

Volume 7

Top of Mind[®]



General Counsel Speak Out on Key Business Issues

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Each year, I have the privilege of introducing this compilation of Top of Mind® features. And each year, I'm struck by the remarkable insights of the agreeably thoughtful general counsel who have offered their views for the rest of us to reflect upon, dissect, disagree with or even applaud.

This year is no exception. Consider the themes our subjects have chosen to address: globalization, compliance, performance, innovation, markets, regulation, functional integration, change, values, and role definition. Huh? The stereotype of the hypertechnical general counsel—already threadbare verging on transparent—can now officially be declared ready for the trashbin of history.

Several years ago, in another publication which will remain nameless, I described the corporate general counsel function as “the critical cross-roads of corporate America.” (Caveat: Authors who quote themselves need to get a life.) I expressed concern about the increasing volume and weight of the traffic hurtling through this intersection. How possibly can the general counsel function maintain its historical qualitative standard in a world in which corporate clients do business in multiple sovereign regimes with conflicting regulatory requirements, in which stakeholders are empowered and emboldened, and in which legal budgets are squeezed?

The answer is, “I don't know for sure but I have a clue.” Clearly, in a world in which even modest-sized enterprises compete in global markets, it cannot be disputed that the corporate legal function must learn to adapt, to become expert where it reasonably can, and to develop appropriate outside relationships where it is not realistic to develop the internal delivery capacity. Here is the clue: Such positioning requires client support. The management of legal risk must be embraced by corporate leadership as a paramount function of the enterprise worthy of reasonable support proportionate to the challenges extant in the world today.

Those challenges are manifold and growing. If a CEO or board wishes to have a simpler, less expensive legal function, the answer is to do business within borders. In the 21st century, this is an untenable business proposition. Legal reform—which was hard enough when it was a matter of getting two U.S. states on the same page—now becomes exponentially more complex and daunting. It's still worth the effort, but let's not think for a second that a global government will emerge to answer our need for legal simplification or that, if it did, the world would be better for it.

So, I'll close, as I always do, by tipping my hat to the general counsel who appeared in our 2008 features. They are worthy representatives indeed for the larger community of corporate counsel.



Peter J. Kalis
Chairman & Global Managing Partner

Top of Mind®

“How do you contend with the forces of globalization?”

“A network of offices and far-reaching expertise.”

The forces of globalization are transforming the challenges faced by the corporate legal function. Our clients' businesses are changing, and the approach of their lawyers must change as well or they will be left behind.

Consider my own company, Columbia Sportswear Company. In the early 1990s, we were mostly a North American outerwear company. Many of our products were made overseas, but our sales were essentially all on this continent. And now? Over 40 percent of our sales are overseas. We operate in over 75 countries, and more than half of our employees are resident outside the United States.

Columbia Sportswear's changed focus is emblematic of what has happened to large companies and modestly sized businesses alike. They compete in global markets, and foreign competitors compete in their own "home" markets. We live in a small, intensely competitive world, and the consumer is the winner.

Now, when I align our corporate legal function with outside law firms, I must inquire whether they can advise us on Asian labor laws, or European Union privacy laws, or international trade matters, or product safety issues in once-exotic lands that are now part of our global marketplace. Our legal function must be able to depend upon a network of offices and far-reaching expertise and the judgment to provide legal support to our business.

The law firm marketplace is segmenting between those law firms that understand that globalization has generated enormous legal challenges for businesses, and those firms that do not. Provided that firms in the prior group invest in getting to know their clients as well as building their international platforms, they will likely be rewarded for their strategic positioning. For, paradoxically, as the businesses of global companies grow, the number of law firms they rely upon may well be reduced.



Peter J. Bragdon
Vice President
General Counsel and Secretary
Columbia Sportswear Company
Portland, Oregon

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“Is there a role for values-based decision-making in the legal function?”

“As a charter for ethical action.”



