A LOOK AT THE ROLE OF CORPORATE COUNSEL: BACK TO THE FUTURE—OR IS IT THE PAST?

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I. INTRODUCTION

In order to understand the structural changes in the practice of corporate law that are occurring and will occur, it is necessary to understand both the historical development of the role of corporate counsel and the changes that are occurring which are shaping not only society, but the practice of the law. Yogi Berra did not say, but very well could have: You can't know where you are going unless you know where you have been and are and why you were and are there.

II. CORPORATE COUNSEL—AN HISTORICAL PERSPECTIVE

The golden age of corporate counsel lasted from the early part of the 20th century through the late 1930s. Counsel were both business and legal advisers. They were held in high repute and their sage counsel was regularly sought. In the corporate arena, this manifested itself in several fashions. First, 75% of the CEOs of the major companies were lawyers compared to less than 5% today. Second, when a company had a general counsel, he (and it was only a *he* then) was paid at a rate that generally equaled 65% of the CEO's pay; but more importantly, he was usually one of the three highest paid individuals in the company.

By the 1940s, the pre-eminent role that corporate counsel once enjoyed began to change. The new wunderkinds of the business community were marketing and finance types—the MBAs. With their ascendancy, the role that the corporate counsel played began to diminish. By the 1960s and early 1970s, corporate counsel's role had reached its nadir, where it remained until the early 1980s.

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Compensation, one measure of success and power, reflected this trend. By the 1970s, corporate counsel averaged about 30% of the compensation of the CEO. The general counsel was not even close to being one of the top three paid individuals in the company. The deterioration of the position of the corporate counsel's salary relative to the CEO's compensation was not reversed until the early 1980s.

During the 1960s and 1970s corporate counsel were looked on with disdain by the outside bar. The corporate counsel role was deemed a parking place for those associates who couldn't make partner. They would be placed with their corporate clients and, in exchange for this largess on the part of the law firm, the law firms expected the loyalty of their former associates in the form of business that would be channeled back to their former employers.

One indicia of this low level of esteem was that the outside bar frequently and deridingly referred to corporate counsel by the very un-PC term (in today's jargon) as "kept women." This level of disdain was reflected throughout the organized bar, which made no effort to accommodate corporate counsel and paid even less heed to their needs.[1]

This second-class citizenship was not limited to how inside counsel were described. In the 1970s, an inside counsel's opinion was generally not acceptable for various transactions. The opinion had to be given by an outside law firm.[2] In another example, one nationally prominent law firm failed to put the general counsel's name on a brief in the D.C. Circuit Court of Appeals even though the general counsel had written part of the brief and was a member of that bar.

What is even more striking is how few companies had internal legal departments.[3] Part of this was a reflection of the fact that most good lawyers were

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1. In 1980, the ABA had only two committees for corporate counsel. One was the Business Law Section's Committee, which had a committee of Corporate General Counsel. It was limited to sixty members, who were general counsel and whose law departments had at least twenty-five members. The Law Practice Management Section had a Corporate Counsel Committee, which I chaired for three years. Its membership was open to anyone and had as many non-corporate counsel (who were interested in practice development) as it did corporate counsel. This committee dealt with management issues and not with substance or law practice issues.

There were also at least one, maybe two, corporate counsel committees at the state level and the Association of the Bar of the City of New York had a corporate counsel committee that was limited to twenty-five in-house general counsel only from "major" companies. The New York State Bar Association created a Corporate Counsel Committee around this time. Other than these, my search, at that time, for state or local bar groups which were created to serve the needs of corporate counsel proved unavailing.

2. This refusal started to end when some deals did not have outside counsel and inside counsel refused to hire outside counsel. In one financing I did in 1977, before we started the transaction, I approached the in-house legal department of the lender and told them I would not use outside counsel and did not expect them to, but in accordance with the custom of the trade, we would pay them for the time of their inside counsel in representing the lender on our transaction.

3. Regrettably, I no longer have the data that I had painstakingly accumulated in the late 1970s and in the early 1980s on corporate counsel in America. Thus, we must rely on my recollection of that data. Of the Fortune 1000 during this period, more than 25%

unwilling to go inside. Another part of it was driven by the fact that many companies, especially smaller ones, did not perceive the need to maintain an internal legal staff. During this era, most business matters could be resolved by the application of common sense and good business practice. The number of nuances to a transaction that had to be accounted for were comparatively small.

