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General Counsel As Persuasive Counselors

Today's General Counsel: Some Key Factors In Predicting Success

The Editor interviews Lizanne Thomas, Partner, Jones Day.

Editor: Would you tell our readers about your professional experience?

Thomas: I have been practicing for 25 years, primarily as a mergers & acquisitions lawyer in the public company arena. I always had an interest in corporate governance and, with the increasing focus on this area, I have been engaged in a substantial amount of governance work over the past nine years or so. That includes advising a number of public companies on governance issues and participating in 80 to 100 board or board committee meetings annually. I also teach governance to MBA students at the Haas School at the University of California – Berkeley, an exercise that permits me to communicate with future business leaders on the importance of doing it right the first time. For the past three years I have been on the board of directors of Krispy Kreme Doughnuts, Inc. I was originally brought on to investigate allegations of various financial and accounting improprieties, and that has led to my chairing the company's governance committee. I wear a number of different hats in this area – as legal practitioner, as scholar and teacher and as a company director – and each of these roles serves to enhance the expertise I am able to bring to the other roles.

Editor: Would you tell us how you came to Jones Day and the types of things that attracted you to the firm?

Thomas: I began my career with Jones Day's predecessor in Atlanta in 1982. That firm was acquired by Jones Day in 1989, and the opportunities that the Jones Day



Lizanne Thomas

platform offered to someone in my position were immediately evident. One of the most attractive things about the firm is the value it places on working lawyers: the people who succeed at Jones Day are completely engaged by the practice of law. I love what I do, and I am surrounded by colleagues who feel the same.

In addition, I have found it immensely rewarding to be part of an enterprise with the international reach of Jones Day, a reach that is based not just on geography but also on an extraordinary depth and breadth of legal expertise.

Editor: In light of the recent article on the “persuasive counselor” by former Delaware Chief Justice Norman Vesey and Christine DiGugliemo, can you comment on the transformation of the role of general counsel in recent years?

Thomas: Although some people think that the transformation of the role of general counsel was precipitated by the corporate scandals – Enron, WorldCom and the like – my experience is that the quality of the corporate legal department began to improve over 20 years ago, as companies began to value appropriately the experience and skills that their in-house lawyers possessed. Companies realized that their lawyers were capable of much more than directing the efforts of outside law firms. By the time of the scandals, in-house counsel had built sufficient credibility that CEOs and corporate boards were receptive to the idea of general counsel as a truly non-partisan advisor, something that would have fallen to outside counsel exclusively but for the in-house transformation already underway.

I would add that I agree with Chief Justice Veasey that an additional aspect of the transformation in the role of general counsel – and as “persuasive counselor” – is the need for someone in this position to understand the company's business, in addition to providing legal advice.

Editor: Should the board be involved in hiring, firing and compensating the general counsel?

Thomas: I think that, as a real advisor to the governing board, general counsel always has the ability to go directly to the board. I do not believe that ability is enhanced by giving the board the right to hire and fire, and compensate, general counsel, responsibilities usually accorded the CEO. The board has a strategic role, and I would question whether such a step might not bring it over into areas that should be the prerogative of the CEO and his or her senior executive group,

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

namely day-to-day management of the company.

Having said that, I should add that a wise CEO will confer with the board on something as critical as the possible termination of general counsel.

Editor: What about participation of general counsel in executive sessions of the board?

Thomas: I think it is essential for the directors to have an opportunity to hear the unvarnished opinions of general counsel, and I think regular executive sessions which include general counsel – or the CFO, the chief risk officer and others – reflect a healthy governance culture. In addition, I think a confident CEO should be pleased that the senior management team has that kind of access to the governing board.

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. That can involve a certain degree of tension.

Thomas: Yes. We are professionals, however, and that means that we may be called upon to address a conflict of interest and take a principled stand. I think there is an increasing recognition that this is one of the expectations of the position of general counsel.

Editor: You mentioned the role general counsel are now playing in the business discussion. What kind of impact is this having?