John E. Page

Vice President,
General Counsel & Secretary
Golden State Foods
Irvine, California

You bet there is. At Golden State Foods, you need go no farther than the home page of our Web site to see our values and creed. When I hand you a business card, moreover, the back of the card has the same statements. We are a values-driven company. However written values may be perceived in other companies, at Golden State, ours are not mere verbiage. They are a charter for ethical action against which we judge our performance every day.

The implications of this for the legal function are profound. We view every legal decision through the lens of our values and creed. The practical effect of this method is that we pursue a preventive approach to the practice of corporate law. If a decision or course of action stacks up well against our core values, we typically avoid much of the legal hassle and heartache that other companies experience. It's obviously critical that our outside counsel “get it” as well. We all have to be on the same page when it comes to values-based legal decision-making. Matters are viewed from more than just the strength of a legal position supported by facts and law, but also from a cost-benefit analysis that takes into consideration our creed and values.

By passing all legal considerations and decisions through the filter of our core values, we also harmonize the legal function with the company as a whole. Our values-driven culture spans a 60-year corporate history and permeates both the executive suite and our workforce of 3,000 employees. Tone at the top is key. It starts with our CEO, Mark Wetterau, and the other GSF executives, including the legal function. Our legal function pursues high performance and high integrity, and we at GSF like it that way. Our legal decisions, therefore, increase in legitimacy because of a shared corporate approach to values.

From the standpoint of a general counsel, a simple, practical, values-based approach to legal decision-making is often head-clearing. In our corporate culture, it works very effectively. But in the cauldron of business disputes and litigation, other parties may initially view our approach as “soft.” They soon, however, discover the contrary. Embracing values at Golden State Foods is indeed our fundamental strength—a powerful strength that fortifies tough litigation. In fact, when another party attempts to take advantage of GSF, we draw the line and can be as tough as the facts, the law and our values require.

And *that's* a winning case every time.

Top of Mind®

“How do you manage the legal function in the face of multiple ownership transitions?”

“Address today’s priorities.”

Some might think that life as an in-house lawyer at a commodity chemicals manufacturer is sedate. They may wish to think again. Soda ash, as it turns out, can be quite exciting.

I joined our legal function in 1997 when we were a business unit within a larger NYSE-listed company. Through a reverse spinoff in 1999, we became a stand-alone NYSE-listed company. Fair enough. But then came Sarbanes-Oxley in 2002, and then a down cycle for soda ash. We negotiated a pre-arranged bankruptcy plan with our secured creditors, and took a bath in Chapter 11 upon filing in December 2003.

No problem. We emerged from bankruptcy in March 2004 with a hedge fund as our majority equity holder and sole lender. In order to provide an exit strategy for the hedge fund’s investment dollars, we began to look at numerous acquisitions so we could create a more diverse profile for the securities markets. We then looked into strategic mergers, and finally, in March 2008, we were instead acquired by a global conglomerate based in India. Sedate indeed.

So, what are the lessons from multiple transitions in ownership?

- First, for a devout corporate generalist, the changing focus of ownership created one substantive law challenge after another. I learned to prize nimbleness and to erect new learning curves as efficiently as possible.
- Second, different ownership interests have different approaches and objectives. It was important throughout to address today’s priorities and not to dwell on the past.
- Third, when shifting between private and public ownership structures, it was crucial to remember the responsibilities that attend each. They don’t always overlap.

The common thread through each phase was that quality lawyering matters. And that’s as exciting a proposition as a lawyer can ask for.

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H. Scott Ellis

Vice President,
General Counsel & Secretary

General Chemical Industrial Products Inc.

East Hanover, New Jersey

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“How do you re-enter the practice of law in a time of dynamic change?”

“In a word, carefully.”

For twenty years, I practiced law in Weyerhaeuser’s corporate law department, and I loved being a lawyer. Then, in 2000, I took a six-year detour from the practice to serve in a strategic planning role and then as the leader of our Canadian subsidiary. It was a challenging and enjoyable period, and I was able to keep my hand in transactions, albeit not as a lawyer.

