their role and responsibilities. Here are some ways they keep up:

Beyond Legal. Given the regulatory focus on financial matters, it is not surprising that generals counsel are reading up on accounting and finance issues and helping others to do the same. “In the past, we just referred accounting issues to the accounting department,” says Alberto Gonzalez-Pita, executive vice president and general counsel of \$26 billion Tyson Foods in Springdale, Ark. “These days, generals counsel need greater knowledge of accounting and finance to minimize related problems and risks.”

Sun Microsystems went so far as to develop fiduciary boot camps that are run by the company’s compliance team, including the general counsel. The latest fiduciary boot camp was held for 1,500 Sun executives and employees and offered two days of training on fiduciary responsibilities and ethical behavior. The boot camp covers everything from revenue recognition to antitrust issues to export regulations.

Develop New Skills. It goes without saying that GCs should have exposure to securities law to have the base of knowledge necessary to operate in today’s environment. But beyond that, “one of the general counsel’s tasks is to persuade executives that [the new regulatory environment] is the way things are and that they may not be able to do certain things that were acceptable in the past,” says John Jussup, vice president, chief legal officer and secretary at \$771 million Cognos in Ottawa, Ontario. “You need to educate executives so that they realize that the world has changed and they are now operating in a highly regulated environment.”

Generals counsel must also be able to think on their feet by quickly analyzing situations as they occur and responding quickly. “There are daily challenges,” says Michael Dillon, senior vice president and general counsel of \$11 billion Sun Microsystems in Santa Clara, Calif. “You might encounter an issue in another country, so you have to assess the issue, determine what law applies, how significant the issue is, to whom the issue should be reported, identify any external disclosure requirements, and decide who will conduct the investigation.”

Strengthen Internal Relationships. To be effective, generals counsel need to develop strong relationships throughout the company, but especially with finance, accounting, and internal audit. But it is also important to build a cohesive legal department. Because Cognos’ legal team has attorneys located throughout its operations, Jussup creates opportunities for the department to get together for workshops and other events as a way for individuals to get to know and to strengthen the team.

Look Outside The Company. Generals counsel must be prepared for the next development on the horizon, so they need to maintain an external network for information and insight into what is happening outside of the company. “Peers in other public companies or outside legal advisors might see emerging trends sooner than I do,” says Michele Coleman Mayes, senior vice president and general counsel of Stamford, Conn.-based Pitney Bowes, the \$4.9 billion office equipment company. ■

might overlap with other areas of the company, such as internal audit. The company is now using that process again as it creates a chief risk officer position, says Mayes.

And now that generals counsel are working more closely than ever before with board members and executive management, the GCs will need to strengthen skills beyond their legal expertise. “The general counsel needs more general business and financial knowledge, as well as strong, interpersonal skills and analytical ability,” says John Jussup, vice president, chief legal officer and secretary at \$771 million Cognos in Ottawa, Ontario.

Elisa Garcia, executive vice president and general counsel, corporate secretary of \$1.4 billion Domino’s Pizza in Ann Arbor, Mich., predicts that the general counsel will

have more one-on-one interactions with the board.

Just as the head of internal audit meets privately with the independent directors in most companies, Garcia expects that the general counsel will also start to have those types of private meetings with independent directors at least quarterly. “As these meetings become a part of the natural course of events, the general counsel will have a regular opportunity to discuss a variety of issues directly with independent directors, including updates on pending legal action or anything else that is happening in the company,” she says.

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