Moreover, the large law firms discouraged their clients from creating in-house departments. In any event, the perceived need for Johnny on the Spot legal advice or someone to manage the legal function was not acute then. Litigation and legal problems existed, but they played nowhere near the role that they began to attain in the 1970s, nor did they result in nearly the cost.

In this connection, it is important to survey what the legal landscape looked like from the 1950s to the start of the 1980s. Compared to today, the 1950s and early 1960s were the land of legal simplicity. More important, there were basically only four federal agencies which crossed the spectrum of corporate America—the Federal Trade Commission, the Department of Justice, the Internal Revenue Service, and the Securities and Exchange Commission (which primarily regulated publicly traded companies, but whose jurisdiction could affect privately held companies in certain areas). Some agencies that initially had limited applicability, such as the Federal Communications Commission, suddenly had a much broader impact on business because of the changing nature of commerce. What was thought to be a relatively limited regulatory area has since become a very broad one affecting businesses that are not in the communications arena. The volume of litigation was comparatively small. For example, in 1970 there were only 127,280 filings in federal district court compared, with 279,288 filings in 1989.[4] One could truly say that those were the good old days.

What happened? Starting in the 1960s, Congress enacted a plethora of legislation which carried with it new rights and remedies and which created a host of agencies that were designed to affect, if not regulate, many aspects of our commercial life. At the federal level, these alphabet soup agencies proliferated faster than rabbits.[5] Once there, they began to be replicated at the state level[5] and

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did not have in-house legal staffs. Almost all such companies have internal legal staffs today. Of those corporations that did have legal staffs, they were sparse in comparison to today's in-house staffs. The number of non-Fortune 1000 companies with legal staffs was even smaller.

This is consistent with data developed by the American Corporate Counsel Association (ACCA), which shows that although the number of lawyers in the United States has gone up seven fold, the percentage of those in corporate practice has remained relatively the same. The reliability of this data, however, is somewhat suspect. It is based on censuses conducted by the ABA in the 1970s and 1980s which are of questionable reliability because the ABA had no real way of reaching corporate counsel, many of whom were not members of the ABA. *See* Am. Corp. Couns. Ass'n, *American Corporate Counsel Association's Census of In-House Counsel: Executive Summary* (Dec. 2001), *at* http://www.acca.com/Surveys/census01 (last visited Sept. 1, 2002).

4. *See* Douglas O. Linder, *Trends in Constitution-Based Litigation in the Federal Courts*, 63 MO. L. REV. 41, 42 (1994).

5. *See, e.g.*, Equal Employment Opportunity Commission (EEOC), Occupational Safety and Health Administration (OSHA), Environmental Protection Agency

in many cases at the municipal level.[7] When I made a count of these in the mid- to late-1980s, I found that there were over eighty agencies at the federal level that could affect all aspects of a corporation created by Congress. Each of these agencies in turn adopted its own set of regulations and procedures which had to be followed. And, of course, the legislation creating those agencies,[8] much of which is known by its own alphabet soup of names, imposed new obligations and new liabilities.

The 1970s and 1980s saw litigation become not only a tool of social policy and redistribution of wealth,[9] but also an avenue of business strategy. Businesses that only occasionally used litigation as a tool before now found it part of the arsenal of business strategies. What company facing a hostile takeover attempt did not bring out the litigation guns to thwart that takeover? What company did not spend millions crafting poison pills and other legal approaches to ward off any unwanted suitor?[10]

What has this led to? Just over thirty years ago we were at 307 F. Supp. and 420 F.2d. Today, we are at 195 F.Supp.2d and 290 F.3d, an increase in over 1,750 volumes of reported federal decisions.[11] This does not even take into account the huge number of unreported decisions at both the trial court and appeals court levels. Nor does this reflect the thousands of volumes of case law at the state level. And litigation: the statistics are mind-boggling. In 2001, the most recent year for which data is available, there were 313,615 cases filed at the federal level[12] and 15,758,366 cases at the state court level.[13]

(EPA), Federal Energy Regulatory Commission (FERC), and Consumer Product Safety Commission (CPSC).

5. Very quickly states mimicked the federal government with their own forms of the Equal Employment Opportunity Commission (EEOC), Occupational Safety and Health Administration (OSHA), and Environmental Protection Agency (EPA).