When I awoke from my ‘legal hibernation,’ I focused on regaining active status for my bar membership. Since I needed about 70 hours of credit, I went to a large, out-of-town conference for corporate counsel where I could accumulate many hours and learn a lot. As I entered the hall, the first thing I observed was that the world of litigation had been transformed in my absence. I was engulfed in a sea of electronic discovery vendors displaying their wares. It was like walking into the home show or the boat show, only a lot less fun.

With my bar status restored, I returned to my desk as the company’s general counsel. And, with the perils and costs of electronic discovery swirling around me, I undertook to understand what was to me a new phenomenon. I came quickly to learn that I had to manage systems, think about the quality and quantity of electronic data, and prioritize the new digitized world of discovery if I intended to serve and protect the company. When I left the law in 2000, it’s safe to say that this was not a major preoccupation of general counsel.

Something else happened while I was ‘away.’ Congress enacted Sarbanes-Oxley and the President signed it into law. This was at least as big a sea change as the revolution in electronic discovery. Quite apart from the substantive law aspects, internal processes had been adjusted to account for the new law, and I had to wrap my mind around the changed perspectives of executives, accountants, shareholders, law firms and other interested groups.

Many have written about the velocity of change in the legal industry. They don’t know the half of it. Sometimes you need to step away to gain perspective on the dynamic and challenging environment in which lawyers have the privilege to serve.

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Sandy D. McDade

Senior Vice President
and General Counsel

Weyerhaeuser Company
Federal Way, Washington

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“How do you meet the regulatory challenges of a growing franchise business?”

“Appreciation and respect for changing regulations.”



Donald A. Burlison
General Counsel
Jani-King International, Inc.
Addison, Texas

For nearly four decades, Jani-King has been the leader in the commercial cleaning franchise industry. From a modest start, Jani-King now is the world's largest commercial cleaning franchise company with more than 12,000 franchises serving thousands of customers in 17 countries.

With this profile, it's understandable that staying abreast of developments in the regulation of franchising arrangements is not just a preferred practice for us. It's the core of our business. As general counsel, I am responsible for directing the company's regulatory compliance program. I, along with Jani-King's assistant general counsel, am also responsible for all other legal matters of the company.

Although we have grown internationally, the web of regulations surrounding the franchising business in the United States is still the most intense in the world. In fact, many foreign countries don't have specialized franchise regulations.

For the last three decades, the Federal Trade Commission (FTC) and several states have sought to regulate the industry. The FTC adopted its own Franchise Rule, while state franchise regulators adopted the Uniform Franchise Offering Circular (UFOC). In 1979, the FTC permitted the UFOC to be used in lieu of its own disclosure format; and it has become the disclosure format of choice for most franchisors. In order to bridge the gap between the UFOC and FTC disclosure formats, the FTC amended its Franchise Rule last year with the introduction of its Franchise Disclosure Document (FDD) which must be used by all franchisors in the United States by July 2008.

Federal and state franchise regulations require us to continually update franchise disclosure documents and no less frequently than on an annual basis. It is my responsibility to incorporate system changes into our disclosure documents and franchise agreements, and update these documents to comply with these regulations. In several states, these documents must be submitted to state regulators for review and approval with state-specific regulations. The documents also serve as a template for our numerous master franchised regions which conform them to their status as sub-franchisors.

Franchising is a ubiquitous business model in the United States. Some estimates state that up to 40 percent of retail sales in this country are through franchised outlets. Success in this field, however, requires an ongoing appreciation and respect for the changing regulations of franchising businesses. At Jani-King, this role is an important part of what our legal function is about.

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“How do you partner in innovation with the client?”

“Embrace change for the positive value that it brings.”



