

General Counsel As Persuasive Counselors

The Changing Role Of General Counsel: From Reactive To Proactive; From Passive To Being The Company's Conscience

The Editor interviews **Keith C. McDole**, former Senior Vice President and General Counsel, Occidental Chemical Corporation; Partner, Jones Day.

Editor: Please tell us something about your career.

McDole: I have been practicing law for 34 years. I began my practice with Kirkland & Ellis in Chicago in 1973, where I became a litigation partner in 1978. My focus during those years was on complex commercial litigation, including antitrust and securities cases, primarily at the trial level. The firm represented *The Chicago Tribune* and a number of other publishers and broadcasters, and I devoted a substantial portion of my practice to defamation and media-related cases. In 1986, after a stint with another firm, I joined Jones Day as a litigation partner in the Dallas office. From 1995 to 2001, I was senior vice president and general counsel of Occidental Chemical Corporation, a worldwide commodity chemical manufacturer and a wholly-owned subsidiary of the Occidental Petroleum Corporation. I rejoined Jones Day in 2001 as a senior partner in the trial practice group. I represent companies and individuals in connection with business disputes and complex commercial litigation involving contracts, torts, antitrust, corporate governance and compliance, oil and gas and real estate.

Editor: Would you tell our readers about your responsibilities as General Counsel of OxyChem?

McDole: As chief legal officer, I generally was responsible for all of the company's legal affairs. I was OxyChem's chief compliance officer and was responsible for the health and environmental services group which monitored our compliance with environmental and health-related laws and regulations. I advised the CEO and other members of the senior management team and served on the company's executive committee. I also managed the in-house legal staff and our outside counsel in litigation, transactional, regulatory and compliance matters.

During my time with the company, Occidental developed and implemented a company-wide corporate compliance program. We also developed and administered the company's annual corporate compliance training, which involved all of our senior managers throughout the world. I also served as general counsel for Oxy Services, Inc. a shared services organization handling litigation, intellectual property and records retention matters for Occidental's oil, gas and chemical businesses.

Editor: In light of your background, you are in a position to comment on the transformation of the role of general counsel in recent years. In your view, what is driving this transformation?

McDole: There is no question that the role of general counsel has changed dramatically in recent years. When I began my career, the general counsel often was viewed as the head of the internal legal department whose primary responsibilities were to advise the company's management and employees, when asked, prepare "legal" documents and review matters requiring legal department approval. Today,

general counsel are viewed as an integral part of the senior management team. They increasingly are seen as holding responsibilities that transcend the representation of their client, the company, and extend to external constituencies, including corporate investors and the general public. CEOs today expect general counsel to be proactive in providing guidance on a variety of business and ethical conduct issues, in addition to counseling senior management on legal matters. It is essential that these issues be identified and addressed before they escalate, and that is the responsibility of general counsel in most corporate settings.

Companies today carry on their activities in a complex legal and regulatory environment, and many of the issues to be addressed call for common sense and wisdom in the absence of any real guidance in terms of statutes or case law. A seasoned general counsel is a figure of singular importance to the CEO, the other members of the senior management team and to the board of directors. Such a person will be familiar with the law, but equally familiar with the company and its business, its employees, shareholders, and the expectations of both government and the general public concerning the company's corporate citizenship and ethical obligations.

Editor: Speaking of the board of directors, one of the interesting discussions that appears in the article on the "persuasive counselor" by former Delaware Chief Justice Norman Veasey and Christine DiGuglielmo concerns the role of the board in the hiring and firing, and compensation, of general counsel. Should the board be involved?

McDole: Absolutely. The board should be involved in hiring general counsel and in approving general counsel's compensation. Most boards have the responsibility to appoint the company's senior executives, but given the pivotal role that general counsel plays today, it is essential that the board be satisfied with the CEO's selection of general counsel. Board members will have frequent occasion to communicate with general counsel in both board and committee meetings. They need to have trust and confidence that the individual occupying this position will be an independent and reliable source of information and advice. For this reason, they should have an opportunity to weigh in on the CEO's choice as general counsel, and indeed, many CEOs will actively seek their input in selecting a new general counsel. Director input would seem equally important in evaluating the general counsel's performance and compensation.

With respect to termination, the board needs to be fully cognizant of the circumstances surrounding the dismissal of general counsel, even if the actual decision is that of the CEO. Such a step is unusual, and it may signal that there are compliance or legal issues that the board should consider as part of its duty to monitor the company's business activities. For this reason, most CEOs would find it prudent to keep the board fully apprised of the circumstances



Keith C. McDole

surrounding a general counsel's termination even in the absence of prodding by the board.

