



JONES DAY  
**WHITE PAPER**

# THE PROACTIVE GENERAL COUNSEL

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I have had the good fortune to work with a number of successful general counsel. These men and women can be described as “proactive” or “visionary.” They add substantial value to their companies by looking forward at how scenarios may play out and anticipating what risks and opportunities may arise. Many of the thoughts in this paper are drawn from watching these successful general counsel in action.

Being proactive, being a visionary, draws on the same skills of analysis that all lawyers use. Being proactive, however, requires:

- that the general counsel seek out a broad understanding of the company and its activities, both as they exist today and as they may exist in the future, and a broad understanding of the legal environment, again both as it exists now and as it may exist in the future,
- that the general counsel consider “what if” situations, anticipating possible changes in the company and its activities together with possible changes in the legal environment and analyzing what risks and also what opportunities that may create in the future,
- that the general counsel consider actions that will shape and use the future legal environment to the company’s advantage, and
- that the general counsel see the big picture (connecting the dots internally) so that in taking actions, the general counsel considers not just the legal function but looks at the roles and connections of all the various functions within the company (operations, accounting and finance, legal, risk management, compliance, disclosure controls and other functions) and considers these roles as they may vary across different jurisdictions and in different lines of business where the company operates.

Consider the following situations and the different approaches that a proactive general counsel might take as opposed to the actions of a reactive general counsel:

***The company experiences an increase in certain types of employee claims.*** The reactive general counsel sees the increase in the number of claims asserted against the company and assigns someone on the internal legal team to oversee the handling and mitigation of these new claims.

The proactive general counsel will have learned, in the course of periodic reviews with external legal counsel and through other external sources, about the likelihood of an increase in these types of employee claims. Prior to these claims being asserted, the proactive general counsel (a) assigns someone internally (perhaps working with external legal counsel) to try to develop effective steps to avoid or to mitigate these types of claims (assessing the costs and benefits of these preventive steps) and (b) develops a general game plan to handle such claims as soon as any arise. The proactive general counsel’s actions are a collaborative effort with the company’s human resources department and perhaps other affected departments within the company.

***The company enters into a new loan agreement.*** The reactive general counsel receives the draft loan agreement and coordinates with outside legal counsel to review and to negotiate the agreement and to close the transaction.

The proactive general counsel becomes involved in the process much earlier. Working with other key decision makers of the company, the proactive general counsel considers in advance what flexibility the company needs in loan covenants and in potential restrictive covenants in other agreements. The proactive general counsel prepares (in concept or by drafting specific language) various exceptions to expected covenants even before the company enters into discussions with potential lenders. Depending on the dynamics with the lenders, the proactive general counsel might put into the term sheet acceptable covenants (giving the company the flexibility it wants) so that these terms are agreed to before drafting of the loan agreement begins. Then, while the loan agreement is being finalized, the proactive general counsel works with personnel in finance and operations to be sure that any necessary guidelines and procedures are put into place so that the company will be able to comply with the provisions of the loan agreement and be able to satisfy any ongoing reporting obligations.

***New governmental rules impose additional restrictions on the company and its competitors.*** The reactive general counsel learns about these new rules through an external source (such as newspapers, conference presentations or law firm alerts) and then asks external legal counsel to advise the company about the applicability of the new rules.

If the rules are in a traditional area where the business is regulated (such as SEC rules in the case of institutions dealing in securities), the proactive general counsel learns through monitoring external sources that developing these new rules is part of the agency's regulatory agenda for the current year. The proactive general counsel then assigns someone to follow the development of the proposed rules, perhaps also using outside sources to monitor developments. The proactive general counsel assesses when and how to approach the regulatory staff to try to shape the rules in the most effective way possible for the company, potentially meeting with the staff as the rules are being developed and before they are proposed. In considering what shape the rules should take, the proactive general counsel works closely with others in the company. When the rules are proposed, if they present any perceived issues, the proactive general counsel considers submitting formal comments on the proposed rules.