Louise M. Parent
Executive Vice President
and General Counsel
American Express Company
New York, NY

In every sector of the economy, businesses strive to be innovative. The successful ones not only are rewarded in the marketplace but also are exciting places to work and to collaborate with like-minded colleagues. In this context, it is imperative that the corporate legal function contribute to a company's culture of innovation, and that's what we've tried to do at American Express.

As a matter of tradition and settled practice, the general counsel's office has typically been geared toward protecting the interests of the company and its stakeholders. And, to be sure, such a perspective must always be central to the discharge of the corporate legal function. These days, however, we must also seek to do more, and that sometimes means leading the charge on innovation. A couple of examples might help to illustrate how we meet this challenge at American Express.

In the past decade, business process patents have become a more prominent feature of the intellectual property landscape. Yet, because we are a company without the sort of history of research and development that one would typically see in companies in other industries, creative personnel at American Express often did not focus on the value enhancements that their ideas presented if properly enshrined in patents. In the law department, we decided to become 'patent proselytizers' and contribute to a different mindset concerning intellectual property. We attended business meetings and became proactive in driving cultural change. We set aggressive goals in the number of patent applications filed annually, and over time we in fact moved from a handful of patent applications each year to hundreds. We promoted a reward system for our inventors, and we worked hard at creating a sustainable model through the generation of revenues, typically through license fees.

A similar example concerns the thrust of multi-national enterprises, such as American Express, to tap into a global talent pool to meet its business objectives. As a law department, we concluded that we should be similarly innovative by resisting the temptation to do our business where and how it has always been done. Recent examples of 'offshoring' our legal projects involve the writing of patent applications and the review and analysis of discovery records.

As lawyers, we should embrace change for the positive value that it brings to our enterprises. At American Express, we do this by contributing to and aligning ourselves with a culture of innovation.

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“What makes the in-house legal role unique?”

“Shining a light on legal obstacles.”

The role of the in-house counsel has received significant attention over the past several years. The budding view that an in-house counsel is a gatekeeper who may disclose a client’s confidential information is astonishing, especially to those of us who were taught that a client’s confidences are sacrosanct.

Years ago, my previous manager used the metaphor of comparing the role of the in-house counsel to a lighthouse: he offered that the in-house team shines a light on the legal obstacles marking the perilous business sea, allowing the business teams to navigate around them. Now, it seems, in-house counsel are expected not only to shine a light but, in some cases, to grab the ship’s wheel (or at least pick up the phone and tell a regulator about the impending wreck).

My legal education and law firm training did little to prepare me to deal with the challenges unique to the in-house practice. Moreover, law firm lawyers don’t always grasp the environment within which in-house lawyers operate. To reach both potential in-house and law firm lawyers, I developed and have taught for several years a class titled, “The Unique Aspects of the In-House Practice” at my alma mater, University at Buffalo Law School.

Interest in the class has been overwhelming as the students receive a complete immersion into the life of an in-house lawyer. They struggle with the identity of the client, and how and when to take issues “up the ladder.” The students administer internal investigations and attempt to manage the attorney-client privilege.

I don’t know how many law students I have scared away from in-house roles while teaching this course, but I expect that those law students whom I have taught who are now in law firms have greater empathy for the role of and pressures facing the in-house counsel. That understanding should form the foundation for deeper and lasting partnerships between in-house and outside counsel.

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Brian M. Martin

Senior Vice President
and General Counsel

KLA-Tencor Corporation

Milpitas, California

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“Does the changing legal marketplace serve the interests of corporate clients?”

“Only if lawyers remain focused on the fundamental value proposition.”



Kenneth F. Khoury

Executive Vice President
and General Counsel

Delta Air Lines, Inc.

Atlanta, Georgia

When I think about how the legal marketplace has changed in the last decade or so, I focus immediately on the extraordinary growth of law firms. Firms with over 1,000 lawyers are almost commonplace. I often wonder whether this is a good thing for corporate clients.