7. At the municipal level, the most common agencies in major metropolitan areas were styled as the Equal Employment Opportunity Commission (EEOC), Occupational Safety and Health Administration (OSHA), and Environmental Protection Agency (EPA). Sometimes these three agencies were coordinated, while others developed conflicting rules—even at their own level—and clearly created conflicts with other municipal regulatory bodies in other fields.

8. *See, e.g.*, Civil Rights Act of 1964, Americans with Disabilities Act (ADA), The Age Discrimination in Employment Act of 1967 (ADEA), Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Racketeer Influenced and Corrupt Organizations Act (RICO), and Foreign Corrupt Practices Act (FCPA).

9. The Plaintiff's class action bar developed a very lucrative business from securities to mass torts, from antitrust to personnel litigation.

10. The Microsoft "wars" are a current example of the use of litigation as a business tool.

11. This is almost a 250% increase in *reported* decisions from the prior fifty year period.

12. ADMIN. OFFICE OF THE U.S. COURTS, *2001 CASELOAD HIGHLIGHTS*, *at* http://www.uscourts.gov/judbus2001/contents.html (last visited Sept. 1, 2002).

13. NAT'L CTR. FOR STATE COURTS, *STATE COURT CASELOAD STATISTICS, 2001*, *at* http://www.ncsc.dni.us/divisions/research/csp/2001_Files/2001_SCCS.html (last visited Sept. 1, 2002). This number does not include the additional 20,000,000 traffic,

Not surprisingly, this volume of legal services has not come cheap. The value of legal services approximated $10.9 billion in 1972.[14] By the end of 2000, this had increased to $146.9 billion,[15] a 9.75% compounded growth rate! And, of course, the largest percentage of this was borne by corporate America.

One other historical perspective is important in this analysis. Until the advent of Lexis in the 1970s, the legal learning, statutes, rules and regulations, and all other precedent were locked in law libraries.

In the private sector, only the largest firms could afford the law libraries that housed this treasure trove of arcane knowledge. Corporate legal departments, to the extent they even existed, maintained small libraries. Law school libraries and even bar libraries were an inconvenient forum for research. Outside law firms thus became the gatekeepers of legal knowledge for their clients and every time an in-house lawyer needed access to the legal information highway, the outside law firm was there to exact a toll. In reality, the large law firms had a monopoly on access to that information, which their clients could not ignore or by-pass without considerable cost.

Understanding this little-observed phenomenon, however, begins to open the door to understanding how and why we began a transformation of the way legal services were provided to corporations and the growth of the in-house legal staffs.

As legal costs began to rise in the early 1970s, management began looking for ways to control them. The first efforts of management were to turn to their existing in-house lawyers or, if they did not exist, to hire an individual to become general counsel.[16] These in-house lawyers began to look for ways to control their legal costs. Their cost controls were partly shaped and constrained by resource allocations. Initially, legal functions that needed extensive outside

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misdemeanor, small claims, and probate cases, which are also filed at the state court level. *Id.*

14. Francis J. Flaherty, *The $38 Billion Legal Market*, NAT'L L.J., Jan. 30, 1984, at 2.

15. EUROMONITOR PLC, *LEGAL SERVICES IN THE USA: EXECUTIVE SUMMARY* (October 2001), *at* http://euromonitor.com/report_summary.asp?docid=9125 (last visited Sept. 1, 2002). It is estimated that the total legal market will grow to $176 billion by 2005. Of this market, commercial legal services were $57.7 billion in 2000. This is estimated to reach $70.7 billion in 2005. Non-commercial legal services (e.g., criminal matters), acquired by corporations are not included in the foregoing data. *Id.*

16. The major accounting firms are clearly a model for this. The Big 8, as it was known prior to 1989, hired its first general counsel in 1968 when Victor M. Earle, III became General Counsel of Peat Marwick. He was followed in short order by Harris Amhowitz (1970) at Lybrand Ross Brothers, Ken Lang (1970) at Ernst & Ernst, Eldon Olson (1971) at Price Waterhouse, myself (1972) at Arthur Young, Kay Crawford (1972) at Touche Ross (who was succeeded in 1974 by Rick Murray), Eden Martin (1975) at Arthur Andersen (who was succeeded by Jon Ekdal in 1978), and Henry Connolly (1976) at Haskins & Sells (who was succeeded by Alan Kramer in 1978). Each of these departments eventually added other lawyers—some starting as early as 1973.