As the new rules are being developed, the proactive general counsel also tries to map out for other decision makers in the company ways that the new rules (a) might curtail opportunities for the company, (b) might affect the company's competitors and (c) might open up attractive new opportunities for the company.

## SOME SUGGESTIONS

Following are some suggestions about various actions and approaches that a proactive general counsel might take. These are only suggestions; the many proactive and successful general counsel know and feel what it means to be a visionary and to be proactive in ways that are not adequately expressed in this paper.

While this paper is generally written from a North American vantage point, many of the thoughts laid out below will be applicable in other jurisdictions as well.

### A. GATHER INTERNAL INTELLIGENCE ABOUT THE COMPANY AND WHERE IT IS GOING

A proactive general counsel needs to understand as much as possible about the company's condition and objectives and about how the company's business is conducted today

and how it may be conducted in the future (as far as manufacturing processes, use of technology, sourcing of supplies, marketing of goods and services and other aspects of the business). What are the company's strengths (so they can be supported) and what are its vulnerabilities or weaknesses (so they can be protected)? What risks are acceptable and what risks (such as reputational risks) are not acceptable? What future directions for the business, new approaches, and new initiatives are being considered? What new opportunities may be available to the business? To gain all this understanding, internal legal counsel can pursue various possible avenues to gather information within the organization.

- Key sources of internal information include the strategic planning process, the process of developing and revising budgets and the process of reviewing financials.
- Confer regularly with other decision makers throughout the company to learn what directions they are going in, what objectives they are pursuing, what flexibility they may need and what risks they can and cannot tolerate. Try to understand where various decision makers want the company to be in two years, in five years, in 10 years. These meetings can be formal or informal.
- Periodically consider whether there are any internal obstacles to access to information. Periodically consider whether there are areas of the business and its direction that the legal department does not understand. Develop strategies to overcome the barriers of any silos within the organization. There is no one-size-fits-all approach. Each organization has its own internal dynamics.
- Foster the image of the in-house legal team as helping to achieve the enterprise's objectives and not as gatekeepers, naysayers or costly fixers.
- Foster a culture where risk assessment by lawyers and willingness to take risks by entrepreneurs are not seen as conflicting but rather as complementary parts of a well-informed exercise to create value for the company.
- Use a team approach to involve business leaders outside the legal department in reviews of restrictive covenants, reviews of restrictions under applicable regulations and reviews of proposed compliance guidelines. This may prompt helpful feedback.

- To assist in understanding the company and where it is going, understand generally the industries in which it operates and the challenges and changes those industries face.

## **B. GATHER INTERNAL INTELLIGENCE ABOUT NEW RISKS**

As part of the process of gathering internal intelligence, be alert for warnings about new risks and new problems that are being encountered or may be anticipated. Perhaps the company is considering entering a new line of business and therefore needs the flexibility in its contracts to do that. At the same time, the company may be concerned that an expansion may create a liquidity crisis and therefore needs better contract payment terms for its payables and receivables to help the company conserve cash.

- Talk regularly with others operating the business and making business decisions about whether they see any looming problems What worries them?
- Develop an understanding both of (a) what problems might be faced and are reasonably likely and (b) even though very unlikely, what might be “bet the company” or “destroy the company” risks.
- Be alert for indications that new types of claims, complaints or restrictions are being encountered or may be encountered by the company. These might be revealed by messages on an employee hotline, by customer complaints, by blog or twitter comments about the company, by communications from regulators, by discussions with suppliers or other contract counterparties or from other sources.
- Use the process of developing the company’s public disclosures (the company’s disclosure controls and procedures) to gather information regarding issues that others in the company may be concerned about.
- Interface in an appropriate fashion with the company’s insurers as they commit to renewals of insurance policies for the company and as they provide feedback on risks. Try to determine what the insurers worry about with respect to the company and the industry.