In particular, inside counsel, like all executives in a corporation, are judged by how efficiently they run their operations and how much value they add for their clients, and law firms have to be a critical part of the formula. We tend not to retain counsel because of a law firm's footprint – its size and geographical reach – and we worry about what that footprint adds to the cost of legal services for our clients specifically. Moreover, I contrast the growth of these firms with the fact that corporate counsel tend to retain individual lawyers and not law firms. We retain counsel because we expect a particular lawyer or group of lawyers to add value. A firm's footprint may add value but only when we can conclude that the requisite trust and quality level can be maintained throughout a law firm's far-flung enterprise. One of our go-to law firms may open an office outside its home market. Whether we use that remote office involves a leap of faith that we're not always willing to make.

That said, corporate counsel have to deal with the realities of the marketplace and can't swim against the tide. The legal marketplace is consolidating. The fact is that many of the lawyers we routinely wish to retain are migrating to mega-firms. They have their own reasons for doing so, of course, but to remain in a preferred position with their core corporate clientele they will need to remain focused on the fundamental value proposition: Cost-effective service coupled with extraordinary quality. Footprints are nice. Wins are better.

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“How do you reconcile the
business and legal aspects
of being general counsel?”

“The buck stops with
the general counsel.”

If you are lucky as a general counsel, you are embraced as part of the senior management team. You are valued for your judgment as well as for your legal skill and your substantive knowledge of the law. But there are limits. When “legal” signs off on any document or initiative, that means something to people. And the general counsel and the entire executive suite must never forget this.

For many general counsel, and I am one, you need to wear a lot of different hats. And there are indeed aspects of my job that impact operations, sales, investor relations and finance, among other fields. Yet, when it comes to thinking about and managing legal risk, the buck stops with the general counsel.

While a general counsel’s judgment may be valued on a variety of business propositions, all concerned should know that the go-to person on legal judgment is the general counsel. When I sit across the table from others and discuss matters, the individuals across the table look at me and see the general counsel and hear the general counsel, regardless of the subject matter — legal or non-legal. I can’t ever forget that.

The general counsel’s role is serious, but it needn’t be deadly. I have boundless enthusiasm for our company and what it is trying to accomplish, and I’m not bashful about communicating my enthusiasm. Yet, at the end of the day, I add value by remembering my role as the company’s general counsel.

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William N. Pedranti

Vice President and General Counsel

Spectrum Pharmaceuticals, Inc.

Irvine, California

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“Should creativity and imagination power the corporate legal function?”

“Absolutely they should. Sometimes you have to get out of the box.”



Michael A. Colliflower

Executive Vice President
and General Counsel

HealthMarkets, Inc.

North Richland Hills, Texas

In a three-decade-long career, I have come to respect time-tested approaches and strategies as much as the next general counsel. Such approaches and strategies are sound for the sort of conventional legal challenges faced by corporate enterprises.

But sometimes you have to get out of the box. Sometimes – and especially in recent years with the growth in business enterprises and increasing governmental regulation of companies – you have to imagine a more creative way of meeting legal challenges.

A creative approach toward litigation challenges is a prime example. We all know we live in a litigious society. And, in our business, where individuals interact with their health insurance policies regularly, there is an even greater propensity for lawsuits to arise. At HealthMarkets, we have put a significant dent in our litigation caseload by an early, proactive approach that regularly places our lawyers in the same office area as our claims personnel. The lawyers are there at the inception of a possible claim event, and they are able to frontload their advice so that disputes are avoided. It's a very simple formula: Fewer disputes means fewer lawsuits.

However, specific initiatives are only part of what's called for. In addition, a general counsel has to work hard to inculcate creativity and imagination into a company's legal culture. There are no substitutes in this regard for strong mentoring of one's colleagues and, as always, a commitment to the sort of collaborative ethic that promotes sound legal solutions to business problems.

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“How do you achieve exceptional performance?”

“Assure that legal services add value.”