The creation of the legal staffs by the accounting firms was a direct response to increasing legal liability, increasing legal responsibilities, and spiraling legal costs.

support, such as big ticket litigation, continued to be delegated to the outside law firms.

On the other hand, functions that did not need outside resources because they were more driven by the internals of the corporation itself, began to be handled internally. Routine corporate activities such as contract negotiation, lease arrangements, and regulatory filings, which did not require extensive resources, were some of the first areas of work to move inside. The value of (or cost of performing) these services varied. In some instances, the amounts to be saved were not significant for a particular corporate entity. However, the cumulative effect on the law firm of losing this type of business *from several clients* was significant and would have a profound effect on law firms and how the profession would be practiced in the future.

One of the first areas to begin to see this internalization of legal services as a means of cost containment was the handling of routine filings with the Securities and Exchange Commission. Historically, the 10-Ks, 10-Qs, 8-Ks, and other such filings had been shepherded by outside law firms. Suddenly, this became the province of the in-house legal staff.[17] Gradually, outside counsel's involvement in these routine filings changed from preparation to assistance to review to not even seeing them.

In due course, in-house counsel found more and more ways to either control outside legal costs or to replace them.

Prior to the mid-1970s, litigation was not routinely handled inside, with the exception of a few major oil companies, who had large legal staffs to handle in-house much of their "slip and fall" cases at their gas stations. This too began to change, however, partially as a result of the advent of computers. At Arthur Young, we began to handle local litigation in 1975. Gradually, as our staff and resources expanded, we began to handle more litigation throughout the United

17. An anecdotal story illustrates this point. When I was a young associate at White & Case in 1971, my mentor and great friend, David Hartfield, one of the senior partners at the firm and one of the most respected lawyers in New York, was comparing White & Case with another major Wall Street powerhouse law firm, which was then suffering an economic downturn because its "green goods" business—the IPOs and bond offerings were off as result of the economic downturn the economy had been suffering since 1970. Hartfield observed that White & Case would suffer less in these economic downturns because it had a strong corporate clientele who required day in and day out legal services for their corporate filings and their corporate business. Shortly after that conversation, Bob Landes, who was General Counsel at McGraw Hill, a large and long time White & Case client, moved all of his routine S.E.C. filing work in-house, and White & Case's steady corporate business disappeared.

This was not a phenomenon unique to White & Case, but became a common event for other law firms with a large corporate client base. This was the start of the reinvention of how large corporate law firms would practice. For example, White & Case, under Jim Hurlock, would reinvent its practice around an international clientele made up of foreign governments. It developed an extensive international finance practice where there was little likelihood of competition from in-house counsel.

States,[18] at first acting as co-counsel with outside law firms (an early form of partnering) and then handling all of the work internally and only using outside counsel when we needed *local* counsel. This trend was not unique to us.[19]

Whatever fingers outside law firms may have had in the dikes to the in-house movement, suddenly they were not enough. The derogation with which outside counsel used to refer to inside lawyers both heated up and changed. Now, besides the politically incorrect reference to in-house lawyers as "kept women," outside counsel was heard to denigrate the ability of inside lawyers or to minimize the successes that they did have. A frequent chastisement that I heard one senior partner of a major firm repeat at ABA meetings was: "They [the in-house lawyers] *cherry pick* the best and easiest cases so their records look good and give us the bad stuff." This was not said in a complimentary or positive manner, but was said with a sneer and tone of disdain.[20]

At the same time this was happening, the economics of the outside law practice began to seriously change. Associate salaries were skyrocketing. Following the February 1979 publication of Steve Brill's *American Lawyer* and the earnings of the Skadden partners, discontent began to set in at law firms.[21] Where, prior to then, partners rarely changed law firms, the game of musical chairs at law firms became the game *de jour*.

Another phenomenon began to happen on the inside in the early 1980s. The compensation of in-house lawyers was going up. The pay of inside

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18. By the mid-1980s, we had tried cases as first chair in Arizona, Arkansas, California, Oklahoma, Pennsylvania, and Wisconsin. (In some of those cases, we did not even have "local" counsel with us in the court room.) We also did most of our appellate work in-house. By 1994, when I retired as General Counsel of Ernst & Young, our in-house legal staff had argued three cases in the United State Supreme Court and more than 40 cases in federal and state courts of appeal.