## **C. LOOK FOR INTERNAL OPPORTUNITIES TO ADD VALUE**

As part of the process of gathering internal intelligence, be alert for situations where the law can be used creatively

to protect the company, to advance its interests and to add value.

- Periodically reexamine whether the company’s IP strategy should be strengthened or changed to protect the company’s rights and to capitalize on those rights.
- Periodically consider whether rights of the company to other tangible and intangible assets are adequately protected now and under likely future scenarios.
- Review contract terms not only to provide needed flexibility for the company but also to ensure that the company receives the benefits it is seeking from the contract. Are there situations where the counterparty could do something to defeat the company’s expectations of the benefits from the contract, and can the contract terms reduce that risk? Will the remedies be adequate and enforceable if the counterparty defaults? Are specific covenants needed to protect the company (such as non-solicitation of employees and a non-compete)?
- Are competitors or suppliers dealing with the company or others in a way that harms the company? If they are, are there statutory or common law rights that the company could assert to stop that harmful conduct?
- Consider whether there are opportunities to choose more favorable jurisdictions:
  - for formation or residency of certain corporate entities in order to achieve greater rights (granted by statute, treaty or otherwise) or to be better protected against various types of claims or liabilities (and of course, as part of a global tax planning strategy),
  - for choice of law clauses in contracts,
  - as the forum in which to assert certain types of claims or
  - as the home of the company’s principal regulator (such as for purposes of financial regulation or oversight of public company disclosures).
- Periodically reassess these jurisdictional choices. These can be complicated choices, and in some cases, governments and courts may not recognize the jurisdictional choice of the company for these or other purposes.

#### **D. GATHER INTELLIGENCE FROM COMPETITORS AND INDUSTRY PEERS**

- Monitor claims, regulatory problems and other legal issues that other similar businesses are encountering, as reported in the press and through other sources. Also, what legal issues have similar businesses used to their advantage? How have other companies succeeded, and how have they failed, in handling these issues?
- Monitor public disclosures by other similar businesses regarding the risks and trends they see, for example in MD&A disclosures and in Risk Factors sections in their public filings with securities regulators.
- Draw on information from appropriate trade and industry associations.
- In gathering intelligence and sharing information with others outside of the company, be mindful of any antitrust and confidentiality issues.

#### **E. GATHER INTELLIGENCE FROM EXTERNAL LEGAL COUNSEL**

- The model of external legal counsel as lawyers hired to handle specific problems has been replaced by a more dynamic relationship. Utilize the opportunities of this new relationship to gather intelligence. In particular, meet periodically with lawyers from your primary external law firm(s) to brainstorm and to think strategically about the future risks and opportunities for the company. Your external legal counsel should generally not charge for these meetings, which should be a part of client relations.
  - Agendas for these meetings should be established jointly by in-house and external legal counsel.
  - Ask external legal counsel to be creative. Challenge them. Ask them to tell you what their firm sees as some of the major issues in the future for companies in your line of business.
  - Identify for external legal counsel any areas where you definitely want early warnings: such as with respect to developments in the law regarding protection of patents, changing environmental regulation of carbon emissions, etc.
  - These meetings should be a collaborative, partnering effort.

- Information you share with external legal counsel at these meetings (and in follow-up discussions) may also provoke focused updates from them as they see new trends and developments from time to time.

- Following are examples of some items that could be on an agenda for these periodic discussions with external legal counsel. Under each topic, the discussion could (a) note significant new and prospective developments and (b) then consider issues and opportunities that those developments might create for the company:

1. Impact of Financial Regulatory Reform
  - a. Domestically and globally
  - b. Depending on the company's business, impacts may be direct (on regulated businesses) or indirect (such as in the costs and clearing of swaps)
2. Antitrust
  - a. Trends in enforcement and civil liability, including claims by government agencies and by private parties
  - b. Changes in the treatment of certain conduct; conduct that is now prohibited or that may now be permitted under certain circumstances and conduct that is becoming more or less suspect
3. Litigation and Claims Generally
  - a. New theories
  - b. New plaintiffs
  - c. New tactics
  - d. New discovery issues (including e-discovery)
  - e. Developments in damages and remedies being awarded
  - f. Other developments
4. Regulatory Compliance
  - a. New rules
  - b. New exemptions
  - c. Trends in enforcement
5. Environmental Regulation
  - a. New rules
  - b. New theories of liability
  - c. Trends in enforcement and in liability to private parties

6. Corporate Governance
    - a. Developments regarding officer and director responsibilities and shareholder rights
    - b. New best practices for directors, board committees, shareholder communications and other matters
  7. Public Disclosure Requirements
    - a. New or expected disclosure requirements
    - b. New directions in industry norms, including regulatory feedback on various matters (such as on compensation disclosure)
    - c. Noteworthy developments in regulatory enforcement or private claims
  8. IP Strategy
    - a. To protect the company's rights
    - b. To profit from the company's rights
  9. Employment Claims
    - a. New claims
    - b. New remedies
    - c. Whistleblower protections
  10. New Financing Structures
    - a. New products
    - b. Issues (including tax, securities regulatory and disclosure issues)
  11. New Tax Issues Generally
  12. New Privacy Issues
  13. New Issues regarding Attorney-Client Privilege
  14. Other Items, depending on the Company's Business
- Similarly, take advantage of approaches by existing or new legal counsel seeking business from you. Ask them to tell you, as part of their pitch to you, what issues and opportunities they see in the future. For example, if a law firm wants to handle your employment discrimination claims, ask them as part of their pitch to tell you what trends they see in this area generally and what in particular might be relevant to your company.
  - Periodically review internal policies (such as policies concerning document retention or concerning guidelines for

communications during offerings of securities) and form documents (such as supplier or customer contracts) to ensure that those policies and documents reflect current best practices, are revised to reflect lessons learned and are appropriate given the current and near-term circumstances of the company. Draw on external legal counsel, as needed, for these reviews.

- If your company may be considering entering a new line of business or conducting business in a new jurisdiction, consider drawing on external legal counsel's assistance in advance. If there are budgetary constraints, consider at least developing a preliminary list of "big picture points" so you can determine whether some issues need further analysis.
- Consider inviting representatives of external legal counsel to any internal legal retreats in order to gather ideas from them and to educate them on your company's objectives.
- Take advantage of legal training programs offered by external legal counsel (CLE programs, webinars about new developments, etc.).
- Review the categories of email legal alerts sent by your external law firm(s) and select which ones you want to receive and who in your legal department should receive them.

#### **F. GATHER INTELLIGENCE FROM OTHER EXTERNAL SOURCES**

- Share ideas with in-house counsel outside your organization, such as at:
  - Canadian Corporate Counsel Association programs.
  - Informal meetings of focused groups of internal lawyers from different companies, sometimes organized by themselves and sometimes by law firms.
  - Bar association events.
- Consider whether members of your in-house legal team should attend selected legal issues programs offered by various service providers. While most of these programs are skills based, some are also forward looking. External legal counsel may be able to provide information on what is available and what might be most appropriate.
- Consider subscribing to focused periodicals on issues relevant to your business.

- Consider signing up for focused email alerts from other sources (accounting firms, benefits consultants, etc.)
- Take advantage of the websites of regulatory agencies (such as the U.S. Securities and Exchange). A fair amount of research can be done on some of these sites. The posted speeches and remarks by the chairmen, commissioners or similar heads of these regulatory agencies may disclose new priorities or changes in enforcement activity and new rulemaking that is being considered.