James L. Lipscomb

Executive Vice President
and General Counsel

MetLife, Inc.
Long Island City, New York

Exceptional legal services are critical to the success of large public companies in a global competitive environment. Such services are provided by both inside and outside counsel. As general counsel, my job is to assure that those legal services add value to the corporation. At MetLife, we are guided by our vision: “To provide exceptional professional services to our Business Partners and be the best in class for all of our disciplines.” To realize our vision, we dedicate ourselves to achieving and maintaining exceptional performance through “hallmarks” that guide our behavior and activities—Proactive Approach, Professionalism, Partnership and Committed People.

Proactive Approach

We possess a thorough understanding of our Business Partners’ business and goals. We contribute to their planning and operations by taking a leadership role in anticipating, identifying and addressing issues, opportunities and risks. We take into account the possible rippling effect of our actions throughout the MetLife enterprise. We highlight innovative strategies that address these developments.

Professionalism

We provide insightful, pragmatic and timely counsel. We communicate issues and concepts in an understandable and useful manner and on an ongoing basis. We demonstrate sound judgment and are consistent and persistent in our attention to Business Partner matters.

We stay current with technological innovations in our field and apply technology to streamline costs, increase efficiency and optimize the service we provide our Business Partners.

Partnership

We draw efficiently upon the diverse talents, experience and expertise of our Associates to address Business Partner matters. Collaboration with our Business Partners from across the MetLife enterprise, marked by open, frequent communication and mutual trust, enables us to provide extraordinary or “WOW” results.

Committed People

We model the behaviors we expect from ourselves and from our colleagues, treating all Associates, regardless of rank and position, with the same respect with which we would like to be treated. We encourage and facilitate the professional development of a diverse workforce. We both champion, and take advantage of, educational, mentoring and developmental opportunities.

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“How do you build and maintain a culture of compliance?”

“Let values dominate your company’s internal dialogue.”



Lawrence T. Greenberg

Senior Vice President
and Chief Legal Officer

The Motley Fool, Inc.
Alexandria, Virginia

I was a securities litigator before I started my in-house career. In that rough and tumble environment, I learned that corporate rules of behavior are important. But I also learned that individuals often make decisions alone, or in small groups, when “no one is looking,” and they might think that they might not be accountable for their actions. Under those circumstances, people model their behavior not just on rules and policies, but on their personal moral codes and according to the standards that the people around them expect them to live up to. Thus, as chief legal officer of my company, I work hard to inculcate values that reinforce a *culture* of compliance, which is particularly important for our business as a source for investment information and ideas that our customers need to be able to trust. I want all our people to have their own little compliance officers, sitting in their cerebral cortices.

Even the best internal controls have limitations. Compliance requires everyone to understand the difference between right and wrong in a corporate environment, that we value their choosing the right course over any wrong one even if the immediate outcome seems bad for the company, and that it’s each person’s responsibility to ensure that the corporation does the right thing. In other words, we glorify people who speak up when they think we might be straying from our “Foolish” values.

Training on all issues relating to compliance is, of course, critical, but it is not enough. Even beyond teaching people the rules and standards of behavior, we need to convey to them that we’re serious about them. Values dominate our internal dialogue as a company. The company’s leadership judges all personnel based on whether they embrace and implement corporate values, and we’re not afraid to part ways with personnel who “don’t get it.”

From the standpoint of the legal function, three items stand out: First, much of the messaging on values is delivered through our lawyers. We have to rise to this challenge both rhetorically and in terms of our own corporate behavior. We have to avoid formal legal jargon and talk and write as real people do, which is surprisingly hard. Second, we must be approachable. We can’t give people a reason to avoid us, or not raise an issue with us, because we’re unpleasant to deal with. Finally, our job would be much harder, perhaps even impossible, if our board and senior management did not support our message consistently.

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Spectrum Pharmaceuticals, Inc.

*Interviewees' company affiliations are accurate as of September 1, 2008.