19. In a series of studies conducted by Arthur Young & Company for the Association of the Bar of the City of New York from 1978 through 1990, we tracked the handling of litigation by in-house counsel. During this period, the volume of litigation handled internally dramatically increased.

20. I would be remiss if I left the impression that this was a universal response by the private bar to in-house counsel. Clearly it was not. However, it was too common. The fact that it was frequently uttered at bar meetings was startling to say the least, but not surprising. One senior partner of a major national law firm was quoted in the press as saying the general counsel was "empire building." Another partner at a major firm told a general counsel that he should leave all the work to them because anything he did would only get the company in trouble. I can assure you that each of these individual counsel no longer represented their clients after those ill-timed and ill-conceived comments.

21. The first issue of the American Lawyer contained an article on Skadden Arps, Slate, Meagher & Flom, then a relatively young and still somewhat unknown firm which had made its mark in the M&A business during the prior seven years. The article provided significant details about the incomes of the Skadden partners, many of whom were laterals who had joined the firm during this period. The numbers were staggering and the earnings far exceeded what partners at well established (then still called "white shoe") firms were earning. Steven Brill, *Flom Firm Takes Over as Top Money Maker in '78*, AM. LAW., Feb. 1979, at 1, 12–15. The publication of the Skadden partners' earnings set off a feeding frenzy among lawyers and a desire to improve their own compensation. The days of partnership forever were now numbered.

counsel was not only catching up with outside lawyers, but outside major metropolitan areas the inside pay was better than what associates and partners were earning in law firms. Equally important, many general counsel were being paid on a par with partners in major national law firms. This pay equalization, along with a perceived easier life and work style, attracted more and more lawyers to the inside bar.

Equally as significant was the fact that in the corporate culture, lawyers would be judged solely on their merits and abilities. Thus, some very bright and capable young lawyers, who provided excellent legal services and had sound judgment, but who were not rainmakers—because they did not have the disposition or marketing talent to be—had a home where their skills could be fully utilized and their value would exceed their value to a law firm.

This impact was not limited to the good, non-rainmaker lawyer. It had an equally dramatic effect on women and minorities, who may very well have been good rainmakers, but whose lifestyles or other interests did not fit with that of the outside law firm.

Significantly, the number of women in senior positions is decidedly greater in-house than it is in the private sector. For example, the number of women who hold the position of senior legal officer, a position analogous to the managing partner of a law firm, is decidedly greater than the number of women who hold that comparable position in law firms. The latest American Corporate Counsel Association (ACCA) study of the corporate legal profession, *American Corporate Counsel Association's Census of In-House Counsel*, shows that 20% of the chief legal officers are female. If the partner level of a law firm is equated with the position of deputy general counsel and assistant general counsel, the numbers are just as stark. Approximately 20% of the deputy general counsel and 30% of the assistant general counsel are women. Although I have not found reliable data showing the number of women partners in law firms, anecdotal data says it is less than those who hold significant positions in legal departments.[22]

Corporations are also more likely to recognize merit more quickly than the outside community. The ACCA data demonstrates that a chief legal officer is likely to have fewer years of practice than the deputy general counsel. One conclusion that can be drawn from this is that there is more of a meritocracy in the selection of corporate counsel than might exist in the private bar.

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22. Even this data is somewhat skewed. In a true apple-to-apple comparison, you would need to look at the number of women who are partners in major firms that have a corporate clientele. I don't mean to demean or minimize a woman who may be a partner in a small law firm that basically has a family law or local type of practice, but in analyzing what is happening in the market place, we need to compare similar types of law practice. Historically, the corporate law practice has been an all white male bastion. The growth of the corporate law department has changed that landscape materially. AM. CORP. COUNS. ASS'N, *AMERICAN CORPORATE COUNSEL ASSOCIATION'S CENSUS OF IN-HOUSE COUNSEL: EXECUTIVE SUMMARY* (Dec. 2001), *at* http://www.acca.com/Surveys/census01#SectionIV (last visited Sept. 1, 2002).

III. THE RENAISSANCE REVISITED

The decades of the 1980s and early 1990s truly were a renaissance for corporate counsel. Many of the structural changes in the profession occurred during this period and several models for corporate counsel began to emerge.