**G. BEING PREPARED DOES NOT NECESSARILY MEAN YOU HAVE TO ACT**

- No general counsel can fully deal in advance with all possible issues that might arise. There are cost and budgetary constraints. Also, some issues may be foreseeable but may not be worth fully preparing for because they are unlikely or are too unpredictable.
- Develop procedures (responses) for handling certain sensitive situations where you need time to assess what is happening before taking any precipitous action that might prejudice your company. Examples include procedures for dealing with receipt of subpoenas and notices of investigation from regulators, dealing with communications regarding potential recalls, etc.
- Consider identifying those problem situations that could be particularly costly and harmful to the company if they occur, even though they are unlikely to occur or are unpredictable. For these potentially serious situations, consider whether you should (a) line up people (internally and externally) who can step in immediately to help the company deal with the situation if it actually does arise and (b) develop some guidelines in advance for initial steps that should be taken if the problem does arise. Examples of some such situations include:
  - Responding to a significant governmental investigation or claim:
    - a) asserted by industry regulators
    - b) asserted by securities regulators
    - c) asserted by prosecutors (criminal claims)
  - Responding to a significant private party lawsuit against the company (including class actions)
  - Handling a product recall

- Dealing with an explosion, accident or other event causing loss of life or significant property damage
- Dealing with environmental contamination
- Dealing with the bankruptcy of a major contract counterparty
- Responding to a corporate takeover attempt or proxy battle
- Protecting important intellectual property rights from infringement or adverse ownership claims
- Dealing with a major privacy breach
- Dealing with a sensitive officer or employee situation (such as insider trading, employment discrimination or harassment claims, etc.)
- Depending on the company, other situations might be considered as well, and some potential situations may warrant more or less advance preparation.

**H. LEARN FROM YOUR COMPANY'S EXPERIENCES**

- After a significant legal project (whether a transaction, legal proceeding or regulatory matter), consider what went right, whether anything went wrong and what changes and improvements might be made going forward in the handling of these projects. Where appropriate, debrief your in-house legal team, others within the company and external legal counsel to help in this analysis.
- If a claim, legal proceeding, investigation or other matter leads to liability for the company, consider ways to avoid a reoccurrence or to produce a more favorable outcome if it arises again.

**I. CONFIGURE THE ENTIRE LEGAL FUNCTION TO BE PROACTIVE**

- The successful general counsel has a vision for the legal role that is consistent with the company's overall goals, including the company's approach to growth and the company's tolerance or avoidance of certain risks. One visionary general counsel talks of "developing corporate resiliency" by protecting the core of the company and trying to grow that core while also shielding the company's vulnerabilities. This vision helps guide this general counsel in structuring the legal department and imbedding the department within the key areas of the organization.

- To implement a vision or to achieve specific results, the legal function must be shaped to be effective within the particular company. To whom the lawyers report, the number and expertise of the lawyers, the physical location of the lawyers in various jurisdictions and the location of lawyers within various business units should all be determined by looking at the realities of the company (its business and the way it functions). This goes back to “seeing the big picture” and “connecting the dots.” Where is a particular legal issue or opportunity likely to be noticed? Where is it most important? How can the lawyers be most effectively placed to implement actions and to pursue the general counsel’s vision for the benefit of the company? These types of questions (asked periodically) determine how best to organize the legal function in a proactive way.
- The legal department cannot and should not act alone. The process of understanding the facts, analyzing situations, making decisions and implementing actions must all be done in a collaborative manner with the rest of the organization. Interest in and appreciation for the business of the company and communication and listening skills are critical competencies for the members of the general counsel’s team.
- Regular internal brainstorming sessions, possibly with occasional retreats, are important in order to allow a full sharing of information. Also, just as external lawyers and other external sources can provide thoughts about future legal developments, issues and opportunities, the internal lawyers as well are often an excellent source of ideas about the future legal environment. Encourage all internal lawyers to think proactively and to come up with new ideas. Foster an environment where a proactive approach infuses every in-house lawyer’s daily job.
- Proactive, visionary general counsel use their own behavior to set the standard for all the internal lawyers. The image projected by these general counsel is an image they want all internal lawyers to project throughout the company.

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