

General Counsel are *One* Conscience of the Company

A Response to IBM's Robert Weber

By: Ben Heineman, Jr.

January 24, 2013



In the February 2013 issue of Corporate Counsel, IBM general counsel Robert Weber makes three points about the independence and stature of in-house lawyers, and a fourth one setting up and then striking down the false idea that inside lawyers should be the conscience of company. (See ["Is the GC the Conscience of the Company? Maybe Not"](#))

Although I agree with much of what he says on independence and stature, I write this comment to disagree strongly with his odd mischaracterization of the inside lawyer's role relating to corporate integrity—to law, ethics, and values—which runs contrary to the actual experience of those of us who are (or have been) in-house lawyers.

On the "conscience" point, Weber argues:

"I explicitly part company with those who now assert—and *there are many*—that the general counsel serves as '*the* conscience of the company.' Few concepts would be as destructive as to the lawyer's right to sit at the senior table as to place around the lawyer's neck the millstone of being *the* company's 'conscience'." [Emphasis added]

Weber goes on to say that the idea of being "*the* company's conscience" is "flawed . . . in many respects." First, he argues, it elevates lawyers to a status above other, talented senior leaders in the company. Second, he asserts: "There is nothing in my training that makes me better or worse suited on matters of conscience than any other senior leader at my company."

But Weber's provocative hyperbole and his straw man—he never cites those "many" who argue for lawyer as the conscience—wrongly depicts the reality for 99.9999 percent of inside counsel:

- General counsel are clearly *one* conscience of the company in a *process sense*, along with other staff and business leaders. They raise issues for debate and discussion about what the company should do (*a normative question!*) in many evolving situations where neither law nor ethics are clear. Lawyers are, of

course, specifically trained to set out options in the gray areas when the law is uncertain. CFOs have similar primacy of place in presenting options on unclear accounting issues. And, as the law is applied morality, GCs also have a role, along with other key staff, in generating options about what the company should do "beyond what the law requires." At General Electric, we had a regular process, led by the CFO and GC, for surfacing "ethical" issues for consideration by senior business leadership and, ultimately, the board if approval on major issues was needed (e.g., ethical outsourcing or ceasing to do business in Iran prior to formal sanctions). The right kind of legal training and real practice experience don't privilege the place of lawyers, but they can give lawyers a strong sense of ethical—not just legal—issues that should be discussed inside a company.

- In contrast to Mr. Weber's "*the conscience of the company*" straw man, every general counsel knows that on most hard questions of law and ethics, the CEO and business leaders—or the CEO, business leaders, and the board—will make the *substantive* decision: will choose among the options generated by the GC and other senior leaders. The general counsel may, in addition to analysis of options, make a recommendation about the desired course of action. But, on major issues, the CEO or board decides. And as substantive deciders, they are the "conscience" of the company.
- Virtually every in-house lawyer also knows that decisions about how to handle complex legal, accounting, or ethical issues are tested against an "enlightened self-interest of the company" standard, and not against some abstract moral principles drawn from some school of moral philosophy. Of course, what is in the "enlightened self-interest" of the company is open to energetic discussion. But, no GC that I know—and I have known a few—would make a recommendation about a hard issue by citing Locke or Kant or Bentham or Rawls rather than arguing why a position is in the best interest of the company.
- In my many writings about general counsel, I have always been careful to say exactly what I have just said above and *never* to say the GC is *the* conscience of the corporation. For example, in an essay on ["The General Counsel as Lawyer-Statesman" \[PDF\]](#), I wrote:
 - "The foundational goals of the modern corporation should be the fusion of high performance with high integrity. The ideal of the modern general counsel is a lawyer-statesman who is an acute lawyer, a wise counselor, and company leader and who has a major role *assisting* the corporation achieve that fundamental fusion which should, indeed, be the foundation

of global capitalism." [Emphasis added]

- On ethics: "The chief lawyer *helps* generate issues (by, for example, systematically reviewing claims on the corporation by various stakeholders); determining which ones require in-depth analysis; conducting that analysis under an 'enlightened self-interest' standard which understands that 'costs' are also 'investments,' that 'benefits' may be expressed in strictly financial terms but may also require judgment, and that the proper 'accounting period' may be years, not just the next quarter." [Emphasis added]
- "As a result of this increase in inside talent, the general counsel has become, in many cases, the chief legal *advisor* to the CEO and to the board of directors, replacing the venerable senior partner from the great law firm . . . This is not to say lawyers make critical decisions for the company: *their primary job is to give the business leaders a range of legitimate options with different degrees of risk and explain pros and cons.* Only after acute analysis, integrating all relevant perspectives, should they make recommendations. And, unless the action is unlawful, general counsel, having spoken their piece, should defer to the CEO's discretion." [Emphasis added]