It is important to note that there is no monolithic model for corporate counsel. Rather, there are a variety of corporate models, some of which are historical and some of which have developed during the past two decades. Although some of these models reflect the corporate culture and corporate structure in which they are set, my experience is that they are less governed by the corporate culture and more determined by the personalities of the general counsel.[23] Thus, a new general counsel is likely to impress his or her mark on the organization and change the *raison d'etre* of the legal department. Sometimes that change will be radical and sometimes it will be minimal or take years to occur.

The various models of legal departments can be described in many ways. Some are not so nice, but clearly descriptive of how they operate. Again, it is worth noting that there is no monolithic model and in fact some corporate legal departments acquire the characteristics of several of these models depending on the focus of the general counsel and the predilections of those below the general counsel.

The basic models are as follows:

1. *The Full Service Organization.* This legal department is a soup-to-nuts operation. It will provide a full range of services for the corporate entity including the litigation function. Its use of outside counsel will be case-specific.

2. *The Integrated Corporate Law Department.* This department will provide a mix of in-house and outside legal services. It may handle litigation on its own, but will also use the services of outside counsel on a variety of litigations. The corporate work will tend to be handled inside more than anything else, but judicious use of outside counsel will be made in those areas where the inside lawyers have not developed the expertise to provide the needed legal services or where the workload does not permit it. In this model, as in the first model, corporate counsel are more likely to select individuals or specific law firms for specific projects and less likely to have a single go-to firm.

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23. Although corporate culture will impact the structure and operation of a legal department, my own experience is that the personality of the head of the department will have a far more meaningful impact and effect upon the legal department than will the corporate culture. The legal department will take on the personality and characteristics of the general counsel. In this connection, the general counsel's background will play a dominant role. If the individual was a litigator in a prior life, it is more likely that the department will handle its own litigation and have more "aggressive" characteristics than a department with a general counsel who had been a corporate lawyer where the art of the deal may have prevailed.

3. *The Monitor.* In this model, the corporate law department provides a number of in-house services to the business entity, but primarily works with outside counsel to have the work done. In this model, corporate counsel may jointly work on a project with inside counsel or may refer it to outside counsel and then play a monitoring and liaison role. The latter is more typical in litigation.

4. *The Traffic Cop.* This model is more typical of smaller departments. The inside counsel functions primarily as a traffic cop to direct the work to the outside counsel and then pay the bills when they come in. Today, this is probably the least prevalent model; but during the 1970s and earlier, it was the predominant model.

Just as there are several structures for corporate legal departments, the individuals who occupied the general counsel seat have their own distinct characteristics and models. Again, there is no one model for the corporate general counsel, although certain traits are now developing and we are seeing a further change in the characteristics of that individual.

The general counsel role has taken on several distinct characteristics. The more predominant models over the past three decades are:

1. *The Leader.* This model has its origins in the golden age of corporate counsel. This general counsel provides direction for most major projects and has the final word on all significant decisions. The individual is more likely to be a hands-on person, who both advises and personally performs certain of the legal services. This is an individual to whom management will look for advice and counsel. This will be, if it is not already, the predominant role model for general counsel.

2. *The Relier.* This individual will tend to seek the advice of many individuals and law firms and then rely on that advice in making the decision. The relier will exercise a modicum of independent judgment, but the decisions that he/she reaches and the advice that is provided will more likely be based on the recommendations of others. The quality of this general counsel's services will be a function of how good that individual is at synthesizing the input of others and in deciding what to adopt as her/his own.[24]

3. *The Order Giver.* Less predominant today than several years ago, this individual is best suited for the traffic cop model and monitoring legal department model. The individual in this position is more comfortable directing others and packaging that work product.

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24. At first blush one might argue that the difference between the "relier" and the "leader" is a distinction without a difference. To the contrary, there are significant quantitative differences between these two personalities. The latter will exercise considerably more independent judgment and have a much greater involvement in and control over the process than the former.

4. *The C.Y.A. General Counsel.* Fortunately, this model is the least found today (if at all), but was a very common model in the pre-1980s period. This general counsel carefully selected outside counsel and then turned everything over to that counsel. The corollary to this approach was that the general counsel took no responsibility for what was done and would typically say, "I hired the best." The hallmark of this model was: "It is someone else's responsibility; don't blame me."

IV. ADVENT OF THE NEW AGE

With the foregoing as background, it is appropriate to reflect on how the factors which have led to the changing roles of corporate counsel, have helped create the "platinum age" for corporate counsel and how they have or will shape the future of the corporate bar.