Editor: What about participation by the general counsel in executive session meetings of the board?

McDole: General counsel should attend executive sessions of the board. It is important for the board to develop and maintain a relationship with general counsel, and this is particularly important for the independent directors. The general counsel should attend at least some portion of the executive sessions of the company's independent directors, in addition to such sessions of the board as a whole. There may be occasions when the presence of general counsel has a dampening effect on deliberations – say, where the CEO is under discussion – but properly managed, the presence of general counsel makes an important contribution to the discussion that must take place at the board level if the directors are going to meet their responsibilities to the company.

Editor: How important is it for general counsel to understand the company's business?

McDole: Today it would be difficult to overstate the importance of understanding the company's business to the position of general counsel. This is an area where the demands on general counsel are very different from those placed on outside counsel, even outside counsel who represent the company on an ongoing basis. In private practice a lawyer is expected to know something about the client's business, but only as it pertains to the matters he or she is handling. General counsel is in a different position. He or she *must* understand the company's overall business, because that is the only way to identify areas of risk in addressing the multitude of legal, ethical, governance and compliance issues that routinely cross general counsel's desk.

Asked to identify the qualities in a general counsel that are most important to them, CEOs invariably will list as most important the general counsel's familiarity with and understanding of the company's business. A thorough understanding of the business is crucial to identifying and addressing corporate risks *proactively*. In addition, knowing the company's business and operations is often essential in negotiating transactions, resolving disputes (both internal and external) and speaking authoritatively to all of the external constituencies to which today's company must be attentive. Finally, and perhaps most importantly, general counsel will not be viewed as a trusted advisor or persuasive counselor unless he or she has a real understanding of the company's business.

Editor: General counsel has a primary responsibility to the company and its board, but he or she is also a member of the senior executive team. You've been there. How do you handle the tension this situation embodies?

McDole: The key to handling the tension is to never lose sight of the fact your primary allegiance is to the company and not to management. Professional disciplinary rules require general counsel to exercise, on behalf of the company, judgment indepen-

dent of the personal interests of the company's officers. When I left Jones Day to join OxyChem as general counsel, one of my partners, himself a former general counsel, put it this way: "Remember that you will not be the law department's representative to senior management, nor will you be the management's representative to the law department; you will be the company's lawyer and that is the entity whose interests you must primarily protect." That was excellent advice. To a certain degree, general counsel must maintain a detachment from the rest of the senior executive team. Very often this is not easy. You develop friendships with other members of the team, but you cannot surrender the ability to question their actions without compromising your primary responsibility, which is to the company. How do you handle the tension? You use your powers of persuasion to encourage management to do the right thing.

Editor: Has the manner in which outside counsel works with a company changed as well?

McDole: There has been a dramatic change in the way outside counsel works with a company, and this has been driven by the changing role of general counsel. In the past, outside legal costs often were regarded as beyond the control of the company. That is not the case in today's very competitive legal market. General counsel are expected to do everything possible to control legal costs. That includes, in many cases, expanding in-house capabilities and taking on legal matters that formerly were referred to outside counsel as a matter of course.

General counsel expect more of outside counsel today, including a much greater familiarity with the company's business and objectives. They also expect greater efficiency in handling the matters assigned to outside counsel. They require budgets and litigation plans, and they closely monitor legal fees and expenses. They participate in staffing decisions, and, indeed, they often partner with outside counsel in appropriate projects. The DuPont legal department has been a leader in this development.

Editor: I gather you agree with Justice Veasey's view of the persuasive counselor being proactive.

McDole: The former Chief Justice's point is that the persuasive counselor should attempt to guide the client in the right course of action *before* an issue attains crisis proportions and demands immediate reaction. It is hard to argue with that. Today, boards of directors and CEOs, to say nothing of all of the outside constituencies that monitor the company's conduct, expect general counsel to provide guidance to ensure that the company conducts its business in an ethical manner and in compliance with the law. The expectation that this be done on a proactive basis means that general counsel must be willing to act as the company's conscience on occasion and step up to persuade senior management and the board to do the right thing at a time when the necessity of doing so is not immediately obvious. This is just one more reflection of how much the role of general counsel has changed in recent years.

Please email the interviewee at kcmcdole@jonesday.com with questions about this interview.