Thomas: A very dramatic one, and one that serves to enhance their opportunity to be effective counselors. Years ago, general counsel would be brought into the discussion only when the problem had been identified and then for the purpose of addressing the legal issues that derived from it. Today, general counsels are part of the discussion from the outset, and one of the principal contributions they make is to spot and address issues *before* they attain crisis proportions. Knowledge of the business is absolutely critical to this process, and all it takes is for one or two examples of general counsel addressing a potential problem in a proactive way, and thereby rendering it manageable, for his or her prestige within the company to soar.

Editor: You have spent your career working as outside counsel to companies and their boards, a somewhat different relationship from that of general counsel with

a company and board.

Thomas: Yes, there is a difference. Often I am called upon to express a view on legal issues where general counsel has a level of self-interest – compensation or equity award issues, for example – that disqualifies his or her participation. In addition, there are times when the board desires to establish a record of having consulted with expert outside counsel on an issue that may require experiential depth, as opposed to company depth, and again, it is the prudent and wise general counsel who knows when that type of experience is required. Another area where outside counsel is called upon has to do with specialized expertise, say in the area of securities regulation or some other area which is not resident in-house.

In all instances, it is essential that outside counsel keep general counsel apprised of what is underway. Irrespective of whom outside counsel is dealing with, it is my view that general counsel functions as a kind of hub and as general supervisor of the relationship.

Editor: Do you find yourself being called upon by governing boards where they wish to stay away from both general counsel and from their regular outside counsel?

Thomas: Yes. This happens from time to time, and perhaps more often than necessary. The need for truly independent external advice is necessary in investigations where senior level conduct is at issue or where there are true conflicting interests. The only other time it is necessary, in my experience, is where a particular expertise does not reside in-house and may not be available at the regular outside firm. I have experienced, occasionally, being called upon where I was not certain my services were necessary but the requisite level of confidence on the part of the board in general counsel and in the regular outside counsel was absent.

Editor: You mention the role that general counsel is assuming with respect to all kinds of corporate governance and compliance activities. I gather you believe this to be a positive development.

Thomas: Recently I was called upon to advise the board of a company with which I had not worked previously. One of the board members asked why I had been brought in since the issue at hand was not a legal one. This is a good question. Governance and compliance are areas of conduct and analysis of concern not only to legal officers but

also to the CEO, to financial and marketing officers and to the board. The reason why governance and compliance are nonetheless led by lawyers is because good lawyers are best equipped to synthesize governance and compliance issues within the context of a financial, tax or some other corporate framework. That is why dealing with these issues has become a lawyer function, and that is why a first-rate general counsel can ensure that they are continuously scrutinized at the right level.

Editor: In the past many of us encountered corporate cultures in which the executives whose efforts constituted a direct financial contribution to the company were dismissive of the general counsel function as an expense, albeit a necessary one. Does such an attitude persist in today's corporate world?

Thomas: You encounter it very occasionally, but I would have to say that the most sophisticated personnel understand, and appreciate, the role of general counsel. Knowing the business provides the position with an immense boost because it permits general counsel to say to his skeptical colleague, "My job is not to say no to every initiative you wish to pursue. It is to work with you to understand where you wish to go and to develop, through the legal function, the means to help you get there."

Editor: I gather that you are in favor of the persuasive counselor being proactive.

Thomas: Absolutely. As but one example, there is a whole range of good corporate citizenship undertakings – diversity, pro bono and community activities, environmental sensitivity, and so on – where a persuasive counselor can assume a leadership role and make an enormous contribution to the company's image and standing in the communities in which it operates and to the morale of the company's workforce. As a profession, we have been acting in this capacity for a long time, and of all the people who make up the senior management team it is the general counsel who is best equipped to take this message to the company and to demonstrate its value.

A general counsel of a major company I work with describes her role as having moved far beyond the legal issues. Her legal department has gained such credibility that it is the *hard* issues – irrespective of whether they carry legal implications – that are referred to it. I think this is an extraordinary compliment to her department and is the clearest reflection of Chief Justice Veasey's views on the persuasive counselor.