A. The Cost of Legal Services

Although it may not be the single largest catalyst, the spiraling cost of legal services clearly has been a major contributor to the redefinition of the corporate law department. No longer could corporations ignore the cost of legal services, even in the bet-your-life cases.[25] The upward-spiraling cost of legal services required all to take notice of their impact on the bottom line. These costs forced management to reevaluate how services are to be provided and whether a Volkswagen might be as cost-effective as a Rolls Royce. It required management to start making risk/benefit analyses.

Outside counsel did not have the luxury of making the business decision that not providing Rolls Royce reliability was an acceptable risk. Both for fear of malpractice and injuring an important client relationship, outside counsel would typically leave no stone unturned, no case unread, and no possible issue unresearched. Corporate counsel, however, could (and began to) make the judgments that they could afford to assume the risk of not using a Rolls Royce approach on certain matters. That business decision could be made on any number of criteria ranging from low dollar exposure to the notion that "this is such an isolated matter that we can take the risk."

Thus, costs will continue to be a dominant factor in extending the breadth of inside counsel's responsibilities and the depth of their power.

B. Relationships with Outside Counsel

The cost factor and the growth in stature of the general counsel are significant factors in changing the relationship between inside and outside counsel. Although there is no monolithic model for these relationships, the once

25. During the IBM/Department of Justice wars of the early 1970s, Nick Katzenbach, then IBM's General Counsel and former Attorney General of the United States, was reportedly the only person who had an unlimited budget at IBM and he managed to exceed it each year! *See* Carlos Lapuerta et al., *Controlling Costs and Improving Performance: Strategic Analysis of Litigation*, 12 No. 3 AM. CORP. COUNS. ASS'N DOCKET 66, 66 (1994).

almost singular relationship that existed between the primary outside law firm and the corporation is the distinctly minority approach today.

There is considerably more spreading of the work among firms and the use of boutique shops for specialized projects. Another perceived trend that has received more oral recognition than reality warrants is the belief that corporate law departments are more likely to hire individuals than law firms.

The concern over fees has created a whole new industry—alternative billing structures. These new methods of billing have created their own cottage industries and provoked considerable comment and analysis. Many corporate counsel eagerly embraced some of these approaches, unfortunately substituting one set of problems for another.[26] A number of corporate law departments (and an even greater number of insurance companies) began to use independent parties to audit the legal bills.[27]

C. From Whence General Counsel Come

Although many general counsel are promoted from within, one of the more interesting phenomena is that whenever a general counsel position opens up, the headhunters have reported a significant number of applications from partners at law firms—including many senior partners.[28] Aside from adding to the prestige of the corporate counsel position, this will have an interesting adverse side effect on law firms if more former partners become general counsel.

As law firms lose more and more partners to senior roles in the corporate legal department (not even the general counsel role), it will place a greater number of individuals who know the dirty little secrets of law firm billing in the hands of the clients. As these former partners become more integrated into the corporate environment and culture and their new role as the client, they will begin to challenge the billing practices of the law firms. This, in turn, will eventually result

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26. Regrettably, it is my personal view that many of these forms of alternative billing are merely an excuse for corporate counsel to abdicate his or her oversight responsibility of outside legal fees and billings. That is not to say that, properly used, they can't provide real benefits to the corporation and result in significant financial benefits for the law firm—either through increased business or by forcing the law firms to be more productive and cost-effective in the provision of legal services.

27. Unfortunately, this too became a crutch for some inside counsel and a substitute for proper case management and oversight of outside counsel. Good audit techniques, usually built around having counsel adopt standard billing protocols and ways of classifying work, are an important tool in managing the legal process. However, they should be just that—a tool to manage and not a substitute for management.

28. Although there are a number of reasons for this, the most frequently cited reason is that the economics of the private law practice are not what they used to be and the pressure to "make rain" and extend the billings from existing clients is too great. It is not surprising, then, when headhunters, who have responsibility for recruiting general counsel and other senior members of the corporate legal staffs, report that they are inundated with job applications from partners at law firms who wish to move inside. Recently, the position of general counsel for a nationally known university resulted in over 400 job applicants. Thirty years ago, there would have been a handful of applicants for that position and almost none of them would have been a partner in a law firm.

in further pressure on law firm billings and create further economic problems for the law firms.