Weber also, inexplicably, states his "discomfort" with those "who describe the modern general counsel as *the* 'guardian of corporate integrity,' primarily because I have no idea what that means." [Emphasis added]

Really? No idea? I have long defined integrity as adherence to the spirit and letter of the law, the adoption of global standards beyond what the law requires, and the values of honesty, candor, fairness, reliability, and trustworthiness among employees. And I am hardly alone in that or similar formulations of integrity.

I cannot imagine that Weber would disagree with that definition. Nor can I imagine that he disagrees with the idea that the GC is one guardian within the company about law, ethics, and values—and must reconcile the tension between being a partner to the CEO and a guardian of the company's integrity (whom he or she, of course, represents, as Weber notes elsewhere in his piece). (See my *Corporate Counsel* article on the partner-guardian tension, ["Caught in the Middle."](#))

Finally, Weber says that he is "slightly uncomfortable" with the idea of in-house counsel as lawyer-statesman, but then says he can accept the term if it means the "executive suite's honest broker."

My concept of the lawyer-statesman entails much more than fairly summarizing different points of views of others, although that is certainly part of the task. It involves engaging in the three broad roles of lawyers:

1. Technical Expert
2. Wise Counselor
3. Lawyer as Leader

It means having lead or shared responsibility—short of the CEO and the board—for wide scope: law, ethics, reputation, public policy, public communications, and risk. It means having one's own point of view to share with others, to help shape issues and discussion and decision. And, to quote again from my "General Counsel as Lawyer-Statesman" paper, the role has many dimensions which Weber does not reference but which are, at least to me, important *and* unexceptionable:

"The lawyer-statesman role involves not just dealing with past problems, but charting future courses; not just playing defense, but playing offense; not just providing legal advice, broadly defined, but being part of the business team and offering business advice. It means being both a partner to business leadership, but ultimately the guardian of the company. Even more broadly, it involves the wise counseling and leadership roles which stem from practical wisdom, not just technical mastery; which requires broad judgment based on knowledge of history, culture, human nature, and institutions, not just a sharp tactical sense; which flows from the ability to understand long-term implications, not just achieve short-term advantage; and which is founded on a deep concern for the public interest, not just the private good.

"In aspiring to be a lawyer-statesman, the general counsel, and inside lawyers, must be skilled in asking 'what ought to be' questions; in articulating systematic and constructive options that expose and explore the value tensions inherent in most decisions; in assessing risk, but not being paralyzed by its existence; in understanding how to make rules realities and develop strategies for meaningful implementation of policies; in understanding the hurly burly world of politics, media, and power outside the corporation and how to navigate with principle and purpose in that domain; in leading and building organizations, creating the vision, the values, the priorities, the strategies, the people, the systems, the resources, and the motivation; in having understanding, intuition, perspective, and respect relating to different cultures around the globe; in, ultimately, having the quintessential quality of the great generalist to envision and understand the

multiple dimensions of issues—to define the problem properly—and the ability to comprehensively integrate those dimensions in decision-making."

At the end of the piece, Weber acknowledges, backhandedly, what all GCs know: On critical matters, a "lawyer is but one voice." But he then goes on to diminish the GC's role and say, "everyone [in the company] is part of the institution's moral construct, everyone is responsible for the execution of the company's values." Of course. But that ignores the critical role that GC's play in helping to create and implement the culture, values, and integrity that guide a company.

Between Weber's unreal straw man of GC as *the* conscience of the company and his pinched "one voice among many" is the practical ideal to which, I believe, all in-house lawyers should aspire: the lawyer-statesman with broad scope and the multiple roles of technician, counselor and leader *who is an invaluable advisor and officer to the CEO and the board in playing a key role—not the role—in helping the company achieve the fundamental goals of capitalism, the fusion of high performance with high integrity.*

Ben Heineman Jr., former General Electric Company senior vice president-general counsel, is currently senior fellow at Harvard's law and government schools. He writes occasional commentary for Corporate Counsel on developments in the law and the legal profession.

http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202585457251&General_Counsel_are_One_Conscience_of_the_Company&slreturn=20130024090648

###