D. Technology—The New Equalizer

The advent of technology to the law is probably the most significant development that has impacted the corporate structure. Its impact is more hidden than observed and more pronounced than most commentators perceive. In fact, the impact has not been fully appreciated or seen yet and it will be several more years before it is.

A very significant impact has been and will be in the continued erosion of the "information gatekeeper" function for the corporate legal community. Until the advent and growth of Lexis in the late 1970s, the outside law firm was the principal gatekeeper to legal knowledge for the corporate law department. There were few places like law school law libraries, bar libraries, and large corporate law firm libraries, which had either the resources on hand or the ready access to arcane legal knowledge. Until Lexis, if an inside corporate lawyer wanted access to legal information, the most readily available source was the corporate law firm. As such, the law firm was the gatekeeper of the corporate law department's information and knowledge base.

Although Lexis began to make this information available to corporations, it was costly and required some computer skills that corporate counsel had not initially mastered. Thus, even though Lexis opened the door to that knowledge base, in reality the door was only ajar.

The advent of the internet with its access to vast amounts of information, including a considerable number of legal resources, has changed the door from being slightly ajar to being almost wide open. This, coupled with the increasing number of computer literate lawyers joining corporate law departments, is materially altering the balance of power. The outside law firm's once almost monopolistic control of that gateway to legal knowledge is broken. This will result in a further alienation of the relations with outside counsel and further undermine the need for outside counsel.

Equally important is the fact that computers are changing the way law firms and clients communicate and interact. Properly utilized, they are leading to efficiencies in the services rendered and in enhanced productivity. Corporate law departments are in the forefront of the use of technology to enhance their services.[29]

The way lawyers (both inside and outside) and clients interact with each other is being profoundly impacted by the presence of technology. Because technology has materially sped up the communication process and permitted people to interact over significant distances, we will see a greater need for instantaneous responses to legal problems. This in turn requires the use of massive

29. Some of this stems from the fact that a corporate environment is much more technology-oriented and has its own IT infrastructure which both supports and helps develop the use of computers in the legal department. A corporate culture has generally been more attuned to the use of technology than the *quill penned* law firm.

databases that accumulate the institutional knowledge of the entity so as to permit the lawyers to provide answers to common types of legal problems without having to reinvent the wheel.

E. New Legal Complexities

The creation of the alphabet soup laws and agencies during the past thirty years permitted law departments to grow their own in-house expertise. In many areas, such as environmental liability, the first experts came from the inside bar. This proliferation of knowledge and expertise on the inside was one of the most significant factors in breaking down the barriers between inside and outside counsel. Whereas prior to this development, the road was pretty much a one-way street from the outside in, law firms started to raid the in-house bar to acquire the expertise that they had not developed or to enhance their expertise.

Not only did this create a new-found respect (and, in reality, need) for in-house counsel, it also helped reshape the dynamics of the relationships between inside and outside counsel. More and more legal departments recognized that they could develop and maintain a level of expertise the equal of any outside law firm. Moreover, as the level of complexity continued to expand, it became obvious to many inside counsel that the outside lawyers could not keep up with that level of complexity and that the best place to develop and nurture that expertise was at home.

We can expect to see more specialized knowledge being developed by in-house counsel in response to legislative and political changes either simultaneous with or in advance of the knowledge being developed by outside counsel. Only when the problem becomes more universal will outside counsel invest in the development of the necessary knowledge bases. Thus, inside counsel are likely, in many instances, to be one step ahead of their outside brethren with respect to new legal issues.

F. New Business Complexities

Just as legal complexities grew, so did the complexities of business itself. This led to the view of many counsel that unless you were part of the organization and saw it on a day-to-day basis, it would be more difficult to provide the quality services business needed. Put another way, knowledge of the law in the lawyer was now only one component of the skill sets that the lawyer needed. The new component was knowledge of the client, which was not as readily available if you were on the outside. This will put a greater stress on the need for inside counsel who sit at the right hand of the master!

V. THE NEW PARADIGM—THE PLATINUM AGE

The general counsel of the future will be a version of the general counsel from the golden age. Subject to more demands, the new general counsel will be

more *consigliore* than just lawyer.[30] The new role will call for a broader set of skills that will extend far beyond the law. This truly is the start of the platinum age for the general counsel.

30. The recent ACCA Survey indicates that almost 75% of corporate management (primarily the CEOs) view the general counsel as a trusted advisor. AM. CORP. COUNS. ASS'N, *supra* note 22.

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